

NUCLEAR REGULATORY COMMISSION ISSUANCES

OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS

July 1, 1993 – December 31, 1993

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PREFACE

This is the thirty-eighth volume of issuances (1 - 391) 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, 1993 - December 31, 1993.

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

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

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

Ivan Sellin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket Nos. 50-321
50-366
50-424
50-425
(10 C.F.R. § 2.206)

GEORGIA POWER COMPANY, et al.
(Hatch Nuclear Plant, Units 1 and 2;
Vogtle Electric Generating Plant,
Units 1 and 2)

July 14, 1993

The Commission *sua sponte* vacates and remands to the NRC Staff for further consideration the Staff's partial decision under 10 C.F.R. § 2.206, DD-93-8, 37 NRC 314 (1993). The Commission takes such action in view of the commonality of some of the issues decided in the petition both with matters in a pending license transfer proceeding and with other matters remaining for decision in the section 2.206 petition.

RULES OF PRACTICE: PETITIONS UNDER 10 C.F.R. § 2.206

The Commission generally discourages use of section 2.206 procedures as an avenue for deciding matters that are under consideration in a pending adjudication; however, this general rule is not intended to bar petitioners from seeking immediate enforcement action from the NRC Staff in circumstances in which the presiding officer in a proceeding is not empowered to grant such relief.

MEMORANDUM AND ORDER

The Nuclear Regulatory Commission (NRC) Staff's partial decision under 10 C.F.R. § 2.206, DD-93-8, 37 NRC 314 (1993), is pending before the Commission for possible review in accordance with 10 C.F.R. § 2.206(c). For the reasons stated in this Order, the Commission is vacating the Staff's partial decision and remanding the matters decided therein to the Staff for further consideration.

The Staff's partial decision responds to a petition filed by Allen L. Mosbaugh and Marvin B. Hobby in September 1990, and further supplemented in October 1990 and July 1991, which asked for initiation of proceedings and other enforcement action against Georgia Power Company (GPC). The Petitioners based their petition on various allegations of false statements, willful violations of NRC requirements, and other misconduct. In DD-93-8, the Staff denied the petition with respect to certain of the Petitioners' allegations that the Staff believed were capable of final resolution. However, the Staff declined to reach a determination with respect to allegations of unlawful discrimination against Messrs. Hobby and Mosbaugh that are related to pending proceedings before the United States Department of Labor and to other allegations of wrongdoing that are still under consideration by the NRC Staff.

In addition to his filing of the section 2.206 petition, Mr. Mosbaugh has been admitted as an intervenor in a proceeding on the transfer of operating authority over the Vogtle Electric Generating Plant from GPC to Southern Nuclear Operating Company (Southern Nuclear).¹ Among the bases for his admitted consolidated contention in the adjudicatory proceeding are the allegations also contained in the section 2.206 petition that GPC and Southern Nuclear had consummated an unlawful *de facto* transfer of control to Southern Nuclear of the operating licenses for the Vogtle and Hatch facilities, and that GPC's executive vice president in a meeting with NRC Staff on January 11, 1991, made material false statements about the formation of Southern Nuclear. The Staff denied the petition on the merits with respect to these matters in DD-93-8. See 37 NRC at 317-24, 345.

The Commission has generally discouraged use of section 2.206 procedures as an avenue for deciding matters that are under consideration in a pending adjudication. Thus, the Commission ordinarily would expect the Staff to deny a section 2.206 petition that raises the same issues that are being considered in a pending adjudication on the basis of the pendency of the identical matters in

¹ LBP-93-5, 37 NRC 96 (1993) (appeal pending before the Commission). Mr. Hobby also petitioned to intervene in the transfer proceeding but was denied standing to intervene. He has not appealed the denial of his intervention.

a proceeding involving the same licensee or facility.² This general rule is not intended to bar Petitioners from seeking immediate enforcement action from the Staff in circumstances in which the presiding officer in a proceeding is not empowered to grant such relief. Moreover, we recognize here that Mr. Mosbaugh has not invoked section 2.206 to avoid a pending adjudication and that his section 2.206 petition seeks relief with respect to issues and facilities that are not before the Licensing Board in the pending transfer proceeding. However, in view of the overlap and similarity of some issues between the section 2.206 petition and the transfer proceeding (particularly those addressed in sections II.A and II.B of DD-93-8), the Staff's final determination of the common issues should take into account the Licensing Board's findings and the outcome of the transfer proceeding.³

Apart from the commonality of some issues decided in DD-93-8 with pending issues in the adjudicatory proceeding, a common thread runs throughout the allegations raised in the section 2.206 petition. The issues raised in the petition generally concern the integrity of GPC or Southern Nuclear officers and the corporate organization responsible for operation of the Hatch and Vogtle plants. Under the particular circumstances of this case, rather than address the issues in the section 2.206 petition in a piecemeal fashion, the Staff should reach a determination of all issues in an integrated manner after consideration of the remaining matters raised in the section 2.206 petition and the outcome of the transfer proceeding.

We therefore vacate DD-93-8 and remand to the Staff those portions of the section 2.206 petition decided therein for the Staff's further evaluation and final decision in conjunction with the Staff's resolution of the other remaining matters in the petition and in light of the outcome of the transfer proceeding. In taking these actions, we intimate no view on the soundness of the Staff's analysis of the issues in DD-93-8. We also do not bar the Staff from taking prompt

² See *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Units 1 and 2; Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 563-65 (1985); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443 (1981).

³ We recognize that GPC has appealed the Licensing Board's admission of Mr. Mosbaugh as a party and of the consolidated contention. We expect to render a decision on the appeal in the near future. Nonetheless, at least pending a further Commission order on appeal, Mr. Mosbaugh is entitled to party status and his contention is deemed admitted.

enforcement action at any time during its ongoing review of the matters raised in the petition.

It is so ORDERED.⁴

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of July 1993.

⁴ Commissioner de Planque did not participate in the Commission's consideration of this Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

**Ivan W. Smith, Chairman
Dr. Charles N. Kelber
Dr. Jerry R. Kline**

In the Matter of

**Docket No. 50-336-OLA
(ASLBP No. 92-665-02-OLA)
(FOL No. DPR-65)
(Spent Fuel Pool Design)**

**NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Unit 2)**

July 9, 1993

**DECISION AND ORDER
(Terminating Proceeding by Summary Disposition)**

SYNOPSIS

Northeast Nuclear Energy Company (NNECO), supported by the NRC Staff, moves for summary disposition of Concerned Citizens Monitoring Network (CCMN) Contention 1. Both NNECO and the NRC Staff have submitted the affidavits of qualified experts demonstrating that Contention 1 has not raised a genuine issue of material fact to be heard. CCMN has not answered the motion. The Licensing Board grants the motion. CCMN Contention 1 was the only contention accepted for adjudication. Accordingly, the Board terminates this proceeding.

BACKGROUND

This proceeding concerns the adequacy of the spent fuel pool criticality calculations performed for Millstone Unit No. 2's license amendment 158. *See* LBP-92-28, 36 NRC 202, 215-16 (1992).¹ This Licensing Board was established to consider intervention petitions filed by CCMN and others. Based on CCMN's August 24, 1992 filing, its Contention 1 was accepted and CCMN was admitted as a party. All other contentions were rejected. *Id.* Contention 1 was based solely upon portions of Dr. Michio Kaku's August 23, 1992 "Declaration" (affidavit).² The adequacy of the criticality study performed for Amendment No. 158 and Dr. Kaku's questions in this regard concerning: (1) the actual state of the Boraflex box degradation, (2) the use of benchmarking data, (3) the use of Monte Carlo calculations, and (4) the use of a vertical buckling term, were identified by this Board as the only issues to be litigated in this proceeding. *Id.* *See* p. 7, *infra*, for the full text of the issues.

On May 7, 1993, NNECO filed its motion, pursuant to 10 C.F.R. § 2.749, for summary disposition of CCMN Contention 1, on the grounds that the contention has not raised a genuine issue of material fact. Accordingly, NNECO states, it is entitled to summary disposition in its favor as a matter of law and that the contention should be dismissed. As support for the motion, NNECO asserts that the attached affidavits demonstrate that there is no genuine issue of material fact to be heard with respect to CCMN's Contention 1 as that contention was characterized by the Licensing Board.

On May 28, 1993, the Staff filed its response, also founded on affidavits, in support of NNECO's motion.

In our order of May 3, 1993, we granted CCMN's request for an extension of time until June 29, 1993, to answer both NNECO's motion and any supporting response by the NRC Staff. *Id.* at 2. CCMN did not answer.

FINDINGS

As noted above, the issues of CCMN Contention 1 were summarized by the Board in LBP-92-28 from the August 23, 1992 affidavit of CCMN's expert advisor, Dr. Michio Kaku. In our November 23, 1992 order we accepted for discovery those issues:

¹ On April 28, 1992, a notice of opportunity for hearing was published in the *Federal Register* regarding the April 16, 1992 application by NNECO seeking authorization to change the design of the spent fuel pool at Millstone Unit 2 from a two-region to a three-region configuration. 57 Fed. Reg. 17,934. On June 4, 1992, the NRC Staff granted NNECO's request and issued Amendment No. 158 to the Millstone 2 operating license, notwithstanding CCMN's petition requesting the Staff to deny NNECO's amendment request.

² *See* Memorandum and Order (Following Prehearing Conference) November 23, 1992 (unpublished). *See also* LBP-92-28, *supra*, at 217.

The Petition has been referred to me for a decision. For the reasons given below, I have concluded that the Petitioner's requests should be denied.

II. BACKGROUND

On December 21, 1989, BG&E applied to NRC for a materials license under 10 C.F.R. Part 72, Subpart B, to allow spent fuel storage in an ISFSI to be located at the CCNPP site. The ISFSI employs the Pacific Nuclear Fuel Services, Inc. (PNFS, formerly NUTECH) NUHOMS-24P concrete module and steel canister dry storage system. The ISFSI would consist of up to 120 modules on concrete pads. In connection with the license application, BG&E submitted a Safety Analysis Report (SAR) and an Environmental Report (ER). Subsequently, on February 9, 1990, NRC, by Notice in the *Federal Register* titled "Baltimore Gas & Electric Co., Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing,"¹ notified the public of receipt of that application and of the opportunity for a public hearing on the application. In response to the Notice, the State of Maryland asked for a hearing, and a Licensing Board was convened. No petition for leave to intervene in the proposed licensing action was received from any other party within the deadline specified in the *Federal Register*.

Intervention was withdrawn when agreement among the State, BG&E, and the NRC was reached. In essence, the agreement stated that the State of Maryland would be kept completely informed by all parties in regard to all correspondence, reports, documents, and meetings during the licensing review process, that a method of airing the State's concerns would be established, and that BG&E would consult with and allow the State to review and qualify a radiological monitoring program for the ISFSI. When the State of Maryland subsequently elected to withdraw from the proceeding, the Licensing Board terminated the proceeding.² On March 22, 1991, the NRC Staff completed its environmental review of BG&E's proposed licensing action, in accordance with 10 C.F.R. Part 51, and issued an Environmental Assessment (EA) and Finding of No Significant Impact for the Calvert Cliffs ISFSI at the CCNPP.³ Subsequently, the Staff completed its safety review, and a Staff report titled "Safety Evaluation Report for the Baltimore Gas and Electric Company's Safety Analysis Report for an Independent Spent Fuel Storage Installation" was completed in November 1992. Materials License SNM-2505 was issued to BG&E on November 25, 1992, and the Staff provided public notice of the action in the *Federal Register*.⁴

¹ 55 Fed. Reg. 4742 (Feb. 9, 1990).

² LBP-90-13, 31 NRC 456 (1990).

³ 55 Fed. Reg. 13,196 (Mar. 29, 1991).

⁴ 57 Fed. Reg. 57,247 (Dec. 3, 1992).

III. DISCUSSION

The Petitioner's three specific requests involve issues related to rulemaking on dry cask storage, as well as specific issues related to the BG&E ISFSI license. In Petitioner's February 10, 1993 letter, Petitioner also enclosed fifty questions to which it is seeking answers from BG&E and NRC, and it indicated that it intends to discuss these questions at the requested rulemaking hearings.

Materials License SNM-2505, issued to BG&E, is a specific license for an ISFSI, pursuant to 10 C.F.R. Part 72, Subpart B. This licensing action does not fall under the general license provision of 10 C.F.R. Part 72, Subpart K, and, therefore, no rulemaking or Certificate of Compliance is required to approve the NUHOMS-24P cask design. In NRC's acknowledgment letter to the Petitioner, dated February 24, 1993, the Staff informed the Petitioner that its request for further rulemaking and regulation of dry cask storage was a request to modify a rule and that the Petitioner should follow the provisions of 10 C.F.R. § 2.802 if it seeks rulemaking.⁵ Therefore, this Decision addresses the specific issues expressed by the Petitioner in relation to BG&E's Part 72 license. The NRC Staff has also considered the similar concerns raised in those of the Petitioner's fifty questions that related to the licensing of BG&E's ISFSI.⁶ Those specific allegations are discussed directly in this Decision.

1. *Danger from Cove Point LNG Plant Has Not Been Analyzed*

Petitioner alleges that the Cove Point Natural Gas Plant, which it alleges is expected to resume operation in 1993, is a potential danger to safe storage that

⁵ Subsequently, on June 23, 1993, the Petitioner filed a petition for rulemaking to modify specific identified provisions of 10 C.F.R. Part 72. That petition is currently under consideration by the Staff. Also by letter to the Director, NMSS, dated July 26, 1993, Petitioner sought to have its rulemaking petition treated as an addendum to this 10 C.F.R. § 2.206 petition. The Staff has reviewed the July 26, 1993 letter and has determined that the requested action is appropriately part of the rulemaking petition, rather than this section 2.206 petition. One aspect of the letter, which requests continuous radiation monitors at the ISFSI exit cooling vents, could be interpreted as a reassertion of a point already raised in the section 2.206 petition and addressed in this Decision. Other than that aspect, all of the other matters raised in the letter are appropriately addressed in a rulemaking context. To the extent that the letter can be read to request a reopening of the CCNPP ISFSI licensing action, no adequate basis is provided for such action. The matters raised in the rulemaking petition including the July 26, 1993 letter will be fully considered by the Staff in the rulemaking, and the issuance of this Decision does not in any way prejudice the Petitioner's right and consideration of its request for rulemaking.

⁶ Although the Petitioner asserts that several relevant omissions from past NRC hearings, expert testimony, and rulings may seriously impact the safe operation of dry cask storage of spent fuel at Calvert Cliffs, it did not provide any citations to past hearings, expert testimony, or rulings related to health and safety issues. This would appear to be a reference to a rulemaking proceeding, since the *Calvert Cliffs* ISFSI proceeding never went beyond a very preliminary stage, namely a ruling that the State of Maryland had established standing to intervene. See LBP-90-13, *supra* note 2. Accordingly, the NRC Staff considered this very generalized assertion of an inadequacy in a rulemaking record to be a matter that the Petitioner could pursue in accordance with 10 C.F.R. § 2.802, if it so elected, and did not consider the assertion further in this Decision.

has not been analyzed, and failure to analyze it is a violation of NRC procedure (see related Question No. 27 in Petitioner's letter dated February 10, 1993).

On August 13, 1976, when NRC issued an operating license for Unit 2 of the CCNPP, NRC imposed a license condition requiring submittal of a license amendment application with a supporting hazard analysis 60 days prior to the operation of the Cove Point Natural Gas Plant. In 1978, before granting the amendment, the NRC Staff, in its license amendment action, had conducted a detailed analysis of the potential risks from that plant to the CCNPP.⁷ Based on the Staff's review, it was concluded that the likelihood of an LNG accident in the vicinity of CCNPP causing a significant radioactivity release is acceptably low, that such an accident does not involve a significant hazard consideration, and that there is reasonable assurance that the health and safety of the public will not be endangered by the effects of an LNG accident on CCNPP. For precaution, at that time, the Staff required, as a license condition, a contingency plan to ensure appropriate prudent action in the event of an LNG accident.

When the Cove Point Natural Gas Plant ceased operation in 1980, BG&E then requested the deletion of some of the license conditions, which NRC subsequently granted. The Licensee committed that if the Cove Point Plant resumed operation, the Licensee would submit an updated hazard analysis report, with proposed actions and mitigating measures (if any are deemed necessary or advisable), to NRC, 60 days before the Cove Point Plant resumed operation. This updated information would allow the NRC Staff to evaluate any changed circumstances with respect to the operation of Cove Point Plant and any significant differences in accident consideration. NRC could then impose appropriate action or mitigating measures, such as those earlier conditions NRC imposed when the Cove Point Plant was in operation in 1978, to ensure protection of the public health and safety in the event of accident.

The past Cove Point Plant analysis for the CCNPP is applicable to the ISFSI. The ISFSI horizontal storage module (HSM) reinforced concrete system is designed for severe wind, tornado missile, and pressure loadings as specified in NRC Regulatory Guide 1.76, which is the same regulatory guide currently used for nuclear power plants. Because of the NUHOMS storage system's robust design and construction, it has inherent resistance to blast pressure, and, therefore, the threat to nuclear safety from a potential natural gas explosion is expected to be negligible. In the NRC Staff's Environmental Assessment (EA)⁸ for the Calvert Cliffs ISFSI, the Staff evaluated a variety of accidents and concluded that a hypothetical bounding case accident would result in a release

⁷U.S. Nuclear Regulatory Commission, "NRC Safety Evaluation Regarding Proximity of Cove Point LNG Facility," June 13, 1978, Docket Nos. 50-317 and 50-318.

⁸U.S. Nuclear Regulatory Commission, "NRC Environmental Assessment Related to Construction and Operation of the Calvert Cliffs Independent Spent Fuel Storage Installation" at 24-29 (March 1991).

of radioactivity from the ISFSI facility from a dry shielded canister (DSC) leakage. The Staff postulated and analyzed a worst-case DSC leakage accident and concluded that the radiation dose to the general public is negligible, and that there is no significant impact to the offsite environment. The severity of the Cove Point Plant's potential hazard to the ISFSI is much less than the worst-case accident for the ISFSI, since the NRC Staff does not expect any release of radioactivity from the ISFSI facility from potential accidents related to operation of the Cove Point Plant.

The Cove Point Natural Gas Plant is expected to be reopened no sooner than December 1994, and NRC understands that BG&E will be notified at least 12 months before its startup. In addition, a joint study between BG&E and the Maryland Department of Natural Resources (DNR) was conducted to evaluate the risks associated with the Cove Point Plant planned resumed operation, thereby updating the study conducted at the time of Cove Point's maiden operation in 1978. The study concluded that the resumption of operation of the Cove Point Plant would not represent an unacceptable risk to the ISFSI, nor the power plant itself.⁹ (By letter dated June 7, 1993, BG&E has submitted updated information on this study to NRC, and the new information, along with information submitted to the Director, NMSS, by the Petitioner in a letter dated July 27, 1993, is currently under review by the NRC Staff.)

2. *Danger from Blockage of Air Convection Ports*

The Petitioner contends that the thermal limits of passively cooled concrete vaults may be exceeded if the air convection ports become blocked, which could also damage the fuel in the canisters, increase the temperature of the canister beyond the design limits for the concrete vault, or increase embrittlement of the canister (see related Questions No. 24, 28, and 29 in Petitioner's letter dated February 10, 1993).

In NRC's Safety Evaluation Report (SER) (see section 2.2.6.2 of SER), the NRC Staff conducted an evaluation and concluded that for the HSM inlet and outlet blocked accident, the peak fuel cladding temperature would be significantly less than the acceptance criterion, and the peak concrete temperature would also be acceptable. The accident scenario conservatively assumed full blockage of all air inlets and outlets. For this specific cask and system design, no damage of fuel cladding or degradation of shielding function is anticipated in the event of air inlet and outlet blockage for a period less than 48 hours. Consequently, the Licensee is required by license condition to conduct a surveillance program to inspect the air inlets and outlets once every 24 hours, to

⁹Letter from Torrey C. Brown (Maryland Department of Natural Resources) to Mr. Richard Ochs (Petitioner), dated January 26, 1993.

ensure that they do not become plugged. If the air inlets and outlets are plugged, they are required to be cleared; and if the screen is damaged, it is required to be replaced.

In NRC's EA (*see* section 6.2.2), the Staff analyzed an accident involving the blockage of air inlets and outlets and found that there are no offsite dose consequences as a result of this postulated accident. The Petitioner's concerns do not raise significant health and safety issues to members of the general public. In addition, the Licensee's occupational and environmental monitoring program will further ensure the protection of the health and safety of workers and the general public. Therefore, the Staff considers that the Petitioner's concerns have been adequately addressed in the EA and SER.

3. *No Requirements for Radiation Limits, Inspection, and Monitoring*

Petitioner alleges that the NRC has failed to require radiation limitations at the air inlets and outlets, which are the points of greatest potential radiological risk, or to require inspection for canister embrittlement, corrosion, or leakage, or internal canister monitoring (see related Question No. 40 in Petitioner's letter dated February 10, 1993).

In the ISFSI license specifications, NRC has imposed contact dose rate limits at the HSM walls and door (20 millirem per hour (mrem/hr) at the HSM walls and 100 mrem/hr at the access door)) to ensure that worker's doses are below the limits that are specified 10 C.F.R. Part 20. The air inlets and outlets of the HSM are localized areas, compared with the overall HSM surfaces. The surface dose rates at the air inlet and outlet locations are less representative than dose rates at the HSM walls and door for assessing the effect on the direct radiation levels to individuals located beyond the controlled area. Further, NRC requires that the overall radiation dose to a member of the general public from the CCNPP's operation be below the U.S. Environmental Protection Agency's Environmental Radiation Standards for fuel cycle facilities — i.e., 25 mrem/yr (0.25 milli-Sievert per year (mSv/yr)) to the whole body and 75 mrem/yr (0.25 mSv/yr) to the thyroid, from the plant's routine operation. When workers are in the vicinity of loaded HSMs, radiation levels at the air inlets and outlets would be measured, in accordance with the Licensee's radiation protection program, to ensure that worker exposures are within the requirements of Part 20. These are the radiation limits imposed to ensure worker safety and the protection of the general public. Radiation limits at the air inlets and outlets, as suggested by the Petitioner, are not needed.

Before the DSC is installed in the HSM system, the Licensee will inspect and check the DSC vacuum system, helium backfill pressure, helium leak rate of primary seal, and DSC surface contamination, and will perform DSC dye penetrant test of closure welds. After the DSC is installed in the HSM, the

Licensee will measure the air temperatures and surface dose rates on the HSM to determine that all design criteria are met. Because the DSC is made of stainless steel, it is not subject to corrosion or embrittlement; therefore, the DSC will not deteriorate under normal conditions. The NUHOMS-24 system is designed to last much longer than the period of the ISFSI license.¹⁰ During operation, the Licensee will have to demonstrate compliance with Part 20 worker dose limits, as well as dose limits for the general public. The Staff concludes that daily inspections to observe abnormalities occurring in the system, and the current radiological environmental monitoring program, are adequate to determine when corrective actions must be taken to maintain safe storage conditions. The Petitioner's proposed requirements to inspect for canister embrittlement and corrosion leakage, or to perform internal canister monitoring would involve periodically removing the DSC or inserting a device into the canister for measurement. These inspections are not necessary to ensure safe operation of the ISFSI and are not warranted. In addition, to perform some of these measurements, or to remove the DSC out of the HSM, could result in a potential increase of the worker's occupational exposures or accident probabilities.

5. Allowing "Pinhole Leaks" Fuel in Dry Cask

The Petitioner alleges that NRC is allowing fuel with "pinhole leaks" to be transferred to the dry casks, without limits in quantity (see related Questions No. 31, 32, 33, and 34 in Petitioner's letter dated February 10, 1993).

As stated in the Part 72 license issued to BG&E, § 3.1.1, at 3/4 1-1 of the fuel technical specification, fuel assemblies known or suspected to have *structural defects* sufficiently severe to adversely affect fuel handling and transfer capability shall not be loaded into the DSC for storage. The required fuel specification is directed at avoiding structural defects, or cladding degradation, that could lead to gross rupture of the fuel, and could pose operational safety problems in the later handling of the fuel, during its removal from storage for further processing or disposal. The NRC Staff does not consider the "pinhole leaks" significant within the context of storage in the ISFSI, since the fuel will still be confined in the cladding, and will be contained and sealed in the DSC. Under normal operations of the ISFSI, leakage is not expected to occur, since the design and the double-seal welding of the DSC covers are checked and tested to provide structural integrity throughout the interim storage period. In practice, the percentage of spent fuel having "pinhole-leaks" is very small,¹¹ and radioactive

¹⁰ NUTECH, Inc., "Topical Report for the Nutech Horizontal Modular Storage System for Irradiated Nuclear Fuel," NUHOMS-24P (July 1989).

¹¹ U.S. Department of Energy, "Characteristics of Potential Repository Wastes," DOE/RW-0184-R1, Vol. 1 (July 1992).

gas, such as Kr-85, will be contained once the fuel is sealed in the DSC. During the storage period in the ISFSI, it is not expected that gas will leak out of the DSC. However, the Licensee is still required to maintain ISFSI operations in compliance with the environmental dose limits for public health protection, as specified in 10 C.F.R. § 72.104. The gas can be vacuumed during retrieval, to minimize occupational exposure.

6. Thermal Limits for the Concrete in the ISFSI Could Be Exceeded

The Petitioner alleges that if the thermal limits for the concrete in the ISFSI are exceeded and the concrete cracks or moves, the canisters may become irretrievable (see related Question No. 23 in Petitioner's letter dated February 10, 1993).

As discussed in item 2 on thermal limits, the thermal limits of the concrete in the ISFSI will not be exceeded under normal or accident conditions, such as the blockage of the air inlets and outlets. With the daily surveillance program, it is unlikely that this full blockage would occur and would be unnoticed by the inspector. Concrete exposed to accident temperatures would be expected to begin a slow degradation process resulting in some loss of its strength, but would not fail so that a DSC could not be retrieved. The required surveillance program will further ensure the safe operation of dry fuel storage.

7. Dry Cask Storage Has Not Been Tested and Should Require Stringent Regulation

The Petitioner is concerned that dry cask storage has not been tested over the length of time of the 20-year license. The Petitioner asserts that, given so many uncertainties, this new procedure can only be called experimental and, as such, requires most stringent and conservative regulation.

Irradiated reactor fuel has been handled under dry conditions since the mid-1940's when irradiated fuel examinations began in hot cells. Light-water reactor fuel has been examined dry in hot cells since approximately 1960. Some of these fuels have been stored continuously in hot cells under dry conditions for approximately two decades. Experience with storage of spent fuel in dry casks is extensive. The United States has extensive experience in the licensing and safe operation of ISFSIs. At the beginning of 1993, five site-specific licenses for dry cask storage had been issued. They include: Virginia Electric and Power's Surry Station, issued July 2, 1986; Carolina Power and Light's (CP&L) H.B. Robinson Steam Electric Plant, issued August 13, 1986; Duke Power's Oconee Nuclear Station, issued January 29, 1990; Public Service Company of Colorado's Fort St. Vrain Nuclear Generating Station, issued November 4, 1991;

and BG&E's Calvert Cliffs Nuclear Power Plant, issued November 25, 1992. All have commenced operation and loaded fuel with the exception of BG&E. Two hundred and fifty-two assemblies are in storage at Surry, 56 assemblies are in storage at H.B. Robinson, 528 assemblies are in storage at Oconee, and 1482 fuel elements are in storage at Fort St. Vrain.

For the specific Calvert Cliffs ISFSI system (i.e., the NUHOMS system), the topical report (*see* note 10) submitted by NUTECH, Inc., had been evaluated thoroughly by the NRC Staff, and the Staff issued a letter of approval, with an SER, on April 21, 1989. The Staff reviewed the various safety features, such as criticality, structural, thermal, and shielding aspects of the design, under normal and accident conditions. In the Staff's safety evaluation, conservative approaches or assumptions were used in case of uncertainties, to ensure safety protection of workers and the general public. The Staff concluded that the NUHOMS system can be used to safely store spent fuel assemblies. At present, the system or similar systems are used at the Oconee ISFSI and the H.B. Robinson ISFSI. The safety features of the system have been reviewed thoroughly and documented. The design criteria on each of these safety features have to be demonstrated by testing and surveillance during or prior to the installation and operation of the system. Because of the passive design of the NUHOMS system, the long-term integrity of these safety features will be maintained once the system is properly installed. The Licensee's daily inspection program and radiological environmental monitoring program will further ensure the safe operation of the facility. Since the safety features of the NUHOMS system have been tested and evaluated, there is ample margin of safety for its operation for the period of interim storage of spent fuel at the Calvert Cliffs site. The Staff disagrees with Petitioner's characterization that dry cask storage and, particularly, the NUHOMS system is "experimental," based on the Staff's review and the operational history of the systems currently in operation.

CONCLUSION

For the reasons discussed above, there is no basis for taking the actions requested by the Petitioner. The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that I have applied to the concerns raised by the Petitioner in this Decision to determine whether action is warranted. As provided by 10

C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission, for the Commission's review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material
Safety and Safeguards

Dated at Rockville, Maryland,
this 16th day of August 1993.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selln, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 50-312-DCOM
(Decommissioning Plan)

SACRAMENTO MUNICIPAL UTILITY
DISTRICT
(Rancho Seco Nuclear Generating
Station)

September 10, 1993

The Commission provides guidance to the Atomic Safety and Licensing Board on one aspect of Environmental and Resources Conservation Organization's (ECO's) environmental contention which the Commission admitted in its decision, CLI-93-3, 37 NRC 135 (1993).

MEMORANDUM AND ORDER

In an August 31, 1993 Notice of Prehearing Conference, the Atomic Safety and Licensing Board directed the parties to address, among other issues, "whether or not the Commission's orders in CLI-93-3 and CLI-93-12 admitted, without qualification, a contention on loss of offsite power (LOOP)." *Id.* at 2. We did not intend for the parties to revisit this matter. Nevertheless, there is obviously some confusion regarding the effect of the Commission's decisions in CLI-93-3, 37 NRC 135, 146, and CLI-93-12, 37 NRC 355, 359-60 (1993). Therefore, we provide the following guidance to the Licensing Board which should obviate any further need for clarification.

In CLI-93-3, we admitted one aspect of Environmental and Resources Conservation Organization's (ECO's) environmental contention — that there is no reference to a particularized study to allow independent verification of Sacramento Municipal Utility District's (SMUD's) conclusion in its Environmental Report that the probability of a LOOP is less than once in 20 years. 37 NRC at 146. This portion of the environmental contention has been admitted without qualification. To the extent that a party believes no genuine issue remains regarding this contention, that party may seek summary disposition in accordance with 10 C.F.R. § 2.749.

Pursuant to the Commission's direction in CLI-93-3, SMUD provided ECO a detailed analysis regarding how the probability of the LOOP was calculated. Because this was the first time that ECO was provided access to this information ECO was permitted to amend its contention based on this analysis. This particular amendment, based on the newly provided analysis, is not subject to the late-filed criteria contained in 10 C.F.R. § 2.714(a). However, any such amendment must meet the criteria for admissibility in 10 C.F.R. § 2.714(b) and (d).

To the extent that ECO's amended contention may raise new issues that were not dependent on the newly provided analysis of the probability of a LOOP, these new issues are subject to the late-filed criteria in 10 C.F.R. § 2.714(a)(i)-(v). In addition, they are subject to the admissibility standards for contentions in section 2.714(b) and (d). *See* CLI-93-12, 37 NRC at 360 n.8.

If the Licensing Board has any further questions regarding the effect of the Commission's holding in either CLI-93-3 or CLI-93-12, it should certify those questions to the Commission in accordance with 10 C.F.R. § 2.718(i).

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of September 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selln, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 50-271-OLA-5

**VERMONT YANKEE NUCLEAR
POWER CORPORATION**
(Vermont Yankee Nuclear Power
Station)

September 16, 1993

The Commission affirms the Licensing Board's ruling that the Board lacked authority under 10 C.F.R. § 2.107(a) to address a notice of withdrawal that the Licensee had filed after a hearing request had been referred to the Atomic Safety and Licensing Board Panel but before the Licensing Board had issued a Notice of Hearing. The Commission reverses the Licensing Board's related ruling that the NRC Staff's acceptance of the withdrawal had the effect of terminating the proceeding. In the interest of efficiency, the Commission dismisses the proceeding on its own authority, rather than remanding it to the Board.

**RULES OF PRACTICE: AUTHORITY TO ADDRESS APPLICATION
WITHDRAWAL**

Under 10 C.F.R. § 2.107(a), the Licensing Board assumes jurisdiction to address the withdrawal of an application in a license amendment proceeding only after the issuance of a Notice of Hearing as provided in 10 C.F.R. § 2.105(e)(2). Prior to that issuance, the Commission (or NRC Staff, by delegation of authority) has exclusive jurisdiction to address such withdrawals.

RULES OF PRACTICE: TERMINATION OF PROCEEDING

The Commission's regulations do not grant the NRC Staff the authority to terminate a license amendment proceeding after a hearing request has been referred to the Atomic Safety and Licensing Board Panel but before the presiding licensing board or officer has issued a Notice of Hearing. Nor has the Commission, through case law, accorded Staff such authority. Rather, it is the presiding board or officer that has jurisdiction to terminate proceedings under such circumstances.

MEMORANDUM AND ORDER

On July 28, 1993, the Licensing Board in the above-captioned proceeding issued a Memorandum, LBP-93-16, 38 NRC 23, in which it explained that this license amendment proceeding had been terminated on March 25, 1993. According to the Board, the Nuclear Regulatory Commission ("NRC") Staff had approved the Licensee's withdrawal of the subject application, "thus terminating the proceeding." LBP-93-16, 38 NRC at 24. The Board also indicated that, because no Notice of Hearing had been issued by the date on which the Licensee had withdrawn its application, the Commission (or the Staff acting for the Commission) rather than the Board had jurisdiction to address that withdrawal. *Id.*

The Board's stated purpose in issuing LBP-93-16 was to clear up any "confusion" regarding whether the proceeding had ever been closed. *Id.* at 23. Although the Board does not identify the specific confusion with which it is concerned, we assume that the Board intended to refer to the fact that petitions to intervene were still outstanding at the time the NRC Staff approved the withdrawal of the application in this proceeding.

The Board was correct in concluding that it lacked jurisdiction to address the withdrawal. Under section 2.107(a) of our regulations,¹ the Board assumes such jurisdiction in a license amendment proceeding only after the issuance of a Notice of Hearing as provided in 10 C.F.R. § 2.105(e)(2). Prior to the issuance

¹This rule states:

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

10 C.F.R. § 2.107(a) (emphasis added).

of that Notice, the Commission (or the NRC Staff, by delegation of authority)² has exclusive jurisdiction to address withdrawals of applications.

However, the Board erred in concluding that the NRC Staff's approval of Vermont Yankee's withdrawal request had the effect of "terminating the proceeding." The Commission's regulations contain no provision granting authority to the Staff to terminate a license amendment proceeding after a hearing request has been referred to the Atomic Safety and Licensing Board Panel but before the presiding licensing board or officer has issued a Notice of Hearing.³ Nor has the Commission, through case law, accorded Staff such authority. Rather, it is the presiding board or officer that has jurisdiction to terminate proceedings under such circumstances. See *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980) (adjudicatory tribunals have "the inherent authority . . . to dismiss those matters placed before them which have been mooted by supervening developments"). We therefore reverse the Board's conclusion that the NRC Staff's action itself had the effect of terminating this proceeding.

Ordinarily, we would remand the proceeding to the Licensing Board with instructions to issue an order terminating the proceeding. However, the instant case is so clearly moot that, in the interest of efficiency, we exercise our own authority and hereby take that action.

Finally, we take this opportunity to state that, whenever a future licensing board or presiding officer is faced with procedural circumstances similar to those in the instant case, it should issue an order indicating both that the Commission (or its Staff) has previously approved the withdrawal of an application and that the proceeding is being terminated, therefore, on grounds of mootness. Such an

²The Commission has delegated such authority to the Director of the Office of Nuclear Reactor Regulation. See 9 *Management Directives: United States Nuclear Regulatory Commission*, "NRC Organization and Functions," Chapter 9.27, §§0123.031 and 0123.032. The Director is, in turn, authorized to redelegate this authority. *Id.* §0123.05.

³In this respect, the treatment of termination differs from the treatment of withdrawal requests in section 2.107(a).

order will avoid both the error in LBP-93-16 and the kind of confusion that the Board in this case properly sought to alleviate.

It is so ORDERED.

For the Commission⁴

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of September 1993.

⁴ Commissioner de Planque was not present for the affirmation of this Order; if she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam

In the Matter of

Docket No. 50-271-OLA-5
(ASLBP No. 92-665-02-OLA-5)
(FOL No. DPR-28)

VERMONT YANKEE NUCLEAR POWER
CORPORATION

(Vermont Yankee Nuclear Power
Station)

July 28, 1993

MEMORANDUM
(Termination of Proceeding)

The purpose of this Memorandum is to note for the adjudicatory record the termination of this license amendment proceeding. Confusion has arisen concerning the status of this unusual proceeding which, according to the adjudicatory record, incorrectly seemed to have been opened but never closed.

On January 21, 1992, the Commission published in the *Federal Register* a "Notice of Consideration of Amendment to Facility Operating License . . . and Opportunity for Hearing" with respect to diesel generators at the Vermont Yankee Nuclear Power Station. 58 Fed. Reg. 5427-35.

Pursuant to the Notice, on February 22, 1993, petitions for leave to intervene and requests for hearing were filed by New England Coalition on Nuclear

Pollution and the Massachusetts Attorney General. The Secretary of the Commission routinely referred the petitions to the Chief Judge of the Atomic Safety and Licensing Board Panel in accordance with 10 C.F.R. § 2.772(j). The proceeding was docketed as an adjudicatory matter and, on March 5, 1993, the Chief Judge established this Atomic Safety and Licensing Board to rule on the petitions and to preside over any consequent hearing.

Before the Licensing Board could rule on the intervention petitions, Vermont Yankee Nuclear Power Corporation, on March 9, 1993, withdrew the application.¹ Since no party had been admitted to the proceeding, the Licensing Board had not issued a Notice of Hearing as provided in 10 C.F.R. § 2.105(e)(2). Therefore, the Commission, not the Licensing Board, had jurisdiction over the withdrawal of the application. *See* 10 C.F.R. § 2.107(a). The NRC Staff, acting for the Commission, approved the withdrawal on March 25, 1993, thus terminating the proceeding.²

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 28, 1993

¹Letter, Donald A. Reid, Vice President, Operations, Vermont Yankee Power Corporation, to U.S. Nuclear Regulatory Commission, March 9, 1993.

²Letter from Daniel H. Dorman, USNRC, to Donald A. Reid, Vermont Yankee Nuclear Power Corporation, March 25, 1993, with attached notice of withdrawal.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

**Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque**

In the Matter of

**Docket Nos. 50-424-OLA-3
50-425-OLA-3**

**GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2)**

August 19, 1993

The Commission considers the appeal of a licensing board decision, LBP-93-5, 37 NRC 96 (1993), which granted a Petitioner's request for intervention and for hearing on a proposal by the Georgia Power Company to transfer its operating authority over the Vogtle nuclear power plant to a new licensee; the Board's decision also admitted one consolidated contention. The Commission denies the appeal and affirms the Licensing Board's order, finding that the Petitioner has standing to intervene and has submitted admissible contention.

ATOMIC ENERGY ACT: LICENSEE'S CHARACTER

The integrity or character of a licensee's management personnel bears on the Commission's ability to find reasonable assurance that a facility can be safely operated.

ATOMIC ENERGY ACT: LICENSEE'S CHARACTER

Lack of either technical competence or character qualifications on the part of licensee or applicant is sufficient grounds for the revocation of a license or the denial of a license application.

ATOMIC ENERGY ACT: LICENSEE'S CHARACTER (STANDARD FOR DETERMINATION)

In making determinations about character, the Commission may consider evidence bearing upon the licensee's candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety. However, not every licensing action throws open an opportunity to engage in an inquiry into the "character" of the licensee. There must be some direct and obvious relationship between the character issues and the licensing action in dispute.

ATOMIC ENERGY ACT: LICENSEE'S CHARACTER (STANDARD FOR DETERMINATION)

The past performance of management or high-ranking officers, as reflected in deliberate violations of regulations or untruthful reports to the Commission, may indicate whether a licensee will comply with agency standards, and will candidly respond to NRC inquiries.

RULES OF PRACTICE: STANDING TO INTERVENE

To determine whether a petitioner has established sufficient interest to intervene in a proceeding the Commission has long applied judicial concepts of standing.

RULES OF PRACTICE: STANDING TO INTERVENE

For standing, a petitioner must allege an "injury in fact" from the licensing action being challenged, and this injury must be to an interest arguably within the zone of interests protected by the governing statute. The alleged injury must be concrete and particularized, fairly traceable to the challenged action, and likely to be redressed by a favorable decision.

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

For proceedings involving the issuance of a construction permit or operating license, the Commission generally has recognized a presumption in favor of standing for those petitioners who have sufficient contacts within the geographic area that could be affected by a release of fission products. However, for this presumption to apply to license amendment proceedings, the proposed action must involve "clear implications for the offsite environment, or major alterations

to the facility with a clear potential for offsite consequences." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Otherwise the petitioner must allege a specific "injury in fact" that will result from the proposed action.

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

A request to transfer operating authority under a full-power license for a power reactor may be deemed an action involving "clear implications for the offsite environment," for purposes of determining threshold injury.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

Under 10 C.F.R. § 2.714(b)(2)(iii), if an application contains disputed information or omits required information, the petitioner normally must specify the portions of the application that are in dispute or are incomplete. However, a petitioner need not refer to a particular portion of the licensee's application when the licensee neither identified, nor was obligated to identify, the disputed issue in its application.

MEMORANDUM AND ORDER

I. INTRODUCTION

Georgia Power Company (GPC or Licensee) has appealed the Atomic Safety and Licensing Board's Memorandum and Order, LBP-93-5, 37 NRC 96 (1993), which granted Allen L. Mosbaugh's petition for leave to intervene and for hearing on a proposed transfer of the licenses to operate the Vogtle Electric Generating Plant (Vogtle) Units 1 and 2. The proposed licensing action would transfer all operational control of Vogtle Units 1 and 2 from GPC, the present Licensee, to Southern Nuclear Operating Company, Inc. (Southern Nuclear). The Licensing Board granted Mr. Mosbaugh standing and admitted a consolidated contention which alleges that Southern Nuclear lacks the requisite character and integrity to be a Commission licensee. On appeal, GPC argues that Mr. Mosbaugh's petition should have been wholly denied because Mr. Mosbaugh both lacks standing and failed to submit an admissible contention. Mr. Mosbaugh and the Nuclear Regulatory Commission (NRC) Staff oppose GPC's appeal. For the reasons stated in this Order, we deny the appeal and affirm the Licensing Board's admission of the Petitioner as a party to this proceeding.

II. BACKGROUND

On October 14, 1992, the NRC Staff published in the *Federal Register* a notice of opportunity for hearing on the proposal to transfer all operating authority over the Vogtle plant from GPC, the current operator, to Southern Nuclear. 57 Fed. Reg. 47,135 (Oct. 14, 1992). Southern Nuclear presently functions as an unlicensed support services company. If the transfer is approved, Southern Nuclear would have the exclusive authority to possess, manage, use, operate, and maintain the facility. The proposed transfer would involve only the authority to operate Vogtle and would not change the ownership interests in the plant; GPC and the other named owners would continue to own the Vogtle plant in the same percentages as today.

Both GPC and Southern Nuclear are wholly owned subsidiaries of Southern Company. Southern Company incorporated Southern Nuclear in December 1990 for the purpose of consolidating within Southern Nuclear those Southern Company personnel engaged in nuclear operations. As a transitional stage prior to the incorporation of Southern Nuclear, Southern Company organized the Southern Nuclear Operating Company (SONOPCO) "project." Numerous SONOPCO project — now Southern Nuclear — personnel are also officers of GPC. GPC explains that this process of "double-hatting" is a common method to maintain a licensed utility's authority and control over transitional organizations, prior to the transfer of operating authority to a new affiliate.¹

On October 22, 1992, Messrs. Allen L. Mosbaugh and Marvin B. Hobby filed a joint petition to intervene and for hearing on the proposed transfer of the Vogtle licenses. The Petitioners claimed that Southern Nuclear's management does not have the character, competence, or integrity to ensure the safe operation of the Vogtle plant, and therefore should not become the licensee. Petition to Intervene and Request for Hearing of Allen L. Mosbaugh and Marvin B. Hobby at 2 (Oct. 22, 1992) [hereinafter Petition]. In an unpublished order dated November 17, 1992, the Licensing Board concluded that Mr. Hobby, who alleged only injury to his economic interests, had not demonstrated sufficient interest for standing and, accordingly, the Board dismissed Mr. Hobby's petition. Mr. Hobby has not appealed. Mr. Mosbaugh claimed that he resides within 50 miles of the Vogtle plant and will face increased risk of radiological harm as a consequence of the proposed transfer. The Board ordered Mr. Mosbaugh to submit an amended petition, to contain both his particularized contentions and a more detailed statement of his contacts in the Vogtle plant area.

GPC has claimed that the transfer would not result in any significant change in nuclear operations personnel or support organizations. Therefore, of particular

¹GPC's Brief in Response to the Board's January 15, 1993 Request for Information and Briefs at 18 (Feb. 4, 1993).

note in this proceeding is the Licensee's repeated assertion that even after the transfer of operating authority to Southern Nuclear, "the change in the actual *personnel* in control of licensed activities will be insignificant."² For example, GPC states that once the proposed transfer becomes effective, the onsite organization responsible for operations at the facility will be transferred as a unit to Southern Nuclear.³ GPC claims that the transfer also would not significantly alter offsite line management; three of the four GPC officers who are the current Vogtle offsite managers are also officers of Southern Nuclear, and GPC states that upon the authorization of the transfer these three officers would continue managing the plant, although they would do so only as officers of Southern Nuclear, not of GPC. GPC thus characterizes the proposed change as resulting primarily in a licensee name change, not a change in the individuals managing the Vogtle plant, and therefore not a change that would result in any *new* injury to Mr. Mosbaugh.

In LBP-93-5, the Licensing Board determined that Mr. Mosbaugh satisfied the Commission's requirements for both standing and an admissible contention, and admitted Mr. Mosbaugh as a party to the proceeding. The Board rejected GPC's argument that Mr. Mosbaugh faces no injury as a consequence of the proposed transfer. The Board found that Mr. Mosbaugh resides periodically at a house located about 35 miles from the plant. Mr. Mosbaugh was found to have alleged, with an adequate basis, that the proposed transfer does not meet the NRC's safety requirements, and that even though "material safety deficiencies he has alleged may already be occurring," the transfer of control from GPC to Southern Nuclear could affect Mr. Mosbaugh's health, safety, and property interests. 37 NRC at 98, 107. The Board also found three of the Petitioner's submitted contentions acceptable, but in the interest of efficiency consolidated these into a single admitted contention. In essence, this contention alleges that the authority to operate Units 1 and 2 should not be transferred to Southern Nuclear because the company lacks the requisite character, competence, integrity, truthfulness, and willingness to abide by regulatory requirements.

GPC has appealed the Licensing Board's decision pursuant to 10 C.F.R. § 2.714a (1993). On appeal, GPC presents principally four arguments. GPC claims that the Board erred in concluding that (1) the proceeding is an appropriate forum in which to address Mr. Mosbaugh's allegations; (2) Mr. Mosbaugh demonstrated that he would sustain an injury in fact from the proposed transfer sufficient for standing; (3) the injury complained of is likely to be redressed by a decision favorable to Mr. Mosbaugh; and (4) Mr. Mosbaugh satisfied the Commission's requirements concerning the admission of contentions.

² GPC's Brief in Support of its March 4, 1993 Notice of Appeal at 4 (Mar. 4, 1993) [hereinafter GPC Appeal Brief].

³ *Id.*

Mr. Mosbaugh answers the Licensee's appeal primarily with a defense of the Licensing Board's finding of standing. The Staff, which initially had concurred with the Licensee that Mr. Mosbaugh had not demonstrated injury, now supports the Licensing Board's finding of standing, based upon the Board's analysis of redressability. NRC Staff Brief in Response to Licensee's Appeal at 6-7 (Mar. 16, 1993). Staff has not taken a position on the adequacy of Mr. Mosbaugh's contentions.⁴ The Staff, however, maintains that the Licensee's character can be an appropriate consideration in this proceeding.

III. ANALYSIS

A. Scope of the Proceeding

Because this issue has importance to GPC's arguments on both Mr. Mosbaugh's standing and his contention, we first address GPC's claim that this proceeding is not an appropriate forum in which to address Mr. Mosbaugh's allegations. GPC emphasizes that character issues have not been considered in other transfer proceedings and that "[a]bsent specific direction from the Commission in enforcement proceedings, an applicant for a license transfer need only demonstrate financial and technical qualifications." GPC Appeal Brief at 43-44 (footnote omitted). GPC suggests that under Commission precedent the Commission permits inquiries into a licensee's character only after the initiation of enforcement actions. *Id.* at 40-41.

We concur with the Staff that the character of a proposed licensee is an appropriate issue in a proceeding to consider transfer of operating authority. The adequacy of a licensee's corporate organization and the integrity and competence of its management are certainly matters that the Commission may consider in its licensing and oversight responsibilities under the Atomic Energy Act (AEA).⁵ Section 182a of the AEA authorizes the Commission to decide, by rule or regulation, what information is necessary to determine the qualifications of an applicant, including the "character" of the applicant. *See* 42 U.S.C. § 2232(a). Although the Commission has not enacted regulations that specifically refer to "character," it has considered the character of licensees and applicants when directly relevant to the proposed action.

⁴ However, in a "Partial Director's Decision Under 10 C.F.R. § 2.206," DD-93-8, 37 NRC 314, 317-24 (1993), that was issued after the Staff's brief was filed, the Staff rejects the merits of one of the bases for Mr. Mosbaugh's contentions, i.e., the alleged *de facto* transfer of the licenses to Southern Nuclear. Because some of the factual issues addressed in DD-93-8 overlap with those now pending in this proceeding, we vacated DD-93-8 and remanded the petition to the Staff for further consideration at the conclusion of this proceeding. *See generally* CLI-93-15, 38 NRC 1 (1993).

⁵ *See* AEA § 182a, 42 U.S.C. § 2232(a); 10 C.F.R. § 50.34(b)(6)(i).

Commission precedent establishes that lack of either technical competence or *character* qualifications on the part of licensee or applicant is sufficient grounds for the revocation of a license or the denial of a license application. See *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291 (1980). The Commission has looked to whether a licensee's management displays "the climate, resources, attitude, and leadership that the Commission expects of a licensee."⁶ In making determinations about "integrity" or "character," the Commission may consider evidence bearing upon the licensee's "candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety."⁷ The past performance of management or high-ranking officers, as reflected in deliberate violations of regulations or untruthful reports to the Commission, may indicate whether a licensee will comply with agency standards, and will candidly respond to NRC inquiries.⁸

Under 10 C.F.R. § 50.80(c), before the Commission may approve an application for a transfer of license it must determine that the proposed transferee is "qualified to be the holder of the license," and that the transfer of the license is otherwise consistent with applicable provisions of law, and Commission regulations and orders.⁹ The regulation does not permit a lower standard of qualifications of a proposed transferee than of an initial license holder. The predictive findings that the Commission must make prior to the issuance of an initial license are no less relevant and no less applicable to a proposal to change the operator of a nuclear facility. For instance, the Commission may issue an operating license only after finding that there is reasonable assurance that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and that such activities will be conducted in compliance with regulations. 10 C.F.R. § 50.57(a)(3). These threshold determinations are equally appropriate in a proposed transfer of operating authority under a license to a new licensee. The integrity or character of a licensee's management personnel bears on the Commission's ability to find reasonable assurance that a facility can be safely operated. See *Three Mile Island*, CLI-85-9, 21 NRC at 1140.

GPC would like us to view the proposed amendment as no more significant than a change of corporate name. But the significance of a total transfer of

⁶ *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1137, *aff'd sub nom. In re Three Mile Island Alert, Inc.*, 771 F.2d 720 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

⁷ *Id.* at 1136-37.

⁸ See *Hamlin Testing Laboratories, Inc.*, 2 AEC 423, 428 (1964), *aff'd sub nom. Hamlin Testing Laboratories, Inc. v. AEC*, 357 F.2d 632 (6th Cir. 1966).

⁹ See also AEA § 184, 42 U.S.C. § 2234 ("No license . . . shall be transferred, assigned or in any manner disposed of, voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing"); 10 C.F.R. § 50.54(c).

operational control and responsibility over a nuclear power plant licensed to operate at full power makes relevant to this proceeding the proposed Licensee's integrity and willingness to abide by regulatory requirements. As Staff has emphasized, the proposed transfer may not be approved "[i]f personnel who will be involved in the operation of the facility lack the character to operate the facility."¹⁰ A resolution of properly admitted contentions regarding character or integrity has a direct bearing on the Commission's ability to find that Southern Nuclear will operate the Vogtle facility in compliance with Commission rules, regulations, and the AEA, and without endangering the health and safety of the public.

We do not mean to suggest that every licensing action throws open an opportunity to engage in a free-ranging inquiry into the "character" of the licensee. There must be some direct and obvious relationship between the character issues and the licensing action in dispute. Where, as here, the proposed action concerns the transfer of the license to a new organization and management that will be responsible for the safe operation of the plant, character issues may be directly relevant.

B. Mr. Mosbaugh's Standing

We next turn to GPC's argument that Mr. Mosbaugh failed to allege an injury both linked to the proposed transfer and redressable by this proceeding, and that accordingly he lacks standing to intervene in this proceeding. To determine whether a petitioner has established sufficient interest to intervene in a proceeding, the Commission has long applied judicial concepts of standing.¹¹ For standing, a petitioner must allege an "injury in fact" from the licensing action being challenged, and this injury must be to an interest arguably within the zone of interests protected by the governing statute. The alleged injury must be concrete and particularized, fairly traceable to the challenged action, and likely to be redressed by a favorable decision. *See generally Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991) (*Seabrook*). Injury may be actual or threatened. *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987).

The standing dispute in this appeal centers on the nature and redressability of Mr. Mosbaugh's injury, not on whether that injury is to an interest that falls within the "zone of interests" protected by the AEA. Because GPC anticipates

¹⁰ NRC Staff Response to Licensing Board Questions at 6 (Feb. 5, 1993).

¹¹ *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *aff'd*, *Environmental & Resources Defense Conservation Organization v. NRC*, No. 92-70202 (9th Cir. June 30, 1993).

that the proposed transfer will result in only what it deems to be a negligible change in personnel, the Licensee argues that Mr. Mosbaugh faces no potential injury from the transfer. GPC states that “the only anticipated change in personnel at this time is that the Executive Vice President of GPC (who is also the President of Southern Nuclear) will no longer report to the President of GPC but will instead report solely to the Board of Directors of Southern Nuclear,” and that this reporting change is insignificant because the president of GPC will remain a member of the Board of Directors of Southern Nuclear. GPC’s Answer to Petition at 11 & n.5. GPC thus concludes that no potential for adverse offsite consequences will arise from the assumption of operating responsibilities by Southern Nuclear. *Id.* For the same reason, the Licensee emphasizes that the injury of which Mr. Mosbaugh complains, if it exists, would not likely be redressed by a decision favorable to him, but would exist regardless of whether the transfers are granted or denied. GPC’s Appeal Brief at 20, 27. We address injury and redressability separately and seriatim.

1. Injury in Fact to Mr. Mosbaugh’s Interests

Mr. Mosbaugh predicates his alleged injury upon his contacts in the area near the Vogtle plant, namely periodic residence at a house in Groveton, Georgia, located approximately 35 miles from the plant. Mr. Mosbaugh alleges that the management of Southern Nuclear lacks the character, competence, and integrity to safely operate the Vogtle plant, and lacks the candor, truthfulness, and willingness to abide by the regulatory requirements necessary to operate a nuclear facility. Petition at 1-2. More specifically, Mr. Mosbaugh alleges that the highest levels of Southern Nuclear’s management intentionally submitted material false information to the NRC in a Licensee Event Report.¹² Mr. Mosbaugh further claims that Southern Nuclear managers deliberately submitted additional material false statements to the NRC Staff to obstruct an NRC investigation by the Office of Investigations (OI). Amended Petition at 16-19. Moreover, Mr. Mosbaugh alleges that Southern Nuclear officials, in violation of NRC regulations and of the Georgia Power Company’s license, used legal and illegal methods to “wrench the control of Plant Vogtle” from GPC and, as a result, GPC, the current Licensee, has ceased to be in control of operations at the plant.¹³

¹² Amendments to Petition to Intervene and Request for Hearing at 15-16 (Dec. 9, 1992) [hereinafter Amended Petition].

¹³ Transcript of January 12, 1993 Prehearing Conference at 67-71 [hereinafter Prehearing Conference Transcript] (remarks by Mr. Mosbaugh’s counsel); *see also* Amended Petition at 5-14; Petitioner’s Brief in Response to the Board’s Request for Information at 1-5 (Feb. 5, 1993); Allen L. Mosbaugh’s Brief in Opposition to GPC’s Appeal of the Licensing Board’s Feb. 18, 1993 Memorandum and Order at 4-7 (Mar. 22, 1993).

Mr. Mosbaugh submits that at the time that Georgia Power Company received its operating license, GPC personnel had the requisite integrity and abided by safety regulations,¹⁴ but over time GPC's previous "management team was reconfigured to accommodate the Southern Company's establishment of SONOPCO. As a result of this transition, all of GPC's line managers over the plant manager have been replaced."¹⁵ This new management team chosen to staff Southern Nuclear allegedly has evinced a willingness to risk safety and deceive the NRC.¹⁶

Mr. Mosbaugh concludes that the influence of Southern Nuclear management personnel at Vogtle resulted in a corporate culture prone to taking risks in areas of safety.¹⁷ Due to the alleged "new corporate milieu"¹⁸ of intentional corporate misconduct by top management at Southern Nuclear, the Petitioner argues that a transfer of operational authority to Southern Nuclear would "encourage Southern Nuclear management to engage in the very type of misconduct Mr. Mosbaugh fears could result in a nuclear accident,"¹⁹ and thus would increase the possibility of an accident and "otherwise represent[] an unsafe operating condition." Amended Petition at 3. Thus, Mr. Mosbaugh emphasizes that the formal transfer of operating control to Southern Nuclear will ratify a management organization that has violated and currently is in violation of Commission requirements, and that a transfer to individuals who tolerate — if not encourage — violations will place him, by virtue of his frequent presence in the plant area, at greater risk of radiological injury.

For proceedings involving the issuance of a construction permit or operating license, the Commission generally has recognized a presumption in favor of standing for those petitioners who have sufficient contacts within the geographic area that could be affected by a release of fission products. *See, e.g., Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979) (*North Anna*). Especially given the possible health consequences of accidental releases, the siting of a plant in a petitioner's environment may be deemed a direct and present injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978).

However, the Commission has stressed that this presumption in favor of an interest to intervene applies only in "proceedings for construction permits, op-

¹⁴ *See, e.g.,* Petitioner's Brief in Response to Board's Request for Information at 4 n.4; Prehearing Conference Transcript at 109.

¹⁵ Petitioner's Brief in Response to the Board's Request for Information at 4 n.4.

¹⁶ *Id.*; Prehearing Conference Transcript at 71. Consequently, the Petitioner argues that "it is incumbent upon GPC to show that the proposed *new* management of Southern Nuclear — not the *old* management of GPC — has the requisite character and integrity to operate a nuclear facility." Petitioner's Brief in Response to the Board's Request for Information at 6.

¹⁷ Prehearing Conference Transcript at 71-72.

¹⁸ *Id.* at 71.

¹⁹ Petitioner's Brief in Response to the Board's Request for Information at 6-7.

erating licenses, or significant amendments thereto," where the proposed action involves "clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (*St. Lucie*). In the absence of "such obvious potential for offsite consequences, a petitioner must allege some specific 'injury in fact' that will result from the action taken." *Id.* at 330. For example, proximity alone did not establish the requisite injury for standing in *St. Lucie* because the proposed action primarily affected the occupational safety of workers in radiation areas within the plant, and posed no readily apparent potential for safety consequences to the offsite public.

The Licensing Board concluded in LBP-93-5 that Mr. Mosbaugh's petition satisfies threshold standing requirements. The Board determined that the petitioner owns a house located approximately 35 miles from the Vogtle plant, and since August 1991 has resided at this home approximately 1 week each month.²⁰ The Licensing Board determined that the proposal to transfer operational authority to Southern Nuclear presents an "obvious potential for offsite consequences," and that, accordingly, because of his frequent presence near the plant Mr. Mosbaugh had adequately established an interest to intervene. LBP-93-5, 37 NRC at 108. The Board reasoned that allegations of intentional withholding of safety-related information by key Southern Nuclear officials pertain to the plant's overall safety, and "[t]he risk of non-safety-conscious management is as great as many other risks that could be adjudicated in an operating license case." *Id.*

On appeal, GPC contests the Board's conclusion that the proposed action involves an obvious potential for offsite consequences. To the Licensee, the proposed amendments involve "little more than a name change" since any change in the personnel who will control licensed activities will be minor. GPC Appeal Brief at 15-16. GPC therefore claims that the transfer of operating control poses no injury to Mr. Mosbaugh.

We concur with the Licensing Board that Mr. Mosbaugh sufficiently has alleged an injury linked to the proposed amendments. Mr. Mosbaugh has established in the Board's estimation regular, though intermittent, residence near the plant. *Compare North Anna*, 9 NRC at 57 (periodic recreational activity). A request to transfer full operating authority over a power reactor may be deemed a "significant" amendment or action involving "clear implications for the offsite environment," for purposes of determining threshold injury.

²⁰ 37 NRC at 107. In response to Mr. Mosbaugh's petition, the Licensee had challenged Mr. Mosbaugh's assertion that he resides in Georgia. The Board reached its findings about Mr. Mosbaugh's contacts in the Vogtle plant area based upon supplemental filings and an evidentiary hearing held January 12, 1993.

We agree with the Petitioner that although key officers at Southern Nuclear may already be in managerial roles as GPC officers at Vogtle, the officers' current presence at Vogtle does not obviate the need for Southern Nuclear to show that it has the willingness to follow NRC regulatory requirements before the company is granted the responsibility for the plant's operations. Amended Petition at 1 n.1. As Staff counsel stated before the Licensing Board, "character has to be looked at, even though it appears to us that these are the same people named both times To issue a license amendment . . . would be an indication that the NRC in some way says at that point character was [acceptable] in the past and that character can continue into the future."²¹ Thus, we cannot accept at this threshold stage GPC's conclusion that no injury would result from transferring responsibility for safe operation to persons in Southern Nuclear's corporate management who are alleged to have violated agency regulations and to have submitted false information to the NRC. Given the need to ensure before the licenses are transferred that Southern Nuclear's management will operate the Vogtle facility consistent with regulatory requirements, we will assume that the transfer has potentially significant public health and safety implications.

GPC's approach would have us ignore matters concerning the individuals filling positions in the new organization simply because they presently occupy similar positions of responsibility in the old one. This approach would insulate the proposed licensee from scrutiny for reasons having nothing to do with the relevance of the matters to the licensing action at issue or with the specificity of the allegations.²²

Whether some or even all of the key personnel are already managing the facility does not eliminate the implications of granting total control over operations to corporate management alleged to be lax on safety. If Mr. Mosbaugh's allegations are correct, the license transfer would act to ratify and reward corrupt management. The Commission has acknowledged that high-level management plays a significant role in assuring "that a proper attitude is followed throughout the organization." *Three Mile Island*, CLI-85-9, 21 NRC at 1139. In assessing threshold standing, we simply cannot conclude

²¹ Prehearing Conference Transcript at 99-100.

²² The Licensee states that the Licensing Board's ruling directly conflicts with *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, *aff'd*, ALAB-470, 7 NRC 473 (1978) (*Fermi*). GPC's Appeal Brief at 35-36. *Fermi* involved a proceeding to amend a construction permit to add new co-owners. The Licensing Board in *Fermi* concluded that the scope of the proceeding did not encompass consideration of whether Detroit Edison had violated Commission regulations by transferring ownership interests in advance of Commission action on the proposed amendment. GPC claims that the Licensing Board in LBP-93-5 should have rejected Mr. Mosbaugh's allegations because he likewise seeks only to litigate historical allegations. We find the instant case distinguishable. Here, Mr. Mosbaugh claims that Southern Nuclear personnel currently lack the character to operate the plant. This claim is based on alleged intentional violations committed by Southern Nuclear officers, which are cited to depict an alleged corrupt management organization that is unfit to operate a nuclear power plant. There were no such allegations about the character of the new co-owners in *Fermi*; whether Detroit Edison had violated Commission regulations in the past simply had no relevance to that proceeding.

that Mr. Mosbaugh would not face increased risk of radiological injury from a formal transfer of operating responsibility to an organization whose high-ranking officers are allegedly willing to violate safety regulations.

GPC itself has stressed the significance of the authority and “final say,” so to speak, exercised by the company named as the exclusive operating licensee. For instance, under the current license, in an irreconcilable dispute between the president and chief executive officer (CEO) of GPC and the president and CEO of Southern Nuclear over whether an employee of GPC should be fired, the GPC president, as president of the Licensee, would prevail.²³ A “double-hatted” officer of GPC and Southern Nuclear stressed that if such a conflict “can’t be ironed out, obviously, the stronger hand in this is [the current Licensee] [T]he sanctity of the license and responsibility is absolute. There can never be a dilution . . . in the sanctity of that operational responsibility.”²⁴ Quite simply, transfer of the license will mean that a different corporate entity, Southern Nuclear, will be responsible for activities at Vogtle. Even if the same personnel will be operating the plant on the day after the transfer, they will be reporting to a different organization. This new organization will have the ability to replace the plant management and affect plant operation in any number of ways. Thus, we do not accept GPC’s argument that the amendments represent nothing more than a corporate “name change.”

If a licensing action involves an obvious potential for offsite consequences, the petitioner need not meet the heightened requirement under *St. Lucie* for specification of the “injury in fact” that will result from the action taken, nor must the petitioner particularize the causal relationship between the alleged injury and the results of the proceeding. *See St. Lucie*, 30 NRC at 329-30; *North Anna*, 9 NRC at 56. Mr. Mosbaugh’s intermittent residence in the plant’s vicinity, coupled with his allegation that personnel of the company that will be authorized to control the Vogtle facility lack the integrity to operate the plant safely, is sufficient to meet the “injury” requirement for standing in this proceeding.

²³ *See* Transcript of Public Meeting on Implementation of Southern Nuclear Operating Company at 39 (Jan. 11, 1991) (referring to analogous hypothetical dispute between the presidents of Alabama Power Company and Southern Nuclear), attached to GPC’s Response to the Board’s Jan. 15, 1993 Request for Information (Feb. 4, 1993). The Licensee emphasizes that after the transfer the only change in line management personnel responsible for licensed activities will be that Mr. McDonald, a senior officer at GPC and Southern Nuclear, will no longer report to Mr. Dahlberg, the president of GPC, and instead will report to the Board of Directors of Southern Nuclear. The Licensee submits that this change will be insignificant because Mr. Dahlberg is on the Southern Nuclear Board of Directors. At this point, in determining threshold standing, we are not prepared to resolve the extent to which the license transfer may result in any changes in the relative influence of personnel at the Vogtle facility, and if so, what the effects might be of such a shift in influence.

²⁴ *Id.* at 39.

2. Redressability of Mr. Mosbaugh's Injury

Notwithstanding a finding of injury to Mr. Mosbaugh's interests, GPC contends that Mr. Mosbaugh cannot satisfy the redressability component of the standing test. GPC argues that even if Mr. Mosbaugh's claims are adjudicated and found to have merit, with the result that the transfer is disapproved, his asserted injury would not be redressed by this proceeding. Disapproval of the transfer, GPC argues, will merely leave the plant under its present management, which employs the same personnel whose integrity Mr. Mosbaugh is attacking. Therefore, this argument goes, a hearing on Mr. Mosbaugh's contentions cannot result in any relief from his claimed injuries, and his case for standing fails the redressability test.

We find GPC's argument unpersuasive. The underlying implication of GPC's approach is that approval of the proposed transfer would in fact be an action of no real consequence or significance. But an adjudication that ended by confirming Mr. Mosbaugh's allegations about the unfitness of Vogtle management, if upheld on further administrative review, most assuredly would do more than simply result in denial of the transfer amendment. Mr. Mosbaugh's asserted injuries would be redressed if he should prevail in this proceeding or even partially prevail. For example, as the Licensing Board suggested, Mr. Mosbaugh could obtain relief if the transfer was granted subject to changes in the structure and personnel of Southern Nuclear.²⁵ As the Staff states, "an order prohibiting or limiting the activities of certain of these officers at Vogtle might prevent potential harm from operation under the proposed transfer."²⁶ Moreover, determinations made in this proceeding, i.e., a finding of adverse character, would have a collateral estoppel effect on related licensing actions or in later proceedings brought on the same facts.²⁷ The consequence of such adverse findings resulting

²⁵ LBP-93-5, 37 NRC at 105. GPC argues that the Board erred in suggesting its own theory of redressability, unadvanced by the petitioner. GPC's reliance on Commission precedent to support this argument is misplaced. In *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991), the Commission held that licensing boards may not freely infer bases for contentions in framing specific issues for litigation once standing is established. We do not believe that this decision can be read to prohibit the Board from considering generally the reach of its jurisdiction to fashion a remedy in determining redressability.

²⁶ NRC Staff Brief in Response to Licensee's Appeal at 7. GPC submits that if the Board were to approve the amendments subject to conditions that GPC found unacceptable, GPC might simply reject those conditions "since it can continue operating Plant Vogtle under the current organizational structure." GPC Appeal Brief at 26-27. GPC, however, may not unilaterally withdraw its application. The Commission provides under 10 C.F.R. § 2.107(a) that "[t]he Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe." See also *Sequoyah Fuels Corp.*, CLI-93-7, 37 NRC 175, 179 (1993); *Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), CLI-82-5, 15 NRC 404, 405 (1982).

²⁷ Collateral estoppel principles may be applied by the Commission in administrative proceedings to bar re-litigation of previously resolved factual issues. See *Alabama Power Co.* (Joseph M. Farley Nuclear Plant,

(Continued)

from the litigation of Mr. Mosbaugh's allegation is fairly a result of *this* proceeding. Thus, the Petitioner's alleged injury is "likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

The Licensee notes that in *Seabrook*, which also involved allegations about character, the Commission denied standing to the Seacoast Anti-Pollution League (SAPL) for failure to demonstrate that its alleged harm would abate by a favorable decision. However, *Seabrook* is distinguishable on its facts. Fearing the alleged corrupt influence of Northeast Utilities (NU) management on NU's subsidiaries, SAPL challenged a proposed transfer of a substantial ownership interest in the Seabrook plant from Public Service Company of New Hampshire to NAEC, an NU subsidiary. Yet SAPL failed to respond to a notice of a separate proposed amendment to transfer *operational* authority to NAESCO, another NU subsidiary. This second proposed amendment authorized NAESCO to manage, operate, and maintain the Seabrook facility, actions central to the Petitioner's fears of unsafe operation. As a result, the Commission found that SAPL's alleged injury would not be redressed by the denial of the proposed transfer of an ownership interest to NAEC. 34 NRC at 268. Unlike *Seabrook*, Mr. Mosbaugh's alleged injury stands to be redressed by a favorable decision in this proceeding.

C. Admission of the Consolidated Contention

To be admitted as a party, a petitioner for intervention must not only establish standing, but must also proffer at least one admissible contention. Commission regulations under 10 C.F.R. § 2.714(b)(2) and (d)(2) establish the standards for an admissible contention. Section 2.714(b)(2) mandates that a contention include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contention, and a concise statement of the alleged facts or expert opinion that support the contention, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contention. Additionally, the petitioner must present sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Asserted contentions must fall within the scope of the issues set forth in the notice of the proposed licensing action. See *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

The Licensing Board found admissible three of Mr. Mosbaugh's proffered contentions, all of which related to the character of Southern Nuclear's manage-

Units 1 and 2), ALAB-182, 7 AEC 210, 214, *remanded on other grounds*, CLI-74-12, 7 AEC 203 (1974); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986).

ment. A fourth contention focused upon Southern Company, the parent company of GPC and Southern Nuclear; the Board rejected this fourth contention for lack of an adequate basis for questioning the character of Southern Company. LBP-93-5, 37 NRC at 105. In brief, the bases for Mr. Mosbaugh's contentions concerned (1) whether the formation of Southern Nuclear's relationship to the Vogtle plant, particularly the alleged illegal transfer of operating authority, evidences a lack of trustworthy character in Southern Nuclear's management, and (2) whether high-ranking officers of Southern Nuclear intentionally submitted material false statements to the NRC concerning the March 1990 site area emergency and resumed operation after that event. *See id.* at 102-03, 104-05. In the interest of efficiency, the Board consolidated the three admissible contentions into the following single contention:

The license to operate the Vogtle Electric Generating Plant, Units 1 and 2, should not be transferred to Southern Nuclear Operating Company, Inc., because it lacks the requisite character, competence, and integrity, as well as the necessary candor, truthfulness, and willingness to abide by regulatory requirements.

Id. at 110.

On appeal, GPC argues that the Licensing Board erred in concluding that Mr. Mosbaugh satisfied the Commission's requirements concerning the admission of contentions. GPC claims that Mr. Mosbaugh's contentions lacked either factual or legal basis. GPC Appeal Brief at 30. Specifically, GPC submits that the Board incorrectly found that Mr. Mosbaugh satisfied the Commission's contention requirements under 10 C.F.R. § 2.714(b)(2)(iii). *Id.* This provision mandates that the petitioner provide the following as to each contention:

Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application . . . that the petitioner disputes, 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.

10 C.F.R. § 2.714(b)(2)(iii).

GPC argues that the Petitioner failed to identify any error or omission in GPC's application, and that the Licensing Board improperly implied that the licensee was required to include Mr. Mosbaugh's allegations in its applications and that GPC's failure to do so constituted an omission. GPC Appeal Brief at 31. In this regard, the Licensing Board stated:

We note that 10 C.F.R. § 2.714(b)(2)(iii) requires the specification of how the application fails to contain information that it should contain. In this instance, Mr. Mosbaugh has alleged material facts that are relevant to the application. The omission of these facts from the application is not surprising, since they are adverse to the interest of the Applicant.

Consequently, Mr. Mosbaugh fulfills the requirements of this section because the omission from the application of the facts he has alleged is material to proper consideration of the amendment.

37 NRC at 103-04. GPC stresses that the Board's suggestion that GPC should have included the Petitioner's allegations is unreasonable because "[n]owhere in the regulations is there any requirement that an applicant for a license transfer elaborate on its 'character.'" GPC Appeal Brief at 31.

We disagree with the Licensing Board's reasoning to the extent that it may suggest that the Petitioner satisfied the requirements under 10 C.F.R. § 2.714(b)(2)(iii) because the Licensee "omitted" from its application Mr. Mosbaugh's allegations about Southern Nuclear's character. The Licensing Board's approach relies upon a legal fiction that is neither contemplated under our regulations nor necessary to satisfy them. We accept *arguendo* that Commission regulations did not require GPC to include references to character allegations in its application. However, in fairness, we cannot then require that to adequately specify a dispute over a material fact, a petitioner must refer to a particular portion of the licensee's application, when the licensee neither identified, nor was obligated to identify, the disputed issue in its application. Such a narrow reading of section 2.714(b)(2)(iii) would have the unintended effect of prohibiting petitioners from raising issues otherwise germane to a proceeding.

Under section 2.714(b)(2)(iii), if an application contains disputed information or omits required information, the petitioner normally must specify the portions of the application that are in dispute or are incomplete. But the rule is not intended to preclude contentions that rest on relevant matters not required to be specifically addressed in the application. As we noted in the Statements of Consideration accompanying the revised contention rule:

Where the intervenor believes the application and supporting material do not address a relevant matter, it will be sufficient for the intervenor to explain why the application is deficient.

54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). Thus, section 2.714(b)(2)(iii) only requires the Petitioner to identify the disputed portion of the application or the omission of required information if the disputed matter is actually considered or is required to be considered in the application. In this special circumstance, no purpose would be furthered by requiring Mr. Mosbaugh to identify a specific portion of GPC's application, when the Licensee had no requirement to refer to "character."

The Licensee also argues that the Board should have found Mr. Mosbaugh's contentions inadmissible because the factual bases for his contentions do not raise any concern with *changes in personnel* who operate plant Vogtle that would occur upon the issuance of the proposed license amendments. GPC Appeal Brief

at 34. GPC argues that the Petitioner failed to demonstrate a nexus between the contentions and this proceeding. *Id.* at 35. This argument in effect goes to the Petitioner's standing, which we have discussed in section III.B of this decision.

The remainder of GPC's challenge to the contention concerns the claim that Mr. Mosbaugh's contention is not appropriate for resolution in this proceeding because character issues are not generally addressed in transfer amendment proceedings.²⁹ For reasons already outlined in section III.A of this opinion, we have decided that this transfer proceeding is an appropriate forum in which to address character issues. We believe that our contention rules provide reasonable discipline when character is a relevant inquiry to ensure that a licensee is not subjected to defending frivolous or unspecific claims. For this reason, our rules require the intervenor to articulate particular contentions and the bases therefor to ensure reasonable specificity and adequate notice of the matters being raised against the proposed action, and to ensure the existence of a genuine dispute of law or fact. *See* 54 Fed. Reg. 33,168-70 (Aug. 11, 1989); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 932-33 (1987). In this regard we note, too, that an intervenor is not free to change the focus of an admitted contention at will as litigation progresses, but is bound by the terms of the contention.³⁰

V. CONCLUSION

For the reasons stated in this decision, Georgia Power Company's appeal is *denied* and the Licensing Board's order in LBP-93-5 admitting Mr. Mosbaugh as a party and admitting the consolidated contention, is *affirmed*.

²⁹ GPC claims that the Licensing Board improperly inferred a legal basis for Mr. Mosbaugh's contention. GPC Appeal Brief at 33-34 (citing LBP-93-5, slip op. at 7). We disagree. We view the Board only as finding character legally germane to the grant of the proposed license transfer. The Board adds nothing to the contention or the bases proffered by Mr. Mosbaugh.

³⁰ *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 n.11 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 112 S. Ct. 275 (1991).

It is so ORDERED.

For the Commission³⁰

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of August 1993.

³⁰ Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

**Docket No. 30-31765-EA
(Suspension Order)
(Byproduct Material License
No. 37-28540-01)**

ONCOLOGY SERVICES CORPORATION

August 19, 1993

The Commission denies Oncology Services Corporation's request to reverse LBP-93-10, 37 NRC 455 (1993), which granted in part the Nuclear Regulatory Commission Staff's motion for an additional delay of this enforcement proceeding, and vacates as moot portions of LBP-93-6, 37 NRC 207 (1993), an order that had granted the NRC Staff's original motion for a stay.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The presiding officer may delay an enforcement proceeding for good cause. 10 C.F.R. § 2.202(c)(2)(ii). In determining whether good cause exists, the presiding officer must consider both the public interest as well as the interests of the person subject to the immediately effective order.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

In determining whether to delay the conduct of an enforcement hearing pursuant to 10 C.F.R. § 2.202(c)(2)(ii), the Commission need not choose between the test applied by the Supreme Court in *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency*, 461 U.S. 555

(1983), and the test applied by the Supreme Court in *FDIC v. Mallen*, 486 U.S. 230, 242 (1988), but may weigh the factors considered by the Court in both cases.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

In determining whether good cause exists for delay of an enforcement proceeding, the factors to be considered in balancing the competing interests include (1) length of delay, (2) reason for delay, (3) risk of erroneous deprivation, (4) assertion of one's right to prompt resolution of the controversy, (5) prejudice to the licensee, including harm to the licensee's interests and harm to the licensee's ability to mount an adequate defense.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The determination of whether the length of delay is excessive depends on the facts of the particular case and the nature of the proceeding.

ENFORCEMENT ACTIONS: STAY OF PROCEEDING

The risk of erroneous deprivation is reduced if the licensee is given an opportunity to request that the presiding officer set aside the immediate effectiveness of the suspension order by challenging whether the suspension order, including the need for immediate effectiveness, is based on adequate evidence.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

Staff's showing of possible interference with an investigation being conducted by the NRC Office of Investigations and a strong interest in protecting the integrity of the investigation in conjunction with a demonstration that the risk of erroneous deprivation has been reduced weighs heavily in the Staff's favor.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

Irrespective of whether the licensee failed to challenge the basis for the immediate effectiveness of the Staff's suspension order, a licensee's vigorous opposition to a stay and its insistence on a prompt adjudicatory hearing are entitled to strong weight.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

Without a particularized showing of harm to the licensee's interests, licensee's argument that the stay affects its interests and the licensee's vigorous opposition to a stay do not tip the scale in favor of the licensee when balancing the competing interests.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Commission has before it a referred ruling from the Atomic Safety and Licensing Board, LBP-93-10, 37 NRC 455 (1993), in which the Licensing Board granted an additional 90-day stay of discovery in this enforcement proceeding. The proceeding stems from a request for a hearing by Oncology Services Corporation (OSC or Licensee) on the Nuclear Regulatory Commission (NRC) Staff's January 20, 1993 order that suspended OSC's license to use sealed sources containing iridium-192 for human brachytherapy treatments at specified OSC facilities in Pennsylvania. Order Suspending License (Effective Immediately), 58 Fed. Reg. 6825 (Feb. 2, 1993). The Licensing Board referred its grant of an additional 90-day stay to the Commission in accordance with the Commission's direction in CLI-93-13, 37 NRC 419 (1993).

The Commission took the unusual step of directing the Licensing Board to refer its ruling because of the peculiar circumstances that arose in the context of the grant of an initial 120-day stay of discovery in this same enforcement proceeding. With respect to the first stay, the Commission granted OSC's petition for interlocutory review of the Licensing Board's March 26, 1993 Memorandum and Order, LBP-93-6, 37 NRC 207, which granted in part the Staff's motion for a 120-day stay of this enforcement proceeding. CLI-93-13, 37 NRC 419 (1993). Because the stay expired by its own terms on June 23, 1993, and because some of the same issues were raised again in the context of Staff's motion for an additional delay filed June 3, 1993, we directed the Licensing Board to refer to the Commission for review any ruling granting Staff's motion for an additional delay.

Upon consideration of the record below and the additional filings before us, we vacate as moot portions of LBP-93-6 challenged by OSC in its original petition for review and the Commission declines to review the remaining unchallenged issues. To the extent that any of these issues relate to the grant of an additional stay, they have been reviewed and decided as they relate to LBP-93-10. OSC's request to reverse LBP-93-10 is denied, and LBP-93-10 is affirmed.

II. BACKGROUND

On December 1, 1992, the NRC was notified of an incident involving the loss of a 3.7-curie iridium-192 source from the Licensee's Indiana Regional Cancer Center in Indiana, Pennsylvania. The Staff investigated the incident and on January 20, 1993, Staff issued an immediately effective order suspending OSC's license to provide brachytherapy treatment at the Pennsylvania cancer treatment facilities named in the license. Order Suspending License (Effective Immediately), 58 Fed. Reg. 6825 (Feb. 2, 1993). The suspension under the order is open-ended.

According to the Staff's order, on November 16, 1992, an iridium-192 sealed-source, which was inserted into a catheter in the abdomen of a nursing home patient, broke off and remained in the patient when the patient was returned to the nursing home that same day. After some 90 hours, the catheter containing the source was dislodged from the patient, and was then handled by various persons who did not know that the catheter contained a radioactive source. The catheter containing the source was only retrieved after it triggered an alarm at a waste disposal facility approximately one week later. The patient died on November 21, 1992. The Staff's order does not specify the cause of the patient's death.

The Staff alleges that as a result of this incident the patient received a significant amount of radiation exposure and numerous other individuals, including health care workers, visitors, sanitation workers, and other members of the general public, were exposed unnecessarily to radiation. 58 Fed. Reg. at 6826. The Staff also identified certain practices and procedures which, according to Staff, demonstrated a significant corporate management breakdown in the control of licensed activities. The Staff concluded that this breakdown was of the utmost regulatory concern because it contributed to the occurrence of the incident noted above. Consequently, the Staff concluded that the public health, safety, and interest required an immediately effective suspension of the license. *Id.* at 6826-27.

Since the initial suspension was imposed, the Staff relaxed the order and, on a case-by-case determination, has allowed OSC to treat more than twenty patients upon a good-cause showing for the individual treatment.¹ By letter dated June 3, 1993, the Staff further relaxed its suspension order to allow resumption of licensed activities at two of the facilities named in the OSC license. The suspension remains in effect for the other facilities named in the license. Letter to Douglas R. Colkitt, M.D., President OSC, from Thomas T. Martin, Regional Administrator, Region I, NRC.

¹ See, e.g., Letter from Thomas T. Martin, Regional Administrator, NRC to Dr. Colkitt, OSC, "Modification to Order," January 22, 1993.

On February 5, 1993, OSC filed a request for hearing on the Staff's order, and an Atomic Safety and Licensing Board subsequently was established pursuant to OSC's request. On February 23, 1993, the NRC Staff filed a motion pursuant to 10 C.F.R. § 2.202(c)(2)(ii) (1993), requesting that the Licensing Board delay the conduct of this proceeding for an initial period of 120 days. The Staff asserted that the delay was needed to prevent prejudice to ongoing federal and state investigations regarding the propriety of OSC's activities under its license. OSC opposed Staff's stay motion. The Licensing Board granted, in part, the Staff's motion by staying for 120 days (through and including June 23, 1993) discovery and any portion of the proceeding that necessarily must follow discovery.

In accordance with the Board's instructions for filing such a motion, the Staff sought an additional stay of the proceeding in a motion filed on June 3, 1993. In LBP-93-10, the Licensing Board granted in part the Staff's motion for an additional delay. Although the Staff had requested another 120-day stay of the proceedings, the Licensing Board granted only a 90-day stay of discovery (through and including September 21, 1993). In addition, the Licensing Board again required that the Staff provide a status report detailing the progress of any investigation and further instructed that any request for an additional delay must be filed on or before September 1, 1993. LBP-93-10, 37 NRC at 467.

Upon the Licensing Board's referral of LBP-93-10 to the Commission per our instructions in CLI-93-13, the Commission set a schedule for the filing of briefs and directed the Licensee to specify the basis for any assertion that LBP-93-10 contains errors of fact or is inconsistent with established law or precedent; we also asked both parties to address whether the Commission should vacate LBP-93-6 on the ground that it is moot. Unpublished Commission Order (June 24, 1993). In response to our order, OSC filed a brief requesting that the Commission reverse LBP-93-10 and deny any further stay. The NRC Staff filed a reply brief requesting affirmance of LBP-93-10.

III. MOOTNESS

We first decide whether the Licensing Board's order granting the original 120-day stay, LBP-93-6, should be vacated on the ground of mootness. The Staff favors vacating as moot the portions of the Licensing Board's order pertaining to the 120-day stay of the proceeding, but the Staff asserts that the portions of the order regarding unrelated procedural matters still pending before the Licensing Board are not moot and, thus, should not be vacated. NRC Staff Response to Brief of OSC in Response to Commission Order of June 24, 1993, at 21-22 (July 13, 1993) (hereinafter Staff Brief). Although OSC objected to vacating LBP-93-6 as moot, it is apparent that OSC only objected to vacating the portion of the order that pertains to the procedural matters still pending before the Board. *See*

Brief of OSC in Response to Commission Order of June 24, 1993, at 12 (July 6, 1993) (hereinafter OSC Brief). Thus, neither party has asserted a continuing cognizable interest in the portions of LBP-93-6 that pertain to the grant of the 120-day stay.

When the original stay expired by its own terms on June 23, 1993, the portion of LBP-93-6 pertaining to the 120-day stay ceased to have any operative effect or purpose. In addition, as will be discussed in more detail below, in this order we review all matters raised in the Licensing Board's subsequent order, LBP-93-10, including matters that were originally raised and contested in the context of LBP-93-6. Thus, the portion of this proceeding relating to the Licensing Board's granting of an initial 120-day stay, is now moot. *Fewell Geotechnical Engineering, Ltd.* (Thomas E. Murray, Radiographer), CLI-92-5, 35 NRC 83, 84 (1992) (hereinafter *Fewell*).

In cases such as this, when prior to the outcome of the appellate process, through happenstance, a proceeding becomes moot, the decision below is normally vacated. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *A.L. Meckling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961); *Fewell*, 35 NRC at 84. Such action is appropriate here with respect to the portion of the Board's order relating to the granting of the initial 120-day stay.

However, still pending before the Board are matters related to the portion of LBP-93-6 pertaining to the submission of a joint prehearing report detailing the central issues for litigation, issues amenable to summary disposition, an estimate of the length of time needed for both discovery and the holding of an evidentiary hearing, and the status of any settlement discussions. Therefore, this portion of LBP-93-6 is not moot. See LBP-93-6, 37 NRC at 223. Moreover, because neither party has raised before the Commission any challenge relating to these procedural instructions, the Commission leaves undisturbed this portion of LBP-93-6.

IV. GENERAL PRINCIPLES RELATING TO DELAY OF PROCEEDINGS

Our rules of practice specifically authorize the presiding officer to delay an enforcement proceeding for good cause. 10 C.F.R. § 2.202(c)(2)(ii). In determining whether good cause exists, the presiding officer must consider both the public interest as well as the interests of the person subject to the immediately

effective order.² The determination of whether a delay is reasonable depends on the facts of a particular case and requires a balancing of the competing interests.

To balance the competing interests in this case, the Licensing Board applied the same test that was applied in *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555 (1983) (hereinafter \$8,850). This test, initially developed in *Barker v. Wingo*, 407 U.S. 514 (1972), includes four factors to be considered: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530 (footnote omitted). In *Barker*, the question at issue was whether the government's delay in affording a trial to a defendant indicted for murder more than 5 years earlier amounted to a deprivation of the defendant's Sixth Amendment right to a speedy trial. The Court in *Barker* did not intend for its test to comprise the exclusive factors considered in every case. Rather, the Court stated, "A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." *Id.* at 530.

In \$8,850, the question at issue was whether a delay in a forfeiture proceeding, 18 months after seizure of the property, amounted to a denial of the claimant's Fifth Amendment right against deprivation of property without due process of law. Although the claim in *Barker* involved the Sixth Amendment right to a speedy trial and not the Fifth Amendment right to due process, the Court in \$8,850 found that the claimant's challenge to the length of time between the seizure and the initiation of the forfeiture trial "mirrors the concern of undue delay encompassed in the right to a speedy trial." \$8,850, 461 U.S. at 564. Thus, the Court concluded that the *Barker* balancing inquiry provided an appropriate framework for determining whether the delay of 18 months amounted to a due process violation.

The Staff argues that it was appropriate for the Board to rely only on the analysis in \$8,850 because the Court there addressed the same question at issue here — whether a delay of a hearing violated an individual's right to due process. In asserting this argument the Staff maintains that two other cases that applied a different balancing test and are cited by the Licensee here for their relevance, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *Matthews v. Eldridge*, 424 U.S. 319 (1976), are inapposite. Staff Brief at 5-8.

It is unnecessary to determine whether the claim here mirrors the claims at issue in *Logan* and *Matthews*. The same interests found relevant to the facts of

² In promulgating section 2.202(c)(2)(ii), the Commission stated that "any delay in the proceeding should take into consideration not only the interests of the government but the persons affected by the order as well," and we instructed presiding officers to stay the proceeding "only if there is an overriding public interest for the delay." Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, Final Rule, 54 Fed. Reg. 20,194, 20,197 (May 12, 1992).

Logan and *Matthews* were applied in a subsequent case that involved a claim very similar to the one being asserted here. In *FDIC v. Mallen*, 486 U.S. 230, 242 (1988), the Supreme Court found that the same interests balanced by the Court in *Logan* and *Matthews* were also relevant interests to be weighed in determining how long a delay is justified before affording a post-suspension hearing.

At issue in *Mallen* was whether the government's interest in ensuring the integrity of the banking system justified a delay of up to 90 days in a post-suspension hearing. The private interest involved a suspended bank officer's property right to continued employment. According to the Court in *Mallen*,

In determining how long a delay is justified in affording a post-suspension hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest, and the likelihood that the interim decision may have been mistaken. Cf. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); *Matthews v. Eldridge*, 424 U.S. 319, 334-335 (1976).

Mallen, 486 U.S. at 242.

We recognize that the balancing in *Mallen* is arguably different than the balancing in *\$8,850*. In *Mallen*, unlike in *\$8,850*, the Court analyzed as a separate factor the risk of erroneous deprivation of the property interest at stake. The Court also did not explicitly discuss whether the delay would hamper the private party's ability to defend against the charges brought by the government in the civil proceeding. Instead, the Court in *Mallen* considered the importance of the private interest — the individual's continued employment — and the harm to this interest occasioned by the delay. In contrast, the balancing by the Court in *\$8,850* of the prejudice to the claimant seemed to consider only the prejudice to the claimant's ability to mount an adequate defense. See *United States v. Premises Located at Route 13*, 946 F.2d 749, 756 & n.11 (11th Cir. 1991) ("The lack of marketability and the inability to buy inventory do not constitute prejudice in the manner proscribed by *\$8,850* . . . [i]e., causing prejudice from the loss of witnesses or evidence.")

The Commission does not believe that we must choose between the tests in *Mallen* and *\$8,850*. As the Court emphasized in *\$8,850*, "none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." 461 U.S. at 565 (footnote omitted). Both tests have been applied in cases involving the question of whether a delay in a post-deprivation hearing was improper. Therefore, we apply an analysis that considers all of the factors listed above.

In this instance the Licensing Board considered both the prejudice to the Licensee's ability to defend against the charges in the suspension order and harm to the Licensee's interest in continuing uninterrupted licensed activity. We believe that the risk of erroneous deprivation is also a relevant consideration.

V. APPLICATION OF THE GENERAL PRINCIPLES

With these general principles in mind we turn to the facts of this particular case to determine whether the Staff has shown a sufficiently compelling interest to justify the delay in the post-suspension hearing.

1. Length of Delay

The Licensing Board viewed the delay requested here, 120 days, of moderate duration, but that it was made more significant by the fact that it comes on the heels of the prior 120-day delay. LBP-93-10, 37 NRC at 460. Thus, the Licensing Board concluded that the Staff must provide a reasonably compelling justification for the requested delay. *Id.*

The Licensee argues that the delay at this point amounts to at least 210 days (120 days for the first stay plus the additional 90 days for the second stay). OSC Brief at 3. However, because it is not clear whether the Staff will ask for an additional stay, OSC argues that the actual length of delay cannot be determined. *Id.* The NRC Staff argues that the Licensing Board's handling of this factor is adequate. Staff Brief at 8.

There are several points of reference that are relevant to our examination of whether the delay here is justified. First, the incident involving the overexposures occurred in November 1992. Therefore, by the time the current stay expires, approximately 10 months will have passed since the occurrence of the incident that provided the catalyst for this enforcement proceeding. This is relevant to the question of prejudice to the Licensee's ability to mount an adequate defense. Second, the Staff suspended OSC's license in January 1993. Thus, licensed activity, at least at some of the Licensee's facilities, will have been suspended for approximately 8 months by the time this stay expires. This is relevant to the question of harm to the Licensee's interest. Third, the proceeding will have been delayed for 210 days at the request of the Staff. This span of time, and perhaps all of the others listed above, are relevant to our examination of Staff's reason for delay.

The Licensing Board stated that the delay being requested at this time is "of moderate duration and its significance is enhanced by the fact that it comes on the heels of the prior 120-day delay period." LBP-93-10, 37 NRC at 460. However, it is not clear on what facts the Licensing Board based its conclusion

that the requested delay is "moderate." "Little can be said on when delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case." \$8,850, 461 U.S. at 565; cf. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 (1985) ("[a] 9-month adjudication is not, of course, unconstitutionally lengthy *per se*").

Therefore, in order to appreciate whether the delay is excessive one must analyze the nature of the proceeding. Compare *Barker*, 407 U.S. at 530-31. For example, a delay may require a strong justification in a proceeding to revoke a license which depends to a great extent on the testimony of witnesses. However, in a civil penalty proceeding where the penalty has not been paid and the proceeding depends less on witness testimony, a delay may need less justification.

The case here more closely resembles the first example because it involves a suspension of licensed activity and apparently it will require the testimony of witnesses to prove or disprove certain aspects of the Staff's case. Therefore, we find that the delay here, which adds an additional 90 days — with the possibility of further delay — onto what will be an 8-month-long proceeding by the time the stay expires (OSC requested a hearing in early February 1993 and the stay will not expire until late September 1993), to be tolerable only if Staff can demonstrate an important government interest coupled with factors minimizing the risk of an erroneous deprivation.

2. Reason for Delay

In this instance, the Licensing Board determined that the Staff had demonstrated an overriding public interest in favor of granting the requested delay by providing the Board with an adequate explanation of the reasons why an ongoing investigation will be impaired without a delay in the proceeding and by making a credible showing that the Staff is attempting to complete its investigation expeditiously.

In its earlier decision, LBP-93-6, the Licensing Board granted a 120-day stay of discovery through June 23, 1993, on the basis that discovery would interfere with investigations being conducted by the NRC's Office of Investigations (OI), the NRC's Office of the Inspector General (OIG), and the Commonwealth of Pennsylvania. In LBP-93-6, the Licensing Board identified two concerns with permitting discovery at that time: (1) naming unidentified witnesses and (2) prematurely disclosing witness interview transcripts and documentary information gathered by Staff investigators.

In LBP-93-10, the Licensing Board granted a stay through September 23, 1993, on the basis that discovery would interfere with the OI investigation by prematurely disclosing witness interview transcripts and documentary information gathered by the investigators. The Staff did not argue, nor did the Licensing

Board find, that a basis for the current delay was that discovery would lead to the naming of unidentified witnesses. Neither did the Licensing Board rely on the OIG investigation as a basis for its ultimate determination. Although the Staff attached to its second stay motion an affidavit from OIG, the Board noted that, in its view, the OIG's affidavit was too vague to provide a sufficient basis for a further stay. LBP-93-10, 37 NRC at 466 n.8. The Staff did not attach to its second stay motion an affidavit from the Commonwealth of Pennsylvania. The Staff later informed the Commission that the Commonwealth had terminated its criminal investigation.³

As we indicate in our discussion of mootness, we are not reviewing matters that were at issue only in LBP-93-6 and, thus, do not remain in controversy with respect to the second stay motion. Therefore, we will only review whether the concerns outlined in the current OI affidavit establish a strong government interest in favor of delay.

OSC apparently does not dispute that the pendency of a criminal proceeding is a consideration in determining whether a delay is reasonable. OSC Brief at 4. However, OSC asserts that the pendency of the government investigation here does not justify a delay. First, OSC argues that the OI affidavit lacks sufficient specificity to establish that discovery will hamper the government's investigation. OSC maintains that the OI affidavit does not establish that the transcripts in its possession at the time of the Staff's motion have "been reviewed in their entirety, understood, or concluded to evidence regulatory violations." OSC Brief at 9. In this respect OSC is challenging, in part, whether there is probable cause for finding criminal wrongdoing. Second, OSC asserts that the Board improperly found irrelevant a recent Supreme Court decision, *United States Department of Justice v. Landano*, 61 U.S.L.W. 4485 (U.S. May 24, 1993).

Attached to Staff's June 3 motion for an additional delay is an affidavit from OI Region I Field Office Director Barry R. Letts. The Licensing Board found compelling the following excerpt from this affidavit:

OI continues to believe that the early release of Incident Investigation Team (IIT) documents/transcripts would adversely impact the ongoing OI investigation, particularly, that portion focusing on possible incomplete and/or inaccurate statements by cancer center personnel and corporate officials. The release of the documents/transcripts obtained from the IIT could adversely impact the investigation because the premature release of information could jeopardize the integrity of the interviews yet to be conducted, and allow personnel an opportunity to tailor their testimony or statements in subsequent interviews so as to explain previous statements in order to avoid culpability or conform testimony with the testimony of others who have been interviewed. Furthermore, it is my concern that information ob-

³ See Letter from Marian Zobler, Counsel for NRC Staff, to Samuel Chilk, Secretary of the Commission (July 14, 1993), with Attachment, Letter from Lawrence N. Claus, Chief Deputy Attorney General, Commonwealth of Pennsylvania Office of Attorney General to the Honorable Michael Handler, District Attorney of Indiana County (July 9, 1993).

tained during the course of the OI investigation conducted subsequent to the Staff's Order Suspending License, could be prematurely released through civil discovery.

Letts Affidavit at 4. The Licensing Board found that OI's concern here is well grounded. See LBP-93-10, 37 NRC at 461-62. In accepting the legitimacy of this basis for delay, the Licensing Board relies on general language contained in forfeiture cases. See *id.* at 460-61 (citing *United States v. Premises Located at Route 13*, 946 F.2d 749, 755 (11th Cir. 1991); *United States v. Forty-Seven Thousand Nine Hundred Eighty Dollars (\$47,980) in Canadian Currency*, 804 F.2d 1085, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1072 (1987)); see also LBP-93-6, 37 NRC at 214 (citing \$8,850). While we agree that the Staff's concern here is well grounded, we think that the forfeiture cases are not dispositive.

As the Court stated in \$8,850, the pendency of a criminal trial does not automatically toll the time for instituting a civil proceeding. 461 U.S. at 567-68. Thus, it is necessary to look at the facts of a particular proceeding. In forfeiture proceedings a pending criminal proceeding provides strong support for delay of a civil forfeiture proceeding because, as was the case in \$8,850, the criminal proceeding often includes forfeiture as part of the proposed sentence. Thus, in the forfeiture cases it is obvious that the civil proceeding could interfere by either providing opportunities to the claimant to discover the details of a contemplated or pending criminal prosecution or serving to estop later criminal proceedings. In addition, if the government prevails in the criminal case and forfeiture is part of the sentence, the civil forfeiture proceeding will be rendered unnecessary. *Id.*

In this instance, even if the government prevails in a criminal case brought as a result on the matters to which the Letts affidavit refers, the effect, if any, on the suspension proceeding is unclear. The suspension order does not specifically refer to incomplete and inaccurate statements by cancer center personnel. Nevertheless, Staff indicates that disclosure of information contained in documents and interview transcripts associated with the IIT report would interfere with OI's investigation. Although imposition of the two stays has prevented discovery up to this time, it is obvious that the IIT documents and transcripts are relevant to this proceeding and are likely to be requested once discovery is permitted. Therefore, the Staff has provided enough detail to demonstrate that discovery here, which would disclose documents and transcripts associated with the IIT report and related documents and transcripts obtained subsequent to the IIT inspection, would interfere with the ongoing OI investigation into possible incomplete or inaccurate statements by cancer center personnel and OSC officials.

The agency has a strong interest in ensuring the truth and accuracy of information provided to the Commission by a licensee. *Randall C. Orem, D.O.*, CLI-93-14, 37 NRC 423, 427 (1993). Allegations of this type may form the

basis for further enforcement action, e.g., pursuant to 10 C.F.R. §§ 30.9 and 30.10, and criminal prosecution, e.g., pursuant to 18 U.S.C. § 1001. Therefore, during the course of such an investigation, the government has a strong interest in preventing premature release of information that could jeopardize the integrity of interviews yet to be conducted, and that could allow witnesses to tailor their testimony or statements in subsequent interviews so as to explain previous statements in order to avoid culpability or to conform testimony with the testimony of others who have been interviewed.

The Licensing Board found, and we agree, that the Staff is diligently pursuing completion of its investigation. LBP-93-10, 37 NRC at 462. Investigations of this type can take time. This investigation involves multiple facilities named in the license. According to Mr. Letts, approximately thirty-five to forty interviews have been completed and OI anticipates conducting approximately twenty-five additional interviews. Letts Affidavit at 3. The investigation has led to compilation of more than 11,000 pages of documentation, and several thousand more pages of material could be received before the investigation is completed. *Id.* at 2.

OSC argues that this volume of paper establishes nothing more than investigator "insatiety." OSC argues that in order to show a compelling interest in the investigation, OI was required to review the material that it had collected prior to requesting this stay and provide an affidavit that demonstrated that information already in its possession evidenced regulatory violations rather than the possibility of regulatory violations.

It is clearly in the public interest and to some extent in OSC's interest that a decision concerning further wrongdoing is not made with excessive haste. *Cf. Mallen*, 486 U.S. at 243. Therefore, we do not find that in order to show a compelling interest Staff was required to reach a conclusion regarding the possible wrongdoing prior to concluding its investigation.

Our finding that Mr. Letts' affidavit contains adequate specificity to support Staff's stay motion is not contrary to *Landano*. The relevance of the holding in *Landano* to the particular circumstances in this proceeding is questionable. The *Landano* decision pertains to the degree of specificity that is required in order for the government to prevail on an assertion of confidentiality as an exception to disclosure under Exemption 7(D) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(D). The Staff is not relying on confidentiality of witness statements as a basis for the present stay. In addition, the Staff has requested only a temporary stay of discovery, rather than an absolute bar against any discovery of investigatory material.

The controlling case related to Exemption 7(A), the exemption more closely analogous to the Staff's rationale in the instant case, is *National Labor Relations Board v. Robbins Tire*, 437 U.S. 214 (1978). See *Department of Justice v. Reporter Committee for Freedom of the Press*, 489 U.S. 749, 776-80 (1989).

OSC has not demonstrated that the Court in *Robbins Tire* contemplated a greater degree of specificity than that provided by Staff in this proceeding.

3. Risk of Erroneous Deprivation

We find of particular relevance to our assessment of the risk of erroneous deprivation the fact that OSC has been provided an opportunity to request that the Board set aside the immediate effectiveness of the suspension order by challenging whether the suspension order, including the need for immediate effectiveness, is based on adequate evidence. Pursuant to 10 C.F.R. § 2.202(c)(2)(i) the Staff's order provided OSC an opportunity to contest whether the order, including the need for immediate effectiveness, was based on adequate evidence rather than mere suspicion, unfounded allegations, or error. 58 Fed. Reg. at 6827. Such a challenge had to be filed at the time the answer was filed or sooner. OSC did not avail itself of this opportunity. Additionally, in its pleadings filed in opposition to the stay, OSC has never challenged whether there is adequate evidence to support the basis for the immediately effective suspension order.

OSC was provided a fair amount of detail regarding the reasons and bases for the Staff's conclusion that the public interest, health, and safety required an immediately effective suspension of OSC's license to conduct brachytherapy. The order includes specific details regarding Staff's assessment of the event in question. The Staff also specified the relevant findings that formed the basis of the Staff's conclusion that there was a significant corporate management breakdown in the control of licensed activities. OSC could have challenged whether there was adequate evidence for any or all of these findings.

Because OSC has been provided this opportunity, we find that the risk of erroneous deprivation has been reduced.⁴ This, in conjunction with Staff's showing of possible interference with the OI investigation, and a strong interest in protecting the integrity of the investigation, weighs heavily in the Staff's favor.

⁴ Cf. *Transco Security, Inc. v. Freeman*, 639 F.2d 318 (6th Cir.) (upholding Government Services Administration regulations permitting a suspension of a contractor for a period of 12 to 18 months in order to allow the Department of Justice an opportunity to prepare its case and decide whether to seek an indictment), *cert. denied*, 454 U.S. 820 (1981); see also *Horne Bros., Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972). In *Transco*, the court found that the regulations providing for the 12- to 18-month immediately effective suspension of a contractor accused of fraud were not excessive because under the regulations a suspended contractor would be provided notice and an opportunity to challenge whether there was "adequate evidence" to support a suspension. 639 F.2d at 324.

4. *OSC's Assertion of Its Right to a Hearing*

According to the Court in *Barker*, "the more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." 407 U.S. at 531-32. Analogously, the Licensee's vigorous opposition to any stay of the proceeding and its constant insistence on a prompt full adjudicatory hearing are entitled to strong weight.

The Licensing Board found, as the Staff urges, that OSC was not entitled necessarily "to all of the benefit this factor might otherwise engender," because OSC did not avail itself of the opportunity to challenge the order's immediate effectiveness. LBP-93-10, 37 NRC at 464. Although OSC did not avail itself of the procedures in section 2.202(c)(2)(i), OSC is entitled to all of the benefit that this factor may provide.

It is possible that resolution of the "adequate evidence" question could delay ultimate resolution of the final controversy. Therefore, it is conceivable that a party challenging an immediately effective order could hasten resolution of the controversy by requesting only a hearing on the merits. This may be attractive to a party that does not believe it has a good chance of prevailing on the "adequate evidence" question.

While OSC maintains that it will ultimately demonstrate that it will prevail on the merits, this is far from saying that the agency as a matter of discretion did not have adequate evidence to impose the suspension in the first place. To prevail in a preliminary hearing pursuant to section 2.202(c)(2)(i), the Staff need only show that it had:

facts and circumstances within the NRC staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety, or interest.

Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective (Final Rule) 57 Fed. Reg. 20,194, 20,196 (May 12, 1992). On the merits, to sustain the order the Staff has the burden to prove by a preponderance of the evidence that the basis of its order is true. *See* Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,673 (Aug. 15, 1991).

OSC's assertion that the stay of this proceeding is interfering with its rights weighs in OSC's favor.

5. *Prejudice to OSC*

As stated earlier, we view potential prejudice to the Licensee to include both prejudice to its ability to defend against the charges in the order and prejudice to its interest to conduct activity under its license.

We assume that litigation of the merits of the suspension order will rely to some extent on testimony of witnesses. OSC argues that granting the delay here will allow more than 10 months to lapse between issuance of the order and discovery and a few more months between initiation of discovery and the holding of a hearing. Thus, it may be close to a year before the witnesses actually testify before the Licensing Board. It is certainly conceivable that the passage of time may affect some witnesses' memories. However, the extent of prejudice from any potentially faded memories is far from clear. *Compare Barker*, 407 U.S. at 534 (after more than 5 years had lapsed between the perpetration of the crime and trial, "[t]he trial transcript indicates only two very minor lapses of memory — one on the part of a prosecution witness — which were in no way significant to the outcome").

Moreover, OSC has made no other demonstration that its ability to proffer evidence will be unreasonably compromised by the delay. In contrast we note that in *Finlay Testing Laboratories, Inc.*, LBP-88-1A, 27 NRC 19 (1988),⁵ the Licensing Board found compelling the Licensee's argument that some witnesses had already been relocated and military documents would in due course be moved, stored, transferred, lost, or destroyed. The Licensee here has made no similar argument.

OSC also did not detail the harm to its finances and reputation. Obviously, the suspension order has curtailed the Licensee's unfettered ability to conduct licensed activities. However, the degree of lost business or financial harm attributable to the suspension order is unclear. The Licensee argues that the Licensing Board ignored an affidavit demonstrating \$10,000 in expenses incurred by OSC. OSC Brief at 11 (referring to Exhibit A, Verified Statement of Kerry A. Kearney). Beyond this showing, the Licensee did not specify particular financial harm.

In contrast, the licensee in *Finlay* argued that it had already lost \$400,000 in revenue and would continue to lose over \$36,000 in monthly revenues as a result of the suspension. LBP-88-1A, 27 NRC at 25. In OSC's case, because the order has been relaxed, the exact extent of the financial burden on the Licensee at this time is unclear. OSC has always been permitted to treat patients on a good-cause basis. Additionally, the suspension has been rescinded entirely as it pertains to two facilities. Of significant import is that these two facilities were

⁵The Staff petitioned the Commission for a stay of the Licensing Board's order in *Finlay*. In a March 17, 1988 unpublished order, the Commission stayed for 30 days the effectiveness of the Licensing Board's decision only after the Department of Justice filed a request for a stay of only 30 additional days.

the only facilities at which the Licensee had requested to treat patients on a good-cause basis.

6. *Balancing of the Competing Factors*

On balance, the Commission finds that the Board's stay of discovery is reasonable. We acknowledge that the stay will adversely affect the Licensee's interest to some extent. However, there has been little, if any, specification of financial or other consequences of the suspension. The absence of any particular showing of financial burden or detriment to patient care, coupled with the Staff's rescission of the order at two OSC facilities, indicates that OSC has suffered only moderate, if not minimal, harm to its interests. Without a more particularized showing of harm, OSC's argument that the stay affects its interests does not tip the scale in OSC's favor. Therefore, we agree with the Licensing Board that the Staff has established good cause by demonstrating an overriding government interest in protecting the integrity of its investigation.

Despite the Licensee's assertions otherwise, our decision is not contrary to the Supreme Court's holding in *Barry v. Barchi*, 443 U.S. 55 (1979). In *Barchi*, the Court found "little or no state interest, and the state ha[d] suggested none, in an appreciable delay in going forward with a full hearing." 443 U.S. at 67. In contrast, in this case the Staff has demonstrated a strong interest in support of staying the proceeding and we have found that the risk of erroneous deprivation is reduced. Moreover, the Licensing Board is closely monitoring the status of the NRC investigations to ensure that due diligence is being exercised to bring the investigations to a close. See LBP-93-10, 37 NRC at 467.

Additionally, the Licensing Board is pursuing resolution of matters that do not depend on discovery. Pursuant to the Board's direction in LBP-93-6, the parties have filed pleadings outlining their positions with respect to central issues for litigation, issues amenable to summary disposition, and the status of settlement discussions. The Licensing Board, in an effort to dispose of any issues amenable to summary disposition, issued an order on July 15, 1993, requesting further party filings on controverted issues.

VI. CONCLUSION

For the reasons stated in this order, OSC's request for reversal is *denied* and, accordingly, the Licensing Board's order, LBP-93-10, is *affirmed*. The Licensing Board's order LBP-93-6, to the extent indicated, is *vacated* as moot.

It is so ORDERED.

For the Commission⁶

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of August 1993.

⁶ Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selln, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket Nos. 50-275-OLA-2
50-323-OLA-2
(Construction Period Recovery)

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

August 19, 1993

The Commission declines to address the issue, referred by the Licensing Board, of whether an Applicant should be required to disclose to Intervenor a document prepared by the Institute for Nuclear Power Operations. The Commission noted that, after the Board had referred the issue to the Commission, the Applicant agreed to disclose the document and the Licensing Board issued a protective order addressing the conditions under which the document is to be released. The Commission found that these events rendered Commission interlocutory review of the matter unnecessary under 10 C.F.R. § 2.786(g).

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Where subsequent developments indicated the absence of any immediate controversy suggesting that interlocutory review was appropriate of a licensing board's order to disclose an assertedly privileged document, the Commission declines review of the licensing board's referred ruling.

MEMORANDUM AND ORDER

The Commission is declining review of an interlocutory discovery order that the Atomic Safety and Licensing Board had referred to us in accordance with 10 C.F.R. § 2.730(f). *See* LBP-93-13, 38 NRC 11 (1993). In the referred ruling the Licensing Board had ordered Pacific Gas and Electric Company, the Applicant in this amendment proceeding, to make available to the San Luis Obispo Mothers for Peace, the Intervenor, a document prepared by the Institute for Nuclear Power Operations (INPO) that the Applicant claimed was confidential and privileged. The Licensing Board had found that the document was relevant to one of the Intervenor's discovery requests and, therefore, should be disclosed. The Licensing Board, however, permitted disclosure to the Intervenor subject to a protective order that would prohibit further public dissemination of the document or its contents. As the Applicant had urged, the Licensing Board referred its ruling to the Commission and stayed the effect of its order pending Commission review.

Upon receipt of the Licensing Board's referral of its ruling in LBP-93-13, we set a schedule for briefs from the parties. Counsel for the Applicant later informed the Commission in a July 22 filing that the Applicant had decided to disclose the INPO document to the Intervenor if agreement could be reached on an appropriate protective order, and counsel moved for a deferral of the briefing on LBP-93-13. In a July 23 order, the Commission granted the motion in part and deferred briefing until August 3 in the event agreement on a protective order could not be reached.

As a result of further discussions among the parties and a telephone conference with the Licensing Board on July 29, agreement on a protective order has been reached and the Licensing Board has issued a protective order reflecting that agreement.¹ Accordingly, the Applicant's counsel informed the Secretary on August 3, 1993, that the Applicant would not be filing a brief on LBP-93-10 and suggested that the Licensing Board's referral was now moot.

When LBP-93-13 was issued, the controversy over the disclosure of the INPO document seemed to fall within the narrow class of interlocutory orders for which Commission review might be appropriate.² However, the Applicant's subsequent agreement to disclose the INPO document and the Licensing Board's entry of a protective order satisfactory to the parties indicate that our review is unnecessary to resolve any immediate controversy. Accordingly, in the absence

¹Memorandum and Order (Protective Order Governing Non-Disclosure of INPO Report) (Aug. 3, 1993, unpublished); *see also* Memorandum and Order (Telephone Conference Call, 7/29/93), at 2-3 (Aug. 3, 1993, unpublished).

²*See Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-327, 3 NRC 408, 411 (1976).

of any present circumstance suggesting that interlocutory review is appropriate under 10 C.F.R. § 2.786(g), we decline review of the referred ruling.

It is so ORDERED.

For the Commission³

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of August 1993.

³ Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

In the Matter of

Docket Nos. 50-275-OLA-2
50-323-OLA-2
(ASLBP No. 92-669-03-OLA-2)
(Construction Period Recovery)
(Facility Operating License
Nos. DPR-80, DPR-82)

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

August 13, 1993

In response to a request by Intervenor for further discovery concerning alleged attempts to alter fire logs (the subject of an admitted contention) as to which the NRC's Office of Investigation had made preliminary inquiries but found no further inquiry warranted, the Licensing Board defers action on the motion pending cross-examination at the hearing of the custodian of the records regarding any possible falsification. The Board also requires that a sanitized copy of the letter raising the question be made available to the Intervenor.

MEMORANDUM AND ORDER
(Telephone Conference Call, 8/13/93)

On July 15, 1993, the NRC Staff prepared Board Notification 93-18 and transmitted it to the Board and parties. (Board members received their copies on July 23, 1993.) The Board Notification stated that the NRC Office of Investigation had investigated an unsigned and anonymous letter from two engineers stating that a high-ranking PG&E employee had put pressure on a PG&E licensing engineer to alter fire logs with respect to Contention V (implementation of Thermo-Lag compensatory measures). The Notification stated that OI had interviewed the named licensing engineer, who denied receiving any such instructions from PG&E or that any fire logs had been altered. OI then determined that there was no need for further inquiry.

On August 11, 1993, the San Luis Obispo Mothers for Peace (MFP) filed a motion to conduct further discovery on this question and to postpone the hearing on Contention V pending completion of such discovery. On August 12, 1993, PG&E and the NRC Staff each filed faxed responses, opposing the request for further discovery. Both viewed the request as creating a new contention without good cause, and each noted that the PG&E custodian of the records was to be a witness and that he could be cross-examined concerning any possible falsification. The Staff noted that the manner in which OI conducts investigations was not a proper subject for inquiry in this proceeding.

On August 13, 1993, the Board conducted a telephone conference call involving all parties. Under discussion was whether the integrity of the NRC hearing process was being compromised absent some further inquiry into the circumstances, particularly identification of the "various meetings in a public forum" at which the directions allegedly were given.

The Board finds that the incident in question is clearly relevant to MFP Contention V. The Board further finds low probative value to anonymous, uncorroborated allegations. The Board also recognizes the privacy considerations attendant to unsupported allegations against company officials and with respect to whistleblowers, as well as the integrity of the hearing process considerations necessary to be protected in a licensing-board proceeding. To this end, we view cross-examination of the custodian of the records as a first step, and will permit that to take place (as suggested by PG&E and the Staff). In addition, however, we direct that the unsigned letter — sanitized to remove all names of individuals — be also provided to MFP (either by PG&E or the Staff), to assist it in its cross-examination. Following cross-examination, the Board will determine whether further discovery may be necessary or whether the allegations should be disregarded.

IT IS SO ORDERED.

**FOR THE ATOMIC SAFETY
AND LICENSING BOARD**

**Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
August 13, 1993**



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket Nos. 72-8
50-317
50-318BALTIMORE GAS AND ELECTRIC
COMPANY
(Calvert Cliffs Independent Spent
Fuel Storage Installation)

August 16, 1993

The Director of the Office of Nuclear Material Safety and Safeguards denies a Petition filed by the Maryland Safe Energy Coalition regarding the licensed Independent Spent Fuel Storage Installation (ISFSI) at the Calvert Cliffs Nuclear Power Plant. Petitioner had requested that the NRC: (1) halt the transfer of nuclear waste from the spent fuel pool to the ISFSI until certain alleged safety problems had been fully solved; (2) conduct hearings for further rulemaking and regulation of nuclear waste at the plant; and (3) deny a Certificate of Compliance (COC) and suspend the license issued to the Licensee for dry cask storage of spent fuel until the concerns set forth in the Petition had been addressed by the NRC and the Licensee. Preliminarily, the Director noted that the licensing of this ISFSI did not fall under the Subpart of 10 C.F.R. Part 72 requiring rulemaking and issuance of a COC for approval of the cask design and, therefore, denied this part of the Petition. (Earlier, the Director had informed the Petitioner that its request for further rulemaking and regulation of dry cask storage was a request to modify the Commission's regulations and had advised the Petitioner to follow the provision of 10 C.F.R. § 2.802 if it sought rulemaking.) The Director then considered each of the safety problems alleged by the Petitioner and concluded that the Petitioner had not raised any substantial health and safety issues. The Director, therefore, denied the remaining actions requested in the Petition.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated December 21, 1992 (Petition), the Maryland Safe Energy Coalition (Petitioner) requested that the Nuclear Regulatory Commission (NRC) institute a proceeding pursuant to 10 C.F.R. § 2.202, with regard to the Independent Spent Fuel Storage Installation (ISFSI) at the Calvert Cliffs Nuclear Power Plant (CCNPP). The Petitioner requests that NRC: (1) halt the transfer of nuclear waste from the spent fuel pool at the CCNPP to the ISFSI, until certain alleged safety problems have been fully investigated and solved; (2) conduct hearings for further rulemaking and regulation of nuclear waste storage at the plant; and (3) deny a Certificate of Compliance and suspend the license issued to the Baltimore Gas & Electric Company (BG&E or Licensee) for dry cask storage of spent fuel until the concerns set forth in the Petition are addressed by NRC and BG&E. Subsequent to the Petitioner's request, NRC's Executive Director for Operations and the Director, Office of Nuclear Material Safety and Safeguards, received letters from individuals supporting the request by the Petitioner. In addition, the Petitioner, by letter dated February 10, 1993, enclosed fifty questions and requested answers from BG&E and NRC.

The Petitioner asserts as the basis for these requests that several relevant omissions from past NRC hearings, expert testimony, and rulings may seriously impact the safe operation of dry cask storage of spent fuel at CCNPP. In addition, the Petitioner asserts that new information allegedly proves the inadequacy of NRC's and BG&E's evaluations of this spent fuel storage, to wit, that the Cove Point Natural Gas Plant, which is expected to resume operation in 1993, is a potential danger to safe storage that has not been analyzed. Failure to analyze it is an alleged violation of NRC procedure (*see* section III.1, below). The Petitioner also alleges that safety problems related to the ISFSI at the Calvert Cliffs Plant exist regarding the following matters: the thermal limits of passively cooled concrete vaults may be exceeded if the air convection ports become blocked, which could also damage the fuel in the canisters, increase the temperature of the canister beyond the design limits, or increase embrittlement (*see* section III.2, below); NRC has failed to require radiation limitations at the air inlets and outlets or to require inspection for canister embrittlement, corrosion or leakage, or internal canister monitoring (*see* section III.3, below); NRC is allowing fuel with "pinhole leaks" to be transferred to the dry casks without limits in quantity (*see* section III.4, below); if the thermal limits of the concrete in the ISFSI are exceeded and the concrete cracks, the canisters may become irretrievable (*see* section III.5, below); and dry cask storage has not been adequately tested (*see* section III.6, below).

The Petition has been referred to me for a decision. For the reasons given below, I have concluded that the Petitioner's requests should be denied.

II. BACKGROUND

On December 21, 1989, BG&E applied to NRC for a materials license under 10 C.F.R. Part 72, Subpart B, to allow spent fuel storage in an ISFSI to be located at the CCNPP site. The ISFSI employs the Pacific Nuclear Fuel Services, Inc. (PNFS, formerly NUTECH) NUHOMS-24P concrete module and steel canister dry storage system. The ISFSI would consist of up to 120 modules on concrete pads. In connection with the license application, BG&E submitted a Safety Analysis Report (SAR) and an Environmental Report (ER). Subsequently, on February 9, 1990, NRC, by Notice in the *Federal Register* titled "Baltimore Gas & Electric Co., Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing,"¹ notified the public of receipt of that application and of the opportunity for a public hearing on the application. In response to the Notice, the State of Maryland asked for a hearing, and a Licensing Board was convened. No petition for leave to intervene in the proposed licensing action was received from any other party within the deadline specified in the *Federal Register*.

Intervention was withdrawn when agreement among the State, BG&E, and the NRC was reached. In essence, the agreement stated that the State of Maryland would be kept completely informed by all parties in regard to all correspondence, reports, documents, and meetings during the licensing review process, that a method of airing the State's concerns would be established, and that BG&E would consult with and allow the State to review and qualify a radiological monitoring program for the ISFSI. When the State of Maryland subsequently elected to withdraw from the proceeding, the Licensing Board terminated the proceeding.² On March 22, 1991, the NRC Staff completed its environmental review of BG&E's proposed licensing action, in accordance with 10 C.F.R. Part 51, and issued an Environmental Assessment (EA) and Finding of No Significant Impact for the Calvert Cliffs ISFSI at the CCNPP.³ Subsequently, the Staff completed its safety review, and a Staff report titled "Safety Evaluation Report for the Baltimore Gas and Electric Company's Safety Analysis Report for an Independent Spent Fuel Storage Installation" was completed in November 1992. Materials License SNM-2505 was issued to BG&E on November 25, 1992, and the Staff provided public notice of the action in the *Federal Register*.⁴

¹ 55 Fed. Reg. 4742 (Feb. 9, 1990).

² LBP-90-13, 31 NRC 456 (1990).

³ 55 Fed. Reg. 13,196 (Mar. 29, 1991).

⁴ 57 Fed. Reg. 57,247 (Dec. 3, 1992).

III. DISCUSSION

The Petitioner's three specific requests involve issues related to rulemaking on dry cask storage, as well as specific issues related to the BG&E ISFSI license. In Petitioner's February 10, 1993 letter, Petitioner also enclosed fifty questions to which it is seeking answers from BG&E and NRC, and it indicated that it intends to discuss these questions at the requested rulemaking hearings.

Materials License SNM-2505, issued to BG&E, is a specific license for an ISFSI, pursuant to 10 C.F.R. Part 72, Subpart B. This licensing action does not fall under the general license provision of 10 C.F.R. Part 72, Subpart K, and, therefore, no rulemaking or Certificate of Compliance is required to approve the NUHOMS-24P cask design. In NRC's acknowledgment letter to the Petitioner, dated February 24, 1993, the Staff informed the Petitioner that its request for further rulemaking and regulation of dry cask storage was a request to modify a rule and that the Petitioner should follow the provisions of 10 C.F.R. § 2.802 if it seeks rulemaking.⁵ Therefore, this Decision addresses the specific issues expressed by the Petitioner in relation to BG&E's Part 72 license. The NRC Staff has also considered the similar concerns raised in those of the Petitioner's fifty questions that related to the licensing of BG&E's ISFSI.⁶ Those specific allegations are discussed directly in this Decision.

1. Danger from Cove Point LNG Plant Has Not Been Analyzed

Petitioner alleges that the Cove Point Natural Gas Plant, which it alleges is expected to resume operation in 1993, is a potential danger to safe storage that

⁵ Subsequently, on June 23, 1993, the Petitioner filed a petition for rulemaking to modify specific identified provisions of 10 C.F.R. Part 72. That petition is currently under consideration by the Staff. Also by letter to the Director, NMSS, dated July 26, 1993, Petitioner sought to have its rulemaking petition treated as an addendum to this 10 C.F.R. § 2.206 petition. The Staff has reviewed the July 26, 1993 letter and has determined that the requested action is appropriately part of the rulemaking petition, rather than this section 2.206 petition. One aspect of the letter, which requests continuous radiation monitors at the ISFSI exit cooling vents, could be interpreted as a reassertion of a point already raised in the section 2.206 petition and addressed in this Decision. Other than that aspect, all of the other matters raised in the letter are appropriately addressed in a rulemaking context. To the extent that the letter can be read to request a reopening of the CCNPP ISFSI licensing action, no adequate basis is provided for such action. The matters raised in the rulemaking petition including the July 26, 1993 letter will be fully considered by the Staff in the rulemaking, and the issuance of this Decision does not in any way prejudice the Petitioner's right and consideration of its request for rulemaking.

⁶ Although the Petitioner asserts that several relevant omissions from past NRC hearings, expert testimony, and rulings may seriously impact the safe operation of dry cask storage of spent fuel at Calvert Cliffs, it did not provide any citations to past hearings, expert testimony, or rulings related to health and safety issues. This would appear to be a reference to a rulemaking proceeding, since the *Calvert Cliffs* ISFSI proceeding never went beyond a very preliminary stage, namely a ruling that the State of Maryland had established standing to intervene. See LBP-90-13, *supra* note 2. Accordingly, the NRC Staff considered this very generalized assertion of an inadequacy in a rulemaking record to be a matter that the Petitioner could pursue in accordance with 10 C.F.R. § 2.802, if it so elected, and did not consider the assertion further in this Decision.

has not been analyzed, and failure to analyze it is a violation of NRC procedure (see related Question No. 27 in Petitioner's letter dated February 10, 1993).

On August 13, 1976, when NRC issued an operating license for Unit 2 of the CCNPP, NRC imposed a license condition requiring submittal of a license amendment application with a supporting hazard analysis 60 days prior to the operation of the Cove Point Natural Gas Plant. In 1978, before granting the amendment, the NRC Staff, in its license amendment action, had conducted a detailed analysis of the potential risks from that plant to the CCNPP.⁷ Based on the Staff's review, it was concluded that the likelihood of an LNG accident in the vicinity of CCNPP causing a significant radioactivity release is acceptably low, that such an accident does not involve a significant hazard consideration, and that there is reasonable assurance that the health and safety of the public will not be endangered by the effects of an LNG accident on CCNPP. For precaution, at that time, the Staff required, as a license condition, a contingency plan to ensure appropriate prudent action in the event of an LNG accident.

When the Cove Point Natural Gas Plant ceased operation in 1980, BG&E then requested the deletion of some of the license conditions, which NRC subsequently granted. The Licensee committed that if the Cove Point Plant resumed operation, the Licensee would submit an updated hazard analysis report, with proposed actions and mitigating measures (if any are deemed necessary or advisable), to NRC, 60 days before the Cove Point Plant resumed operation. This updated information would allow the NRC Staff to evaluate any changed circumstances with respect to the operation of Cove Point Plant and any significant differences in accident consideration. NRC could then impose appropriate action or mitigating measures, such as those earlier conditions NRC imposed when the Cove Point Plant was in operation in 1978, to ensure protection of the public health and safety in the event of accident.

The past Cove Point Plant analysis for the CCNPP is applicable to the ISFSI. The ISFSI horizontal storage module (HSM) reinforced concrete system is designed for severe wind, tornado missile, and pressure loadings as specified in NRC Regulatory Guide 1.76, which is the same regulatory guide currently used for nuclear power plants. Because of the NUHOMS storage system's robust design and construction, it has inherent resistance to blast pressure, and, therefore, the threat to nuclear safety from a potential natural gas explosion is expected to be negligible. In the NRC Staff's Environmental Assessment (EA)⁸ for the Calvert Cliffs ISFSI, the Staff evaluated a variety of accidents and concluded that a hypothetical bounding case accident would result in a release

⁷U.S. Nuclear Regulatory Commission, "NRC Safety Evaluation Regarding Proximity of Cove Point LNG Facility," June 13, 1978, Docket Nos. 50-317 and 50-318.

⁸U.S. Nuclear Regulatory Commission, "NRC Environmental Assessment Related to Construction and Operation of the Calvert Cliffs Independent Spent Fuel Storage Installation" at 24-29 (March 1991).

of radioactivity from the ISFSI facility from a dry shielded canister (DSC) leakage. The Staff postulated and analyzed a worst-case DSC leakage accident and concluded that the radiation dose to the general public is negligible, and that there is no significant impact to the offsite environment. The severity of the Cove Point Plant's potential hazard to the ISFSI is much less than the worst-case accident for the ISFSI, since the NRC Staff does not expect any release of radioactivity from the ISFSI facility from potential accidents related to operation of the Cove Point Plant.

The Cove Point Natural Gas Plant is expected to be reopened no sooner than December 1994, and NRC understands that BG&E will be notified at least 12 months before its startup. In addition, a joint study between BG&E and the Maryland Department of Natural Resources (DNR) was conducted to evaluate the risks associated with the Cove Point Plant planned resumed operation, thereby updating the study conducted at the time of Cove Point's maiden operation in 1978. The study concluded that the resumption of operation of the Cove Point Plant would not represent an unacceptable risk to the ISFSI, nor the power plant itself.⁹ (By letter dated June 7, 1993, BG&E has submitted updated information on this study to NRC, and the new information, along with information submitted to the Director, NMSS, by the Petitioner in a letter dated July 27, 1993, is currently under review by the NRC Staff.)

2. Danger from Blockage of Air Convection Ports

The Petitioner contends that the thermal limits of passively cooled concrete vaults may be exceeded if the air convection ports become blocked, which could also damage the fuel in the canisters, increase the temperature of the canister beyond the design limits for the concrete vault, or increase embrittlement of the canister (see related Questions No. 24, 28, and 29 in Petitioner's letter dated February 10, 1993).

In NRC's Safety Evaluation Report (SER) (see section 2.2.6.2 of SER), the NRC Staff conducted an evaluation and concluded that for the HSM inlet and outlet blocked accident, the peak fuel cladding temperature would be significantly less than the acceptance criterion, and the peak concrete temperature would also be acceptable. The accident scenario conservatively assumed full blockage of all air inlets and outlets. For this specific cask and system design, no damage of fuel cladding or degradation of shielding function is anticipated in the event of air inlet and outlet blockage for a period less than 48 hours. Consequently, the Licensee is required by license condition to conduct a surveillance program to inspect the air inlets and outlets once every 24 hours, to

⁹Letter from Torrey C. Brown (Maryland Department of Natural Resources) to Mr. Richard Ochs (Petitioner), dated January 26, 1993.

ensure that they do not become plugged. If the air inlets and outlets are plugged, they are required to be cleared; and if the screen is damaged, it is required to be replaced.

In NRC's EA (*see* section 6.2.2), the Staff analyzed an accident involving the blockage of air inlets and outlets and found that there are no offsite dose consequences as a result of this postulated accident. The Petitioner's concerns do not raise significant health and safety issues to members of the general public. In addition, the Licensee's occupational and environmental monitoring program will further ensure the protection of the health and safety of workers and the general public. Therefore, the Staff considers that the Petitioner's concerns have been adequately addressed in the EA and SER.

3. No Requirements for Radiation Limits, Inspection, and Monitoring

Petitioner alleges that the NRC has failed to require radiation limitations at the air inlets and outlets, which are the points of greatest potential radiological risk, or to require inspection for canister embrittlement, corrosion, or leakage, or internal canister monitoring (see related Question No. 40 in Petitioner's letter dated February 10, 1993).

In the ISFSI license specifications, NRC has imposed contact dose rate limits at the HSM walls and door (20 millirem per hour (mrem/hr) at the HSM walls and 100 mrem/hr at the access door)) to ensure that worker's doses are below the limits that are specified 10 C.F.R. Part 20. The air inlets and outlets of the HSM are localized areas, compared with the overall HSM surfaces. The surface dose rates at the air inlet and outlet locations are less representative than dose rates at the HSM walls and door for assessing the effect on the direct radiation levels to individuals located beyond the controlled area. Further, NRC requires that the overall radiation dose to a member of the general public from the CCNPP's operation be below the U.S. Environmental Protection Agency's Environmental Radiation Standards for fuel cycle facilities — i.e., 25 mrem/yr (0.25 milli-Sievert per year (mSv/yr)) to the whole body and 75 mrem/yr (0.25 mSv/yr) to the thyroid, from the plant's routine operation. When workers are in the vicinity of loaded HSMs, radiation levels at the air inlets and outlets would be measured, in accordance with the Licensee's radiation protection program, to ensure that worker exposures are within the requirements of Part 20. These are the radiation limits imposed to ensure worker safety and the protection of the general public. Radiation limits at the air inlets and outlets, as suggested by the Petitioner, are not needed.

Before the DSC is installed in the HSM system, the Licensee will inspect and check the DSC vacuum system, helium backfill pressure, helium leak rate of primary seal, and DSC surface contamination, and will perform DSC dye penetrant test of closure welds. After the DSC is installed in the HSM, the

Licensee will measure the air temperatures and surface dose rates on the HSM to determine that all design criteria are met. Because the DSC is made of stainless steel, it is not subject to corrosion or embrittlement; therefore, the DSC will not deteriorate under normal conditions. The NUHOMS-24 system is designed to last much longer than the period of the ISFSI license.¹⁰ During operation, the Licensee will have to demonstrate compliance with Part 20 worker dose limits, as well as dose limits for the general public. The Staff concludes that daily inspections to observe abnormalities occurring in the system, and the current radiological environmental monitoring program, are adequate to determine when corrective actions must be taken to maintain safe storage conditions. The Petitioner's proposed requirements to inspect for canister embrittlement and corrosion leakage, or to perform internal canister monitoring would involve periodically removing the DSC or inserting a device into the canister for measurement. These inspections are not necessary to ensure safe operation of the ISFSI and are not warranted. In addition, to perform some of these measurements, or to remove the DSC out of the HSM, could result in a potential increase of the worker's occupational exposures or accident probabilities.

5. Allowing "Pinhole Leaks" Fuel in Dry Cask

The Petitioner alleges that NRC is allowing fuel with "pinhole leaks" to be transferred to the dry casks, without limits in quantity (see related Questions No. 31, 32, 33, and 34 in Petitioner's letter dated February 10, 1993).

As stated in the Part 72 license issued to BG&E, § 3.1.1, at 3/4 1-1 of the fuel technical specification, fuel assemblies known or suspected to have *structural defects* sufficiently severe to adversely affect fuel handling and transfer capability shall not be loaded into the DSC for storage. The required fuel specification is directed at avoiding structural defects, or cladding degradation, that could lead to gross rupture of the fuel, and could pose operational safety problems in the later handling of the fuel, during its removal from storage for further processing or disposal. The NRC Staff does not consider the "pinhole leaks" significant within the context of storage in the ISFSI, since the fuel will still be confined in the cladding, and will be contained and sealed in the DSC. Under normal operations of the ISFSI, leakage is not expected to occur, since the design and the double-seal welding of the DSC covers are checked and tested to provide structural integrity throughout the interim storage period. In practice, the percentage of spent fuel having "pinhole-leaks" is very small,¹¹ and radioactive

¹⁰ NUTECH, Inc., "Topical Report for the Nutech Horizontal Modular Storage System for Irradiated Nuclear Fuel," NUHOMS-24P (July 1989).

¹¹ U.S. Department of Energy, "Characteristics of Potential Repository Wastes," DOE/RW-0184-R1, Vol. 1 (July 1992).

gas, such as Kr-85, will be contained once the fuel is sealed in the DSC. During the storage period in the ISFSI, it is not expected that gas will leak out of the DSC. However, the Licensee is still required to maintain ISFSI operations in compliance with the environmental dose limits for public health protection, as specified in 10 C.F.R. § 72.104. The gas can be vacuumed during retrieval, to minimize occupational exposure.

6. Thermal Limits for the Concrete in the ISFSI Could Be Exceeded

The Petitioner alleges that if the thermal limits for the concrete in the ISFSI are exceeded and the concrete cracks or moves, the canisters may become irretrievable (see related Question No. 23 in Petitioner's letter dated February 10, 1993).

As discussed in item 2 on thermal limits, the thermal limits of the concrete in the ISFSI will not be exceeded under normal or accident conditions, such as the blockage of the air inlets and outlets. With the daily surveillance program, it is unlikely that this full blockage would occur and would be unnoticed by the inspector. Concrete exposed to accident temperatures would be expected to begin a slow degradation process resulting in some loss of its strength, but would not fail so that a DSC could not be retrieved. The required surveillance program will further ensure the safe operation of dry fuel storage.

7. Dry Cask Storage Has Not Been Tested and Should Require Stringent Regulation

The Petitioner is concerned that dry cask storage has not been tested over the length of time of the 20-year license. The Petitioner asserts that, given so many uncertainties, this new procedure can only be called experimental and, as such, requires most stringent and conservative regulation.

Irradiated reactor fuel has been handled under dry conditions since the mid-1940's when irradiated fuel examinations began in hot cells. Light-water reactor fuel has been examined dry in hot cells since approximately 1960. Some of these fuels have been stored continuously in hot cells under dry conditions for approximately two decades. Experience with storage of spent fuel in dry casks is extensive. The United States has extensive experience in the licensing and safe operation of ISFSIs. At the beginning of 1993, five site-specific licenses for dry cask storage had been issued. They include: Virginia Electric and Power's Surry Station, issued July 2, 1986; Carolina Power and Light's (CP&L) H.B. Robinson Steam Electric Plant, issued August 13, 1986; Duke Power's Oconee Nuclear Station, issued January 29, 1990; Public Service Company of Colorado's Fort St. Vrain Nuclear Generating Station, issued November 4, 1991;

and BG&E's Calvert Cliffs Nuclear Power Plant, issued November 25, 1992. All have commenced operation and loaded fuel with the exception of BG&E. Two hundred and fifty-two assemblies are in storage at Surry, 56 assemblies are in storage at H.B. Robinson, 528 assemblies are in storage at Oconee, and 1482 fuel elements are in storage at Fort St. Vrain.

For the specific Calvert Cliffs ISFSI system (i.e., the NUHOMS system), the topical report (*see* note 10) submitted by NUTECH, Inc., had been evaluated thoroughly by the NRC Staff, and the Staff issued a letter of approval, with an SER, on April 21, 1989. The Staff reviewed the various safety features, such as criticality, structural, thermal, and shielding aspects of the design, under normal and accident conditions. In the Staff's safety evaluation, conservative approaches or assumptions were used in case of uncertainties, to ensure safety protection of workers and the general public. The Staff concluded that the NUHOMS system can be used to safely store spent fuel assemblies. At present, the system or similar systems are used at the Oconee ISFSI and the H.B. Robinson ISFSI. The safety features of the system have been reviewed thoroughly and documented. The design criteria on each of these safety features have to be demonstrated by testing and surveillance during or prior to the installation and operation of the system. Because of the passive design of the NUHOMS system, the long-term integrity of these safety features will be maintained once the system is properly installed. The Licensee's daily inspection program and radiological environmental monitoring program will further ensure the safe operation of the facility. Since the safety features of the NUHOMS system have been tested and evaluated, there is ample margin of safety for its operation for the period of interim storage of spent fuel at the Calvert Cliffs site. The Staff disagrees with Petitioner's characterization that dry cask storage and, particularly, the NUHOMS system is "experimental," based on the Staff's review and the operational history of the systems currently in operation.

CONCLUSION

For the reasons discussed above, there is no basis for taking the actions requested by the Petitioner. The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that I have applied to the concerns raised by the Petitioner in this Decision to determine whether action is warranted. As provided by 10

C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission, for the Commission's review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material
Safety and Safeguards

Dated at Rockville, Maryland,
this 16th day of August 1993.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 50-312-DCOM
(Decommissioning Plan)

**SACRAMENTO MUNICIPAL UTILITY
DISTRICT**
(Rancho Seco Nuclear Generating
Station)

September 10, 1993

The Commission provides guidance to the Atomic Safety and Licensing Board on one aspect of Environmental and Resources Conservation Organization's (ECO's) environmental contention which the Commission admitted in its decision, CLI-93-3, 37 NRC 135 (1993).

MEMORANDUM AND ORDER

In an August 31, 1993 Notice of Prehearing Conference, the Atomic Safety and Licensing Board directed the parties to address, among other issues, "whether or not the Commission's orders in CLI-93-3 and CLI-93-12 admitted, without qualification, a contention on loss of offsite power (LOOP)." *Id.* at 2. We did not intend for the parties to revisit this matter. Nevertheless, there is obviously some confusion regarding the effect of the Commission's decisions in CLI-93-3, 37 NRC 135, 146, and CLI-93-12, 37 NRC 355, 359-60 (1993). Therefore, we provide the following guidance to the Licensing Board which should obviate any further need for clarification.

In CLI-93-3, we admitted one aspect of Environmental and Resources Conservation Organization's (ECO's) environmental contention — that there is no reference to a particularized study to allow independent verification of Sacramento Municipal Utility District's (SMUD's) conclusion in its Environmental Report that the probability of a LOOP is less than once in 20 years. 37 NRC at 146. This portion of the environmental contention has been admitted without qualification. To the extent that a party believes no genuine issue remains regarding this contention, that party may seek summary disposition in accordance with 10 C.F.R. § 2.749.

Pursuant to the Commission's direction in CLI-93-3, SMUD provided ECO a detailed analysis regarding how the probability of the LOOP was calculated. Because this was the first time that ECO was provided access to this information ECO was permitted to amend its contention based on this analysis. This particular amendment, based on the newly provided analysis, is not subject to the late-filed criteria contained in 10 C.F.R. § 2.714(a). However, any such amendment must meet the criteria for admissibility in 10 C.F.R. § 2.714(b) and (d).

To the extent that ECO's amended contention may raise new issues that were not dependent on the newly provided analysis of the probability of a LOOP, these new issues are subject to the late-filed criteria in 10 C.F.R. § 2.714(a)(i)-(v). In addition, they are subject to the admissibility standards for contentions in section 2.714(b) and (d). See CLI-93-12, 37 NRC at 360 n.8.

If the Licensing Board has any further questions regarding the effect of the Commission's holding in either CLI-93-3 or CLI-93-12, it should certify those questions to the Commission in accordance with 10 C.F.R. § 2.718(i).

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of September 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 50-271-OLA-5

**VERMONT YANKEE NUCLEAR
POWER CORPORATION**
(Vermont Yankee Nuclear Power
Station)

September 16, 1993

The Commission affirms the Licensing Board's ruling that the Board lacked authority under 10 C.F.R. § 2.107(a) to address a notice of withdrawal that the Licensee had filed after a hearing request had been referred to the Atomic Safety and Licensing Board Panel but before the Licensing Board had issued a Notice of Hearing. The Commission reverses the Licensing Board's related ruling that the NRC Staff's acceptance of the withdrawal had the effect of terminating the proceeding. In the interest of efficiency, the Commission dismisses the proceeding on its own authority, rather than remanding it to the Board.

**RULES OF PRACTICE: AUTHORITY TO ADDRESS APPLICATION
WITHDRAWAL**

Under 10 C.F.R. § 2.107(a), the Licensing Board assumes jurisdiction to address the withdrawal of an application in a license amendment proceeding only after the issuance of a Notice of Hearing as provided in 10 C.F.R. § 2.105(e)(2). Prior to that issuance, the Commission (or NRC Staff, by delegation of authority) has exclusive jurisdiction to address such withdrawals.

RULES OF PRACTICE: TERMINATION OF PROCEEDING

The Commission's regulations do not grant the NRC Staff the authority to terminate a license amendment proceeding after a hearing request has been referred to the Atomic Safety and Licensing Board Panel but before the presiding licensing board or officer has issued a Notice of Hearing. Nor has the Commission, through case law, accorded Staff such authority. Rather, it is the presiding board or officer that has jurisdiction to terminate proceedings under such circumstances.

MEMORANDUM AND ORDER

On July 28, 1993, the Licensing Board in the above-captioned proceeding issued a Memorandum, LBP-93-16, 38 NRC 23, in which it explained that this license amendment proceeding had been terminated on March 25, 1993. According to the Board, the Nuclear Regulatory Commission ("NRC") Staff had approved the Licensee's withdrawal of the subject application, "thus terminating the proceeding." LBP-93-16, 38 NRC at 24. The Board also indicated that, because no Notice of Hearing had been issued by the date on which the Licensee had withdrawn its application, the Commission (or the Staff acting for the Commission) rather than the Board had jurisdiction to address that withdrawal. *Id.*

The Board's stated purpose in issuing LBP-93-16 was to clear up any "confusion" regarding whether the proceeding had ever been closed. *Id.* at 23. Although the Board does not identify the specific confusion with which it is concerned, we assume that the Board intended to refer to the fact that petitions to intervene were still outstanding at the time the NRC Staff approved the withdrawal of the application in this proceeding.

The Board was correct in concluding that it lacked jurisdiction to address the withdrawal. Under section 2.107(a) of our regulations,¹ the Board assumes such jurisdiction in a license amendment proceeding only after the issuance of a Notice of Hearing as provided in 10 C.F.R. § 2.105(e)(2). Prior to the issuance

¹This rule states:

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

10 C.F.R. § 2.107(a) (emphasis added).

of that Notice, the Commission (or the NRC Staff, by delegation of authority)² has exclusive jurisdiction to address withdrawals of applications.

However, the Board erred in concluding that the NRC Staff's approval of Vermont Yankee's withdrawal request had the effect of "terminating the proceeding." The Commission's regulations contain no provision granting authority to the Staff to terminate a license amendment proceeding after a hearing request has been referred to the Atomic Safety and Licensing Board Panel but before the presiding licensing board or officer has issued a Notice of Hearing.³ Nor has the Commission, through case law, accorded Staff such authority. Rather, it is the presiding board or officer that has jurisdiction to terminate proceedings under such circumstances. See *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980) (adjudicatory tribunals have "the inherent authority . . . to dismiss those matters placed before them which have been mooted by supervening developments"). We therefore reverse the Board's conclusion that the NRC Staff's action itself had the effect of terminating this proceeding.

Ordinarily, we would remand the proceeding to the Licensing Board with instructions to issue an order terminating the proceeding. However, the instant case is so clearly moot that, in the interest of efficiency, we exercise our own authority and hereby take that action.

Finally, we take this opportunity to state that, whenever a future licensing board or presiding officer is faced with procedural circumstances similar to those in the instant case, it should issue an order indicating both that the Commission (or its Staff) has previously approved the withdrawal of an application and that the proceeding is being terminated, therefore, on grounds of mootness. Such an

²The Commission has delegated such authority to the Director of the Office of Nuclear Reactor Regulation. See 9 *Management Directives: United States Nuclear Regulatory Commission*, "NRC Organization and Functions," Chapter 9.27, §§ 0123.031 and 0123.032. The Director is, in turn, authorized to redelegate this authority. *Id.* § 0123.05.

³In this respect, the treatment of termination differs from the treatment of withdrawal requests in section 2.107(a).

order will avoid both the error in LBP-93-16 and the kind of confusion that the Board in this case properly sought to alleviate.

It is so ORDERED.

For the Commission⁴

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of September 1993.

⁴ Commissioner de Planque was not present for the affirmation of this Order; if she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 50-440-OLA-3

**CLEVELAND ELECTRIC ILLUMINATING
COMPANY, *et al.***

(Perry Nuclear Power Plant, Unit 1)

September 30, 1993

The Commission considers the appeal of a Licensing Board decision, LBP-92-4, 35 NRC 114 (1992), which denied, on the basis of lack of standing, the appellants' petition for leave to intervene and for a hearing on a request by Cleveland Electric Illuminating Company to amend its operating license for the Perry facility, Unit 1. The license amendment transfers the reactor vessel material surveillance withdrawal schedule from the Perry plant's technical specifications and transfers the schedule to the facility's updated safety analysis report. On the ground that the appellants alleged sufficient injury for standing, the Commission grants the appeal, reverses the Licensing Board's order, and remands the Petitioners' contention to the Board for an evaluation of the contention's admissibility.

RULES OF PRACTICE: STANDING TO INTERVENE

To determine whether a petitioner has established the requisite interest to intervene in a proceeding, the Commission has long applied contemporaneous judicial concepts of standing.

RULES OF PRACTICE: STANDING TO INTERVENE

To demonstrate standing, the petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. The injury also must be to an interest arguably within the zone of interests protected by the governing statute. Injury may be actual or threatened.

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

The loss of the rights to notice, opportunity for a hearing, and opportunity for judicial review constitutes a discrete injury.

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

Standing may be based upon the alleged loss of a procedural right, as long as the procedure at issue is designed to protect against a threatened concrete injury.

RULES OF PRACTICE: STANDING TO INTERVENE

For construction permit and operating license proceedings, the Commission generally has recognized a presumption in favor of standing for those persons who have frequent contacts with the area near a nuclear power plant. In license amendment proceedings, residence near a nuclear facility is sufficient to establish injury for standing if the proposed action involves an "obvious potential for offsite consequences." See *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

MEMORANDUM AND ORDER

I. INTRODUCTION

The Ohio Citizens for Responsible Energy, Inc. (OCRE), and Susan L. Hiatt have appealed the Atomic Safety and Licensing Board's Memorandum and Order, LBP-92-4, 35 NRC 114 (1992), which denied their petition for leave to intervene and for a hearing on an amendment to the operating license for the Perry Nuclear Power Plant. The amendment deletes the reactor vessel material

surveillance program withdrawal schedule from the Perry plant's technical specifications and transfers the schedule to the facility's updated safety analysis report. Both the Nuclear Regulatory Commission (NRC) Staff and the Licensee oppose the appeal, on the ground that the Petitioners have failed to establish standing to intervene in this license amendment proceeding. For the reasons stated in this Memorandum and Order, we grant the appeal and reverse the Licensing Board's denial of standing.

II. BACKGROUND

On July 24, 1991, the NRC Staff published in the *Federal Register* a notice of opportunity for hearing on a proposed amendment to the Perry Nuclear Power Plant operating license. 56 Fed. Reg. 33,961 (July 24, 1991). Under the amendment, the schedule for the withdrawal of reactor vessel material specimens is moved from the Perry technical specifications to the facility's updated safety analysis report (USAR). The Licensee, Cleveland Electric Illuminating Company, had supplemented a pending license application on March 15, 1991, to seek this transfer of the withdrawal schedule to the USAR. In the notice, the Staff indicated its determination that the amendment involved no significant hazards considerations. The Staff issued the amendment on December 18, 1992. 58 Fed. Reg. 5438 (Jan. 21, 1993).

The proposed amendment came in response to the Staff's issuance of Generic Letter 91-01,¹ which noted that the Commission's regulations under 10 C.F.R. Part 50, Appendix H, § II.B.3, already mandate prior NRC approval of any changes to the withdrawal schedule. The Staff found that the removal of the schedule from the technical specifications "will not result in any loss of regulatory control because changes to this schedule are controlled by the requirements of Appendix H to 10 C.F.R. Part 50."² Consequently, the Staff guidance letter concluded that it was redundant for the agency to retain regulatory control over the withdrawal schedule through the license amendment process. In accordance with an agency effort to improve the technical specifications by pruning unessential or duplicative provisions,³ the Staff encouraged licensees to propose the removal of the withdrawal schedule from their technical specifications.

OCRE and Ms. Hiatt filed their petition for leave to intervene and for hearing on the withdrawal schedule portion of the operating license amendment on

¹ Generic Letter 91-01, "Removal of the Schedule for the Withdrawal of Reactor Vessel Material Specimens from Technical Specifications" (Jan. 4, 1991).

² Enclosure to Generic Letter 91-01 at 2.

³ See Proposed Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors, 52 Fed. Reg. 3788 (Feb. 6, 1987); Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors, 58 Fed. Reg. 39,132 (July 22, 1993).

August 23, 1991. The petition was referred to an Atomic Safety and Licensing Board established to rule on such petitions and to preside over the proceeding if a hearing was ordered. On the ground that the Petitioners lacked standing to intervene, both the Staff and the Licensee opposed the intervention.⁴ In an unpublished order dated October 28, 1991, the Licensing Board established a schedule for the Petitioners to amend their petition to address the arguments of the Licensee and Staff, and to explain why several standing cases cited by the Board were not persuasive in the circumstances. The Petitioners filed their amended petition on November 22, 1991, followed by replies by the Staff and the Licensee.⁵

In the petition, OCRE described itself as a private, nonprofit corporation under the laws of Ohio, dedicated to research and advocacy on issues of nuclear reactor safety, with the goal of promoting the highest safety standards. Some of OCRE's members reside within 15 miles of the Perry facility. Ms. Hiatt attached an affidavit to the petition stating that she is a member and officer of OCRE who resides and owns property approximately 13 miles from the Perry plant. She further stated that she authorized OCRE to represent her interests in the proceeding, and that OCRE had empowered her, as an officer of the organization, to represent OCRE before the agency. Petition for Leave to Intervene and Request for Hearing at 2-4 (Aug. 23, 1991) [hereinafter Petition].

The Petitioners claimed an interest "in the preservation of their lives, their physical health, their livelihoods, the value of their property, a safe and healthy environment, and the cultural, historical, and economic resources of Northeast Ohio." Petition at 4. They also asserted an interest in preserving their legal right to participate meaningfully in those Perry plant issues that could affect their health and safety or other listed concerns. *See id.* The petition challenged only the portion of the proposed license amendment that would remove the material specimen withdrawal schedule from the technical specifications. The Petitioners agreed with the Staff and the Licensee that the challenged portion of the amendment was purely an administrative matter that involved no significant hazards consideration. Petition at 4-5.

In their challenge to the proposed amendment, OCRE and Ms. Hiatt raised only one issue of law — that the amendment violates section 189a of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a). The Petitioners contended that the specimen withdrawal schedule traditionally has been included in the technical specifications and, therefore, could not be changed without notice in the *Federal*

⁴ Licensee's Answer to Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt Petition for Leave to Intervene and Request for Hearing (Sept. 6, 1991); NRC Staff Answer to Petition for Leave to Intervene Filed by Ohio Citizens for Responsible Energy and Susan L. Hiatt (Sept. 12, 1991).

⁵ Licensee's Response to Ohio Citizens for Responsible Energy, Inc. and Susan L. Hiatt Amended Petition for Leave to Intervene (Dec. 17, 1991); NRC Staff Response to OCRE's Amended Petition (Dec. 17, 1991).

Register and an opportunity for a hearing in accordance with section 189a.⁶ The Petitioners argued that the removal of the withdrawal schedule from the technical specifications would violate the AEA by depriving the public of the right to notice and an opportunity for a hearing on any future changes to the schedule. If the license were amended, the public's only means to participate in future schedule changes would be through a request for action under 10 C.F.R. § 2.206. Because the agency would still need to approve any changes to the withdrawal schedule, the Petitioners argued that any future NRC approvals of proposed changes to the withdrawal schedule would be "*de facto*" license amendments that would be issued without notice, opportunity for a hearing, and opportunity for judicial review. Petition at 4-8. The Petitioners concluded that they would suffer irreparable injury from the loss of their procedural rights, and that this injury would be traceable to the challenged action, for if the proposed amendment were granted without affording them the opportunity to challenge its legality, the Petitioners' rights under section 2.206 to challenge any future changes to the withdrawal schedule would be "woefully inadequate." Petitioners' Amended Petition for Leave to Intervene at 4-5 (Nov. 22, 1991) [hereinafter Amended Petition].

On March 19, 1992, the Licensing Board denied OCRE and Ms. Hiatt's petition to intervene. The Board ruled that OCRE and Ms. Hiatt had failed to allege sufficient interest in the proceeding, as required by 10 C.F.R. § 2.714(a)(1), and therefore had not established injury in fact for standing.⁷ More specifically, the Board found that the Petitioners' asserted interests were generalized and conjectural, and did not constitute concrete, palpable injury. LBP-92-4, 35 NRC at 122. The fact that Ms. Hiatt and certain OCRE members reside within 15 miles of the Perry plant was by itself inadequate for standing. The Board concluded that there was no connection or causal nexus established between the professed interests and the proposed amendment, because the amendment was an administrative change that would merely remove the withdrawal schedule from the technical specifications and transfer it to the updated safety analysis report. *Id.* The Board noted that the Petitioners had concurred with the Licensee and Staff that the amendment was a purely administrative matter that involved no significant hazards consideration.

Lastly, the Board found that the Petitioners' asserted procedural injury from the alleged loss of rights under section 189a did not confer standing. LBP-92-4, 35 NRC at 123-24. Any such injury was deemed to be speculative in view of the

⁶ Technical Specifications are included in each license for a production or utilization facility. 10 C.F.R. § 50.36(b). Licensees may seek changes to technical specifications through an amendment application. 10 C.F.R. § 50.90.

⁷ The Board noted its divergence from the reasoning and ruling of an earlier Licensing Board decision involving the Perry facility which found that OCRE had standing to intervene in a similar license amendment proceeding. LBP-92-4, 35 NRC at 125-26 (referring to LBP-90-15, 31 NRC 501, *reconsid. denied*, LBP-90-25, 32 NRC 21 (1990)).

uncertainty over whether changes will ever be made to the withdrawal schedule. The Board reasoned that the Petitioners have no guaranteed right to participate in NRC proceedings and, thus, their claim of legal injury was footed on an erroneous premise. LBP-92-4, 35 NRC at 123. Moreover, the Board stated that to confer standing a legal injury must be linked to a substantive underlying injury that would result from the instant amendment and that otherwise would confer standing. LBP-92-4, 35 NRC at 124-25. The Board found no such concrete injury.

OCRE and Ms. Hiatt filed a timely notice of appeal and appellate brief with the Commission in accordance with 10 C.F.R. § 2.714a. On appeal, the Petitioners challenge the Licensing Board's denial of standing. They argue that their concurrence with the Staff's determination of "no significant hazards" does not obviate their claim of injury. As particularly relevant to our consideration of their appeal, they stress that procedural injuries can confer standing, and that they confront the loss of significant procedural rights under section 189a.

III. THE PETITIONER'S STANDING

Under section 189a of the Atomic Energy Act, the Commission must grant a hearing upon the request of any person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). Accordingly, NRC regulations provide that a petition to intervene and for a hearing "shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene." 10 C.F.R. § 2.714(a)(2). To determine whether a petitioner has established the requisite "interest" to intervene, the Commission has long applied contemporaneous judicial concepts of standing. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *aff'd*, *Environmental & Resources Conservation Organization v. NRC*, No. 92-70202 (9th Cir. June 30, 1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

To demonstrate standing, the petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. See generally *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991). This injury must be to an interest arguably within the zone of interests protected by the governing statute. *Three Mile Island*, 18 NRC at 332. Injury may be "actual or threatened." *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987) (quoting *Valley Forge Christian*

College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)).

In addressing Ms. Hiatt's⁸ asserted interests in the proceeding, the Licensing Board found that:

Generalized interests of the kind asserted by the petitioner do not comprise an injury that is distinct and palpable or particular and concrete. Rather, the petitioner's asserted interests are abstract and conjectural grievances that fall far short of the kind of real or threatened harm essential to establish an injury in fact.

LBP-92-4, 35 NRC at 122 (footnote omitted). The Board also concluded that Ms. Hiatt's grievances lack a causal nexus to the proposed amendment. We disagree.

The Petitioners have satisfied threshold standing requirements. OCRE and Ms. Hiatt allege a particularized injury that is fairly traceable to the challenged amendment and likely to be redressed by a favorable decision. The loss of the rights to notice, opportunity for a hearing, and opportunity for judicial review, constitutes a discrete and palpable — not hypothetical — injury. This alleged procedural injury is linked to *this* amendment. With the license amendment in effect, future changes to the withdrawal schedule no longer require notice and an opportunity for a hearing under section 189a. After the amendment, the only opportunity to challenge changes to the withdrawal schedule is through a petition under 10 C.F.R. § 2.206, which the Petitioners maintain is inadequate because no opportunity exists under section 2.206 to present evidence, cross-examine witnesses, or to appellate review of the final decision. Petition at 7-8.

We note that the issues raised in this case are similar to those raised previously by OCRE in *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-90-25, 32 NRC 21 (1990), in which OCRE challenged a proposal to delete cycle-specific parameter limits from the Perry plant technical specifications. As in this case, OCRE alleged the amendment would unlawfully deprive the petitioner of hearing rights under section 189a of the AEA. The Licensing Board in LBP-90-25 found that OCRE had alleged a "direct and immediate injury," and noted that the loss of hearing rights, instead of speculative, was "one of the intended results of the license amendment," and that "[i]f OCRE does not assert it as a basis for standing now, but rather permits the license amendment to go into effect, there will be no future opportunity to raise the issue before the Commission." *Id.* at 24 (footnote omitted). Similarly, we reject the Licensing Board's claim here in LBP-92-4 that the alleged procedural

⁸ Since both OCRE and Ms. Hiatt alleged the same interests, and OCRE's standing as the representative of its members is dependent upon that of Ms. Hiatt, the Licensing Board addressed only Ms. Hiatt's claimed interests. Because Ms. Hiatt's claims were found insufficient for standing, OCRE's claims likewise failed. LBP-92-4, 35 NRC at 121.

injury is speculative. The Board reasons that “[b]efore the alleged harm can occur, a number of uncertain and unlikely events must take place, including most obviously, a change in the withdrawal schedule.” 35 NRC at 123. Although future changes to the withdrawal schedule are by no means certain, the likelihood of changes cannot be discounted, particularly when a goal of the license amendment is to simplify the required procedural steps for such changes.

OCRE and Ms. Hiatt allege that they are entitled to the rights accorded interested petitioners under section 189a because future changes to the withdrawal schedule would in fact be *de facto* license amendments, and “[t]he only real effect of this amendment is that the public is excluded from the process.” The fact that the NRC will continue under Appendix H to require prior Staff approval of any schedule changes — and to otherwise exercise the same degree of control over the Licensee — is indicative of the significance of the withdrawal schedule, changes to which should be deemed license amendments under section 189a, whether labeled as such or not, argue the Petitioners. Petition at 8. In sum, OCRE and Ms. Hiatt allege the loss of the ability under section 189a to meaningfully participate in proposed future changes to the withdrawal schedule.

Standing may be based upon the alleged loss of a procedural right “so long as the procedures in question are designed to protect some threatened concrete interest” that is the ultimate basis of the individual’s standing.⁹ Although the Licensing Board correctly stated that to confer standing a procedural injury must be linked to a concrete injury, the Board’s compartmentalized reading of the Petitioners’ pleadings led it to conclude that the alleged procedural injury is unconnected to any substantive harm. LBP-92-4, 35 NRC at 124. However, a fair reading of the Petitioners’ claims indicates that, at bottom, OCRE and Ms. Hiatt fear that if they are deprived of the opportunity to challenge future proposals to alter the withdrawal schedule, the surveillance of the Perry reactor vessel may become lax and prevent detection of a weakened reactor vessel, and ultimately result in an accidental release of radioactive fission products into the environment if the vessel should fail. As the Petitioners outlined in their appeal:

[A]lthough this particular amendment presents no significant hazards in and of itself, future changes to the reactor vessel specimen withdrawal schedule are of such safety significance as to require NRC staff review and approval. The potential for offsite consequences exists if changes to this schedule are such that the material specimens are not withdrawn frequently enough to assure that the reactor vessel has not become dangerously embrittled. What

⁹ *Lujan*, 112 S. Ct. at 2143 n.8. See also *id.* at 2142 n.7 (“one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an Environmental Impact Statement”); *McGarry v. Secretary of the Treasury*, 853 F.2d 981, 985 (D.C. Cir. 1988) (“[h]aving been given a procedural right by Congress to help protect these interests, appellants must have standing to challenge an alleged deprivation of the right”). Indeed, procedural rights are “special,” and the “person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Lujan*, 112 S. Ct. at 2142 n.7.

petitioners seek to preserve in this proceeding is the right to participate in a matter which the NRC's regulations have made material and which does have safety significance.

Petitioners' Appellate Brief at 10 (Apr. 2, 1992).

Although the Petitioners' claims on appeal provide a more cogent specification of their ultimate concerns, namely by depicting the reactor vessel embrittlement scenario, their pleadings before the Licensing Board sufficiently presented a link between the loss of procedural opportunities under section 189a and their asserted health and safety interests. For example, in their Amended Petition, OCRE and Ms. Hiatt refer to the removal of "safety-significant" material from the operating license. Amended Petition at 8. They express an interest in the "safe operation" of the Perry plant, given their residence near the facility. Amended Petition at 7. Clearly, they seek to vindicate the loss of an alleged procedural right that relates to a potential substantive injury — radiological harm to them as residents in the plant's vicinity.¹⁰ The Petitioners' radiological safety concerns unquestionably fall within the zone of interests regulated and protected by the Atomic Energy Act.

The Petitioners' fear of reactor vessel embrittlement and its potential consequences certainly would be insufficient for standing if they had little contact with the geographic area that could be affected by a release of radiation. Here no one contests that Ms. Hiatt, herself a member of OCRE, lives within 15 miles of the Perry plant. For construction permit and operating license proceedings, the Commission generally has recognized a presumption in favor of standing for those persons who have frequent contacts with the area near a nuclear power plant. See *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). In license amendment proceedings, residence near a nuclear facility is sufficient to establish injury for standing if the proposed action involves an "obvious potential for offsite consequences." See *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989) ("*St. Lucie*").

Here, the Petitioners have claimed that the material specimen withdrawal schedule is safety-related. Amended Petition at 8. Unlike in *St. Lucie*, which involved a change in the use of respirators by plant workers, without a potential risk to the general public, the instant amendment directly involves surveillance of the reactor vessel's integrity. The surveillance schedule exists to ensure that the structural integrity of the reactor vessel is monitored as one measure to guard against its brittle fracture. At this stage in deciding threshold standing, we cannot conclude that no potential for offsite consequences is posed by the

¹⁰In finding that the Petitioners sufficiently have raised an injury for standing, we did not accept their claimed interests in preserving the "cultural, historical, and economic resources" of northeastern Ohio. Standing requires more than general interests in a geographic area. See *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *Wilderness Society*, 824 F.2d at 15.

loss of notice and opportunity for a hearing to challenge future changes to the withdrawal schedule. The material condition of the plant's reactor vessel obviously bears on the health and safety of those members of the public who reside in the plant's vicinity.

IV. THE PETITIONERS' CONTENTION

Although we have found that OCRE and Ms. Hiatt have standing, Petitioners must also proffer at least one admissible contention to be admitted as a party. 10 C.F.R. § 2.714(b). The Petitioners submitted only one contention, which reads as follows:

The Licensee's proposed amendment to remove the reactor vessel material specimen withdrawal schedule from the plant Technical Specifications to the Updated Safety Analysis Report violates Section 189a of the Atomic Energy Act (42 U.S.C. 2239a) in that it deprives members of the public of the right to notice and opportunity for hearing on any changes to the withdrawal schedule.

Petition at 5.

The Petitioners aver that their contention raises only a question of law, and, as such, is capable of resolution on the basis of briefs or oral argument, pursuant to 10 C.F.R. § 2.714(e). Petition at 5. An acceptable contention may raise only a pure issue of law. *See* 10 C.F.R. § 2.714(b)(2) and (e). Because the Licensing Board concluded that the Petitioners lacked standing, the Board never addressed the adequacy of the Petitioners' contention. We therefore remand the contention to the Board.

Our decision does not signify any opinion on the admissibility or the merits of the Petitioners' contention. Although we have found that the Petitioners' claim of injury is sufficient to establish threshold standing, we do not hold that the amendment is therefore unlawful. We only hold that the Petitioners should have an opportunity to raise and have resolved, subject to our rules of practice on the admission and litigation of contentions, whether the removal of the withdrawal schedule from the technical specifications is indeed an unlawful act.

V. CONCLUSION AND ORDER

For the reasons stated in this decision, the appeal of petitioner OCRE and petitioner Hiatt is *granted* and the Licensing Board's order in LBP-92-4 is *reversed*. We *remand* the Petitioners' contention to the Licensing Board for further proceedings consistent with our decision.

It is so ORDERED.

For the Commission¹¹

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of September 1993.

¹¹ The Chairman was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 30-16055-CivP
(Civil Penalty)

ADVANCED MEDICAL SYSTEMS, INC.
(One Factory Row, Geneva, Ohio 44041)

September 30, 1993

The Commission affirms in part the Atomic Safety and Licensing Board's decision, LBP-91-9, 33 NRC 212 (1991), in which the Licensing Board granted the Nuclear Regulatory Commission Staff's motion for summary disposition in a proceeding to impose a \$6250 civil penalty on the Licensee, Advanced Medical Systems, Inc. The Commission reverses the Licensing Board's disposition of one violation and remands to the Board for further proceedings all issues related to that violation.

RULES OF PRACTICE: SUMMARY DISPOSITION

The party seeking summary judgment bears the burden of showing the absence of a genuine issue as to any material fact and the evidence must be viewed in the light most favorable to the party opposing summary disposition.

RULES OF PRACTICE: SUMMARY DISPOSITION

To preclude summary disposition, when the proponent has met its burden, the party opposing the motion may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue. Bare assertions or general denials are not sufficient.

RULES OF PRACTICE: SUMMARY DISPOSITION

The opposing party must controvert any material fact properly set out in the statement of material facts that accompanies a summary disposition motion or that fact will be deemed admitted.

RULES OF PRACTICE: SUMMARY DISPOSITION

When the movant has satisfied its initial burden and has supported its motion by affidavit, the opposing party must either proffer rebuttal evidence or submit an affidavit explaining why it is impractical to do so. If the presiding officer determines from affidavits filed by the opposing party that the opposing party cannot present by affidavit the facts essential to justify its opposition, the presiding officer may order a continuance to permit such affidavits to be obtained or may take other appropriate action.

TECHNICAL ISSUES DISCUSSED: RADIATION DOSE STANDARDS

A licensee is excused from complying with the maximum permissible dose standards set out in 10 C.F.R. § 20.101(a), only if the licensee can satisfy the conditions set forth in section 20.201(b).

RULES OF PRACTICE: SUMMARY DISPOSITION

Prior NRC inspection reports that conclude that at the time of an inspection there were no regulatory violations found do not in themselves raise a genuine issue of material fact. The failure by the NRC to detect a violation does not necessarily prove the negative that no violation existed. The NRC inspectors are not omniscient, and limited NRC resources preclude careful review of all but a fraction of the licensed activity.

TECHNICAL ISSUES DISCUSSED: RADIATION SURVEYS

When determining what constitutes a survey, 10 C.F.R. § 20.201 requires consideration of more than quantitative measurements of radiation levels used to determine exposure. It also requires, where appropriate, consideration of physical surveys of the location of materials and equipment.

RULES OF PRACTICE: SUMMARY DISPOSITION

An evidentiary hearing is necessary only if a genuine issue of material fact is in dispute.

MEMORANDUM AND ORDER AFFIRMING IN PART AND REVERSING IN PART ATOMIC SAFETY AND LICENSING BOARD'S ORDER, AND REMANDING ISSUES

This case involves an appeal by Advanced Medical Systems, Inc. ("AMS"), of a Memorandum and Order in which the Atomic Safety and Licensing Board ("Licensing Board" or "Board") granted the Nuclear Regulatory Commission ("NRC") Staff's Motion for Summary Disposition. LBP-91-9, 33 NRC 212 (1990). For the reasons stated herein, the Commission affirms LBP-91-9 in part, reverses the Licensing Board's summary disposition of one violation, and remands to the Board for further proceedings consistent with this order all issues related to that violation.

I. BACKGROUND

On June 28, 1985, Staff issued a Notice of Violation and Proposed Imposition of Civil Penalties after conducting an investigation regarding an AMS employee's apparent overexposure to radiation.¹ The Notice identified the following four regulatory and license condition violations, all of which occurred in late 1984 and which together constituted a single Severity Level III violation under the Commission's Enforcement Policy:²

(1) An AMS employee ("Individual A") working in a restricted area received a whole body dose of 2.9 rems in the fourth calendar quarter of 1984. This dose exceeded the limit, established in 10 C.F.R. § 20.101(a), for whole body dose of an individual in a restricted area, *i.e.*, 1.25 rems per calendar quarter, except as provided by 10 C.F.R. § 20.101(b). Although subsection (b) of that regulation provides for a [maximum allowable] whole body dose of three rems per calendar quarter under certain conditions, those conditions were not present in this case.

¹ In response to the Notice to the Parties, issued by the Commission in this proceeding on July 24, 1991, AMS objected to any participation as an adjudicatory advisor by Mr. Stephen G. Burns, currently the Director of the NRC's Office of Commission Appellate Adjudication, because Mr. Burns had provided concurrence in the June 28, 1985 Notice of Violation. In response to AMS' objection, Mr. Burns has recused himself from all involvement in advising the Commission regarding the merits of this case.

² General Statement of Policy and Procedure for NRC Enforcement Actions, 10 C.F.R. Part 2, Appendix C (1984).

(2) On November 6 and 21, 1984, AMS conducted inadequate radiation surveys of its hot cell to calculate the future stay time of personnel in the hot cell. Consequently, the Licensee's method of surveying the hot cell violated 10 C.F.R. § 20.201(b), which requires each licensee to "make or cause to be made such surveys as (1) may be necessary for the licensee to comply with the regulations in [10 C.F.R. Part 20], and (2) are reasonable under the circumstances to evaluate the extent of radiation hazards that may be present."

(3) On November 21, 1984, two AMS employees (Individuals A and B) failed to read their dosimeters at intervals consistent with the anticipated dose rate that they would receive while working in the hot cell. This failure violated Condition 16 of the AMS license which requires AMS to use licensed materials in accordance with the statements, representations and procedures contained in AMS' "Radiation Safety Procedures Manual, ISP-1", dated July 1983. Section 7.2.c ("Personnel Monitoring") of ISP-1 states that "[w]ork in high dose areas will be preceded by a survey with appropriate monitoring equipment and an estimated total accumulated exposure determined The pencil type dosimeters will be read at intervals consistent with the anticipated dose rate to determine that the actual exposure is not greater than the anticipated exposure."³

(4) AMS failed to calibrate the dosimeters of Individuals A and B within 180 days prior to their entries into the hot cell on November 6 and 21, 1984. This failure violated the AMS License Condition 16 which requires AMS to possess and use its licensed material in accordance with statements, representations, and procedures contained in AMS' application received July 16, 1979. Schedule E of the referenced application requires dosimeters to be calibrated using a calibrated radiation source at intervals of 180 days or less, or before first use if more than 180 days since last calibration.⁴

Staff proposed to impose upon AMS a \$6250 civil penalty, assessed equally among these four violations.

On May 30, 1989, the NRC Staff issued an order imposing a \$6250 civil penalty on AMS, for violations of both the Commission's regulations and AMS' license conditions.⁵ On June 20, 1989, AMS requested a hearing to challenge the penalty and the findings of violation. On August 29, 1990, Staff filed a motion for summary disposition. On October 4, 1990, AMS filed a brief in opposition to Staff's motion for summary disposition. On March 19, 1991, the Licensing Board issued LBP-91-9 granting Staff's motion. Specifically, the Board affirmed all of the Staff's findings of violation, sustained the amount of the civil penalty, and terminated the proceeding. On March 27, 1991, AMS filed an appeal with the Commission, requesting reversal of LBP-91-9. Staff filed a brief responding to the appeal.

³ NRC Staff Motion for Summary Disposition and for Decision Sustaining Order (August 29, 1990) (hereinafter "Staff Motion"), Attachment 5, "Order Imposing Civil Monetary Penalties" (May 30, 1989), Appendix ("Evaluations and Conclusions"), at 3.

⁴ *Id.* at 4.

⁵ See 54 Fed. Reg. 24,433 (June 7, 1989).

II. COMMISSION STANDARDS FOR SUMMARY DISPOSITION

The Commission's standards for ruling on motions for summary disposition are set forth in 10 C.F.R. § 2.749. That regulation specifies that summary disposition may be granted only if the filings in the proceeding, including statements of the parties and affidavits, demonstrate both that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. In general, when considering motions for summary disposition under section 2.749, the Commission has used the same standards that the Federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.⁶ Rule 56 is analogous to section 2.749.

The party seeking summary judgment bears the burden of showing the absence of a genuine issue as to any material fact.⁷ In addition, the Board must view the record in the light most favorable to the party opposing such a motion.⁸ Thus, if the proponent of the motion fails to make the requisite showing, the Board must deny the motion — even if the opposing party chooses not to respond or its response is inadequate.⁹ However, if the movant makes a proper showing for summary disposition, and if the party opposing the motion does not show that a genuine issue of material fact exists, the Board may summarily dispose of all arguments on the basis of pleadings.¹⁰

To preclude summary disposition, when the proponent has met its burden, the party opposing the motion may not rest upon "mere allegations or denials," but must set forth specific facts showing that there is a genuine issue.¹¹ Bare assertions or general denials are not sufficient.¹² Although the opposing party does not have to show that it would prevail on the issues, it must at least demonstrate that there is a genuine factual issue to be tried.¹³ The opposing party must controvert any material fact properly set out in the statement of

⁶ *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

⁷ *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); *Perry*, ALAB-443, 6 NRC at 752-53.

⁸ See *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962).

⁹ *Perry*, 6 NRC at 753-54.

¹⁰ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241, 242 (1973), *aff'd sub nom. BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974); 10 C.F.R. § 2.749(d).

¹¹ 10 C.F.R. § 2.749(b).

¹² *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981). See also *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 455 (1980).

¹³ See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 154 (1992) (to avoid summary disposition, intervenors have to present contrary evidence that is so significantly probative that it creates a material factual issue). See also *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (to defeat a motion for summary disposition, the opposing party must show the existence of more than just some "metaphysical doubt" concerning the material facts).

material facts that accompanies a summary disposition motion or that fact will be deemed admitted.¹⁴

Moreover, when the movant has satisfied its initial burden and has supported its motion by affidavit, the opposing party must either proffer rebutting evidence or submit an affidavit explaining why it is impractical to do so.¹⁵ If the presiding officer determines from affidavits filed by the opposing party that the opposing party cannot present by affidavit the facts essential to justify its opposition, the presiding officer may order a continuance to permit such affidavits to be obtained, or may take other appropriate action.¹⁶

With these general principles in mind, we turn to the Licensing Board's rulings on the parties' arguments.

III. THE LICENSING BOARD'S DECISION

In the Motion for Summary Disposition, Staff submitted the following five statements of material fact about which, Staff claimed, no genuine issue existed:

1) Individual A (an AMS employee) received a whole body dose of 2.9 rems in the fourth quarter of 1984;

2) On November 6 and 21, 1984, the surveys of radiation levels at the door of the AMS hot cell were the only surveys made to assess the possible exposure of AMS employees who worked in the hot cell;

3) The surveys made at the door of the hot cell on November 6 and 21, 1984, were not adequate to detect the radiation level within the hot cell;

4) On November 21, 1984, two AMS employees (Individuals A and B) failed to read their dosimeters between entries to the hot cell; and

5) Dosimeters used by the same two AMS employees on November 6 and 21, 1984, had not been calibrated for more than 180 days.¹⁷

The Licensing Board agreed with Staff that the first four facts were both material and undisputed. Regarding Staff's fifth statement, the Licensing Board indicated that Staff was also required to, and did, establish that the dosimeter calibration procedure used by AMS was neither the calibration method described in AMS' application (and incorporated into the license) nor a method otherwise approved by the NRC.¹⁸ Consequently, the Licensing Board determined both that Staff had proven the existence of all four alleged violations and that the imposition of a

¹⁴ 10 C.F.R. § 2.749(a).

¹⁵ See 10 C.F.R. § 2.749(b). See also Fed. R. Civ. P. 56(e) and Advisory Committee Note; *Adickes*, 398 U.S. at 160-61.

¹⁶ 10 C.F.R. § 2.749(c).

¹⁷ Staff Motion, Attachment entitled "Statement of Material Facts About Which No Genuine Issue Exists."

¹⁸ LBP-91-9, 33 NRC at 222.

civil penalty of \$6250 was in accordance with Commission policy for violations of this type.¹⁹

IV. ANALYSIS

AMS argues that there are genuine issues of material fact still in dispute and that the Licensing Board consequently erred in granting Staff's motion for summary disposition. AMS sets forth eight instances (discussed in sections A through H below) in which it claims that the Licensing Board committed reversible error.

A. Violation 1: Radiation Exposure for Individual A in Excess of the Limits Established in 10 C.F.R. § 20.101(a) (1984)

Section 20.101(a) establishes radiation dose standards for individuals in restricted areas. Specifically, this section provides that an individual must not receive a whole-body dose of radiation in excess of 1.25 rems per calendar quarter, except as provided in paragraph (b) of the same section. Paragraph (b) raises the limit to 3 rems per calendar quarter if, prior to the individual's entry into the restricted area, the licensee has determined (i.e., calculated) the individual's accumulated occupational whole-body dose on a Form NRC-4 ("Form-4") or on a clear and legible record containing all the information required on a Form-4.²⁰

AMS does not dispute the fact that, during the fourth quarter of 1984, Individual A received a whole body dose of 2.9 rems — an amount in excess of the maximum dose permitted in section 20.101(a). However, AMS does challenge the Board's conclusion that this exposure constituted a violation of section 20.101.²¹ AMS argues that genuine issues of material fact exist as to whether it qualified for an exception to the requirements in section 20.101(a). According to AMS, its own expectations regarding its employees' dose levels excused it from complying with the dose requirement in section 20.101(a). In addition, AMS argues that, even if it were not thus excused from compliance, a genuine issue of material fact nevertheless exists as to whether AMS qualified for the exception to 20.101(a) by completing a Form-4 prior to Individual A's entry into the restricted area. AMS' arguments fail for the following reasons.

¹⁹ *Id.* at 227-28.

²⁰ Paragraph (b) also contains other conditions, but they are not at issue in this proceeding.

²¹ See AMS' Brief in Support of Reversal of the Licensing Board's Order Granting NRC Staff Motion for Summary Disposition and Terminating Proceeding at 17-22 (April 26, 1991) (hereinafter "AMS Brief").

1. AMS Was Not Excused from Complying with the Requirements in Section 20.101(a)

AMS argues that the Licensing Board erroneously ignored section 20.102(a) which, according to AMS, provides for an exception to the standards prescribed by section 20.101(a) in addition to the exception set forth in section 20.101(b). AMS contends that section 20.102(a) excuses a licensee from the radiation dose limits set forth in section 20.101 if the licensee does not “expect” an individual to receive a dose in excess of the maximum level specified in section 20.101(a).²² More specifically, AMS asserts that Staff, to obtain summary disposition, would have to present uncontradicted evidence that, prior to Individual A’s November entries into the restricted area, AMS actually “expected” him to receive more than 1.25 rems during that calendar quarter. AMS argues that Staff has not made such a showing.

We conclude that neither section 20.101(a) nor section 20.102(a) supports AMS’ position. Under the provisions of section 20.101(a) quoted immediately below, a licensee is excused from complying with that section’s radiation dose standards only if the licensee can satisfy the conditions set forth in section 20.101(b):

In accordance with the provisions of § 20.102(a), and *except as provided in paragraph (b) of this section*, no licensee shall . . . cause any individual in a restricted area to receive in any period of one calendar quarter . . . a total occupational dose in excess of the standards specified [in section 20.101(a)].

(Emphasis added).

Section 20.101(a) contains no similar language indicating that section 20.102(a) provides a second exception. Nor would such an exception make sense. Section 20.102(a) concerns a written document other than a Form-4 and merely addresses the determination and recordation of an individual’s prior dose history. Specifically, this section provides that, if an individual will or is likely to receive during a calendar quarter more than 25% of the applicable dose specified in section 20.101(a), the licensee must require the individual to disclose in a written signed statement the prior occupational dose received by the individual during the then-current calendar quarter.

Section 20.101(b), which provides for the only circumstance under which the licensee is excused from complying with the maximum dose standards contained in section 20.101(a), does not provide for an exception based upon the dose level being unexpected. Section 20.101(b) requires that, for a licensee to be excused from the requirements in section 20.101(a), the licensee must have completed a Form-4 (or its equivalent) for an employee prior to that employee’s entry

²² AMS Brief at 17-18.

into a restricted area. To prevent an overexposure, irrespective of whether the employee received the dose level "expected" by the licensee, AMS should have instructed the employee (here, Individual A) to leave the restricted area prior to receiving a dose level in excess of the standards provided in section 20.101(a) if no Form-4 for that employee were on file.

2. *AMS Did Not Satisfy the Form-4 Requirement*

AMS also contends that it was excused from complying with section 20.101(a) because it had actually prepared a Form-4 prior to Individual A's entry into the restricted area. We reject this argument on the ground that it is unsupported by the record. AMS has never offered into the record the Form-4 that was purportedly completed prior to the entry in question. Nor has AMS proffered an affidavit either from the person who supposedly filled out the Form-4 prior to Individual A's entry into the restricted area or from any person who saw that Form-4.²³ In fact, AMS never specifically identified any such individuals.

Instead, AMS argues that the Form-4 was filled out, but was missing when Mr. Irwin looked for it.²⁴ In support of this argument, AMS relies upon testimony from Mr. Irwin indicating that he knew the exposure history necessary to prepare a Form-4 for Individual A. AMS also asserts that NRC inspection reports indicate the presence of such a Form-4 in AMS' files prior to November 1984. For the reasons set forth below, we conclude that AMS' first argument is irrelevant to the issue at bar and that AMS' second argument is insufficient to raise a genuine issue of material fact.²⁵

a. *Mr. Irwin's Knowledge*

Although Mr. Irwin's knowledge of the employee's exposure history²⁶ might arguably be relevant to the question of whether AMS *could* have completed a Form-4 prior to Individual A's November entries into the restricted area, Mr. Irwin's knowledge raises no genuine issue regarding whether AMS *actually* prepared such a Form-4 — the question at issue here.

²³ According to Mr. Howard Irwin (Radiation Safety Officer in November 1985), Dr. Seymour Stein (President of AMS) was of the opinion that he (Dr. Stein) had seen a Form-4. Staff Motion, Attachment 10, "Transcribed Interview of Howard Irwin" (Oct. 9, 1985), at 12. However, AMS never presented an affidavit from Dr. Stein stating that he saw a Form-4 for Individual A prior to the November entry in question. In addition, an affidavit from Dr. Stein (not itself in the record but quoted by the NRC investigator in the same interview with Mr. Irwin) indicated that Dr. Stein himself had not seen the Form-4, but rather that other "individuals" had informed him that they had seen it. *Id.* at 7.

²⁴ AMS Brief at 20-22.

²⁵ See authorities cited in note 13, *supra*.

²⁶ AMS Brief at 19-20.

To be complete, the Form-4 in question was required to include a calculation of Individual A's entire past occupational exposure history, a calculation of the additional occupational exposure that Individual A could still receive, and Individual A's signature.²⁷ Moreover, AMS was required to have completed the Form-4 prior to Individual A's entry into the restricted area.²⁸

Even assuming that Mr. Irwin knew Individual A's exposure history, Mr. Irwin nevertheless acknowledged that, prior to Individual A's entry into the restricted area, Mr. Irwin had not yet committed to writing the two required calculations specified above.²⁹ In addition, Mr. Irwin indicated that, in his view, no one else would have prepared Individual A's Form-4. In this regard, Mr. Irwin stated that he had no specific knowledge of any other person completing a Form-4 for Individual A prior to the entries in question.³⁰ For all of the reasons set forth above, we conclude as a matter of law that Mr. Irwin's knowledge of the exposure history is inadequate to raise a question as to whether AMS completed a Form-4 in connection with, and prior to, Individual A's November entries into the restricted area.

b. Prior Inspection Reports

In addition, AMS argues that certain NRC inspection reports raise a factual question as to whether a Form-4 for Individual A was on file at AMS.³¹ AMS indicates that NRC Staff had prepared those reports as a result of inspections in July and September 1984 regarding both the presence of Form-4s for AMS' employees and another alleged overexposure of Individual A. According to AMS, these inspection reports contained no indication that a Form-4 for Individual A was improperly missing from AMS' files. From this, AMS concludes that a completed Form-4 was *necessarily* present in its files at the time of the July and September investigations. Otherwise, according to AMS, the investigators would have been unable to review Individual A's exposure history or investigate the allegations.

²⁷ 10 C.F.R. § 20.102(b)(1).

²⁸ *Id.*

²⁹ Although Mr. Irwin did prepare a Form-4 which was dated September 12, 1984, he acknowledged that he had actually prepared that Form-4 in January 1985 (approximately 2 months after the exposures) and had backdated the document. Staff Motion, Attachment 10, "Transcribed Interview of Howard Irwin" (Oct. 9, 1985), at 5-10. Mr. Irwin further stated that he did not even provide a rough copy of the Form-4 for typing until late December 1984 or January 1985 — at least a month after the November 1984 entries. *Id.* at 9.

³⁰ Furthermore, the record contains no evidence that AMS ever satisfied the third requirement for a completed Form-4, i.e., that Individual A signed the Form-4 prior to entering the restricted area in November. In fact, Individual A stated that the only time he signed a Form-4 was in January 1985 — approximately 2 months after the November entries in question. Staff Motion, Attachment 6, "Transcribed Interview of 'Individual A'" (Sept. 3, 1985), at 23.

³¹ AMS Brief at 20-22.

AMS' logic is flawed because the failure by the NRC to detect a violation does not necessarily prove the negative that no violation existed. The NRC inspectors are not omniscient, and limited NRC resources preclude careful review of all but a fraction of the licensed activity. The argument is also flawed because no Form-4 for Individual A's November entry was required to be in AMS' files in July and September. AMS could have qualified for the Form-4 exception to the dose limits of section 20.101(a) by completing a Form-4 as late as November 6, immediately before Individual A made his first entry. Therefore, contrary to AMS' assertion, the NRC inspectors' review of the exposure history for Individual A in July and September 1984 would not *necessarily* have revealed a Form-4. Consequently, these reports do not raise a genuine issue as to whether AMS completed the missing Form-4 in preparation for Individual A's November entries.

3. *Conclusion*

Based on the above analyses, we conclude that Staff met its burden of demonstrating that there is no genuine issue in dispute regarding this violation.

B. Violation 2: Inadequate Radiation Surveys, in Contravention of 10 C.F.R. § 20.201(b) (1984)

Section 20.201(b) requires each licensee to "make or cause to be made such surveys as (1) may be necessary for the licensee to comply with the regulations in [10 C.F.R. Part 20], and (2) are reasonable under the circumstances to evaluate the extent of radiation hazards that may be present." The Board concluded that no genuine issue of material fact existed with regard to whether AMS violated this regulation.

AMS disagrees. It argues that the Licensing Board committed reversible error in finding that (1) AMS' only surveys for the purposes of compliance with 10 C.F.R. § 20.201 on November 6 and 21, 1984, were taken on a hand-held meter at the door of the hot cell, and (2) its surveys were inadequate to detect the radiation level within the hot cell.

We agree with AMS that Staff failed to show that no genuine issue remains regarding the adequacy of AMS' surveys. As evidence that the survey at the hot cell door was inadequate, Staff did not specifically argue that the procedure used to take the survey was inadequate. Instead, Staff relied solely on what it considered to be a significant underestimation of the exposure rate when compared with the actual exposure rate.³² AMS did not challenge the Staff's

³² See Staff Motion at 8.

calculation of the underestimation. Rather, AMS argued that it had used proper procedures when determining the estimated exposure rate on the days in question and that its surveys were therefore adequate, irrespective of the underestimation.

We find that the Inspection Report, upon which the Licensing Board relied,³³ erroneously concluded that AMS' surveys yielded an estimated exposure rate that was 50% below the actual exposure rate.³⁴ We find instead that the survey's underestimations for Individuals A and B are 32% and 37%, respectively.³⁵ We cannot conclude that a 32% or 37% underestimation constitutes *per se* an unreasonable survey in violation of section 20.201(b).³⁶ Our regulations allow for a certain margin of error for both survey instrument and dosimeter readings.³⁷ Because these instruments do not yield perfect results, there will almost invariably be discrepancies between the estimated and the actual exposure rates derived from reliance on the readings from these devices.³⁸ Therefore, on remand, when determining whether AMS' radiation survey was adequate, the Staff and Board should consider not only the results from the radiation level readings but also the procedures AMS used to survey for radiation hazards.

With respect to the procedures used to conduct the survey, AMS maintains that it conducted surveys in addition to those performed at the hot cell door. Specifically, according to AMS, it repeatedly used a remote probe survey in preparation for the employees' entries into the hot cell. AMS asserts that the remote probe surveyed the entire hot cell in an effort to detect and remove radioactive pellets (used in conjunction with the assembly of cobalt-

³³ LBP-91-9, 33 NRC at 223.

³⁴ Staff Motion, Attachment 1, "Inspection Report" (June 28, 1985), at 4 and 6.

³⁵ We base this conclusion on the following calculations:

INDIVIDUAL A:

$$\frac{\text{survey dose rate}}{\text{"actual" dose rate}} = \frac{729 \text{ mrem}/2.5 \text{ min}}{750 \text{ mrem}/1.75 \text{ min}} = \frac{292 \text{ mrem}/\text{min}}{429 \text{ mrem}/\text{min}} = 0.68$$

The dose rate measured by the survey was 68% of the value determined by Individual A's dosimeter, or 32% lower than the dosimeter reading (100% - 68% = 32%).

INDIVIDUAL B:

$$\frac{\text{survey dose rate}}{\text{"actual" dose rate}} = \frac{729 \text{ mrem}/2.5 \text{ min}}{790 \text{ mrem}/1.70 \text{ min}} = \frac{292 \text{ mrem}/\text{min}}{465 \text{ mrem}/\text{min}} = 0.63$$

The dose rate measured by the survey was 63% of the value determined by Individual B's dosimeter, or 37% lower than the dosimeter reading (100% - 63% = 37%).

³⁶ We need not and do not reach the question of whether a sufficiently high discrepancy between the estimated and actual exposure rate could constitute a *per se* violation of 20.201(b), irrespective of the procedures used to take the survey. Nor do we need to reach the related question of how serious the discrepancy must be to qualify as a *per se* violation. We note that the Licensing Board did not provide any support for its conclusion that 50% discrepancy between the estimated exposure rate and the actual exposure rate is "not a reliable survey capable of protecting health or promoting safety in any stretch of the imagination." LBP-91-9, 33 NRC at 223. Nor did the Staff, in its filings, provide any support for the same proposition.

³⁷ See, e.g., 10 C.F.R. §§ 35.51(b) and 34.33(c).

³⁸ The underestimations of 32% and 37% in this instance may have actually been acceptable in light of the inherent instrument error.

60 sources³⁹). According to AMS, this survey was done to ensure that the contamination in the hot cell was as low as reasonably achievable, so that the employees would not receive unnecessarily high doses of radiation.⁴⁰ According to AMS, the Licensing Board, in considering whether a genuine issue remained with respect to the adequacy of the AMS' surveys, should have considered these decontamination efforts as part of the survey.

However, the Licensing Board disregarded AMS' decontamination efforts on the grounds that the remote probe that AMS claims to have used to scan for pellets was not calibrated and thus would have been incapable of providing accurate measurements of potential radiation exposure.⁴¹ In addition, the Licensing Board determined that the 50% inaccuracy of the surveys taken with a hand-held meter to measure the radiation exposure levels amounted to a *per se* violation of section 20.201(b).⁴² Therefore, the Licensing Board concluded, "whether or not the remote probe was used becomes immaterial to whether or not a regulatory violation occurred."⁴³

If there had been a 50% discrepancy and if that discrepancy had amounted to a *per se* violation, then the scanning for pellets would have been irrelevant. However, in light of our conclusions that the discrepancy between the estimated and actual exposure rate is less than 50% and that the 32% and 37% discrepancies do not establish a *per se* violation of section 20.201(b), we conclude that the scanning for pellets should have been considered when determining if a genuine issue remains regarding the adequacy of the survey. Section 20.201(a) defines "survey" as:

an evaluation of the radiation hazards incident to the production, use, release, disposal, or presence of radioactive materials or other sources of radiation under a specific set of conditions. When appropriate, such evaluation includes a *physical survey* of the location of materials and equipment, and measurements of levels of radiation or concentrations of radioactive material present.

(Emphasis added.) Thus, when determining what constitutes a survey, section 20.201 requires consideration of more than just quantitative measurements of radiation levels used to determine exposure. It also requires, where appropriate, consideration of physical surveys of the location of materials and equipment.⁴⁴

³⁹ AMS' Brief in Opposition to NRC Staff Motion for Summary Disposition and for Decision Sustaining Order, filed October 4, 1990, at 2.

⁴⁰ AMS Brief at 23-32.

⁴¹ LBP-91-9, 33 NRC at 217 n.22.

⁴² *Id.* at 223.

⁴³ *Id.* at 217 n.22.

⁴⁴ See *Radiation Technology, Inc.* (Lake Denmark Road, Rockway, NJ 07866), ALAB-567, 10 NRC 533, 546 (1979) (the question of whether a violation of section 20.201(b) occurred did not turn on "the presence or absence of any specific radiation level, but in the failure to check regularly for the presence of radiation hazards").

Although the scanning for pellets, alone, would not have amounted to an adequate survey, the probe in this instance was used as only the first step of the overall survey, and was used in a nonquantitative manner to detect the presence of radiation hazards, i.e., the pellets. As such, the scanning for pellets, in addition to the radiation level and airborne contamination readings, is material to the issue of whether AMS had failed to perform an adequate survey in violation of section 20.201(b).

We therefore reverse the Licensing Board's grant of summary disposition with respect to Violation 2 and remand Violation 2 to the Licensing Board for further proceedings consistent with this order. The Licensing Board, before commencing with any evidentiary hearing on this matter, should direct the parties to address the question of whether, in light of our findings on appellate review, a genuine issue remains regarding the adequacy of AMS' survey.

C. Violation 3: Failure to Read Dosimeters at Required Intervals, in Contravention of License Condition 16

Condition 16 of AMS' 1984 license requires AMS to use licensed materials in accordance with the statements, representations and procedures contained in AMS' "Radiation Safety Procedures Manual, ISP-1." Section 7.2.c of that Manual states that:

[I]n high dose areas . . . [t]he pencil type dosimeters will be read at intervals consistent with the anticipated dose rate to determine that the actual exposure is not greater than the anticipated exposure.⁴⁵

According to AMS, the Licensing Board committed reversible error when it concluded that, on November 21, 1984, two AMS employees failed to read their dosimeters between entries into the hot cell. AMS asserts that each of these two employees entered the hot cell only twice and that each read his dosimeter between his two entries.⁴⁶ Both Staff and the Board disagree with AMS and conclude instead that each of the two employees entered the hot cell on four separate occasions (rather than just two) and, during those four entries, each failed to read his dosimeter at the proper intervals.

Thus, the questions at issue are how frequently should the dosimeters have been read (based on the intervals consistent with the dose rate), and whether AMS' employees actually read their dosimeters at the required frequency. AMS itself established a 1-minute interval as the maximum allowable exposure time

⁴⁵ Staff Motion, Attachment 5, "Order Imposing Civil Monetary Penalties" (May 30, 1989), Appendix ("Evaluations and Conclusions"), at 3.

⁴⁶ AMS Brief at 33-41.

before which Individuals A and B were required to read their dosimeters while in the hot cell on November 21, 1984.⁴⁷ This interval was based on an anticipated dose rate of 750 millirems per person.⁴⁸ On November 21, Individuals A and B spent 3.65 minutes and 3.8 minutes in the hot cell, respectively.⁴⁹ Therefore, simple mathematics indicates that each individual should have checked his dosimeter a minimum of three times during the total time spent in the hot cell and an additional time after the individual had completed his work.⁵⁰

However, Individuals A and B failed to read their dosimeters with this required frequency. The Licensing Board correctly determined that they read their dosimeters only twice — once after the morning entry and a second time after the employees left the hot cell for the final time in the afternoon.⁵¹

To support its argument that the Board erred in making this determination, AMS relies upon its own internal documents and upon Staff's interviews with two AMS employees (Mr. Sibert and Individual A). However, as discussed below, the evidence on which AMS relies does not controvert the Board's findings that the dosimeters were read only twice and that the frequency of the readings was inadequate.

AMS' internal documents indicate only that, prior to the November 21 cell entry, Ms. Josephine Powell (an AMS employee who was stationed outside the

⁴⁷ Staff Motion, Attachment 1, "Inspection Report" (June 28, 1985), Attachment C, Item 2, "Form ISP-18" (Nov. 21, 1984), at 2, prepared by AMS in connection with the November 21 hot cell entries.

⁴⁸ *Id.*

⁴⁹ *Id.* See also Staff Motion, Attachment 8, "Transcribed Interview with Glenn Sibert" (Sept. 3, 1985), at 33-34, 36 (the periods of 3.65 and 3.8 minutes were spent entirely in the hot cell).

⁵⁰ We agree with AMS that reading of the dosimeters in the hot cell could be inconsistent with efforts to maintain radiation exposure to levels "as low as is reasonably achievable ['ALARA']" as that phrase is defined in 10 C.F.R. § 20.1(c). Therefore, we interpret AMS' calculations regarding the 1-minute intervals for reading the dosimeters as only an approximation. Nevertheless, as discussed in more detail below, AMS employees made four different entries on the day in question and, therefore, could have read their dosimeters at the required frequency when they were outside the hot cell without violating ALARA principles.

The evidence clearly established that Individuals A and B each entered the hot cell on four separate occasions — one in the morning and three in the afternoon. See LBP-91-9, 33 NRC at 219, 221. In addition to the evidence cited by the Licensing Board, the following two statements by the president of AMS also support this conclusion. In a July 31, 1985 letter from AMS' president, Dr. Stein, to the NRC Staff, the president stated that "[t]he work performed on November 21, 1984 involved two cell openings and multiple individual trips in and out of the cell." He further stated that "the individuals made four trips during the total entry time of 3.65 and 3.80 minutes." Staff Motion, Attachment 3, AMS' July 31, 1985 "Response to Notice of Violation," at 2.

One related matter also deserves brief comment. The Licensing Board, in making its determination regarding the number of entries into the hot cell, concluded that Mr. Sibert's testimony on this issue was internally inconsistent and therefore "simply lack[s] credibility." 33 NRC at 219-20. AMS argues that such a determination regarding credibility should be made only in a decision on the merits after hearing, not in a summary disposition order. AMS Brief at 30-31. We believe that AMS has taken the Board's language out of context and has thereby distorted its meaning. When we read the Board's language in context, we conclude that the Board was merely determining that Mr. Sibert's statements were ambiguous and therefore insufficient to raise a genuine issue of dispute. Thus, the Board's statement regarding Mr. Sibert's credibility, while unartful, does not constitute reversible error. See *Gagne v. Northwestern National Insurance Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (a genuine issue of material fact is not created by "ambiguous" and "abstract" statements that are insufficient to support a finding of discrimination).

⁵¹ LBP-91-9, 33 NRC at 218-21.

cell) was assigned to monitor the times of Individuals A and B in the cell.⁵² However, AMS has not offered an affidavit from Ms. Powell or any other person who actually saw the two employees read their dosimeters four times. Although AMS alleges that Staff withheld a transcript of an interview with Ms. Powell, AMS has never requested any such transcript from Staff. Nor has AMS disclosed the results of any internal investigation that it may have conducted shortly after the events in question to determine if the violations occurred, including any statement from Ms. Powell.

Instead, AMS relies on the testimony of Mr. Sibert and Individual A in an effort to establish that Individuals A and B read their dosimeters with the required frequency. However, Mr. Sibert could specifically recall only one actual reading in the restricted area (160 millirems)⁵³ — a reading that the Licensing Board included when determining that the two employees had read their dosimeters only twice.⁵⁴

In addition, AMS quoted Mr. Sibert's testimony that AMS had established the 1-minute intervals and that Ms. Powell was in the observation booth as a monitor. However, without more, Mr. Sibert's statements are insufficient to raise a genuine issue of material fact as to whether the employees actually read their dosimeters more than twice.

In a further effort to support its assertion that Individuals A and B read their dosimeters at the proper frequency, AMS relies upon Individual A's statements that each interval spent in the hot cell was no more than 1 minute.⁵⁵ According to AMS, if each employee made only two 1-minute entries, this would amount to a total of only 2 minutes in the hot cell, and reading of the dosimeters twice in this time period would be an adequate frequency. We reject AMS' argument on the ground that Individual A himself contradicts the underlying premise of the argument by stating he entered the hot cell four times, not two.⁵⁶

The actual final dosimeter readings also support our conclusion that the two employees failed to read their dosimeters at an adequate frequency. Individuals A and B received more than twice their anticipated doses (750 millirems each) on November 21, 1984. By the time they had left the decontamination room on the day in question, Individual A had received a 1625-millirem dose and Individual B had received a 1600-millirem dose for the day.⁵⁷ If the dosimeters

⁵² Staff Motion, Attachment 1, "Inspection Report" (June 28, 1985), Attachment C, Item 2, "Form ISP-18" (Nov. 21, 1984), at 2.

⁵³ Staff Motion, Attachment 8, "Transcribed Interview of Glenn Sibert" (Sept. 3, 1985), at 50-51.

⁵⁴ LBP-91-9, 33 NRC at 220-21.

⁵⁵ AMS Brief at 34 (quoting Staff Motion, Attachment 6, "Transcribed Interview of 'Individual A'" (Sept. 3, 1985), at 21).

⁵⁶ Staff Motion, Attachment 6, "Transcribed Interview of 'Individual A'" (Sept. 3, 1985), at 16-21.

⁵⁷ Staff Motion, Attachment 1, "Inspection Report" (June 28, 1985), Attachment C, Item 2, "Form ISP-18" (Nov. 21, 1984), at 2.

had been checked at approximately 1-minute intervals, the employees should not have received twice the estimated dose.

Based on the reasoning above, we conclude that the uncontroverted evidence in the record clearly establishes that Individuals A and B read their dosimeters only twice, and that this frequency was inadequate, in light of AMS' own calculation of the anticipated dose rate. Therefore, Staff has established that there are no genuine issues of material fact in dispute regarding Violation 3.

D. Violation 4: Failure to Calibrate Dosimeters Within 180 Days, in Contravention of License Condition 16

License Condition 16 requires AMS to possess and use its licensed material in accordance with statements, representations, and procedures contained in AMS' license application. Schedule E of the referenced application requires dosimeters to be calibrated with a radiation source at intervals of 180 days or less, or before first use if longer than 180 days since last calibration.⁵⁸ The Board concluded that Staff had demonstrated an absence of genuine issues of material fact regarding Violation 4 and that AMS had committed the violation.⁵⁹ AMS argues that the Licensing Board erred in holding that the dosimetry used by two AMS employees on November 6 and 21, 1984, had not been calibrated.⁶⁰ We disagree.

The Board correctly ruled that the material fact regarding this violation is AMS' failure to calibrate the dosimetry devices at intervals not exceeding 180 days, in accordance with the techniques set forth in Schedule E.⁶¹ The Licensing Board also correctly determined that AMS had admitted deviating from the license conditions with regard to the calibration of the dosimeters used in November 1984.⁶² The Licensing Board properly concluded that both Staff and Licensee had either misinterpreted or misstated the material fact at issue in Violation 4. Therefore, the Board clarified that the material fact was not that AMS failed to calibrate the dosimeters, but that AMS failed to calibrate the dosimeters in accordance with the provisions of its own license — using certain specified techniques and within certain specified time intervals.

⁵⁸ Staff Motion, Attachment 5, "Order Imposing Civil Monetary Penalties" (May 30, 1989), Appendix ("Evaluations and Conclusions"), at 4.

⁵⁹ LBP-91-9, 33 NRC at 221-22, 224-25.

⁶⁰ AMS Brief at 42-46.

⁶¹ LBP-91-9, 33 NRC at 222. The dosimeters used by Individuals A and B had not been properly calibrated since at least January 1983. Notice of Violation and Proposed Imposition of Civil Penalties, issued June 28, 1985, at 2.

⁶² 33 NRC at 222 (citing Staff Motion, Attachment 3, AMS' July 31, 1985 "Response to Notice of Violation," at 3-4, and Attachment 7, "Transcribed Interview of Howard Irwin" (Sept. 4, 1985), at 35-37).

AMS argues that the Licensing Board cannot merely “rewrite an alleged violation to better suit its finding against AMS.”⁶³ In so arguing, AMS misreads the Board’s order. The Licensing Board did not “rewrite [the] alleged violation” in any respect. The Board merely indicated what facts were material to this violation. The Licensing Board, as one would expect, based this conclusion on not only the “Statement of Material Facts” submitted by the parties, but also the parties’ discussion of these facts in the Staff’s motion and AMS’ answer to the motion.⁶⁴ To do otherwise could lead to unnecessary or protracted litigation in instances where material facts are misstated in the “Statement of Material Facts” but are clearly indicated by other submissions, and where no genuine issue as to any of these material facts is established by the record.⁶⁵

AMS goes on to argue that “it is extremely difficult to put forward one’s case when the judges change the rules.”⁶⁶ This argument appears to suggest that AMS was somehow not on notice that Violation 4 involved AMS’ failure to calibrate its dosimeters in accordance with the method specified in License Condition 16. If this is in fact AMS’ position, then we reject it. AMS has acknowledged that it was not following the procedure for calibrating the dosimeters contained in its 1979 application, which was required by License Condition 16. In AMS’ response to the Notice of Violation, dated July 31, 1985, signed by AMS’ president, Dr. Seymour S. Stein, the Licensee stated:

AMS denies the alleged violation. The procedure for calibration submitted [to the NRC] in 1979 was found to be unworkable in that it did not produce repeatable results. The technique

⁶³ AMS Brief at 42.

⁶⁴ AMS argues that the Licensing Board “may not impose its judgement upon litigators.” AMS Brief at 42. In support of this position, AMS relies on *Regents of the University of California* (UCLA Research Reactor), LBP-82-93, 16 NRC 1391 (1982) (“UCLA”), in which the Licensing Board held that it could not substitute its own judgment for that of a party by dictating the manner in which the party presents its case. *Id.* at 1394-95. Although AMS’ restatement of this particular ruling in *UCLA* is accurate, it is nevertheless inapposite to the case at bar. The Licensing Board in *UCLA* never held that it was in any way precluded from determining what the material facts were and whether any genuine issues existed regarding these material facts. To the contrary, the Licensing Board in *UCLA* stated that, after it received the parties’ (Staff’s, Licensee’s, and Intervenor’s) conclusions as to whether there was any genuine issue regarding any fact pertinent to the contentions at issue, it would determine the facts about which there existed no genuine disputes, the “relevance of any particular fact and the legal consequences of any set of facts.” *Id.* at 1396-97.

⁶⁵ This conclusion is consistent with Commission policy. The Commission has encouraged the Licensing Board’s use of summary disposition procedures in instances where there is no genuine issue as to any material fact so that evidentiary hearing time will not be unnecessarily devoted to such issues. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 457 (1981). Moreover, Commission regulations indicate that a determination on a motion for summary judgment should be based on all the pleadings, and there is no restriction indicating that the Licensing Board may not make its own determination about what facts are indeed material after all parties have had an opportunity to respond to the motion for summary disposition. See 10 C.F.R. § 2.749(d) (1992) (“The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law”).

⁶⁶ AMS Brief at 44.

adopted as an alternative was the comparison of dosimeter readings with film badge reports on a monthly basis.⁶⁷

Moreover, in the Order Imposing Civil Penalties, dated May 30, 1989, the AMS argument outlined above was specifically addressed and rejected by NRC Staff. Staff informed AMS that:

The licensee is required, in accordance with the provisions of License Condition No. 16, to calibrate dosimeters by using a calibrated radiation source. Intercomparison between dosimeter and film badge readings is not an approved calibration technique. If the licensee concludes that the method required by License Condition No. 16 is unworkable, an alternative method may not be substituted without first having the license amended to authorize the alternative procedure. Using a radiation source is the method used throughout the industry and is the only calibration method currently approved by the NRC.⁶⁸

This detailed response from Staff clearly outlined the factors it considered in assessing Violation 4. AMS' concession and Staff's rebuttal clearly indicate that AMS was on notice that Violation 4 involved AMS' failure to calibrate its dosimeters in accordance with the method required by its license.

AMS never challenged Staff's reading of License Condition 16 or Schedule E of the referenced application, nor is there any indication from our review that either was misinterpreted. In addition, AMS never indicated that it had received authorization from the NRC to develop or apply a new method of calibration. We therefore conclude that there are no genuine issues of material fact in dispute regarding Violation 4. The dosimeters used by the two individuals who worked in the hot cell on November 6 and 21, 1984, had not been calibrated (as that term is defined in the 1979 application) for more than 180 days. This failure violated AMS License Condition 16.

E. Affidavits

AMS raises three arguments on appeal regarding affidavits. First, AMS contends that the Licensing Board committed reversible error in "chastising"⁶⁹ AMS for not providing affidavits when the NRC Staff's only affidavit was provided by an individual "who was not involved in the events surrounding the alleged violations, not involved in the issuance of the [May 30, 1989] Order, and who failed to even state that he even had personal knowledge of the events."⁷⁰

⁶⁷ Staff Motion, Attachment 3, AMS' July 31, 1985 "Response to Notice of Violation," at 3.

⁶⁸ Staff Motion, Attachment 5, "Order Imposing Civil Monetary Penalties" (May 30, 1989), Appendix ("Evaluations and Conclusions"), at 4.

⁶⁹ AMS Brief at 47 (citing LBP-91-9, 33 NRC at 215 n.12).

⁷⁰ AMS Brief at 48. *See also id.* at 52-53 (asserting that Staff failed to submit the affidavit of the Director of the NRC's Office of Enforcement).

AMS' contention is frivolous. The individual to whom AMS is referring is Mr. James Lieberman and, as indicated both in his affidavit and in Staff's Motion for Summary Disposition, he is the Director of the NRC's Office of Enforcement — the same office that initiated this civil penalty proceeding against AMS.⁷¹ Mr. Lieberman has held that position since 1987 and was Director on May 30, 1989, when Staff issued the Penalty Order to AMS. In fact, earlier in this proceeding, AMS itself acknowledged that Mr. Lieberman was Director of the Office of Enforcement.⁷² Staff submitted his affidavit for the sole purpose of establishing that the severity level assigned to the four violations and the amount of the civil penalty assessed for this severity level were in accordance with the General Statement of Policy and Procedure for NRC Enforcement Actions.⁷³ Mr. Lieberman's position as Director of the Office of Enforcement qualifies him to address this issue. Consequently, the Board did not err in the manner suggested by AMS.

Second, AMS complains that the Board inappropriately "attack[ed]" it for failing to provide affidavits addressing Violation 3.⁷⁴ AMS responds to the Board's alleged "attack" by asserting that AMS could not obtain affidavits from Individual A and Ms. Powell because they no longer work for AMS, and from Mr. Sibert because he is deceased.⁷⁵ If AMS was having difficulty obtaining the affidavits it needed, but anticipated obtaining them in the future, or if it suspected that Staff possessed evidence necessary for AMS to justify its position, AMS should have notified the Licensing Board. As specified in 10 C.F.R. § 2.749(c), this notification should have been by affidavit indicating that AMS could not produce by affidavit the facts essential to justify its position at that time. In filing such an affidavit, AMS could have asked the Board to deny the motion for summary disposition or to order a continuance so that AMS might obtain the factual affidavits. AMS' failure to avail itself of the procedural protection described above precludes it from prevailing in its second argument.

Third, AMS suggests that the Lieberman affidavit, the sworn testimony contained in transcripts of interviews, and the other evidence offered by Staff fail to establish the absence of genuine issues in dispute regarding material facts.⁷⁶ Thus, according to AMS, Staff was not entitled to a decision in its favor,

⁷¹ Staff Motion at 11 and Affidavit of James Lieberman (attached to motion) at 1.

⁷² AMS' Brief in Opposition to NRC Staff Motion for Summary Disposition and for Decision Sustaining Order, filed October 4, 1990, at 25:

In his affidavit, James Lieberman admits that none of the single violations were of a Severity Level III but that he reached Severity Level III due to the collective violations. Since the agency admits it was the judgment of their Director of the Office of Enforcement and not that their [*sic*] was, *per se*, a Severity Level III violation, there is an obvious dispute as to a material fact. The basis of Mr. Lieberman's judgment certainly raises a question of material fact.

⁷³ 10 C.F.R. Part 2, Appendix C.

⁷⁴ AMS Brief at 38.

⁷⁵ *Id.* at 4, 5, 38.

⁷⁶ *Id.* at 48-49.

regardless of whether AMS offered additional evidence in support of its position opposing the motion for summary disposition. For the reasons previously set forth in this order, we agree with the Licensing Board that the evidence submitted by Staff with respect to Violations 1, 3, and 4 was sufficient to establish the absence of a genuine issue as to any material fact. With respect to Violation 2, we have reversed the grant of summary disposition in favor of Staff and have remanded that violation to the Licensing Board for further disposition. Consequently, we reject AMS' third contention to the extent indicated.

F. Allegedly Retroactive Application of Commission Rule

In a footnote, the Licensing Board commented that Staff's reliance on documents that are referenced in the license is consistent with the Atomic Energy Act, Commission regulations, and past Staff practice.⁷⁷ In support of this comment, the Board cited a 1986 notice to a Final Rule that related to the medical use of byproduct material. In that notice, according to the Licensing Board, the Commission gave a "clear account of its regulatory program and licensing practices regarding byproduct material licenses of the type issued to AMS."⁷⁸

On appeal, AMS complains that the Licensing Board committed reversible error when it chastised AMS for failing in 1984 to abide by this 1986 Commission notice.⁷⁹ AMS has misconstrued the intent of the Licensing Board. The Licensing Board was neither chastising AMS nor holding it to standards that were not yet in effect at the time of the November 1984 violations. Rather, the Board raised this matter in reference to Staff's practice, not Licensee's. To the extent that AMS might be asserting that, prior to 1986, the Commission's regulatory program and licensing practices were unclear as to whether a final license could incorporate by reference the requirements in the application for that same license, we disagree.

G. Mitigation of Severity Level

Our decision to remand Violation 2 to the Licensing Board may ultimately necessitate a modification of the severity level and/or penalty amount, if Staff

⁷⁷ LBP-91-9, 33 NRC at 223 n.49. In this footnote, the Licensing Board was specifically referring to Staff's references to language in AMS' 1979 license application which the Commission incorporated into Condition 16 of AMS' license. The Licensing Board's citations included the Atomic Energy Act of 1954, § 182(a), 42 U.S.C. § 2232, and 10 C.F.R. § 30.34. The pertinent language in both of these sections existed well before the alleged violations in 1984.

⁷⁸ LBP-91-9, 33 NRC at 223-24 n.49 (citing Final Rule, Medical Use of Byproduct Material, 51 Fed. Reg. 36,932 (Oct. 16, 1986)).

⁷⁹ See AMS Brief at 50.

fails to prove the occurrence of Violation 2. We therefore remand the issue of the appropriateness of the severity level and penalty amount to the Licensing Board for further proceedings consistent with the disposition of Violation 2. Nevertheless, we will address two arguments raised by AMS, the disposition of which may be helpful to the Board and parties in any further litigation regarding the appropriateness of the severity level and penalty amount.

First, AMS argues that the Licensing Board committed reversible error “in attacking counsel for AMS’ approach in requesting a hearing on the imposition of an escalated fine.”⁸⁰ AMS again misconstrues the Board’s order. In the part of the order to which AMS is referring, the Licensing Board merely pointed out that AMS’ tactic of requesting mitigation of the severity level rather than of the civil penalty amount was not the approach that licensees typically take in proceedings involving civil penalties.⁸¹ We see nothing offensive about this observation.

Second, AMS maintains that the Licensing Board’s discussion of the Severity Level was flawed because the Licensing Board relied on an affidavit from James Lieberman as opposed to one provided by the “Director of the Office of Enforcement whose affidavit was not presented.”⁸² The Licensing Board’s reliance on Mr. Lieberman’s affidavit was proper. As is noted above and as was expressly stated in his affidavit, Mr. Lieberman *is* the Director of the NRC’s Office of Enforcement.

H. Evidentiary Hearing

AMS argues that the unusually long delay between the proposal of the civil penalty and its actual imposition constituted a denial of due process because AMS never had an opportunity to cross-examine witnesses who later became unavailable.⁸³ Thus, according to AMS, an evidentiary hearing is required. However, AMS fails to demonstrate that there was any additional testimony that *could be presented at a hearing*, but which was not available at that time regarding Violations 1, 3 and 4, when the proceeding was before the Licensing Board.⁸⁴ An evidentiary hearing would be necessary only if a genuine issue of

⁸⁰ AMS Brief at 51.

⁸¹ Specifically, the Licensing Board noted that other licensees have generally requested mitigation of the *amount* of the penalty — a request that AMS never specifically proffered either to the Board or to us. The Licensing Board found this to be peculiar because, if the severity level was lowered to a Severity Level IV violation, as AMS requested, a fine could still be imposed, especially where there are repeated violations, as is the case here. LBP-91-9, 33 NRC at 227. Thus, the Licensing Board concluded that, although AMS had cited the proper portion of the Commission’s enforcement policy regarding mitigation of the amount of a civil penalty, AMS had never made the argument that the considerations outlined in this enforcement policy were improperly overlooked in the Director’s decision to impose the specific amount of civil penalty present in this proceeding. *Id.* at 225 n.58.

⁸² AMS Brief at 52-53.

⁸³ AMS Brief at 56.

⁸⁴ See 10 C.F.R. § 2.749(c).

material fact were in dispute. Because AMS has not demonstrated the existence of such a genuine issue with respect to Violations 1, 3, and 4, AMS has not been denied its statutory right to a fair hearing with respect to these violations, even though an evidentiary hearing was not held.⁸⁵ With respect to Violation 2, an evidentiary hearing has not been precluded.

VI. CONCLUSION

1. The Licensing Board's grant of summary disposition in favor of the Staff with respect to Violation 2 of Staff's Order Imposing Civil Monetary Penalties is *reversed*.

2. Violation 2 is *remanded* to the Licensing Board for further proceedings consistent with this order.

3. The issue of the appropriate severity level and penalty amount is *re-manded* to the Licensing Board for resolution consistent with the disposition of Violation 2.

4. All other portions of LBP-91-9 are *affirmed* and AMS' appeal of those portions of that order is hereby *denied*.

It is so ORDERED.

For the Commission⁸⁶

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of September 1993.

⁸⁵ See *Veg-Mix, Inc. v. Department of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (an agency may ordinarily dispense with an evidentiary hearing when there is no genuine dispute as to a material issue of fact); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985) ("[a] request for hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held"), *cert. denied*, 475 U.S. 1123 (1986).

AMS also argues that the Licensing Board committed reversible error in chastising AMS for citing a case pertinent to the question of whether an evidentiary hearing is required to permit AMS to cross-examine witnesses — a case also cited by the NRC Staff. AMS Brief at 56 (citing *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962)). We have reviewed the Licensing Board's discussion of this case and read no such chastisement in the Board's language.

⁸⁶ The Chairman was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

**Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy**

In the Matter of

**Docket Nos. 50-424-OLA-3
50-425-OLA-3
(ASLBP No. 93-671-01-OLA-3)
(Re: License Amendment;
Transfer to Southern Nuclear)**

**GEORGIA POWER COMPANY, et al.
(Vogtle Electric Generating Plant,
Units 1 and 2)**

September 8, 1993

The Board ruled that statements were privileged both as attorney work-product and attorney-client privilege when the statements were given to Applicant's attorneys at a time that they had reason to believe they were relevant to an OI investigation that could occur. An allegation that the interviewees were "hounded" to make them tell a common story is not enough to overcome the privilege. However, persuasive evidence, presented at a hearing, of "hounding" or other improper attorney conduct could overcome the privilege.

**RULES OF PRACTICE: WORK PRODUCT PRIVILEGE;
ATTORNEY-CLIENT PRIVILEGE ("HOUNDING")**

Proof at a hearing that clients had been "hounded" or otherwise improperly treated could overcome a claim of privilege, either under the work product privilege or the attorney-client privilege. Where a party is on notice that such

proof may be presented, he may be ordered to have disputed documents available at the hearing for purposes of possible production.

**RULES OF PRACTICE: ATTORNEY-CLIENT AND
WORK-PRODUCT PRIVILEGES IN A CORPORATION**

Attorney-client and work-product privileges are not limited to a controlling group with a corporation. The privileges are broadly construed to encourage full information-gathering by attorneys. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

**RULES OF PRACTICE: ATTORNEY-CLIENT AND
WORK-PRODUCT PRIVILEGES (WAIVER)**

An evidentiary privilege held by a corporation may be waived only by an authorized employee.

**MEMORANDUM AND ORDER
(Discovery Motion)**

The purpose of this Memorandum and Order is to rule on a motion to compel filed by Intervenor on July 23, 1993.¹

I. BACKGROUND

The documents sought by Intervenor through this motion are signed statements of John Aufdenkampe, Thomas Webb, Jack Stringfellow, and George Hairston — all GPC employees at the time. The statements relate to conversations held on April 19, 1990, about LER 90-006, which Intervenor alleges was inaccurate when it was filed with the Nuclear Regulatory Commission (NRC).

¹Intervenor is Allen L. Mosbaugh. The relevant filings are Intervenor's Motion to Compel Production of Affidavits in the Possession of Georgia Power Company (GPC), July 23, 1993 (Intervenor's Motion to Compel), and Georgia Power Company's Response to Intervenor's Motion to Compel Production of Affidavits, August 2, 1993 (GPC Response).

We note that there is one other pending motion to compel: Intervenor's Motion to Compel Answers to Interrogatories and Document Requests by the Staff of the U.S. Nuclear Regulatory Commission, July 12, 1993. However, we have been informed by the Staff (NRC Staff Report on Outstanding Discovery Matters, August 9, 1993, at 2), that this motion is under negotiation. We request Intervenor and Staff to notify us promptly if those negotiations end or if the parties determine that the Intervenor's needs have been adequately satisfied.

These affidavits were obtained at a time when GPC could reasonably anticipate enforcement action against it.²

II. LEGAL SETTING

GPC claims that the affidavits in question are not discoverable because they are protected by the attorney work-product privilege and the attorney-client privilege. For reasons set forth below, we accept, at this time, both claims of privilege.

A. Work Product Privilege³

The NRC's discovery rules regarding the work product doctrine are set out in 10 C.F.R. § 2.740(b)(2), which provides:

(2) *Trial preparation materials.* A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

These rules are adapted from Rule 26(b)(3) of the Federal Rules of Civil Procedure, *Commonwealth Edison Co. (Zion Station, Units 1 and 2)*, ALAB-196, 7 AEC 457, 460 (1974), which is itself a derivation of the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947). See *Advisory Committee Note to 1970 Amendments to Fed. R. Civ. P.*, 48 F.R.D. 459, 499 (1970).

The affidavits in question were prepared in anticipation of a hearing. At the time, a section 2.206 petition was pending. Also, GPC had information that there might be an investigation by the NRC Office of Investigations. Hence, it reasonably believed that there would be some form of enforcement litigation for

² GPC's First Supplemental Response to Allen L. Mosbaugh's First Set of Interrogatories, July 13, 1993 (GPC Supplement) at 6, omits any mention of the date of the interviews with its four employees. Similarly, GPC's Response does not appear to contain any date for these interviews. We think this ambiguity in our record should be clarified as there is no reason to consider the date privileged.

³ The beginning of this section of our Memorandum is drawn from our opinion in LBP-93-11, 37 NRC 469, 472 (1993).

which the affidavits might be necessary.⁴ The affidavits are, therefore, covered by the work product privilege.

B. Attorney-Client Privilege

We accept the following statement of GPC as accurately setting forth the law concerning the attorney-client privilege:⁵

The United States Supreme Court has held that, when the client is a corporation, the attorney-client privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation. *Upjohn Co. v. United States*, 449 U.S. 383, 396-97, 101 S. Ct. 677, 685-86 (1981); see also *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1492 (9th Cir. 1989). The Court in *Upjohn* declined to establish an all-encompassing test for application of the attorney-client privilege to corporations. Instead, it held that each case must be evaluated to determine whether application of the privilege would further its underlying purposes of encouraging candid communications between client and counsel and providing effective representation of counsel. *Upjohn*, *supra*, 449 U.S. at 389, 390-91, 396-97, 101 S. Ct. at 682-86.⁶

It is important to understand that *Upjohn* resolved an issue that had been dividing the courts of appeals: whether or not to extend the protection of the attorney-client privilege only to a "control group" in a corporation or to all employees acting within the scope of their duties. *Upjohn* took this second, enlarged view of the privilege. In the course of its opinion, at 449 U.S. 390, 66 L. Ed. 2d 592, the Court stated:

[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. . . .

Then, at 449 U.S. 391-92, 66 L. Ed. 2d 592-93, the Court quotes *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (*en banc*):

In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem "is thus faced with a 'Hobson's choice'. If he interviews employees not having 'the very highest authority', their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with

⁴ GPC Response at 9-10.

⁵ *Id.* at 17.

⁶ See also *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-31, 18 NRC 1303, 1305 (1983).

'the very highest authority', he may find it extremely difficult, if not impossible, to determine what happened.'"

Applied to this case, the Board thinks of management's Hobson's choice slightly differently, but we nevertheless conclude that the privilege applies. Management may decide it wants to investigate a problem and ascertain the truth. It may need to ask very probing questions. To encourage this kind of appropriate management action, in a complex regulatory setting in which an enforcement action was reasonably foreseeable, GPC used its lawyers. It is appropriate that these professionals should be given as much information as possible without having to risk public disclosure of their work. The attorney-client privilege protects this activity, and the company need not later reveal the affidavits it compiled. (Needless to say, it is only the affidavits that are protected and not the underlying facts, which are certainly discoverable. *Upjohn*, 449 U.S. at 395-96, 66 L. Ed. 2d at 595.)

In this instance, GPC's employees spoke to GPC's lawyer concerning an important safety event. It was the lawyers' job to represent their employer, to ascertain the truth, and to disclose the truth as perceived by GPC. It is the purpose of the attorney-client privilege to provide the conditions under which employees may talk freely to the company attorney.

We therefore hold that these documents are covered by the attorney-client privilege.

C. Limitations on the Privileges

There is one more complication to this situation. This arises because Intervenor asserts that some or all of these individuals may have been "hounded" or otherwise pressured to sign these affidavits.⁷ This mere assertion, not demonstrated at a hearing, is not sufficient to overcome the attorney-client privilege or the attorney work-product privilege. However, if Intervenor proved that fact at hearing, we could be persuaded to release the affidavits at that time. *Upjohn*, 449 U.S. at 396, 66 L. Ed. 2d at 595, *citing* Federal Rules of Evidence 501 and S. Rep No. 93-1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"). *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1468-69 (1984), *citing* Rule 1.7 of the ABA Model Rules of Professional Conduct.

⁷ Intervenor's Motion to Compel at 2.

III. TIMELINESS

In its response to Intervenor's Motion to Compel, GPC claimed that the request to compel production of these documents is untimely and should be prohibited. Under NRC rules, Intervenor has no automatic right to reply to this claim in order to defend its timeliness. However, a reply will not be necessary because it appears to the Board that the documents being sought are sufficiently important that we will not deny them to Intervenor on the ground of untimeliness. On the other hand, we caution all the parties to be timely, as the Board has the authority to penalize untimeliness in appropriate ways.

IV. WAIVER

Intervenor's claim to waiver of the attorney-client privilege is based entirely on attorney statements concerning actions by Mr. Aufdenkampe.⁸ These statements are not supported by affidavits. They are contradicted by GPC's attorney.⁹ So we find that there is insufficient evidence to persuade us of the facts alleged to lead to waiver. Furthermore, as counsel for GPC points out, when the client is a corporation, the power to waive the attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.¹⁰ *In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129 v. Under Seal*, 902 F.2d 244, 248 (4th Cir. 1990).

V. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 8th day of September 1993, ORDERED that:

- Allen L. Mosbaugh's Motion to Compel is denied.
- At any hearing in this matter, Georgia Power Company shall have available for production the affidavits covered by the Motion to Compel.

⁸ *Id.* at 7.

⁹ GPC Response at 21-22.

¹⁰ *Id.* at 19.

- GPC shall promptly file in this docket the date on which each of the affidavits mentioned in the previous paragraph was taken.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**James H. Carpenter (by PBB)
ADMINISTRATIVE JUDGE**

**Thomas D. Murphy
ADMINISTRATIVE JUDGE**

**Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE**

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Charles N. Kelber
Thomas D. Murphy

In the Matter of

Docket No. 50-293-OLA
(ASLBP No. 93-678-03-OLA)
(Facility Operating License
No. DPR-35)

BOSTON EDISON COMPANY
(Pilgrim Nuclear Power Station)

September 13, 1993

MEMORANDUM AND ORDER
(Termination of Proceeding)

In connection with the Boston Edison Company (Licensee) application for an expansion of a spent fuel pool at its Pilgrim Nuclear Power Station, the Board has pending a request for hearing and petition to intervene filed by the Massachusetts Attorney General (Petitioner) on May 27, 1993. Several extensions of time for filing contentions were requested and granted and a subsequent notification from the Petitioner, dated August 25, 1983, informs the Board that matters at issue with the Licensee have been satisfactorily resolved. The Petitioner therein withdraws its motion to intervene and request for hearing, and the Staff on September 2, 1993, advised the Board that it has no objection to the withdrawal. Accordingly, no matters in controversy existing between the parties, the Board terminates and dismisses the proceeding herein.

It is so ORDERED.

**FOR THE ATOMIC SAFETY
AND LICENSING BOARD**

**James P. Gleason, Chairman
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
September 13, 1993**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

Docket No. 030-31765-EA
(ASLBP No. 93-674-03-EA)
(EA 93-006)
(Order Suspending
Byproduct Material License
No. 37-28540-01)

ONCOLOGY SERVICES CORPORATION

September 21, 1993

In response to a third NRC Staff motion for an additional delay in conducting a license suspension proceeding, the Licensing Board orders discovery delayed for seventy-five days.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

In determining whether to delay an enforcement proceeding pending the outcome of a Staff investigation, five factors must be weighed. They are: (1) length of the delay; (2) reasons for the delay; (3) risk of erroneous deprivation of the due process property or liberty interests of the licensee or any other party; (4) assertion of the right to a hearing by the party opposing the delay; and (5) prejudice to the party opposing the delay. *See* CLI-93-17, 38 NRC 44, 49-52 (1993).

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

In assessing the balancing factor of the reasons for the delay in the proceeding, the presiding officer is called upon to appraise two separate concerns. First, there is the question of what legitimate government interest is served by the delay. This involves an inquiry into the propriety of the Staff's demonstration that there will be a detrimental impact on the investigative process if the delay is not granted. Additionally, there is the question of whether the Staff has shown that there is a legitimate basis for the period of delay it seeks. This involves an inquiry into whether the Staff has made "a credible showing that it is attempting to complete its investigation expeditiously." LBP-93-10, 37 NRC 455, 462, *aff'd*, CLI-93-17, 38 NRC 44 (1993).

EVIDENCE: HEARSAY (STANDARD OF ADMISSIBILITY)

RULES OF PRACTICE: HEARSAY EVIDENCE

It is the rule in administrative hearings that hearsay evidence is generally admissible so long as it is reliable (as well as relevant and material) evidence. *See Duke Power Co.* (Perkins Nuclear Power Station, Units 1, 2, and 3), ALAB-668, 15 NRC 450, 477 (1982).

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

Two components that make up the factor of prejudice to the party opposing delay in an enforcement proceeding are prejudice to the party's ability to conduct licensed activities and prejudice to its ability to defend against the charges in the enforcement order.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

Regarding the ability of the party opposing any delay in an enforcement proceeding to defend itself against the charges leveled by the Staff, although the passage of time is likely to affect the memory of some witnesses, the prejudice arising from this phenomenon is extremely difficult to gauge in the abstract. *See* CLI-93-17, 38 NRC at 58-59.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

In granting a Staff request to delay an enforcement proceeding, the presiding officer has the responsibility to minimize the effects of any delay and to monitor

closely the status of the Staff's investigation to ensure that due diligence is being exercised to bring its inquiry to a conclusion. *See id.* at 60.

MEMORANDUM AND ORDER
(Granting in Part NRC Staff Motion to Delay Proceeding;
Requiring Submission of Staff Status Reports)

Presently before us is the NRC Staff's third request to delay this license suspension proceeding pending the completion of its investigation into the activities of Licensee Oncology Services Corporation (OSC). The suspension at issue was imposed by a January 20, 1993 Staff order discontinuing OSC's authorization to use sealed-source iridium-192 for high dose rate (HDR) human brachytherapy treatments at six specified OSC facilities in Pennsylvania. *See* 58 Fed. Reg. 6825 (1993). The investigation, which is being conducted by the NRC's Office of Investigations (OI), had as its initial focus a November 1992 incident in which a nursing home resident, after undergoing an HDR brachytherapy treatment at OSC's Indiana (Pennsylvania) Regional Cancer Center (IRCC), was released with an iridium-192 source still lodged in her abdomen.

Acting pursuant to 10 C.F.R. § 2.202(c)(2)(ii), we have granted in part two previous Staff requests for a delay in this proceeding by deferring discovery by the parties for consecutive periods of 120 and 90 days, or up through and including September 21, 1993. *See* LBP-93-10, 37 NRC 455, *aff'd*, CLI-93-17, 38 NRC 44 (1993); LBP-93-6, 37 NRC 207, *vacated in part as moot*, CLI-93-17, 38 NRC 44 (1993). The Staff now makes a request for an additional ninety-day delay. *See* NRC Staff Motion for Additional Delay of Proceeding (Sept. 1, 1993) [hereinafter Staff Additional Delay Motion]. OSC again opposes this Staff request. *See* Response of [OSC] to NRC Staff's Third Motion for Additional Delay of Proceeding (Sept. 10, 1993) [hereinafter OSC Additional Delay Motion Response].

For the reasons stated below, we grant the Staff's request in part by delaying discovery for an additional period of seventy-five days. Also, we continue to require the Staff to submit status reports on the progress of the OI investigation.

I. BACKGROUND

Our prior decisions in LBP-93-6, 37 NRC at 210-13, and LBP-93-10, *id.* at 459-60, contain an extended discussion of the backdrop to this proceeding from its initiation in early February 1993 through mid-June 1993 when we ruled on the Staff's second delay motion. Thereafter, as directed in LBP-93-10, *id.* at 467, the Staff filed a status report on the ongoing investigations of OI and

the agency's Office of Inspector General (OIG) into the November 1992 IRCC incident and related events at other OSC facilities. NRC Staff Status Report on Investigations (Aug. 2, 1993) [hereinafter Staff Status Report].

Referencing the accompanying affidavits of OI and OIG officials, the Staff stated in its status report that both the OI and OIG investigations were still ongoing. As it had done previously, the Staff noted that because of OIG's findings from one completed report regarding OSC's activities, OIG was pursuing additional issues. OIG's completion of this additional inquiry was being hampered, the Staff contended, by the failure of OSC to comply fully with outstanding administrative subpoenas and by OSC's requests to delay scheduling interviews. *See id.* at 2. The Staff also stated that the OI investigation was not yet completed because interviews OI previously had indicated it wished to conduct still had not been obtained. The Staff asserted that this was a result of OSC's failure to provide all documents requested under several outstanding administrative subpoenas. The Staff further declared that it was working with the agency's Office of the General Counsel to request that the United States Department of Justice (DOJ) seek a court order enforcing the subpoenas. *See id.*

With its September 1, 1993 motion, the Staff now seeks a third delay of this proceeding, through December 20, 1993. This time, however, the Staff puts forward only the incomplete OI investigation as the basis for delay.¹ Referring to statements in the attached affidavit of OI Deputy Director Roger A. Fortuna, the Staff asserts that OI still has not been able to complete the necessary witness interviews or reach a final determination about whether any other documents are needed because of the purported failure of OSC to produce all subpoenaed documents. The Staff also continues to maintain that, pending the completion of the OI investigation, the release of investigative documents and interview transcripts through civil discovery could adversely affect OI's investigation by jeopardizing the integrity of any witness interviews yet to be conducted and by revealing to OSC the methods and focus of its investigation. *See Staff Additional Delay Motion at 6-7.*

In its response, OSC again protests that further delay is unwarranted because the Staff has failed to meet its "good cause" burden under section 2.202(c)(2)(ii). OSC maintains that the purported basis for the delay — its failure to supply subpoenaed documents — is not compelling because the Staff has not demonstrated the relevance of the documents requested so as to meet its increasing burden to justify any delay. *See OSC Additional Delay Motion Response at 1-4.* This demonstration is particularly wanting, OSC asserts, in light of OI's

¹In its motion, the Staff states that OIG is not requesting any additional delay in this proceeding. *See Staff Additional Delay Motion at 6 n.3.* Further, in its August status report the Staff informed us that a Commonwealth of Pennsylvania criminal investigation regarding the November 1992 IRCC incident has been concluded and will not result in any state criminal charges against OSC or its employees. *See Staff Status Report at 2-3.* The Staff thus makes no attempt to rely on any potential state prosecution as a basis for delay.

recent issuance of an additional subpoena for the documents that OI previously contended were required to be disclosed under several outstanding subpoenas. OSC also declares that there is a substantial risk that the Staff's suspension order is erroneously depriving OSC of its license, as evidenced by recent filings regarding summary disposition of several issues posed by the parties for litigation in this proceeding. *See id.* at 5-6.

II. ANALYSIS

In its recent decision affirming our June 1993 determination to delay discovery in this proceeding for an additional period of 120 days, the Commission identified five factors it found were appropriate to weigh in reaching a decision about whether to grant the Staff's delay request. These elements are: (1) length of the delay; (2) reason for the delay; (3) risk of erroneous deprivation of the due process property or liberty interests of the Licensee or any other party; (4) assertion of the right to a hearing by the party opposing the delay; and (5) prejudice to the party opposing the delay. *See* CLI-93-17, 38 NRC at 49-52. These factors continue to be the relevant considerations and we thus evaluate each in turn.

A. Length of the Delay

If granted, the additional delay sought in this instance would mean that discovery in this proceeding will have been deferred for a little over ten months from the initiation of this litigation in early February 1993. In CLI-93-17, the Commission found the eight-month total delay engendered by our grant of the Staff's second delay request "to be tolerable only if Staff can demonstrate an important government interest coupled with factors minimizing the risk of an erroneous deprivation." 38 NRC at 53. This observation applies with equal force here, mandating that we give close scrutiny to the reasons for delay given by the Staff, as well as the risk of an erroneous deprivation of any OSC property interest in its license.

B. Reasons for the Delay

In assessing the reasons for the delay, we are called upon to appraise two separate concerns. First, there is the question of what legitimate government interest is served by the delay. This involves an inquiry into the propriety of the Staff's demonstration that there will be a detrimental impact on the investigative process if the delay is not granted. Additionally, there is the question of whether the Staff has shown that there is a legitimate basis for the period of delay it

seeks. As we noted previously, this involves an inquiry into whether the Staff has made "a credible showing that it is attempting to complete its investigation expeditiously." LBP-93-10, 37 NRC at 462.

In its second delay request, the Staff put forth as its principal reason for delay the potentially deleterious impact that the disclosure of witness interview transcripts and documentary evidence gathered during agency investigations would have upon the integrity of yet to be completed witness interviews. The Staff expressed particular concern about how the disclosure of materials gathered by the agency's initial fact-finding Incident Investigation Team (IIT) concerning the November 1992 IRCC incident would impact upon the OI investigation as it focuses on possible incomplete and/or inaccurate statements by OSC personnel. In its third delay motion, the Staff expresses this apprehension again, by way of the affidavit of OI Deputy Director Fortuna. See Staff Additional Delay Motion, Affidavit of Roger A. Fortuna at 4 [hereinafter Fortuna Affidavit]. In addition, Deputy Director Fortuna indicates a concern about the possibility that information obtained by OI subsequent to the IIT investigation, if prematurely disclosed, "could reveal to OSC the methods and focus of the continuing OI investigation and thereby harm the ongoing investigation." *Id.* at 4.

In CLI-93-17, in assessing the validity of the Staff argument that premature disclosure of investigative materials could jeopardize the integrity of still to be completed witness interviews, the Commission concluded that

the Staff has provided enough detail to demonstrate that discovery here, which would disclose documents and transcripts associated with the IIT report and related documents and transcripts obtained subsequent to the IIT investigation, would interfere with the ongoing OI investigation into possible incomplete or inaccurate statements by cancer center personnel and OSC officials.

38 NRC at 55. OSC now contends that the Staff's continued reliance upon this basis is insufficient to fulfill our admonition that additional delay requests require Staff explanations that are more specific and detailed. See OSC Additional Delay Motion Response at 2-4 (citing LBP-93-6, 37 NRC at 221; LBP-93-10, 37 NRC at 466 n.8).

We conclude, however, that at present this Staff statement of reasons continues to suffice.² The potential relevance of the IIT transcripts and documents

² In its response, OSC contends that the affidavit of OI Deputy Director Fortuna, which provides the evidentiary underpinning for the Staff's delay motion, should be disregarded because it is based on "hearsay" that lacks substance and credibility. See OSC Additional Delay Motion Response at 4. It is, of course, the rule in administrative hearings that hearsay evidence is generally admissible so long as it is reliable (as well as relevant and material) evidence. See *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-668, 15 NRC 450, 477 (1982). Deputy Director Fortuna is a senior OI supervisor rather than the OI investigator with direct operational responsibility for the OSC investigation. Nonetheless, his affidavit makes it clear that he is "responsible

(Continued)

to this proceeding, and thus their status as possibly discoverable material, remains obvious. Further, OSC has provided no basis for questioning the Staff's assertion that some fifteen witness interviews, including some with IRCC personnel, are necessary to complete the OI investigation, thereby implicating the Staff's concern about the impact of premature disclosure on the integrity of witness statements. In addition, OSC presents nothing suggesting that the Staff's concern about premature disclosure of the "methods and focus" of the OI investigation is ill-defined or unfounded. At this juncture, therefore, the Staff's showing is sufficient to establish a strong government interest in any delay.

Of course, this strong government interest showing must go hand-in-hand with a demonstration that the Staff is acting with reasonable diligence to complete its investigation. In seeking a second delay, the Staff advised us that it hoped to conclude its investigation by October 1993, with the caveat that this depended upon completing witness interviews and OSC compliance with outstanding document production requests served upon OSC in February 1993. See LBP-93-10, 37 NRC at 462. Now, the cardinal reason offered by the Staff for not having finished its investigation is OSC's purported lack of cooperation regarding these OI subpoenas. As noted above, *see supra* p. 133, the Staff first advised us in its August status report that because OSC had not complied fully with several outstanding subpoenas, it was taking action to obtain judicial enforcement of the subpoenas. In its delay motion, however, the Staff declares that on August 26, 1993, it served OSC with a new subpoena with which OSC now must comply before OI can complete its witness interviews and conclude its investigation. See Staff Additional Delay Motion at 6.

For its part, OSC asserts that OI's actions regarding these document requests demonstrate that the Staff is not acting diligently to complete the investigation. OSC declares that it has objected to some of the OI production requests as unduly burdensome and not relevant to the OI investigation. See OSC Additional Delay Motion Response at 1-2. Before us, however, OSC has not presented any specific arguments supporting its position that the document requests are improper. Instead, it relies upon OI's purported failure to justify the relevance of its requests as proof that they are invalid and thus cannot support the Staff's additional delay request. OSC also contends that OI's issuance of a new subpoena in lieu of enforcing the prior subpoenas evidences conduct that improperly delays this proceeding. See *id.* at 2.

In assessing whether the Staff is attempting to complete its investigation promptly, we need not make any judgment about whether certain documents are

for, among other things, the daily oversight of OI field operations" and that he is "familiar, through my discussions with Gerard Kenna, the investigator assigned to this investigation, with the status of the [OSC] investigation." Fortuna Affidavit at 1. This is sufficient in this instance to establish the reliability of the statements in his affidavit.

or are not subject to disclosure under a particular Staff investigative subpoena, particularly when the party seeking to avoid compliance has not presented any substantive arguments to support its refusal to comply.³ The issue, instead, becomes one of the reasonableness of the Staff's efforts to complete its inquiry, given the complexities of the particular investigation.

The Commission already has recognized that the OI investigation is a complex one that is not necessarily subject to a prompt resolution. *See* CLI-93-17, 38 NRC at 56. In this context, we do not think it untoward for OI to want to see its investigative document requests substantially complied with before it completes any final interviews and closes its investigation. Nor do we think it unreasonable for OI, when OSC is aggressively challenging the scope of existing subpoenas, to attempt to ensure that there is no question about what documentation is being sought by issuing a subsequent, more detailed subpoena.⁴ Thus, rather than denoting a Staff failure to attempt to complete its investigation diligently, these recent developments regarding the Staff's subpoenas provide sufficient justification to support some additional delay.

C. Risk of Erroneous Deprivation

In assessing the factor of risk of erroneous deprivation relative to the Staff's second delay request, the Commission found "of particular relevance" the fact that OSC had failed to avail itself of the opportunity afforded by 10 C.F.R. § 2.202(c)(2)(i) to request that the Board set aside the immediate effectiveness of the January 1992 suspension order. CLI-93-17, 38 NRC at 57. The Commission also noted that in responding to the Staff's previous delay requests, OSC had never challenged whether there was "adequate evidence" to support the basis for the immediately effective suspension order. *See id.* The Commission concluded that these factors established that the risk of the erroneous deprivation of OSC's property interest in its license had been reduced such that, in conjunction with the Staff's showings about possible interference with the OI investigation and the strong government interest in protecting that inquiry, it weighed in the Staff's favor. *See id.*

While the first circumstance — OSC's failure initially to contest the immediate effectiveness of the Staff's suspension order — remains extant, OSC now

³ Our authority to delve into the validity of the OI investigative subpoenas is not entirely clear given that, under the terms of the subpoenas, OSC could have presented its substantive concerns about their validity to the Commission in the form of a motion to quash. As far as we are aware, OSC has not done so.

⁴ In comparing the OI subpoenas served on February 25 and 26, 1993, to the more recent August 26, 1993 request, the main distinctions seem to be that (1) the August subpoena is aimed at disclosure of particular types of documents relating to OSC's suspended Byproduct Materials License No. 37-28540-1, whereas the February subpoenas set forth broader categories of documents relating to that license; and (2) the August subpoena seeks disclosure of documents relating to another purported OSC byproduct materials license, No. 37-28179-01, in general categories that are similar to those set forth in the February subpoenas.

seeks to invoke the erroneous deprivation factor by raising a challenge to the adequacy of the January 1993 enforcement order. According to OSC, its pending summary disposition motion challenging certain of the bases for the suspension order establish that the order is, in substantial part, without a legal foundation. This, OSC concludes, establishes a clear risk of an erroneous deprivation of its property interest in its license (and its ability to carry out the medical activities authorized by that license) such that further delay in this proceeding should not be permitted. *See* OSC Additional Delay Motion Response at 5-6.

We are unable to agree with OSC's assessment. Initially, we must point out that the issue raised by OSC regarding the legal sufficiency of certain bases for the January 1993 order is not, as OSC seems to suggest, a matter that has been definitively resolved in its favor. In a recent response to OSC's summary disposition motion, the Staff contests OSC's argument that there is an inadequate legal footing for some bases in the order. *See* NRC Staff's Response to [OSC] Motion for Summary Judgment with Respect to Certain Issues and NRC Staff Motion to Dismiss (Sept. 16, 1993). But, even assuming that these OSC legal assertions ultimately are found to be correct, the suspension order bases in question are not all-encompassing. They involve only two of the eight instances of alleged OSC deficiencies identified during December 8, 1992 inspections of OSC's Lehighton and Exton, Pennsylvania facilities and two of four deficiencies attributed to the corporate radiation safety officer as a result of agency investigations and inspections relative to the November 1992 IRCC incident. Given that OSC's summary disposition challenge does not relate to the various other bases put forth by the Staff in support of its January 1993 suspension order, we cannot say that it establishes that the order otherwise is based only upon "mere suspicion, unfounded allegations, or error" so as to fail to meet the minimal "adequate evidence" showing required under section 2.202(c)(2)(i). Accordingly, OSC has failed to show any risk of erroneous deprivation sufficient to establish this as a significant factor favoring the denial of the Staff's delay request.

D. Assertion of the Right to a Hearing

In assessing the Staff's second delay request, based on OSC's past actions the Commission found that it has insisted upon its hearing rights such that the fourth factor regarding the assertion of hearing rights weighs in its favor. *See* CLI-93-17, 38 NRC at 57-58. As is evident from its response to the Staff's third delay request, OSC persists in claiming its right to a hearing with considerable vigor. Accordingly, this factor continues to weigh in its favor.

E. Prejudice to the Party Opposing the Delay

Of the two components that make up the factor of prejudice to the party opposing the delay — prejudice to the ability to conduct licensed activities and prejudice to the ability to defend against the enforcement order charges — the former is the easier to measure in this instance. In considering the propriety of our ruling on the Staff's second delay request, the Commission noted that because its license suspension has been rescinded at the only two facilities at which OSC subsequently requested permission to treat patients, "the exact extent of the financial burden on [OSC] at this time is unclear." CLI-93-17, 38 NRC at 59. OSC's conclusory declaration before us that its assertion of its hearing rights has involved "substantial cost," OSC Additional Delay Motion Response at 6, provides no greater elucidation.

There remains the concern about OSC's ability to defend itself against the charges leveled by the Staff. As the Commission observed, although the passage of time is likely to affect the memory of some witnesses, the prejudice arising from this phenomenon is extremely difficult to gauge in the abstract. *See* CLI-93-17, 38 NRC at 58-59. The inherent uncertainty of this factor, in conjunction with OSC's failure up to this point to offer any concrete evidence that the additional delay arising from the Staff's request will otherwise impede its ability to present evidence when a hearing is convened, leads us to conclude that at present the impact of delay on OSC's "ability to defend" does not provide a compelling counterweight for OSC in the balancing process.

F. Conclusion

Based upon the showings made by the Staff and OSC relative to the Staff's delay request, the one factor that clearly weighs on OSC's side of the balance is its continued, forceful assertion of its right to a hearing. The other factor that accretes to OSC's side of the balance is the length of delay, which continues to grow and requires that the Staff provide compelling reasons for its hearing postponement requests. As we have explained, however, the Staff has met this burden at present by demonstrating that there is a significant government interest in protecting the integrity of the OI investigation, that permitting discovery has a reasonable likelihood of impairing OI's ongoing investigation, and that, notwithstanding the need for more time, OI continues to conduct its inquiry with reasonable expedition so as to bring it to a timely conclusion. Nor do we find that OSC's challenges to the legal justification for some of the Staff charges in the January 1993 suspension order establish a lack of "adequate evidence" for the order, thereby allaying any argument that there is a compelling risk of an erroneous deprivation of its property interest in its license. Finally, and perhaps most critically, OSC again has failed to establish that any additional delay will

result in any particular harm to its financial interests, to the interests of its patients, or to its ability to present an adequate defense at any future hearing. We conclude, therefore, that the balance remains in the Staff's favor so as to warrant some period of additional delay.

III. FURTHER PROCEEDINGS BEFORE THE BOARD

We have advanced, and the Commission has not disavowed, our authority to minimize the effects of any delay and to monitor closely the status of the Staff's investigation to ensure that due diligence is being exercised to bring its inquiry to a conclusion. *See* CLI-93-17, 38 NRC at 60. In exercising this responsibility previously, we have granted the Staff's delay request only as it encompasses discovery and any portion of the adjudicatory process that can proceed only after discovery is completed. We do so again here. In addition, we have concluded that it is appropriate to grant only a portion of the delay period requested by the staff. For the reasons set forth below, we do so in this instance as well.

As we noted above, *see supra* p. 137, the Staff's determination to issue an additional subpoena rather than seek judicial enforcement of its outstanding document requests was reasonable under the circumstances. That action, however, does have potentially far-reaching consequences for the expeditious completion of the OI investigation and, by implication, this proceeding.⁵ As such, it merits our close scrutiny to ensure that it does not prolong the OI inquiry unnecessarily.

Prompt negotiations between the parties to resolve their differences about any outstanding OI document request, as opposed to agency-initiated subpoena enforcement litigation, may well be the most expeditious means for resolving any dispute over the scope of that request. Nonetheless, in the context of this proceeding in which the Staff has chosen to suspend OSC's license while at the same time continuing an investigation into its activities, the Staff ultimately has the burden of demonstrating that it is acting expeditiously to complete its investigation. As a consequence, if good-faith negotiations are unsuccessful in resolving the dispute between the parties over document production,⁶ expeditious

⁵ The Staff already has suggested that its concern about the detrimental impact of premature release of investigative materials may well apply to the DOJ criminal-referral process that could follow completion of the OI inquiry. *See* LBP-93-10, 37 NRC at 459 & n.2. Such an eventuality could cause the Staff to request an additional delay pending the outcome of any DOJ referrals.

⁶ In this regard, we note that in a September 16, 1993 letter to the Staff regarding compliance with the August 26, 1993 subpoena, counsel for OSC declares that "absent a federal court order, OSC will not be compelled to respond to irrelevant and/or overly burdensome requests." NRC Staff Report on Documentation Sought in Administrative Subpoena (Sept. 17, 1993), attach. at 1 (Letter from M. Colkitt, General Counsel, OSC, to B. Letts, Director, OI Region I Field Office, NRC (Sept. 16, 1993)). The letter goes on to indicate which requests in the August 26 subpoena OSC considers irrelevant and burdensome.

action to obtain prosecution of a subpoena enforcement action in federal district court likely is the most viable avenue open to the Staff for fulfilling its burden to demonstrate it is acting to complete its investigation promptly.

We need not reach now the issue of the appropriate timing of any Staff action in this regard. Our concerns about the potential for delay do, however, merit our heightened scrutiny into the status of this document dispute. For the same reason, we will shorten somewhat the stay period granted from the requested ninety days to seventy-five days.

Accordingly, at twenty-one day intervals, the Staff is required to file a status report, accompanied by supporting affidavits, regarding the still-ongoing OI investigation. In particular, the Staff should describe the status of any negotiations with OSC regarding any outstanding Staff document requests relating to the OI investigation or, alternatively, when the Staff anticipates subpoena enforcement litigation will be instituted. Further, although the Staff apparently no longer relies upon the OIG investigation as a direct basis for delaying this proceeding, *see supra* note 1, if it anticipates that OIG activities will be relevant to any further delay request, the Staff should advise us of those activities as well.⁷

Finally, as with our previous determinations, to obtain a delay of this proceeding beyond the seventy-five day period we sanction today, twenty days before the expiration of that period the Staff must file a further request with the Board that indicates the specific period of additional delay sought and describes *in detail*, with supporting affidavits and documentation, the specific reasons why "good cause" exists for the delay. The schedule for such a Staff motion and OSC's response are set forth below.

For the foregoing reasons, it is this twenty-first day of September 1993, ORDERED that:

1. The September 1, 1993 motion of the Staff to delay this proceeding for a period of ninety days is *granted in part* in that all discovery in this proceeding is delayed for a further period of seventy-five days, up through and including *Monday, December 6, 1993*, provided, however, that if the Staff files a request for additional delay in accordance with ¶3 below, discovery will not commence absent further order of the Board.

2. On *Tuesday, October 12, 1993*, and *Tuesday, November 2, 1993*, the Staff should file a report, with supporting affidavits, describing:

⁷ With the Commonwealth's determination that it will not bring any criminal prosecutions relative to the November 1992 IRCC incident, *see supra* note 1, we have not included in this memorandum and order our prior directive that the Staff inform us of any criminal indictment or information filed against OSC or any of its employees relative to that incident or the January 1993 suspension order. Nonetheless, it is apparent that if a criminal action were to be instituted relating to the matters at issue in this proceeding, the parties should notify the Board of this fact promptly.

- A. The status of the OI investigation regarding the matters set forth as the basis for the January 20, 1993 suspension order and any related circumstances, including a discussion of OSC's compliance with any outstanding OI administrative subpoenas that describes (i) the status of any negotiations between the Staff and OSC regarding any subpoena or (ii) the Staff's actions concerning any timetable for the institution of civil enforcement litigation relative to any subpoena.
- B. The status of any OIG investigative activities regarding the November 1992 IRCC incident and any related circumstances, if the Staff anticipates that those activities will be relevant to any further Staff delay request.

3. A Staff request for an additional delay of any aspect of this proceeding beyond Monday, December 6, 1993, must be filed on or before *Tuesday, November 16, 1993*. In its motion the Staff must describe in detail, with supporting affidavits and documentation, why "good cause" exists for the delay, including an exposition of the specific reasons why the Board's failure to grant the additional period of delay sought will prejudice any ongoing federal or state investigation or criminal prosecution. OSC may respond to the Staff's request on or before *Monday, November 29, 1993*. Both the Staff's motion and OSC's response should be served on the Board's members and opposing counsel by a method (e.g., express mail) that ensures delivery by the next business day.⁸

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 21, 1993

⁸ Copies of this memorandum and order are being sent this date to OSC counsel by facsimile transmission and to Staff counsel by E-Mail transmission through the agency's wide area network system.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

In the Matter of

Docket Nos. 50-424-OLA-3
50-425-OLA-3
(ASLBP No. 93-671-01-OLA-3)
(Re: License Amendment;
Transfer to Southern Nuclear)

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2)

September 24, 1993

The Board acknowledged error in an earlier opinion, resulting from accepting the unopposed arguments of Intervenor and therefore interpreting a portion of the Intervenor's Amended Petition out of context. This opinion narrows the issues.

RULES OF PRACTICE: MOTION FOR RECONSIDERATION (NOT FOR NEW ARGUMENTS)

Motions for reconsideration are for the purpose of pointing out errors in the existing record, not for stating new arguments. However, new arguments have been presented and there is no time pressure in the present status of this case. Consequently, the Board chose in its discretion to decide the motion on the merits by granting it.

RULES OF PRACTICE: CONTENTIONS

Intervenors must carefully communicate the scope of their contentions so that neither the board nor the other parties need to guess their meaning. Unclear contentions may be construed narrowly rather than having the parties search for materials that might have been referenced by a vague, unspecific reference.

RULES OF PRACTICE: CONTENTIONS (REFERENCES TO OTHER MATERIALS)

The Board refused to rule that contentions could not reference material not included in the petition. It considered it more important that the contentions be clearly worded, with or without references, and that the parties not be required by a nonspecific reference to hunt for a needle in a haystack.

RULES OF PRACTICE: CONTENTIONS

The amended petition should be construed in light of all four corners of the document, and individual passages should not be interpreted out of context.

MEMORANDUM AND ORDER (Georgia Power Motion to Reconsider Scope of Proceeding)

In our unpublished decision of August 12, 1993, at pages 2-3, we said:

We find that Intervenor is correct in each statement it makes in Intervenor's Report,¹ especially at p. 2, footnote 1. In particular, the Amended Petition² states, at p. 6, footnote 2 (continued) — with respect to 10 CFR § 2.206 petitions filed on September 11, 1990, and July 8, 1991:

Because both of these petitions contain significant factual information relating to all four contentions, petitioners hereby incorporate by reference these two petitions into the body of this amendment.

Subsequently, on August 23, 1993, Georgia Power Company (GPC) filed a Motion for Reconsideration of August 12, 1993 Memorandum and Order or in the Alternative for Certification. (Motion for Reconsideration.) This Memorandum and Order shall grant GPC's Motion for Reconsideration.

¹ Intervenor's Report of the Status of Discovery (August 9, 1993).

² Amendments to Petition to Intervene and Request for Hearing, December 9, 1992.

Our review of the Amended Petition persuades us that the main text of that Petition clearly delineates the major issues that support the contention. There are a few references to the section 2.206 petitions — but only in footnotes. These footnotes reference only portions of the petitions that are relevant to the text that is being footnoted. If Intervenor intended more than this, he did not make it plain in the document, and parties and adjudicators are not required to search for meanings that are not obvious. We have therefore decided that the footnotes are an add-on and do not change the thrust of the primary argument in the text.

I. PRELIMINARY PROCEDURAL POINT

We consider GPC's Motion for Reconsideration to be extraordinary because it raises new arguments that GPC had the opportunity to raise at each of the following earlier junctures: its response to Allen L. Mosbaugh's (Intervenor's) motion to produce, its response to Intervenor's motion to compel, and its status report concerning negotiations among the parties. Indeed, Intervenor's argument in its Report on the Status of Discovery, August 9, 1993, was persuasive to us concerning the scope of discovery. Since GPC knew that this issue was unresolved it also had an opportunity to use its status report to brief this issue.

Ordinarily, a motion for reconsideration points out a deficiency in the way a board considered the arguments before it. It should not delay a case by presenting new arguments that should have been presented earlier. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984); *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-418, 6 NRC 1, 2 (1977).

In this case, no party objects to the nature of this motion and we are not under any time pressure because a delay in discovery has been granted to permit Staff to complete a pending investigation. Therefore, we do not deny this request because of its extraordinary nature. Instead, fairness requires that we decide the motion on its merits.

II. THE MERITS OF THE PETITION

A. References Relating to Alienation of Control

The most persuasive argument presented by GPC (Motion at 13, 14, and 15) is contained in the following statement:

Intervenor's Amended Petition did not specify any issues other than the alleged illegal license transfer and the alleged false statements relating to LER 90-006. . . .

* * *

Nor could GPC reasonably infer that Intervenor intended to raise . . . issues [relating to its section 2.206 petitions] in his Amended Petition. In the context in which they were used in the Amended Petition, the references to the § 2.206 petitions appeared to be nothing more than references to documents asserted to support the specific allegations discussed in the Amended Petition.

For example, footnote 2 of the Amended Petition appears in the section discussing the alleged illegal license transfer and references the 2.206 petitions as evidence related to the creation of Southern Nuclear. . . .

* * *

Intervenor's broader view of the references to his 2.206 petitions is unreasonable. . . .

The Staff of the Nuclear Regulatory Commission (Staff) agrees with GPC's position.³

B. Principles of Interpretation

We conclude that 10 C.F.R. § 2.714(b)(2) should be interpreted not only as a pleading requirement but also as a principle of interpretation. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142-43 (1993) (petitions should be organized so that their meaning is obvious);⁴ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989) (a reference in a contention to a massive document lacks sufficient clarity because the Commission need not search for a needle in a haystack).

Section 2.714(b)(2) requires that Petitioner state what he will rely on and the portion of the application that he is differing from. Thus, the regulation requires substantial specificity and it is a settled rule of practice at this Commission that contentions ought to be interpreted in light of the required specificity, so that adjudicators and parties need not search out broader meanings than were clearly intended.

We reach no holding on the broad argument that material cannot be incorporated in a petition by reference. It appears to us that such matters are better decided on a case-by-case basis by interpreting the materials actually filed and the nature of the references in question. As the Appeal Board said in *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930 (1987):

³ Staff's September 9, 1993 Response to Motion for Reconsideration of August 12, 1993 Memorandum and Order or in the Alternative for Certification, at 6-7.

⁴ We do not accept Staff's argument that the cited case means that no outside documents may be referenced. (Staff Response at 5.) In *Rancho Seco*, 37 NRC at 146, the Commission says that Staff questions may not be cited in support of a contention because questions do not by themselves indicate that an Environmental Report is inadequate.

[T]he bases requirement is merely a pleading requirement designed to make certain that a proffered issue is sufficiently articulated to provide the other parties with its broad outlines and to provide the Licensing Board with enough information for determining whether the issue is appropriately litigable in the instant proceeding. The requirement generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and texts that provide such reasons.

We are persuaded that the scope of the contention should be determined by interpreting it in light of the entire Amended Petition. We admit that after re-reading that document in light of the Motion for Reconsideration, we conclude that we erroneously accepted Intervenor's argument and interpreted passages out of context. We also conclude that Intervenor's references to the section 2.206 petition were intended only to supply additional material in support of the basic facts that were supplied in the petition.⁵ A careful examination of the Amended Petition will show this to be so.

For example, at page 5 n.2, Intervenor makes his first mention of the section 2.206 petitions. The footnote begins: "Evidence relating to the creation of SONOPCO is contained in petitions filed . . . pursuant to 10 C.F.R. 2.206." This is the predicate for a footnote that concludes:

Because both of these petitions contain significant factual information relating to all four contentions, petitioners hereby incorporate by reference these two petitions into the body of this amendment.

This concluding paragraph, read out of context, seems very broad. It could be a general reference to all the issues and evidence presented in the petitions. However, in light of the first sentence of the footnote, we think it appropriate to interpret the concluding paragraph as a careful effort to ensure that Intervenor could rely on anything in the petitions having to do with the creation and operation of SONOPCO.

C. References with Respect to Character

The Amended Petition contains the same general pattern that we have just discussed in subsequent references to the petition contained in its discussion of the factual basis of Contentions 2, 3, and 4. At the bottom of page 14

⁵ See, in support of this position, the September 9, 1993 NRC Staff Response to Motion for Reconsideration of August 12, 1993 Memorandum and Order, or in the Alternative for Certification (Staff Response), at 6.

We are aware that Intervenor's Response, at 3, particularly footnote 1, cites portions of GPC's Response to the Amended Petition in support of its interpretation. However, we were never impressed by GPC's argument that there was any relevance to the admission of contentions in this proceeding to whether or not they were raised in the prior section 2.206 petition. We are also not persuaded that because GPC made that argument that either GPC or the Board should interpret the Amended Petition to incorporate in its entirety the section 2.206 petition.

of the petition, Intervenor states, "The factors demonstrating that SONOPCO management does not have the candor, truthfulness and willingness to abide by regulatory requirements necessary to operate a nuclear facility follows." The Amended Petition then focuses on an alleged conspiracy to submit materially false information in two different arenas. Near the end of the discussion of Contentions 2, 3, and 4, on page 16, in footnote 11, there is general language reminiscent of the language we have discussed in the text above. The footnote "incorporates the petition." We conclude, however, that this reference is solely for the purpose of buttressing other bases for the existence of the alleged conspiracy to submit false information.

Similarly, on page 18, Intervenor "incorporates by reference the entirety of his July 8, 1991 . . . petition" but then specifically mentions two sections relating to false statements. We also interpret this general language as a careful, lawyerly device to preserve the right to use material contained in the petitions that supports the allegation of a conspiracy to submit false information.

D. Conclusions

To the extent that the cited reference material falls within the argued contentions, the references are effective to incorporate referenced material that may be the basis for further discovery. But the references do not raise new points not argued in the Amended Petition. There was nothing in the Amended Petition that we interpret to indicate that Intervenor would rely on other portions of the section 2.206 petitions, including portions of those petitions that allege violations of technical specifications.

Since Intervenor knew of the other allegations in the section 2.206 petition at the time it filed the contention, we conclude that it included by reference only those portions of the section 2.206 petition that were relevant to its discussions of its contention in its Amended Petition. It voluntarily excluded the nondiscussed matters from the scope of its petition. Hence, those nondiscussed matters may not be included in this proceeding at this time.⁶

Intervenor is not precluded from moving to add additional matters as bases to its contention, but the ground for this motion must be that the additional matters are relevant and *newly* discovered. We derive this principle from *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 20-21 (1993), which stated, with citation to appropriate authority:

⁶ At the conclusion of Phase I of this proceeding, we will have compiled a record and we will be responsible for deciding whether that record is adequate or whether we should require that it be expanded in order to make it adequate. At that time, we may consider whether further allegations in the section 2.206 petition should be included in this case.

We note that, in proving its claim, [Intervenor] will not be limited to the specific incidents relied on to admit its contention. As set forth in the Statement of Considerations for the revised contention rule,

[The contention] 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 opinion, 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 (emphasis supplied in *Diablo Canyon*).

Incidents such as those that MFP attempted to read into the record at the prehearing conference may be acceptable, as long as they are material to the implementation of the surveillance and maintenance programs. To the extent that MFP is asked to do so, however, it must identify prior to hearing all of the incidents on which it intends to rely in advancing and going forward with its contention.

III. RELEVANCE OF CLI-93-15

Intervenor's Response, at 5 n.3, relies on CLI-93-15, 38 NRC 1 (1993), as having determined that all the issues in the section 2.206 petition are properly before this Board. Our review of the Commission's decision does not support this view. Instead, we prefer the following view, found in the Staff Response at 8-9 n.5:

The Commission in *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-93-15, 38 NRC [1 (1993)], indicated that the issues before this Board did not encompass all of the many issues in the 2.206 petitions. It stated [38 NRC at 3]:

Moreover, we recognize here that Mr. Mosbaugh has not invoked section 2.206 to avoid a pending adjudication and that his section 2.206 petition seeks relief with respect to issues and facilities that are not before the Licensing Board in the pending transfer proceeding.

We note, in addition, that on the same page of the Commission's decision, it notes an "overlap and similarity of *some issues* between the section 2.206 petition and the transfer proceeding" (emphasis added) pending before us. This is consistent with the position we are taking in this Memorandum and Order.⁷

⁷We note GPC's motion to Certify a Question, but that motion is moot. We would have denied that motion because of the procedural nature of our challenged action if we had been required to reach that motion on the merits. See Staff Response at 9-10.

IV. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 24th day of September 1993, ORDERED that:

1. Mr. Allen Mosbaugh, Intervenor, included by reference in his Amended Petition⁸ only those portions of his prior section 2.206 petitions that were relevant to his discussions of his contention in his Amended Petition.

2. Matters that were not discussed in the Amended Petition, except by reference to Intervenor's prior section 2.206 petitions, shall not be considered to have been raised in the Amended Petition and shall not be included in Phase 1 of this proceeding.⁹

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

James H. Carpenter
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

⁸ Amendments to Petition to Intervene and Request for Hearing, December 9, 1992.

⁹ We continue to urge the parties to conclude stipulations that will streamline the proceeding or to reach a negotiated settlement. In our opinion, such agreements should be easier to reach than the agreement between the Palestinians and Israelis.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Law Judge:

Morton B. Margulies

In the Matter of

**Docket No. 93-01-PF
(ASLBP No. 93-673-01-PF)**

LLOYD P. ZERR

September 20, 1993

RULING ON DEFENDANT'S MOTION TO DISMISS

There is before me for decision a motion filed by the Defendant, Lloyd P. Zerr, on August 16, 1993, entitled "Motion to Dismiss," seeking dismissal of this proceeding on the grounds that it constitutes double jeopardy in violation of the Fifth Amendment of the United States Constitution and because the institution of the proceeding violates agreements reached with the United States government. The United States Nuclear Regulatory Commission, in a response dated September 2, 1993, contends that the motion is entirely without merit and that it should be denied. A reply was served by Defendant on September 10, 1993. I find against the Defendant on the motion.

BACKGROUND

Defendant was indicted by a Grand Jury in the United States District Court for the Southern District of Georgia on December 9, 1991, on two counts of violating 18 U.S.C. § 287 (Making False, Fictitious, or Fraudulent Claims) and three counts of violating 18 U.S.C. § 1001 (Making False Statements). The activities charged occurred in almost all of the time frame alleged in the subject complaint, served December 10, 1992, alleging violations of the Program Fraud

Civil Remedies Act of 1986 (31 U.S.C. 3801-3812) (Making False Claims). The same activities alleged in the indictment underlie much of that alleged in the complaint.

In May 1992, Defendant entered into an "Agreement for Pretrial Diversion," with the United States Attorney for the Southern District of Georgia which provided, among other things, that prosecution would be deferred for a period of 18 months and, if Defendant complied with the conditions of the agreement, no prosecution for the offense charged in the indictment would be instituted in the District and that the indictment would be discharged. A condition of the agreement provided that Defendant's attorney, the Assistant United States Attorney, and a Special Agent of the Inspector General of the Nuclear Regulatory Commission would determine "what restitution, if any, is owed by [Defendant] to the United States." The sum arrived at was for the amount of the alleged false claims, totaling \$7454.57. The United States Attorney found the amount to be adequate restitution for resolution of the matter before him.

The indictment was dismissed without prejudice on May 20, 1992, because Defendant was placed on pretrial diversion. By letter dated June 30, 1993, the United States Attorney advised the Nuclear Regulatory Commission that Defendant had fulfilled the terms of the diversion agreement and that no further prosecution would be forthcoming for the crimes covered by the agreement.

On February 7, 1992, Defendant resigned his federal employment. The Notification Of Personnel Action under Remarks stated that it was a "Resignation in Lieu of Adverse Action."

DEFENDANT'S MOTION

Defendant, by counsel, argues that the subject complaint is punitive in nature in seeking restitution and monetary penalties. He contends that Defendant has already been subject to criminal sanction, having been indicted and having reached a settlement with the United States government on restitution. He states that the subject action places Defendant in jeopardy twice for the same matter, which constitutes a violation of the double jeopardy clause of the Fifth Amendment of the Constitution.

Defendant further argues that the United States having already received restitution under a settlement previously reached, now seeks to breach the settlement by the subject action. Additionally, he alleges that the Defendant resigned from federal employment in lieu of adverse action but now is made the subject of adverse action. Defendant requests that the complaint be dismissed because the United States has been fully satisfied in this matter and all that remains is an attempt to obtain additional penal sanctions, which are barred by the Constitution.

No case law was cited in support of Defendant's position.

COMPLAINANT'S RESPONSE

Complainant argues that the Constitutional provision against double jeopardy, which protects an accused against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense, requires that jeopardy first attach sometime prior to the second punishment, citing *Fransaw v. Lynaugh*, 810 F.2d 518 (5th Cir. 1987), *cert. denied*, 483 U.S. 1008 (1987). Complainant contends that the mere bringing of an indictment, followed by its withdrawal after the conditions of a pretrial diversion agreement were met, never placed Defendant in jeopardy so that he can claim protection against double jeopardy.

Complainant asserts that jeopardy never attached as a result of the Georgia indictment and pretrial diversion agreement. It argues that for jeopardy to attach, in a jury trial it is when the jury is impounded and sworn and in a bench trial when evidence is heard, citing *Buffington v. Baltimore County*, 913 F.2d 113 (4th Cir. 1990), *cert. denied*, 499 U.S. 906, 113 S. Ct. 1106 (1991), or when a court unconditionally accepts a guilty plea, citing *United States v. Baggett*, 901 F.2d 1546 (11th Cir. 1990), *cert. denied*, 498 U.S. 862, 111 S. Ct. 168 (1990).

Complainant argues that procedural matters preliminary to a trial, such as a pretrial diversion agreement, do not constitute jeopardy. It cites *United States v. Soto-Alvarez*, 958 F.2d 473 (1st Cir. 1992), *cert. denied*, — U.S. —, 113 S. Ct. 221 (1992), where the court considered, only for jeopardy purposes, those counts to which defendant pled guilty and not those that were dismissed and on which no finding of guilty was made. It also relies on *United States v. Schaffner*, 771 F.2d 149 (6th Cir. 1985), where there was a pretrial diversion agreement concerning defendant's violation of obstruction of process. Defendant's subsequent trial for obstruction of justice was held not to violate the rules of double jeopardy because defendant was never tried on the obstruction of process charge and therefore was never put in jeopardy.

As to the matter of Defendant's claim that the United States seeks to breach the conditions of the diversion agreement by the subject action, Complainant contends that it is without merit. It states that the only commitments made by the United States Attorney in the diversion agreement, to defer prosecution for 18 months and to not prosecute and to discharge the indictment upon Defendant meeting the terms of the agreement, were carried out.

Complainant further asserts that Defendant's resignation in lieu of discharge did not foreclose the NRC from bringing this complaint under the Program Fraud Civil Remedies Act. It contends that the adverse action that the resignation was

in lieu of was being fired and not the filing of the subject complaint. Complainant argues that Defendant's claim is unsupported by any evidence to the contrary.

DEFENDANT'S REPLY

In the Reply served September 10, 1993, Defendant asserts that the Complainant, in its response to the motion, incorrectly cited cases Complainant relied upon and did not cite other cases that would assist Defendant.

Complainant had cited *Baggett, supra*, for the proposition that jeopardy attaches when the court unconditionally accepts a guilty plea. Defendant claims that the case provides that the concept of due process and double jeopardy means that the government with all of its resources and power should not be allowed to make repeated efforts against an individual, subjecting that individual to embarrassment, expense, and ordeal and compelling that individual to live in a continuing state of anxiety and insecurity. The government is permitted "one complete opportunity" against the individual. It also states that the case provides that any effort to discourage resolution of cases by prearrangement with prosecutors is contrary to the interest of justice and that, where violations of the agreement take place, both parties are to be returned to the position that they occupied before relinquishing those positions. Defendant argues that the case is supportive of Defendant who entered into an agreement with the government, which the latter now seeks to avoid.

Complainant had cited *Schaffner*, for the proposition that a pretrial diversion agreement does not place a defendant in jeopardy. It is Defendant's position that the Court in *Schaffner* recognized that diversion prohibited further prosecution on the same offense and that diversion is enforceable.

In support of Defendant's case it cited *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), where the Court upheld the enforceability of plea agreements stating that they involved promises that must be fulfilled.

Defendant also cited *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), where the Court held that an analysis of double jeopardy and due process issues requires a particularized assessment of the nature of the penalty sought, not the simplified labeling of civil or criminal.

Defendant argues that in violation of due process and double jeopardy protection, the government instituted the subject proceeding despite the fact that Defendant fulfilled the pretrial diversion agreement and voluntarily left government employment in lieu of any further action.

DISCUSSION AND CONCLUSIONS

I cannot find, on the facts and law presented, that this proceeding constitutes double jeopardy and that it should be dismissed under the double jeopardy clause of the Constitution. Defendant has neither established that the criminal action taken against him in the Southern District of Georgia is the initial jeopardy needed to invoke the claim of double jeopardy nor has he shown that this civil proceeding for false claims against the government, brought under the Program Frauds Civil Penalties Act, would rise to the level of punishment for the purpose of applying the double jeopardy clause.

Defendant's indictment, his entering into a pretrial diversion agreement under which he arranged for restitution in the amount alleged to be falsely claimed, the deferral from prosecution by the United States Attorney and the dismissal of the indictment do not constitute jeopardy as contemplated by the double jeopardy clause. None of these activities placed him in judicial jeopardy, an essential element in claiming the protection of the double jeopardy clause. *Fransaw*, 810 F.2d at 523. Defendant, under the pretrial diversion agreement, had obtained the benefit of not being prosecuted at the cost of not being placed in jeopardy. The failure to establish the initial jeopardy vitiates any claim to double jeopardy protection. *Id.* That alone is sufficient to deny the motion.

Even had Defendant established that the Georgia process had constituted jeopardy, the bringing of the subject action does not *per se* constitute double jeopardy. It is well established that Congress may impose both a criminal and civil sanction in respect to the same act or omission. *Helvering v. Mountain Producers Corp.*, 303 U.S. 390, 399 (1937). If jeopardy has attached and the civil penalty for filing false claims with the government bears no rational relationship to the government's loss, then there is double jeopardy.¹ *Halper, supra.*

In *Halper*, the Supreme Court upheld the District Court finding that a sanction in excess of \$130,000 set under mandatory penalties of the False Claims Act, where the government's losses, costs, or expenses were approximately \$16,000, bore no rational relationship and constituted a second punishment in violation of the double jeopardy clause.

The Court held that the government is entitled to rough remedial justice, that it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages, or a fixed sum plus double damages without being deemed to have imposed a second punishment. *Id.* at 446. It may include ancillary costs such as the costs of detection and investigation.

¹The Court stated that the government can seek the full civil penalty against a defendant who previously had not been punished for the same conduct even if the civil sanction imposed is punitive. *Id.* at 450.

The Court went on to state that the protection of the double jeopardy clause “is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state” (footnote omitted). *Id.* at 447.

Assuming *arguendo* that Defendant had established the initial jeopardy, it is premature for him to contend at this time that this proceeding constitutes double punishment and therefore is double jeopardy.

The actual sanctions imposed on the individual must be analyzed to determine whether the civil penalty is to recompense the government or is punitive. There is no way to do that at this pretrial stage when no determination has been made as to whether a penalty is warranted. It should be noted that this proceeding differs from that in *Halper* which involved mandatory penalties. In this proceeding the judge can mitigate penalties and assessments and obviate double punishment. 10 C.F.R. § 1331.

Defendant’s Reply does nothing to warrant a different result. *Baggett, supra*, does not preclude the filing of a complaint under the Program Fraud Civil Remedies Act where Defendant had entered into a pretrial diversion agreement in the criminal matter. Subsequent action can be taken against a defendant even after jeopardy has attached. In *Halper, supra*, the Court held that a proceeding for a civil sanction could follow jeopardy in a criminal proceeding so long as a second punishment is not imposed. *Id.*, 490 U.S. at 446.

In *Baggett*, a second action was permitted to be taken against the defendant after jeopardy attached. Defendant had entered into a plea agreement after the jury was sworn and the Court accepted the guilty plea. As a result a number of counts were dismissed. The trial judge rejected the sentencing agreement at the sentencing hearing, and permitted the defendant to withdraw the guilty plea. Defendant was brought to trial on the dismissed counts and objected on the grounds of double jeopardy.

The Court held “that a strict application of the rule that jeopardy attaches upon the swearing of a jury or the acceptance of a guilty plea would result in a decision in favor of Baggett.” However, the Court would not so find because it would provide defendants with an opportunity to avoid prosecution by entering a plea bargain after trial commences and revoking the plea at sentencing. Also, it would discourage prosecutors from entering into plea bargains after commencement of trial. Permitting the defendant to be tried on the dismissed counts placed the parties in the same position as they had been before they voluntarily relinquished it. *Baggett*, 901 F.2d at 1550. *Baggett* does not support Defendant’s position on double jeopardy.

The facts submitted do not support Defendant’s claim that by filing this action the government is breaching the pretrial diversion agreement. That agreement settled the criminal matter that was within the jurisdiction of the United States Attorney. Nothing was cited in the agreement that would preclude the Nuclear

Regulatory Commission from filing a civil action against the Defendant as is authorized by the Program Fraud Civil Remedies Act. Congress has authorized a criminal and civil sanction in respect to the same act, which it is authorized to do. *Helvering, supra*.

Defendant's argument, that his resigning from government employment in lieu of adverse action precludes the filing of the subject action, is not convincing. He has not shown that the adverse action referred to involves more than being fired.

The cases of *Schaffner* and *Santobello, supra*, cited by Defendant for the propositions that diversion and plea agreements are enforceable, that they must be kept, and that they prohibit prosecution on the same offense, provide no basis for altering the findings above.

In *Schaffner*, defendant had entered into a pretrial diversion agreement under which a charge of obstruction of process was dismissed with prejudice. Defendant was subsequently tried for obstruction of justice, a separate criminal offense, which was not contrary to the terms of the pretrial diversion agreement. The Court had ruled, in response to defendant's claim that the two charges constituted the same offense, that the elements of the offenses were different, and there could be no double jeopardy on that basis. The Court never ruled that the pretrial diversion agreement constituted a prior jeopardy. In fact, the Court found that "because he was never found guilty of violating § 1501 (obstruction of process), the subsequent trial of the § 1503 (obstruction of justice) charge was not barred by *res judicata* or *collateral estoppel*." *Schaffner*, 771 F.2d at 152. Jeopardy did not attach under the pretrial diversion agreement absent a guilty finding. *Fransaw*, 810 F.2d at 523.

Here Defendant has not made a legal or factual showing that the pretrial diversion agreement entered into by Defendant does not permit the filing of the subject complaint by the Nuclear Regulatory Commission or that the resignation from federal employment in lieu of adverse action prohibits the filing. Absent such showing, no finding can be made in Defendant's favor.

Defendant's motion is not meritorious on the issues that he has raised.

ORDER

Based on all of the foregoing, it is hereby Ordered that Defendant's motion filed August 16, 1993, requesting dismissal of the proceeding, is hereby denied.

Morton B. Margulies
CHIEF ADMINISTRATIVE LAW
JUDGE

Dated September 20, 1993,
at Bethesda, Maryland.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-440
(License No. NPF-58)CLEVELAND ELECTRIC ILLUMINATING
COMPANY, *et al.*
(Perry Nuclear Power Plant, Unit 1)

September 21, 1993

The Director, Office of Nuclear Reactor Regulation, supplements his denial of this petition regarding the construction and operation of an interim onsite low-level radioactive waste processing and storage facility that was set forth in DD-93-5 (37 NRC 238 (1993)). In DD-93-5, the Director had concluded that the construction and operation of the proposed interim facility did not raise any substantial public health and safety issues and that the Licensee had complied with all applicable NRC regulations and guidance. This Supplemental Decision was prepared to respond to a letter from the Petitioner to the Commission asserting that DD-93-5 fell far short of demonstrating the safety of the interim low-level waste facility itself and only addressed the effect the facility could have on existing equipment at the plant. In this Supplemental Decision, the NRC Staff reviews the Licensee's safety evaluation and supporting documentation for the design, construction, and operation of the interim facility and concludes that those activities do not raise an "unreviewed safety question" under 10 C.F.R. § 50.59 and that the design and operation of the facility will conform to the Licensee's Final Safety Analysis Report (FSAR) prepared for operation of the Perry plant. In confirming his earlier decision, the Director clarified the following points: (1) with limited exceptions, the design and operation of the interim facility do not involve changes in the handling and storage of low-level radioactive waste as described in the FSAR; (2) those few changes to the FSAR description do not involve unreviewed safety questions; and (3) therefore, under section 50.59, NRC review and approval was not required for construction and

operation of the facility, no federal action was required for the construction and operation of this facility, and the requirements of the National Environmental Policy Act (NEPA) and the Commission's NEPA implementing regulations do not apply.

SUPPLEMENTAL DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On September 29, 1992, Mr. Steven C. LaTourette submitted a petition on behalf of the Lake County Board of County Commissioners (the Petitioners), requesting that the Director, Office of Nuclear Reactor Regulation, take certain actions with respect to the proposed construction of an onsite, low-level radioactive waste storage facility at the Perry Nuclear Power Plant (Perry). The petition specifically requested that (1) a public hearing be held before the Licensee constructs such a facility and (2) the construction of the facility be suspended until (a) either the U.S. Nuclear Regulatory Commission (NRC) or the Licensee (the Cleveland Electric Illuminating Company, *et al.*) produces an environmental impact statement assessing the risks of onsite storage of low-level waste and (b) the NRC promulgates regulations for storing low-level radioactive waste at nuclear power plant sites. On March 28, 1993 (DD-93-5, 37 NRC 238), I denied the Petitioners' request on the bases that the Petitioners raised no substantial health and safety issues and that the Licensee had complied with the applicable NRC regulations and guidance.

In a letter of April 21, 1993, the Petitioners requested that the Commission review and reverse DD-93-5. In that letter, the Petitioners contended that DD-93-5 and 10 C.F.R. § 50.59 "fall far short of demonstrating the safety of the facility itself," as they claim that the discussion in the director's decision only addresses the effect the facility could have on existing equipment in the plant. Although 10 C.F.R. § 2.206(c)(2) provides that the Commission will not entertain any petition or other request for review of a director's decision under that section, I am issuing this supplemental decision to clarify the bases for my earlier decision, in response to the Petitioners' letter of April 21, 1993.

II. BACKGROUND

Part 50 of Title 10 of the *Code of Federal Regulations*, "Domestic Licensing of Production and Utilization Facilities," includes regulations governing the licensing and operation of commercial nuclear power plants in the United States.

Section 50.59 addresses the disposition of changes, tests, and experiments at these facilities, as follows:

(a)(1) The holder of a license authorizing operation of a production or utilization facility may (i) make changes in the facility as described in the safety analysis report, (ii) make changes in the procedures as described in the safety analysis report, and (iii) conduct tests or experiments not described in the safety analysis report, without prior Commission approval, unless the proposed change, test, or experiment involves a change in the technical specifications incorporated in the license or an unreviewed safety question.

(2) A proposed change, test, or experiment shall be deemed to involve an unreviewed safety question (i) if the probability of occurrence or the consequences of an accident or malfunction of equipment important to safety previously evaluated in the safety analysis report may be increased; or (ii) if a possibility for an accident or malfunction of a different type than any evaluated previously in the safety analysis report may be created; or (iii) if the margin of safety as defined in the basis for any technical specification is reduced.

(b)(1) The licensee shall maintain records of changes in the facility and of changes in procedures made pursuant to this section, to the extent that these changes constitute changes in the facility as described in the safety analysis report or to the extent that they constitute changes in procedures as described in the safety analysis report. The licensee shall also maintain records of tests and experiments carried out pursuant to paragraph (a) of this section. These records must include a written safety evaluation which provides the bases for the determination that the change, test, or experiment does not involve an unreviewed safety question.

(2) The licensee shall submit, as specified in § 50.4, a report containing a brief description of any changes, tests, and experiments, including a summary of the safety evaluation of each. The report may be submitted annually or along with the FSAR updates as required by § 50.71(e), or at such shorter intervals as may be specified in the license.

(3) The records of changes in the facility shall be maintained until the date of termination of the license, and records of changes in procedures and records of tests and experiments shall be maintained for a period of five years.

(c) The holder of a license authorizing operation of a production or utilization facility who desires (1) a change in technical specifications or (2) to make a change in the facility or procedures described in the safety analysis report or to conduct tests or experiments not described in the safety analysis report, which involve an unreviewed safety question or a change in the technical specifications, shall submit an application for amendment of his license pursuant to § 50.90.

In August 1992, the Cleveland Electric Illuminating Company announced plans to construct an interim onsite low-level radioactive waste (LLW) storage and processing facility, in anticipation of the possible loss of access to the three disposal sites currently operating in the United States. In accordance with section 50.59 and NRC Staff guidance in NRC Generic Letter (GL) 81-38, "Storage of Low-Level Radioactive Wastes at Power Reactor Sites," dated November 10, 1981, the Licensee performed and documented a safety evaluation for the proposed facility. In the safety evaluation, the Licensee concluded that the construction and operation of the interim LLW facility do not constitute an unreviewed safety question as defined in 10 C.F.R. § 50.59(a)(2) and that

no changes in license conditions or technical specifications are necessary. Therefore, the Licensee further concluded that the facility could be built and operated without prior NRC approval, as stated in 10 C.F.R. § 50.59(a)(1). The NRC Staff has reviewed the Licensee's safety evaluation and supporting documentation for the interim onsite LLW storage and processing facility. As discussed in DD-93-5, the Staff concluded that the Licensee correctly determined that the interim LLW storage and processing facility does not constitute an unreviewed safety question and that the design and operation of the facility will conform with the safety analyses in the Perry Final Safety Analysis Report (FSAR).

III. DISCUSSION

In accordance with 10 C.F.R. § 50.59(b)(1), the Licensee evaluated the interim LLW facility in a written safety evaluation, which provided the bases for the conclusion that the interim onsite LLW storage and processing facility does not involve an unreviewed safety question. The bases for the Licensee's conclusion and the Staff's agreement with that conclusion are described below in greater detail, to address the Petitioners' assertions of April 21, 1993, that DD-93-5 and section 50.59 fall far short of demonstrating the safety of the facility itself and only address the effect the facility could have on existing equipment in the plant.

The Licensee analyzed the processing and storage of solid radioactive waste in section 11.4 and a spectrum of potential accidents and events in Chapter 15 of the Perry FSAR, to demonstrate the ability of the plant to operate within regulatory guidelines without undue risk to the public health and safety. This spectrum was selected to represent the types of accidents and events postulated to occur at Perry and to bound the potential consequences of less significant accidents and events. The NRC Staff evaluated and accepted this spectrum of accidents and events as part of the licensing basis for the plant. While this spectrum of accidents and events is primarily focused on reactor safety and the equipment and systems directly affecting reactor safety, the Licensee also evaluated other types of accidents not affecting reactor safety, including fuel handling accidents and liquid radioactive waste tank failures, both of which could result in the release of radioactive material off site.

The Licensee addressed the three criteria of section 50.59(a)(2) to determine if a change, test, or experiment involves an unreviewed safety question, as part of its safety evaluation of the construction and operation of the interim onsite LLW storage and processing facility. The Licensee divided the three criteria into seven separate items in performing its analysis. Although the Licensee's seven-point analysis did not explicitly address certain of the matters discussed

below, the Licensee's safety analysis and its attachments, and the FSAR, provide sufficient information for the Staff to confirm that the construction and operation of the interim LLW facility do not involve an unreviewed safety question.

Effect on the Reactor Facility

The Licensee's analysis clearly demonstrates that there are no interactions between the interim onsite LLW storage and processing facility and the operation of the reactor facility. The Licensee has analyzed the potential catastrophic failure of the interim LLW facility and determined that the facility is located far enough away from other plant structures to prevent a postulated complete failure of the building from damaging any plant systems or equipment important to reactor safety. The interim LLW facility is not interconnected with any system relied on to mitigate any accident or event previously evaluated in the FSAR. The only significant system connected to the interim LLW storage and processing facility is the fire protection water system (FPWS), which is controlled in accordance with facility-approved guidance (i.e., Licensee procedures and training provide that the FPWS is to be available when and where it is needed and also provide that it can be isolated from the interim LLW facility, if necessary to ensure integrity of the FPWS). The Licensee determined that a failure of the FPWS branch piping to the interim LLW facility will not reduce the fire suppression capability in the plant.

The NRC Staff has reviewed the Licensee's evaluation and agrees that, with respect to the safe operation of the reactor facility, the construction and operation of the interim LLW storage and processing facility will not (1) increase the probability or consequences of an accident or malfunction of equipment important to safety previously evaluated, (2) create the possibility of an accident or malfunction of a different type than previously evaluated, or (3) reduce the margin of safety.

Operation of the Interim LLW Facility

1. Dry Solid Radwaste

Currently, processing of dry solid radioactive wastes is carried out mainly in the radwaste building, but some activities are carried out in other locations of the plant in accordance with the FSAR description. Many of these activities will continue to be performed in the same locations. The processing of low-level dry radwaste material with average contact radiation levels less than 5 millirem per hour (mrem/hr) will be carried out in the interim LLW storage and processing facility. Dry solid radwaste with radiation levels in excess of 5 mrem/hr will continue to be processed in the radwaste building. In addition,

the plant will retain the previous capability to process dry solid radwaste in the radwaste building.

Dry solid radwaste will be stored in the interim LLW storage building. The operating license for Perry contains no restriction on the storage of dry radwaste and the FSAR addresses the storage of dry radwaste at any location at the site, provided such interim storage locations are evaluated for compliance with NRC GL 81-38. GL 81-38 provides guidance on a number of aspects of the design of onsite, temporary low-level radwaste storage facilities, including limits on the amount of radwaste to be stored, the potential consequences of design-basis accidents, shielding and dose limits from normal activities, container selection and inspection, physical security, monitoring of potential release pathways, and the control of liquid drainage. The Licensee's evaluation demonstrates that storage of dry radwaste in the interim LLW facility complies with the provisions of GL 81-38. Thus, the storage of dry radwaste at the interim LLW facility does not involve a change to the Perry FSAR.

The only change to the FSAR description for the processing of dry radwaste is the location of the compactor used for processing low-level dry radwaste with average contact radiation levels less than 5 mrem/hr. This material will be processed in the interim LLW building rather than in the radwaste building. Although the interim LLW facility will use an improved compactor and a shredder, neither the plant's operating license nor the FSAR specify details of the compactor. Further, the Licensee indicates and the Staff agrees that this equipment is similar to that currently used and does not represent a handling process different from that described in the Perry FSAR.

Thus, the storage of dry radwaste has been evaluated against the guidance of GL 81-38 as set forth in the FSAR, and the changed location for the processing of dry radwaste with radiation levels below 5 mrem/hr has been evaluated against the standards of section 50.59.

The Licensee designed the interim LLW facility and has established administrative controls to ensure that (1) the volume and activity of the stored radwaste will be limited, (2) sufficient radiation shielding will be provided, (3) periodic monitoring and inspections will be performed, and (4) the other applicable provisions of GL 81-38 are satisfied.

The interim LLW facility will incorporate safety features similar to those existing in the radwaste building processing and storage area, including foot-thick concrete walls for shielding, a fire suppression sprinkler system, and a ventilation system incorporating high-efficiency particulate air filters and radiation monitors. The facility ventilation system is designed to maintain a negative pressure in the building so that all effluents will be discharged through the filtered, monitored pathway. Although NRC regulations do not require such facilities to be designed to specific seismic criteria, the basic structure of the facility is designed to withstand the effects of the maximum predicted

earthquake. However, the Licensee did not take credit for this design feature in conservatively postulating a complete failure of the building (due to unspecified causes) for the purpose of performing an accident analysis, as discussed later. In addition, the Licensee sited the building so that the probable maximum flood from Lake Erie would still be 15 feet below the level of the curb surrounding the building.

The Licensee has analyzed the consequences of various potential accidents involving the interim LLW facility, including a catastrophic failure of the building itself, which the Licensee does not consider a credible event. For such a failure, the Licensee assumed that 10% of the radioactivity of the entire 5-year volume of LLW would be released, a reasonable assumption based on the design of the storage containers, the nature of the waste, and the design features of the facility described above. The maximum calculated radiation dose to an individual at the nearest offsite point (the shoreline of Lake Erie, north of the plant) is approximately 5 millirem for this accident. This *accident* dose is several hundred times smaller than the NRC Staff guidance of GL 81-38 for accidents involving onsite storage of radwaste, 2.5 rem (i.e., 10% of the 10 C.F.R. Part 100 limits of 25-rem radiation dose to the whole body).

The consequences of accidents involving dry radwaste processing or storage were not specifically calculated in the Perry FSAR; rather, the FSAR computes the consequences of a category of accidents involving "radioactive release from subsystems and components." This category encompasses releases from radioactive waste systems. The radiological consequences of accidents in this category were bounded by the consequences of the fuel handling accident, for which the calculated consequences result in a radiation exposure of approximately 1000 millirems at the exclusion area boundary.

The potential radiological consequences from the storage and processing of dry radwaste at the interim LLW facility were calculated to be a maximum of 5 millirem, far below the value specified in the guidance of GL 81-38. Thus, the storage of dry radwaste conforms to the provisions of the FSAR, and the consequences associated with the processing of dry radwaste with contact radiation levels less than 5 mrem/hr are far below the consequences of the category of radwaste accidents previously evaluated in the FSAR.

The NRC Staff concludes that the storage of dry radwaste in the interim LLW facility is consistent with the requirements of the FSAR and that the processing of dry solid radwaste at the interim LLW facility will not increase the probability or consequences of an accident or malfunction of equipment important to safety previously evaluated, nor will it create the possibility of an accident or malfunction of a different type from that previously evaluated. The dry solid radwaste processing and handling activities are essentially unchanged, except for the fact that some of these activities will be performed in the interim LLW facility. The equipment and processes to be employed in the interim LLW

facility are similar to the equipment and handling processes currently used in the radwaste building. There are no margins of safety associated with the handling of dry solid wastes as defined in the basis for any technical specification.

2. Resin Processing

The processing, dewatering, and handling of radioactive resins is unchanged and will continue to be carried out in the radwaste building. The dewatered or solidified liners resulting from these activities will continue to be packaged into high-integrity containers (HICs) in the radwaste building. The only change in resin handling is that the HICs containing spent resin will be placed in individual Onsite Storage Containers (OSSCs). The OSSCs are cylindrical concrete and steel-reinforced vessels designed to provide additional shielding and structural protection for the HICs containing spent resin material.

Again, the Perry operating license contains no restriction on the storage of HICs, and as indicated above, the FSAR permits the storage of radwaste, including dewatered resins, at any location at the site, provided such interim storage locations are evaluated for compliance with NRC GL 81-38. The Licensee's evaluation demonstrates that storage of dewatered resins in the OSSCs complies with the provisions of GL 81-38. Thus, the storage of HICs in the OSSCs does not involve a change to the Perry FSAR.

The Licensee has analyzed the effects of tornadoes, floods, and seismic events on the OSSCs and concluded that these events will not result in the failure of the OSSCs, nor in the release of any radioactive material contained in the HICs inside the OSSCs. Further, the OSSCs will be kept on a concrete pad away from any potential sources of combustible material and are not themselves subject to combustion. Therefore, the Licensee does not consider a potential fire in the vicinity of the OSSCs to be a credible event.

The specific consequences of accidents involving spent resin radwaste processing or storage were not explicitly calculated in the FSAR for the Perry facility, but are encompassed by the category of accidents involving radioactive releases from subsystems and components. This category of accidents is bounded by the consequences of the fuel handling accident.

In connection with the design of the interim LLW storage and processing facility and the OSSCs, the Licensee calculated the consequences of an accident involving the failure of a HIC as a result of dropping a HIC during placement into an OSSC. The calculation assumes that 10% of the contents of a HIC are released for dispersal into the atmosphere. This is a very conservative estimate since the radioactive material is chemically and physically bound to the resin material and would not be readily dispersed. In addition, the HIC is designed and tested to withstand a drop of 25 feet, and the Licensee has established administrative controls to limit the lifting of a HIC to a maximum height of 15

feet. The maximum calculated dose at the nearest offsite point (Lake Erie, north of the plant) is approximately 80 millirem for this accident. This is about 3% of the limit recommended in the NRC Staff guidance in GL 81-38 for accidents involving the onsite storage and handling of radwaste. It is also substantially lower than the offsite dose consequences calculated for the bounding fuel drop accident in the FSAR (approximately 1000 millirem).

In summary, storage of the HICs in the OSSCs conforms to the guidance of GL 81-38 and thus conforms to the requirements of the FSAR.

Although the consequences of an accident involving the failure of a HIC were not explicitly calculated in the FSAR, the FSAR indicated that such storage containers would be used for offsite transport of spent resin material. The failure of a HIC as a result of dropping the container while loading it into an OSSC would be similar to a potential failure during the existing processes for the temporary storage or loading of HICs for transport offsite. The dropping of a HIC while loading it into an OSSC would not be more likely than a handling accident during the temporary storage or loading of a HIC for transport offsite.

The NRC Staff has concluded that the Licensee's evaluation of the three criteria of section 50.59(a)(2) is sufficient and that the construction and operation of the interim onsite LLW storage and processing facility and the associated OSSCs at Perry do not involve an unreviewed safety question.

Environmental Impact Statement Issue

The National Environmental Policy Act of 1969 (NEPA), as amended, requires the preparation of an environmental impact statement for a major federal action significantly affecting the quality of the human environment. The Commission's regulations in 10 C.F.R. 51.20 also specify criteria for licensing and regulatory actions requiring environmental impact statements. Since the Licensee can construct and operate the LLW storage facility on the Perry site without prior NRC approval, no federal action is involved and neither NEPA nor the provisions of section 51.20 apply. Therefore, neither a hearing nor an environmental impact statement is required.

IV. CONCLUSION

In DD-93-5, I determined that the Petitioners' requests concerning the temporary onsite low-level radioactive waste storage and processing facility at the Perry Nuclear Power Plant did not present any substantial health and safety issues and did not provide a basis for the NRC to require a public hearing for the construction and operation of the facility, or for the NRC to write (or require the Licensee to produce) an environmental impact statement for the use of the

facility. The Staff concluded that the interim LLW facility does not require an amendment to the plant's operating license; therefore, in accordance with section 50.59(a)(1), prior NRC approval is not required for the Licensee to construct and operate the facility. In this supplemental decision, I have clarified the bases for the Staff's previous finding that the construction and use of the facility does not constitute an unreviewed safety question. I am issuing this supplemental decision to address the Petitioners' contentions raised in their letter of April 21, 1993, to the Secretary of the Commission. I find that those contentions also fail to raise any substantial health and safety issues.

Therefore, I confirm my previous conclusion in DD-93-5, that the Petitioners have not submitted a sufficient basis for the NRC to require the preparation of an environmental impact statement or to hold a hearing regarding the facility. I have not changed my previous finding from that discussed in DD-93-5 concerning the Petitioners' request for rulemaking.

In accordance with 10 C.F.R. § 2.206(c), a copy of this supplemental decision will be filed with the Secretary of the Commission for the Commission's review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 21st day of September 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

In the Matter of

OL Docket No. 1-93-027R

**FIVE STAR PRODUCTS, INC.
and CONSTRUCTION PRODUCTS
RESEARCH, INC.**

October 21, 1993

The Commission denies Petitioners' motion to quash or modify a subpoena issued by the NRC Staff in the course of an investigation to determine if Petitioners have violated NRC regulations and to determine if safety-related problems exist at NRC-licensed facilities. The new enforcement date for the subpoena is November 1, 1993.

**REGULATIONS: INTERPRETATION AND APPLICABILITY
(10 C.F.R. § 50.7)**

Section 50.7 of 10 C.F.R. was adopted both to implement section 211 of the Energy Reorganization Act and to incorporate into NRC regulations the Commission's authority under section 161 of the Atomic Energy Act.

NRC: ENFORCEMENT OF SUBPOENAS

In general, an agency subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena's issuance.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

The philosophy underlying the adoption of section 211 of the Energy Reorganization Act and its implementing regulations is that any employee of an NRC licensee or of a firm that deals directly or indirectly with NRC licensees on nuclear-related matters and who is in a position to have information relating to nuclear safety must feel free to come to the NRC with that information.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

A defect in materials provided by a “supplier” or “vendor” can prove just as dangerous to public health and safety as a defect in materials provided by a “contractor” that has a more complex or long-term relationship with the NRC licensee.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The risk to public health and safety — and the NRC’s responsibility to protect that public health and safety — is not measured simply by the length of time in the contractual relationship between the NRC licensee and the commercial entity providing the goods and services at issue.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The protection afforded to employees who may be able to provide information to the NRC regarding threats to the public health and safety cannot be measured by the length of their employer’s contract with the NRC licensee.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The risk to public health and safety, the NRC’s responsibility to protect it, and the amount of protection afforded to “whistleblower” employees cannot be measured by the length of the contractual relationship between a licensee and a supplier of goods. This is especially true where the “supplier” offered goods and services that were certified to meet the NRC’s requirements for installation in safety-related applications.

NRC LICENSEES: CONTRACTUAL RELATIONSHIPS

Filling a purchase order issued by an NRC licensee by a vendor or “supplier” constitutes a contract between those two parties.

REGULATIONS: INTERPRETATION AND APPLICABILITY (10 C.F.R. § 50.7)

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION (CONTRACTORS)

The term “contractor” in section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7 of NRC regulations includes — at a minimum — employers such as “vendors” or “suppliers” that manufacture and offer for sale materials that are (1) intended for use by NRC licensees and (2) certified to meet the requirements of 10 C.F.R. Part 50, Appendix B.

REGULATIONS: SAFETY STANDARDS

Cement and grout sold to NRC licensees under Part 50 Appendix B certification are “basic components” whose failure could create a substantial safety hazard, as defined by 10 C.F.R. § 21.3(a)(1) and (2).

REGULATIONS: SAFETY STANDARDS

A vendor or supplier who itself certifies that its products were manufactured and sold in accordance with Part 21 cannot reverse itself and allege that Part 21 does not cover the manufacture of these products.

REGULATIONS: SAFETY STANDARDS

A vendor or supplier who certifies its products were manufactured and sold in accordance with Part 21 is required to “permit duly authorized representatives of the [NRC] to inspect its records, premises, activities, and basic components as necessary to effectuate the purposes of [Part 21].” 10 C.F.R. § 21.41.

**ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION
(CONTRACTORS)**

**REGULATIONS: INTERPRETATION AND APPLICABILITY
(10 C.F.R. § 50.7)**

An entity that maintains an on-going contractual relationship with a manufacturer to test that manufacturer's products, which are then sold to NRC licensees, is a "subcontractor" of the manufacturer within the meaning of section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

"Whistleblowers" are protected under section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7, regardless of the accuracy of their allegations.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

A supplier's subsequent act of ceasing to sell materials certified under 10 C.F.R. Part 50 Appendix B does not remove an employee's protection for engaging in protected activity that occurred prior to that supplier's ceasing to sell such materials.

**REGULATIONS: INTERPRETATION AND APPLICABILITY
(10 C.F.R. § 50.7)**

For purposes of 10 C.F.R. § 50.7, the term "contractor" is not limited to those persons who perform work within the protected area.

**REGULATIONS: INTERPRETATION AND APPLICABILITY
(10 C.F.R. § 50.7)**

For purposes of 10 C.F.R. § 50.7, the NRC has jurisdiction over an employer with a long history of providing materials, including safety-related materials, to the nuclear industry and over acts by that employer that are directly related to its transactions with NRC licensees.

NUCLEAR REGULATORY COMMISSION: INVESTIGATIVE AUTHORITY

Congress intended, in passing the Energy Reorganization Act, that the NRC have the ability to conduct its own investigations under the Atomic Energy Act during the pendency of a Department of Labor proceeding.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The remedies provided by an arbitrator in a “whistleblower” case are similar to those provided by the Department of Labor in such a case — they assist the employee as an individual. Those remedies do not assist the NRC in performing the duties assigned it by Congress — protecting the rights of workers in the nuclear industry and ensuring the free flow of information to the NRC.

RULES OF PRACTICE: DISCOVERY RULINGS

The Commission will not rule on claims of privilege in discovery disputes in the abstract.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a motion by both Five Star Products (“Five Star”) and Construction Products Research (“CPR”) (collectively “Petitioners”) to quash or modify a subpoena issued by the NRC Staff. The NRC Staff has responded in opposition to the Motion to Quash and Petitioners have submitted a motion for leave to file a reply with a tendered reply. We have also considered a letter from Petitioners dated September 28, 1993. After due consideration, we grant the motion for leave to file the reply, but deny the motion to quash and/or modify. We enforce the subpoena as issued. Because we held the subpoena in abeyance pending our resolution of this question, *see* Order in this Docket, August 27, 1993, we hereby establish a new response date for the subpoena of Monday, November 1, 1993, at the time and place stated in the original subpoena.

I. FACTUAL BACKGROUND

A. Petitioners' Industry-Related Activities

Five Star Products and CPR are closely related companies; they are both owned by Babcock & King, Inc., they share the same premises in Fairfield, Connecticut, and they share common officers. For example, Mr. William Babcock is the president of Babcock & King, Inc., the president of Five Star, and the vice-president of CPR. His father, Mr. H. Nash Babcock, is the president of CPR and vice-president of Five Star.

Five Star manufactures and sells grout and concrete products to the nuclear industry and has done so for about 20 years. Prior to the events that precipitated this incident, Five Star submitted these materials to CPR for testing. Following those tests, CPR issued Certificates of Conformance, certifying that the materials manufactured by Five Star meet the requirements of 10 C.F.R. Part 50, Appendix B. Under federal statute, section 206 of the Energy Reorganization Act, 42 U.S.C. § 5846, and implementing NRC regulations, 10 C.F.R. Part 21, this certification signified to nuclear power plant licensees that Five Star manufactured these materials subject to special quality requirements tailored to nuclear power plant safety applications, and subjected Five Star and CPR to safety reporting obligations to the NRC so that safety problems would be discovered and evaluated. Certified materials can be installed in "safety-related" systems without further testing by the NRC licensee that purchases them.

Based upon these certifications, several NRC licensees have purchased and installed Five Star's products in safety-related applications at various nuclear power plants in the United States over a period of years. See NRC Staff Response at 3 n.4. The Staff has also submitted an exhibit documenting the purchase by an NRC licensee of material manufactured by Five Star and certified by CPR as meeting the requirements of 10 C.F.R. Part 50, Appendix B, i.e., as safety-grade material. See NRC Staff Response at 13 n.19 and Exhibit 5.

B. The August 1992 Safety Inspection

On August 19, 1992, an NRC Staff inspection team began an unannounced inspection of Five Star. The inspection team viewed certificates of compliance signed by Five Star officials certifying that certain orders from NRC licensees for concrete and grout were filled in compliance with 10 C.F.R. Part 50, Appendix B, and subject to 10 C.F.R. Part 21. However, the inspection team also uncovered audits of Five Star's quality assurance ("QA") program performed by nuclear power plant licensees who were customers of Five Star's products. While some of the audits approved Five Star's QA program, other audits stated that the program was not qualified under NRC regulations because Five Star would

not allow the licensees access to the testing laboratory and, therefore, the qualifications of the QA program could not be verified.

The NRC inspection team requested access to the Five Star/CPR laboratory; however, access was denied on August 18th by CPR president H. Nash Babcock. Subsequently, Mr. Babcock again denied the NRC inspectors access to the laboratory on August 19th, and refused the inspectors' request for access to the laboratory technicians' notebooks. In addition, Mr. Babcock refused to allow the NRC inspectors to copy any of the records they had reviewed in the course of their inspection with the exception of the current QA manual. Finally, Mr. Babcock asked the inspectors to leave the Five Star/CPR premises before they had the opportunity to review all the documents that had originally been made available to them.

Subsequently, on August 25, 1992, Five Star informed its current customers that it was suspending its QA program immediately and that in the future it would only supply commercial-grade products, i.e., products that were not certified for safety-related uses. In response, the NRC Staff issued an Information Notice ("IN") that informed all NRC Part 50 licensees that (1) the NRC Staff had been denied access to Five Star's test laboratory and test data, and, (2) accordingly, the NRC had been unable to verify the quality of certain Five Star products used in safety-related applications. *See* IN-92-66 (Sept. 1, 1992).¹

C. The Holub Investigation

On January 22, 1993, CPR terminated the employment of Mr. Edward P. Holub, CPR's Director of Research. The NRC Staff has now confirmed that Mr. Holub did indeed bring safety concerns to the NRC Staff. These concerns related to the quality of the cement and grout that was (1) ordered pursuant to 10 C.F.R. Part 50, Appendix B, criteria by nuclear facilities licensed pursuant to 10 C.F.R. Part 50, and (2) tested by CPR and certified by CPR and Five Star to satisfy the requirements of 10 C.F.R. Part 50, Appendix B, subject to the requirements of 10 C.F.R. Part 21. *See generally* NRC Staff Response at 6 n.11, and 7.

On January 28, 1993, Mr. Holub filed a complaint with the Wage and Hour Division, U.S. Department of Labor ("DOL"), alleging that CPR had terminated his employment in retaliation for his providing safety concerns to the NRC on or about June 22, 1992. On April 1, 1993, the DOL Wage and Hour Division, New Haven, Connecticut, issued an Area Director's Finding, signed by the Assistant

¹On September 1, 1992, the NRC Staff, with the assistance of the United States Marshals, seized documents relating to Five Star's and CPR's activities under the authority of a criminal search warrant issued by the United States District Court, District of Connecticut. The NRC Staff has since returned copies and/or originals of those documents to Five Star and/or CPR as appropriate.

Area Director, which found that (1) Mr. Holub was engaged in protected activity within the scope and meaning of section 211 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851; and that (2) discrimination as defined and prohibited by that statute was a factor in the actions that comprised his complaint. Five Star and CPR have appealed that decision and have requested a hearing before a DOL Administrative Law Judge.

As a result of the DOL Area Director's Finding, the NRC Staff, in accordance with normal procedure, issued a "chilling effect" letter to CPR on April 30, 1993. The NRC Staff requested CPR (1) to provide the reasons for Mr. Holub's termination, including any supporting documentation, and (2) to describe the actions, if any, taken or planned, to ensure that Mr. Holub's termination would not have a "chilling effect" in discouraging other employees from raising perceived safety concerns regarding Five Star products sold as meeting the requirements of 10 C.F.R. Part 50, Appendix B.

On May 6, 1993, CPR replied to the NRC Staff's letter. In its response, CPR refused to provide either the basis for Mr. Holub's termination or a description of any activities taken to prevent a "chilling effect" on its other employees. CPR based its refusal to provide the requested information on its assertion that the NRC lacked jurisdiction over CPR. On June 6, 1993, the NRC issued another "chilling effect" letter to CPR and on August 5, 1993, CPR responded, again refusing to provide the information requested by the NRC, based upon an assertion that the NRC lacked jurisdiction over CPR.

On June 21, 1993, the NRC's Office of Investigations ("OI") initiated investigation No. 1-93-027R into the circumstances of Mr. Holub's termination. On August 17, 1993, the Director of OI issued a subpoena to William N. Babcock, or the Custodian of Records for Five Star and CPR, seeking production of any documents "relating . . . to the termination of employment" of Mr. Holub "and the deliberations, discussions and communications that resulted in the decision to terminate Mr. Holub." The subpoena defined "document" to include

any handwritten, typed, recorded, reproduced communication, memoranda (whether issued or not), draft memoranda, notes, records, letters, messages, bulletin board postings, working papers, reports, summaries, opinions of consultants, notices, instructions, minutes of meetings, and inter & intra office communications."

Subpoena at 1. Furthermore, the subpoena sought "any and all company policies, procedures, or requirements regarding involuntary terminations" in addition to the position descriptions of three other named employees. *Id.* Finally, the subpoena sought Mr. Holub's official personnel file, "including any disciplinary warnings or actions; as well as attendance records and compensation, salary, bonus and/or payroll records . . ." *Id.*

On August 26, 1993, Petitioners filed their motion to quash or modify the subpoena. Petitioners argued that (1) the NRC Staff lacked jurisdiction over them and, alternatively, (2) that the subpoena sought privileged material. On August 27, 1993, we issued an order directing the NRC Staff to respond to the Motion to Quash by September 9, 1993. The NRC Staff has now responded and the matter is before us for resolution.

III. ANALYSIS

A. Applicable Statutes and Regulations

In section 161c of the Atomic Energy Act ("AEA") of 1954, as amended, Congress explicitly provided that the NRC

is authorized . . . to make such studies and investigations, obtain such information . . . as the Commission may deem necessary and 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 . . . 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 AEA, in turn, defines "person" as "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, . . . and (2) any legal successor, representative, agent or agency of the foregoing." 42 U.S.C. § 2014(s).

In section 211 of the Energy Reorganization Act ("ERA"), as amended, Congress has provided that

[n]o employer may discharge any employee or otherwise discriminate against any employee . . . because the employee . . . (A) commenced, caused to be commenced, or is about to commence or cause to be commenced . . . a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended; . . . or (F) assisted or participated . . . in any 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.

42 U.S.C. § 5851(a)(1). An "employer," under the ERA, includes "a contractor or subcontractor of a licensee . . ." 42 U.S.C. § 5851(a)(2)(C).

The Commission has adopted regulations implementing section 161 of the AEA and section 211 of the ERA for each area of licensing activities.² The regu-

²Section 50.7 was adopted not only "to implement section [211], 'Employee Protection' of the [ERA]," but also "to incorporate into the regulations the Commission's authority under section 161 of the [AEA] to investigate an alleged unlawful discrimination against an employee and to take appropriate action . . ." 47 Fed. Reg. 30,452

(Continued)

lation implementing employee protection for activities under Part 50 is found at 10 C.F.R. § 50.7, which prohibits “[d]iscrimination by a Commission licensee, . . . or a contractor or subcontractor of a Commission licensee” 10 C.F.R. § 50.7(a). “[P]rotected activities include but are not limited to: (i) [p]roviding the Commission information about possible violations of requirements imposed under either [the Atomic Energy Act or Energy Reorganization Act].” 10 C.F.R. § 50.7(a)(1).

In general, an agency subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena’s issuance. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989).

B. Application

1. *Petitioners Are a “Contractor” and a “Subcontractor” Within the Meaning of the Statute and the Regulation*

Petitioners are subject to the Commission’s jurisdiction under section 161 of the AEA and section 211 of the ERA.³ Stripped of its rhetoric, Petitioners’ argument that they are not subject to the NRC’s jurisdiction under section 211 boils down to a simple assertion that each of the two entities, Five Star and CPR, is not a “contractor” or “subcontractor” within the meaning of section 211 of the ERA and 10 C.F.R. § 50.7(a). Instead, Petitioners argue that they are “suppliers” of goods and services, not “contractors.”

We infer that Petitioners’ argument is that the term “contractor” requires an extended relationship between the NRC licensee and the contracting party, not the individual contract that results from the filling of a purchase order. However, Petitioners cite no law whatsoever for that proposition or the proposition that a “supplier” of materials has no contract with the purchaser. Furthermore, Petitioners cite no definition of the term “contractor” in either section 211 and its legislative history or in 10 C.F.R. § 50.7 and its statement of considerations for their position. Instead, Petitioners’ only citation to *any* authority in support of their argument is to the definition of a contractor for purposes of the NRC’s Fitness for Duty requirements in 10 C.F.R. Part 26.

The NRC Staff argues that because Five Star entered into “contracts” with NRC licensees to provide concrete and grout that was certified to meet NRC

(July 14, 1982). Thus, this section of our regulations is adopted under *both* section 211 of the ERA and section 161 of the AEA.

³ Clearly, Petitioners are “persons” as defined in section 11s of the AEA and we do not read their pleadings to argue to the contrary.

requirements for installation in safety-related applications, Five Star is a "contractor" within the meaning of section 211 and 10 C.F.R. § 50.7. Furthermore, the Staff argues that because CPR "contracted" its services to Five Star for the purpose of enhancing Five Star's contracts with NRC licensees, CPR is a "subcontractor" within the meaning of section 211 and 10 C.F.R. § 50.7.

Neither the legislative history of section 211 (then section 210) of the ERA nor the Statement of Considerations of 10 C.F.R. § 50.7 provide any discussion or the definition of the term "contractor." Congress added section 211 to the ERA as part of the NRC's Authorization for Fiscal Year 1979, Pub. L. No. 95-601. This provision originated in the United States Senate as section 7 of S.2584, the Senate version of the NRC's authorization legislation. The Senate Committee Report only briefly discusses the provision without discussing the term "contractor." See S. Rep. No. 95-848 (May 15, 1978) at 29-30. Because the House version of the authorization legislation did not contain a similar provision, the Senate version was adopted as section 10 of the final legislation. See H.R. Conf. Rep. No. 95-1796 (Oct. 14, 1978) at 16-17. Likewise, the Statement of Considerations accompanying the adoption of 10 C.F.R. § 50.7 contains no discussion of the term "contractor." See 47 Fed. Reg. 30,452.

After considering this matter, we do not think that Congress could have intended to exclude employees at entities such as Five Star and CPR from the protection of section 211. The philosophy underlying the adoption of section 211 and its implementing regulations is that any employee of an NRC licensee or of a firm that deals directly or indirectly with NRC licensees on nuclear-related matters and who is in a position to have information relating to nuclear safety must feel free to come to the NRC with that information. Any attempt to "chill" this access to the NRC by harassing, intimidating, or firing employees who report conditions that could adversely affect the public health and safety violates section 211.

Quite simply, a defect in materials provided by a "supplier" or "vendor" can prove just as dangerous to public health and safety as a defect in materials provided by a "contractor" that has a more complex or long-term relationship with the NRC licensee. The risk to public health and safety — and the NRC's responsibility to protect that public health and safety — is not measured simply by the length of time in the contractual relationship between the NRC licensee and the commercial entity providing the goods and services at issue. Likewise, the protection afforded to employees who may be able to provide information to the NRC regarding threats to the public health and safety cannot be measured by the length of their employer's contract with the NRC licensee.

We believe that this is especially true where — as here — the "supplier" offered goods and services that were certified to meet the NRC's requirements for installation in safety-related applications. Five Star offered a product for a price; and part of the product offered for purchase was the value of the certificate

under Part 50, Appendix B, allowing installation in safety-related applications. Because the cement and grout purchased from Five Star carried this certificate, NRC licensees were likely to use such materials in safety-related applications without further testing or investigation.

If an employee of a firm that manufactures such material has information regarding a defect in the material or in the method of testing that material, we believe that Congress clearly intended that such an employee be protected if he or she provides that information to the NRC. Any other interpretation would be contrary to the spirit of section 211 and would create a serious gap in the protection that Congress clearly intended to create for employees in the nuclear industry and related occupations.

Moreover, we cannot accept Petitioners' distinction between a "contractor" and a "vendor" — or "supplier," to use Petitioners' words. As the Staff notes, Five Star provided materials to NRC licensees by means of a contract. True, these contracts did not require an extended relationship between Five Star and the licensee and were not performed at the location of the NRC licensee's facility. But they were still contracts in every legal sense of the word; accordingly, Five Star was a "contractor" in every legal sense of the word.⁴

Accordingly, we construe the term "contractor" in section 211 of the ERA and 10 C.F.R. § 50.7 of our regulations to include — at a minimum — employers such as "vendors" or "suppliers" that manufacture and offer for sale materials that are (1) intended for use by NRC licensees and (2) certified to meet the requirements of 10 C.F.R. Part 50, Appendix B. Five Star is such an employer and therefore, is a "contractor" for purposes of 10 C.F.R. § 50.7 and section 211

⁴ In a letter to the NRC Staff, dated July 23, 1993, containing an affidavit by William N. Babcock, Petitioners asserted that the filling of a purchase order did not constitute the establishment of a contractual relationship between Five Star and the NRC licensee that purchased the materials. See Motion to Quash at Exhibit E, Affidavit at 3. However, it is a well-settled point of contract law that in certain situations, performance by an offeree in compliance with an offer constitutes an acceptance of that offer and creates a contract. See, e.g., Calamari and Perillo, *Contracts* § 31 (1970); Farnsworth, *Contracts* §§ 3.14, 3.24 (1982); Restatement (Second) of the Law of Contracts § 50 (1979). See also *Himfar v. United States*, 174 Ct. Cl. 209, 355 F.2d 606 (1966); *Radium Mines, Inc. v. United States*, 139 Ct. Cl. 144, 153 F. Supp. 403 (1957). This concept has been adopted by article 2 of the Uniform Commercial Code. See U.C.C. § 2-206(1)(b). As one court has recently noted, a purchase order is generally presumed to be an offer inviting acceptance by the seller. *Harper Trucks, Inc. v. Allied Welding Supply*, 2 U.C.C. 835 (D. Kan. 1986).

In his Affidavit, Mr. Babcock admits that Five Star has supplied materials to NRC licensees in response to "blanket purchase orders for products." See Motion to Quash at Exhibit E, Affidavit at 3. The purchase orders described by Mr. Babcock constituted "offers" to buy conforming materials. Five Star apparently replied by supplying the conforming materials, see, e.g., NRC Staff Response at Exhibit 5E, which constituted an "acceptance" of the offer by performance, creating a unilateral contract. Of course, if the licensee exchanged additional correspondence with Five Star, a more traditional bilateral contract may have been established. Thus, we find that Five Star entered into contractual relationships with NRC licensees when it consummated transactions in which it supplied materials to fill purchase orders issued by those NRC licensees.

The final step in the process would be for the NRC licensee to send Five Star the payment for the materials, the "consideration" for the performance of the contract. We have no doubt that if Five Star had supplied the conforming materials to the NRC licensee but the licensee refused to pay the price quoted in the purchase order, Five Star would have sued the licensee for breach of contract under the theory described above.

of the ERA. Therefore, the Staff has authority to investigate the circumstances of Mr. Holub's termination under section 211 of the ERA, section 161 of the AEA, and 10 C.F.R. § 50.7.⁵

Having determined that Five Star is a "contractor" within the meaning of section 211 and 10 C.F.R. § 50.7, we can easily find that CPR is a "subcontractor" — even by Petitioners' own definition. Clearly, CPR maintained an ongoing contractual relationship with Five Star to provide testing services regarding the cement and grout sold to the NRC licensees. Based upon those tests, Five Star certified that the materials meet the NRC's requirements found in 10 C.F.R. Part 50, Appendix B, subject to the requirements of 10 C.F.R. Part 21. Absent CPR's testing services, Five Star could not have issued the certificates that were an integral part of the sale of its materials to NRC licensees. Therefore, CPR is a "subcontractor" to Five Star within the meaning of section 211 of the ERA and 10 C.F.R. § 50.7 adopted under both section 211 and section 161 of the AEA.

Petitioners raise three additional arguments that they are not subject to the NRC's jurisdiction. All are easily rejected. First, Petitioners argue that they are not subject to our jurisdiction because they now sell only "commercial-grade" grout and cement to the nuclear industry. Motion to Quash at 7. However, Mr. Holub alleges — and Petitioners do not deny — that at the time he provided information to the NRC, Five Star was selling materials to NRC licensees with CPR's certificates that the materials complied with the requirements of 10 C.F.R. Part 50, Appendix B.⁶ In other words, at the time in question, Five Star was selling "safety-grade" materials, not "commercial-grade" materials.

We cannot and will not allow Five Star's subsequent act of ceasing to sell safety-grade materials to remove Mr. Holub's protection for engaging in protected activity. Otherwise, a contractor could protect itself from a charge of discrimination simply by terminating the contract when it was caught in the act

⁵In their letter of September 28, 1993, Petitioners allege that the Staff did not have jurisdiction to conduct its August 1992 inspection. However, the NRC Staff clearly had jurisdiction to inspect Five Star's operations under 10 C.F.R. Part 21, which implements sections 161 and 234 of the AEA and section 206 of the ERA. Briefly, Part 21 requires that any firm that manufactures a "basic component" of a facility or activity licensed by the NRC, must report any known defects or noncompliances in that component that could create a substantial safety hazard, to the NRC as soon as those are discovered. Contrary to Petitioners' allegation, *see* Motion to Quash at Exhibit E, at 2, the cement and grout manufactured by Five Star and sold to NRC licensees under Part 50 Appendix B certification, are "basic components" whose failure could create a substantial safety hazard, as defined by 10 C.F.R. § 21.3(a)(1) and (2). Moreover, Five Star itself certified that its products were manufactured and sold in accordance with Part 21. Therefore, Five Star cannot now reverse itself and allege that Part 21 does not cover the manufacture of these products. Accordingly, Five Star was required to "permit duly authorized representatives of the [NRC], to inspect its records, premises, activities, and basic components as necessary to effectuate the purposes of [Part 21]." 10 C.F.R. § 21.41.

⁶Mr. Holub alleges that he provided information to the NRC Staff on or about June 22, 1992, before Five Star abandoned its QA program. NRC Staff Response at 7. Petitioners do not argue to the contrary.

We note that Petitioners have characterized Mr. Holub's allegation as "baseless." Motion to Quash at 2. However, Mr. Holub is protected under section 211 and 10 C.F.R. § 50.7 regardless of the *accuracy* of his allegation.

of discrimination. Again, we cannot find that Congress intended such a result in enacting section 211.

Second, Petitioners argue that they are not “contractors” because they did not perform work “inside the protected area boundary. . . .” Motion to Quash at 7, *citing* 10 C.F.R. Part 26. However, that argument is clearly specious. Section 26.3 defines a class of persons who are subject to random drug testing by urinalysis, not the class of persons who are subject to the employee-protection provisions. We defined “contractor” narrowly in Part 26 for the specific purpose of limiting the intrusive testing for illegal drugs and only for that purpose.

More importantly, we believe that Congress could not have intended to limit the NRC’s ability to protect employees from discrimination to those employees who performed jobs in the protected area, and, as before, we read no such limitation in either the ERA or its legislative history. For example, such an interpretation would mean that the NRC could not protect workers who prefabricated portions of the reactor outside a protected area. Therefore, we conclude that the fact that the Petitioners did not actually install the materials in the licensees’ plants does not remove them from the coverage of either the ERA or the Commission’s regulations.

Third, Petitioners rely upon *Adams v. Dole*, 927 F.2d 771 (4th Cir. 1991) *cert. denied*, 112 S. Ct. 122 (1991), for the proposition that their employees are not protected under section 211. Petitioners argue that the NRC can assert jurisdiction over them only if the NRC has jurisdiction over “any” employer and that the Fourth Circuit rejected that approach in *Adams v. Dole*. Motion to Quash at 6. We have reviewed that case and we believe that Petitioners have misread it.

In *Adams v. Dole*, the Fourth Circuit held that an employee of a DOE contractor was not protected under section 211 — a decision that Congress legislatively reversed in enacting the 1992 amendments to section 211. In reaching its decision, the Fourth Circuit concluded that only employees of NRC licensees and their contractors and subcontractors were protected — not employees of DOE licensees and their contractors and subcontractors. 927 F.2d at 777. In the process, the Fourth Circuit rejected an argument raised by the Petitioners that the DOL had jurisdiction over “any” employer, regardless of the employer’s relationship to an NRC licensee.⁷

In this case, we do not assert jurisdiction over just “any” employer. Instead, we are today asserting jurisdiction over an employer with a long history of providing materials — including safety-related materials — to the nuclear industry and, more specifically, over acts by that employer that are directly

⁷At no point during its decision did the Fourth Circuit discuss the type of relationship that constituted a “contractor” for purposes of section 211.

related to its transactions with NRC licensees. Thus, we find Petitioners' citation to *Adams v. Dole* to be inapposite.

Finally, Petitioners characterize this dispute as simply "an employment matter." Motion to Quash at 9 (emphasis deleted). However, this dispute presents more than just a concern over the circumstances of Mr. Holub's termination. For approximately 20 years, Petitioners have sold products to various NRC licensees and those licensees have, in turn, presumably installed in safety-related systems, based upon certifications from Petitioners that these products met the requirements of 10 C.F.R. Part 50, Appendix B, subject to the requirements of 10 C.F.R. Part 21. The NRC Staff is naturally concerned that Petitioners may have discharged Mr. Holub in violation of his rights under the ERA and the Commission's regulations because he provided safety concerns to the NRC, and, as we noted above, the staff has jurisdiction to investigate that issue.

However, another fundamental question exists: if Petitioners discriminated against Mr. Holub for reporting safety concerns, did they discriminate against others for the same actions over the past 20 years and did such discrimination create an atmosphere in which unsafe products were sold to NRC licensees for installation in safety-related areas of nuclear power plants? In order to determine whether an investigation is needed into *that* question, the NRC Staff must first make a threshold determination of whether Petitioners discriminated against Mr. Holub.

In a case almost directly on point, the Appeal Board found that the NRC Staff needed similar information related to the termination of a contractor's employee in order to determine whether to order an augmented inspection at the employer's office. See *Union Electric Co.* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126 (1979) ("*Callaway*").

We find the *Callaway* Board's reasoning persuasive. The Staff's purpose in instituting this investigation is not to provide Mr. Holub with a remedy for the loss of his employment. Instead, the NRC Staff must determine whether to initiate an investigation into (1) whether Petitioners have taken similar actions against other workers or whether Mr. Holub's termination may have had a "chilling effect" on his co-workers and (2) in either case, are there any safety implications resulting from the employer's actions.

As the Staff points out, Petitioners' products have been

used as support for safety-related dynamic machinery installed in safety-related systems. Grout and structural concrete are also used as support for the nuclear reactor vessel, which is part of the reactor coolant pressure boundary, and structural concrete is also used in nuclear vessel containment walls, shielding, and in the walls and floor of diesel generator rooms."

Staff Response at 3 n.3.⁸ Clearly, a failure by Petitioners' products in one of these safety-related systems could create a threat to the public health and safety. Such a failure could occur if Petitioners' employment practices have created a situation in which substandard material has been sold as safety-grade material. Investigating this type of potential threat to public health and safety is a purpose clearly authorized by Congress in section 161 of the AEA, independent of any authorization provided for this investigation by section 211.⁹

2. The Pendency of a DOL Proceeding Does Not Prevent the NRC from Acting to Protect Public Health and Safety

Petitioners argue that because Mr. Holub has initiated a proceeding before the DOL, the NRC should not pursue its own investigation into this matter as a matter of "discretion." Motion to Quash at 8-10. Specifically, Petitioners argue that Mr. Holub's sole remedy under both the ERA and NRC regulations is provided by the DOL and that the NRC's investigation would be "improvident." Motion to Quash at 9. However, this argument is clearly rebutted by both the legislative history of the ERA and our prior case law.

First, it is clear that Congress intended that the NRC have the ability to conduct its own investigations during the pendency of a DOL proceeding. As the Senate floor manager of the ERA noted, "the pendency of a proceeding before the [DOL] need not delay any action by the Commission to carry out the purposes of the Atomic Energy Act of 1954." 124 Cong. Rec. 29,771 (1978) (remarks of Senator Hart). Reflecting this view, the Memorandum of Understanding ("MOU") between the NRC and the DOL clearly provides that the NRC can take action independent of the status of the DOL's proceedings. See Memorandum of Understanding Between the NRC and the Department of Labor, 47 Fed. Reg. 54,585 (Dec. 3, 1982).

As we noted above, NRC licensees have purchased cement and grout from Petitioners for approximately 20 years. These licensees have installed these

⁸ For example, Five Star's promotional literature states that its grout is intended for use under applied loads to support a component, structure, or piece of equipment or machinery. The grout provides the necessary structural support between the bottom of the supporting device and the top surface of its foundation, and transfers the applied support or equipment loadings (static and/or dynamic) uniformly to the foundation for which stress levels have been analyzed. Thus, shrinkage or expansion from the material's specification can cause unanalyzed stress distributions that may impact equipment operability. In addition, Five Star states that applications for its Special Grout 160 include radiation shielding, penetration closures, and nuclear reactor foundations. Finally, Five Star states that its Structural Concrete is used primarily in the repair of structural concrete. Applications include the repair of concrete columns, floors, walls, foundations, and setting of structural anchors. These products can also be used in other safety-related applications as determined by the licensee.

⁹ While the NRC Staff has informed us that it has "determined that Five Star's products d[o] not constitute a safety concern[.]" NRC Staff Response at 6, we read that statement to indicate that the Staff has no safety concerns arising out of Mr. Holub's particular allegation. We do not read that response as meaning that the Staff has reviewed and validated *all* sales by Five Star to the nuclear industry over its 20-year history.

materials in safety-related systems, relying on the certification that the purchased materials met the NRC's requirements for safety-grade materials. The Staff has a legitimate concern that Petitioners' employment practices may have allowed substandard materials to have been sold as safety-grade materials. It is clear that Congress did not intend that the agency await the conclusion of a lengthy DOL hearing process before investigating such a safety-related issue.

Second, the *Callaway* decision speaks directly to this issue. In that case the Appeal Board held that the Staff had jurisdiction to investigate and take action against contractors who retaliate against their employees who bring safety concerns to the NRC, even if that employee has either contractual or statutory remedies for his discharge. *See generally Callaway*, 9 NRC at 132-39. As the *Callaway* Board pointed out, the remedies provided by the arbitrator in that case — like the DOL in this case — will only assist the employee as an individual. Those remedies will not assist the NRC in performing the duties assigned it by Congress; protecting the rights of workers in the nuclear industry and ensuring the free flow of information to the NRC. *E.g.*, *Callaway*, 9 NRC at 138-39. Accordingly, the NRC Staff need not await the conclusion of Mr. Holub's DOL proceedings before conducting its investigation.¹⁰

3. Petitioners Have Failed to Demonstrate That the Subpoena Should Be Modified

In their Motion to Quash, Petitioners urge that if we find that we have jurisdiction over them in this matter, that we should in any event modify the subpoena. Motion to Quash at 11. First, Petitioners ask that the Staff be directed to tell them what documents it already has so they can identify the documents they need to produce. The Staff has now done exactly as requested by Petitioners: it has informed the Petitioners that it (the Staff) has no documents that are requested in the subpoena. *See* NRC Staff Response at 18.

Second, Petitioners ask that the Commission modify the subpoena to eliminate the requirement to produce any documents covered by the attorney-client privilege or the work-product privilege. Motion to Quash at 11-12. We will not take that step at this time. The normal practice in discovery is for the party opposing discovery to identify the documents for which a privilege is claimed (as the Staff notes, Response at 18-19, by date, author, addressee, and reason for claiming the privilege) and submit that list to the Court — or in this case, to the Commission — for an adjudication of those claims if the parties cannot

¹⁰ Petitioners argue that the NRC recently opposed efforts to require simultaneous investigations by both the DOL and the NRC. That statement is true; the Commission opposes any effort to *require* simultaneous investigations. However, the Commission has always maintained that it has the *discretion* to conduct a simultaneous investigation in an "appropriate" case. The NRC Staff has determined that this case is an "appropriate" case.

reach an agreement among themselves. We will not rule on such claims in the abstract.¹¹

4. *The Involvement of the United States Attorney*

Finally, Petitioners claim that the United States Attorney for the District of Connecticut appears to be involved in this case on behalf of the NRC in some manner and imply that such involvement should be grounds to quash the subpoena. We disagree. The Staff has not referred this case to the U.S. Attorney and says that it knows of no such involvement. NRC Staff Response at 20. If the Petitioners wish to understand the involvement — if any — of the Office of the U.S. Attorney for the District of Connecticut, they may communicate directly with that Office. This allegation is not grounds to quash the subpoena.

IV. SUMMARY

As we have shown above, the subpoena before us has been issued in the course of an investigation to determine if Petitioners have violated the Commission's regulations issued pursuant to section 161 of the AEA and section 211 of the ERA and to determine if any possible safety-related problems exist at NRC licensed facilities. The information sought is clearly relevant to that investigation, clearly described, and Petitioners have not alleged any failure to follow statutory procedures in issuing the subpoena. Thus, we find no reason to quash the subpoena. *United States v. Powell, supra; United States v. Comley, supra*. Accordingly, we deny the motion to quash or modify the subpoena and establish a new enforcement date for the subpoena of November 1, 1993.

It is so ORDERED.¹²

For the Commission¹²

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this day of 21st October 1993.

¹¹ In their tendered reply, Petitioners appear to have abandoned this argument. Reply at 4 n.4.

¹² Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 30-16055-CivP
(Civil Penalty)

ADVANCED MEDICAL SYSTEMS, INC.
(One Factory Row,
Geneva, Ohio 44041)

November 24, 1993

The Commission denies petitions, one from the NRC Staff and the other from the Licensee, seeking reconsideration of the Commission's September 30, 1993 Memorandum and Order, CLI-93-22, 38 NRC 98, which affirmed in part, and reversed and remanded in part, the Atomic Safety and Licensing Board's decision, LBP-91-9, 33 NRC 212 (1991). In LBP-91-9, the Licensing Board granted the Nuclear Regulatory Commission Staff's motion for summary disposition in a proceeding to impose a \$6250 civil penalty on Licensee, Advanced Medical Systems, Inc.

ORDER

The Commission has before it two petitions, one filed by the Nuclear Regulatory (NRC) Staff and the other by Advanced Medical Systems, Inc. (AMS), each of which seeks reconsideration of the Commission's September 30, 1993 Memorandum and Order, CLI-93-22, 38 NRC 98. In that order, the Commission affirmed in part, and reversed and remanded in part, the Atomic Safety and Licensing Board's Memorandum and Order, LBP-91-9, 33 NRC

212 (1991), in which the Licensing Board granted the NRC Staff's motion for summary disposition. We deny both petitions.

This proceeding involves AMS' challenge to the NRC Staff's order imposing a \$6250 civil penalty for four alleged violations: (1) exposure of an individual to radiation in excess of regulatory limits, (2) inadequate surveys to evaluate radiation hazards, (3) failure to read dosimeters at required intervals, and (4) failure to calibrate dosimeters using specified techniques and within specified time intervals. In CLI-93-22, we affirmed the Licensing Board's grant of summary disposition with respect to Violations 1, 3, and 4. AMS petitions for reconsideration of this portion of the order. Also in CLI-93-22, we reversed the Licensing Board's grant of summary disposition regarding Violation 2 and we remanded to the Board for further proceedings all issues related to that violation. The Staff seeks reconsideration of this portion of CLI-93-22.

Neither the Staff nor AMS has identified any error or abuse of discretion by the Commission in deciding CLI-93-22. Nor have the Petitioners persuaded us that our decision is otherwise incorrect or incomplete. For the most part, both of the petitions merely re-argue matters that the Commission already considered in deciding CLI-93-22. AMS does raise one new issue, i.e., that the Staff was barred by the doctrine of *res judicata* from litigating Violation 1. However, AMS has not offered, nor can we find, any basis for this argument.

For the reasons stated above, the Staff's and AMS' petitions for reconsideration of CLI-93-22 are *denied*.

It is so ORDERED.

For the Commission¹

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of November 1993.

¹ Commissioner Remick was not present for the affirmation of this Order; if he had been present he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

In the Matter of

Docket Nos. 50-424-OLA-3
50-425-OLA-3
(ASLBP No. 93-671-01-OLA-3)
(Re: License Amendment;
Transfer to Southern Nuclear)

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2)

November 17, 1993

The Licensing Board granted, in part, Staff's Motion to defer discovery of certain documents related to an ongoing investigation. In limiting the extent of the deferral, the Board used a balancing test comprised of four factors: (1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right to a prompt proceeding, and (4) the prejudice to the defendant of a delay in the civil proceeding. It applied the Commission's guidance that these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.' " *Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 51 (1993), quoting *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555, 565 (1983). (The Commission also considers the "risk of erroneous deprivation," (38 NRC at 57) which appears to apply primarily in cases of the immediately effective suspension of a license. In this case there is no suspension, so we deal with the harm to GPC entirely under the factor covering "prejudice" to it.) The Board also considered the diligence

being exercised by the Staff to bring the investigations to a close. *Oncology Services*, 38 NRC at 60.

RULES OF PRACTICE: DELAY IN DISCOVERY; ONGOING INVESTIGATION

The Licensing Board weighed several factors related to the Staff's request for a delay due to an ongoing investigation and concluded that only part of the Staff's requested delay should be granted.

MEMORANDUM AND ORDER (Renewed Motion to Compel Staff Production of Documents)

On August 31, 1993, we issued an unpublished Memorandum and Order that determined that we would not order the production of documents that Georgia Power Company (GPC) sought from the Staff of the Nuclear Regulatory Commission (Staff). The Staff wished to withhold specific documents from discovery because of its claim that release of the documents would interfere with an ongoing enforcement investigation. On the other hand, we considered these materials essential to the adjudication of this case. Mr. Mosbaugh's [Intervenor's] petition was filed in October 1992; and we were sympathetic to GPC's desire to get this case tried in a timely manner. We stated, on August 31, 1993, that we were highly sensitive to this need, even though GPC had not presented specific factual arguments about the extent to which it is being injured by delay.¹

¹ In *Piping Specialists Inc.*, unpublished opinion of March 18, 1992 (Staff Reply Concerning Stay), the presiding officer considered whether or not to stay a civil proceeding concerning possible reinstatement of a license to use special nuclear materials. The stay was sought by the Staff because of a pending criminal prosecution. The effect of the stay would have been to keep the respondent in the case out of business indefinitely. The presiding officer applied the following test to whether or not to grant the stay:

The test is a weighing of four factors: (1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right to a prompt proceeding, and (4) the prejudice to the defendant of a delay in the civil proceeding. [*Barker v. Wingo*, 407 U.S. 514, 530 (1972) and *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency*, 461 U.S. 555, 564-65 (1983). See also *Advanced Medical Systems*, ALJ-87-4, 25 NRC 865, 869-71 (1987).]

Although a stay is not being sought in the instant case, the question may be considered to be analogous: when to require the disclosure of documents alleged to be relevant to an enforcement purpose.

I. INTRODUCTION² AND POSITION OF THE PARTIES

On May 3, 1993, GPC filed its First Request for Production of Documents by the NRC Staff. Following unsuccessful attempts to reach an agreement with the Staff concerning document production, GPC's Motion to Compel was filed requesting that the Staff produce a limited set of documents: (1) 44 tapes provided by Intervenor to NRC, (2) transcripts of such tapes, and (3) certain documents evidencing statements made by Intervenor to NRC. The NRC Staff's response requested the Board to defer ruling on GPC's Motion to Compel, representing that a period of 75 days should be sufficient for completion of the Staff's investigation and enforcement review.

The Board's Memorandum and Order (Motion to Compel Production of Documents by the NRC Staff), dated August 31, 1993 (the "Board's Order"), deferred for 75 days GPC's Motion to Compel NRC Staff Production of Documents, dated August 9, 1993 ("GPC's Motion to Compel"). The Board ordered that "[o]n Monday November 8, 1993, the first working day after the 75th day, the [GPC] Motion shall be granted, unless the Staff has earlier filed a show-cause motion. Such a motion should be filed by the Staff promptly upon learning that it will need a further extension of time." Board's Order at 7.

Now the Staff has filed a timely "Motion for Further Extension of Time to Defer Discovery Documents to the Licensee," October 27, 1993 (Staff Motion). It requests at least until March 15, 1994, for the production of the requested documents and suggests that a further delay may also be necessary.

The Staff asserts that its requested delay is necessary due to the need for additional efforts by the Office of Investigations ("OI"), including additional interviews, which are expected to be completed by December 17, 1993. Staff's Motion, Affidavit of James Lieberman at 2. The Staff's requested delay also includes the time necessary for the NRC's Office of Enforcement, Office of General Counsel, and Office of Nuclear Reactor Regulation "to evaluate and analyze the material gathered by OI, and to determine whether enforcement action is warranted." Staff's Motion at 3. "[B]arring unforeseen circumstances, the Executive Director for Operations would forward his decision regarding possible enforcement action to the Commission by February 18, 1994, for Commission action." Lieberman Affidavit at 2.

Mr. Lieberman also states that the "OI Office retains the responsibility to again refer this matter to [the Department of Justice] if, after completion, the investigation reveals evidence of a willful violation of certain NRC regulations. The possibility of further review by the Department of Justice may further delay review [by the Office of Enforcement]." *Id.* at 3.

² In this section of our opinion, we borrow practically verbatim the accurate discussion in GPC's Motion to Compel NRC Staff Production of Documents, November 8, 1993.

The Staff takes the position that “[t]he requested documents should not be released until the Commission completes its review and a determination is made whether to initiate an enforcement action.” Staff’s Motion at 3. The Staff’s new schedule is a “present best estimate schedule based on the review and planning efforts of the Staff which are proceeding with all deliberate speed.” *Id.*

The history of the changes to the Staff’s schedule for the investigation and enforcement activities is worth recounting:

1. In mid-1990, following the receipt of allegations from Mr. Mosbaugh that GPC officials had made material false statements to the NRC Staff, an OI investigation was initiated.
2. In October 1991, the NRC informed a Department of Labor Administrative Law Judge, who was hearing a complaint filed by Mr. Mosbaugh, that the NRC “was making every effort to conclude” its investigation “as quickly as possible.”
3. In late 1991 or early 1992, OI referred the case to the Department of Justice (“DOJ”), which, in March 1993, referred the matter back to NRC to be “pursued administratively.” During the DOJ review, OI investigators were assigned as special agents to the U.S. Attorney’s Office in Atlanta.
4. On March 8, 1993, the Staff filed with the Board an affidavit of Mr. Ben Hayes, Director of OI, which stated: “I believe these [DOJ and OI] investigations and review of the allegations can be completed within four to six months.” NRC Staff’s Response to Licensing Board Memorandum and Order (Admitting a Party), Hayes Affidavit at 3.
5. In April 1993, the Staff informed the Licensing Board that the investigation was expected to be completed within the next several months, but stated that “the date of completion of the investigation cannot be predicted, as it is unknown where matters uncovered in the investigation will lead.” NRC Staff Response to the Licensing Board Questions Regarding Schedule and Discovery, dated April 13, 1993, at 5.
6. On August 26, 1993, the Staff filed another affidavit signed by Mr. Hayes which stated: “Based on the current status, I believe this [OI] review can be completed within two months.”
7. On October 21, 1993, counsel for the Staff contacted counsel for GPC to solicit GPC’s reaction to an NRC request to delay the production of documents until December 17, 1993. This date was said to include sufficient time for NRC Staff review, EDO approval, and, if necessary, Commission approval.
8. On October 25, 1993, counsel for the Staff advised counsel for GPC that the Staff would be requesting a delay until January 12, 1994.
9. On October 27, 1993, the Staff’s Motion was filed requesting a delay until March 15, 1994.

II. THE LEGAL STANDARD

The four-factor test cited in the Board's Memorandum and Order of August 31, 1993, is still applicable:

The test is a weighing of four factors: (1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right to a prompt proceeding, and (4) the prejudice to the defendant of a delay in the civil proceeding. Board's Order at 2 n.1 (quoting *Piping Specialists Inc.*, unpublished opinion of March 18, 1992).

Since our Memorandum, the Commission has held that "'none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.'" *Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 51 (1993),³ quoting *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555, 565 (1983).

We also note that the Commission considers it to be relevant that "the Licensing Board is closely monitoring the status of the NRC investigations to ensure that due diligence is being exercised to bring the investigations to a close." *Oncology Services*, 38 NRC at 60.

III. BALANCING THE FACTORS

A. The Length of the Delay

The delay of discovery in this case began in May 1993. If we were to grant the Staff's current request, we would delay discovery until March 1993 — a 10-month delay in discovery. However, the Staff's request may realistically be viewed as open-ended, since it anticipates further review, which may lead to further investigation and to possible enforcement or criminal actions.

On May 3, 1993, GPC filed Georgia Power Company's First Request for Production of Documents by the NRC Staff. GPC's Motion to Compel was filed August 9, 1993, requesting that the Staff produce a limited set of documents: (1) 44 tapes provided by Intervenor to NRC, (2) transcripts of such tapes, and (3) certain documents evidencing statements made by Intervenor to NRC.⁴ The NRC Staff's response requested the Board to defer ruling on GPC's Motion to

³The Commission also considers, 38 NRC at 57, the "risk of erroneous deprivation," which appears to apply primarily in cases of the immediately effective suspension of a license. In this case there is no suspension, so we deal with the harm to GPC entirely under the factor covering "prejudice" to it.

⁴There are 12 documents that GPC has requested in the category of Mr. Mosbaugh's statements. They are identified at pp. 25-26 of GPC's Motion to Compel.

Compel, representing that a period of 75 days should be sufficient to complete the Staff's investigation and enforcement review.

We note that the delay in our case also affects the Staff's ability to resolve pending 10 C.F.R. § 2.206 petitions that date back to September 1990 and that are being held in abeyance pending the outcome of this proceeding. *Georgia Power Co.* (Hatch Nuclear Plant, Units 1 and 2; Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-15, 38 NRC 1, 3 (1993).

B. The Reason for the Delay

We consider the allegations against GPC to be highly important. Some of its key officials, who are also key officials of the Southern Nuclear Operating Company (SONOPCO), are accused of intentionally withholding safety information from the Nuclear Regulatory Commission following a site emergency in March 1990. The allegations are serious enough that, if sustained, they raise questions about the character and competence of SONOPCO to operate a nuclear power plant with adequate safety.

The long history of this case is peppered with assurances of Staff that the investigation was soon to be completed. (*See* p. 192, above.) In mid-1990, following the receipt of allegations from Mr. Mosbaugh that GPC officials had made material false statements to the NRC Staff, an OI investigation was initiated. Then, in October 1991, the NRC informed a Department of Labor Administrative Law Judge, who was hearing a complaint filed by Mr. Mosbaugh, that the NRC "was making every effort to conclude" its investigation "as quickly as possible." This is the first assurance that the end was in sight.

It is time to determine these charges. While a large investigative record has been compiled, the events happened over 3 years ago. The question is whether people improperly withheld information from the Nuclear Regulatory Commission. The longer the delay, the more likely that key witnesses will be lost and recollections will fade. Hence, live testimony becomes less and less reliable.

The Staff has attempted to explain the reason for this delay. In the "NRC Staff Motion for a Further Extension of Time to Defer Discovery Documents to the Licensee" (Staff Motion), October 27, 1993, we find the following explanations of the slowness of the investigation:

1. The original documentation gathered by OI "is more voluminous than realized at first" (*id.* at 3).
2. The joint review of the Office of Enforcement, the Office of Nuclear Reactor Regulation, Region II, and the Office of the General Counsel "is taking longer than initially anticipated" (*id.*).
3. Further interviews, to be completed by December 17, 1993, have been necessitated (*id.*; attached affidavit of James Lieberman at ¶3).

4. Analysis and an additional decision process that must occur after the further interviews are completed (*id.* at 3).

Of these explanations, the least persuasive is that the documents assembled were "more voluminous than believed at first." This is inexplicable. While we understand some failure to estimate the time for analyzing data and interviewing and reinterviewing witnesses, we see no logical explanation of how a diligent investigation could reasonably fail to know the volume of the documentation it collected. Additionally, when estimates of completion of the investigation have been so poor, we expect a more complete explanation than we have been given. We are not satisfied that the Staff has adequately addressed its reasons for delay, helping us to understand its point of view without compromising its investigation. The size of the record and the need to reinterview witnesses are not, without more, an explanation for the slowness of completing this important investigation. Hence, we are unpersuaded that the Staff has exercised due diligence to promptly bring this matter to a close and present live evidence to a hearing or in the context of a criminal charge. All this time, there is uncertainty affecting both the public's interest in safe operation of a nuclear power plant and GPC's reputation.

Nevertheless, we will also consider Staff's argument that the release of documents will seriously interfere with an important investigation. In this regard, Staff argues that disclosure of the requested information:

1. Would reveal the possible subjects of the ongoing investigation (Lieberman Affidavit at 3, ¶4).
2. Would reveal "possible inspections and the scope of the evidence" (*id.*).
3. Could compromise investigation activities (*id.*).
4. Could affect the outcome of a further criminal referral to the Department of Justice (which returned one referral to the NRC previously).

We have reviewed these considerations and are unpersuaded that they justify further delay after the current phase of the investigation is completed on December 17, 1993. With Staff's approval, GPC has completed its discovery of documents possessed by Allen Mosbaugh. It also knows which of its own employees have been interviewed, and undoubtedly has obtained information from them. In light of all this completed discovery, we do not accept the Staff's vague assertions of how its investigation will be prejudiced. Nor do we see how any of the arguments can justify a March 15, 1994 *current* request for an extension, with substantial likelihood that further developments would prolong that delay.

By December 17, 1993, Staff says that all anticipated followup interviews should be completed.⁵ Although another Staff and Commission review could,

⁵ Staff Motion: Affidavit of James Lieberman at 2, ¶3 (Oct. 2, 1993); Affidavit of Roger Fortuna at 2, ¶3 (Oct. 27, 1993).

of course, uncover still further reasons for interviews, we lack confidence that the continuing need for followup on followup continues to be productive.

We also are persuaded by GPC's argument that:⁶

None of the documents requested by GPC (44 tape recordings made by Mr. Mosbaugh, associated transcripts, and statements made by Mr. Mosbaugh) would disclose the identity of any person interviewed except Mr. Mosbaugh. None of the documents would disclose persons yet to be interviewed. As to the scope and subjects of OI's investigation, that information is already known.

We are willing to accommodate the Staff's current plans for investigation, although the balance in favor of permitting this is tenuous. In light of the entire record (including arguments discussed below), we are not willing to delay the requested discovery beyond December 17, 1993.

C. The Applicant's Request for a Prompt Proceeding

GPC has consistently and repeatedly sought a prompt proceeding on its amendment request. It is being denied a prompt proceeding and it deserves to have an evaluation of the prolonged investigation of it.

D. The Prejudice to GPC

We agree with GPC's characterization of the importance of the sought documents:⁷

public perception and employee morale are adversely affected by NRC's continued withholding of the license amendments on the basis of contrived allegations regarding the character and integrity of the companies' management. The longer it takes to remove the stigma created by such concerns, the greater the chance that the companies' standings in their respective communities and in the industry will be adversely affected. Of course, it is difficult to maintain good employee morale in the face of lingering NRC concerns which are based on such serious allegations lodged by a former employee. Although it cannot be quantified, the importance of good employee morale cannot be overstated. Also, until the license amendments are granted, substantial management attention is required to maintain the appropriate separation of the two companies (GPC and Southern Nuclear) who are responsible for operating the Southern system's nuclear plants (Hatch, Vogtle and Farley). Additional administrative costs are also being incurred to maintain duplicate staffs to perform certain administrative services.

⁶ "GPC's Response to NRC Staff Motion for a Further Extension of Time to Defer Discovery Documents to the Licensee" (Nov. 8, 1993) at 8.

⁷ *Id.* at 13-15, as detailed in the attached affidavit of Mr. W. George Hairston III, GPC's Executive Vice President-Nuclear Operations.

Furthermore, GPC's ability to mount an effective defense will be further prejudiced by the passage of another four months. The recollection of GPC employees as well as NRC witnesses is already diminished due to the significant passage of time since the event under investigation occurred. Even though there are tape recordings of conversations which occurred in 1990, in some cases, it may be difficult for GPC personnel to recollect the circumstances of those conversations. Further delays in this case will exacerbate the difficulty the Company will experience in defending itself in 1994 against allegations that false statements were made to NRC in April, 1990.

Moreover, further delay in the issuance of the license amendments will delay the realization of the benefits of the consolidation, including, for example:

- (a) a single-purpose organization dedicated solely to excellence in nuclear power plant operations, undistracted by the demands of other electric utility operations;
- (b) consistency in personnel policies resulting in cost savings and efficiencies;
- (c) the ability to attract and retain nuclear professionals by offering them an opportunity to build a career within an operating organization responsible for the operation and maintenance of multiple nuclear plants; and
- (d) an increase in Southern Nuclear's effectiveness through recognition by the nuclear community of its responsibility as the exclusive operator of three nuclear power plants.

The documents being sought are extremely important to GPC's defense and preparation for this case. This proceeding involves very serious allegations made by Intervenor against GPC — allegations that GPC vigorously disputes. Intervenor maintains that his allegations are supported by the tape recordings which he transferred to the NRC, and has produced excerpts of his recordings. Intervenor's excerpts, however, are not complete and appear to omit important exculpatory material. Portions of the full tapes have been played in the presence of GPC counsel during OI [Office of Investigations] interviews and reveal that there are additional statements and discussions showing the importance that GPC places on accurate reporting and the efforts that were undertaken to resolve comments on the April 19, 1990 LER. Accordingly, to demonstrate that Intervenor's claims of willful misconduct are baseless, it is critical that GPC have access to the complete tapes. Indeed, the tapes have already been recognized by the Licensing Board as being "essential evidence" in this proceeding. Memorandum and Order (April 21, 1993), LBP-93-8, 37 NRC [292, 299].

Intervenor has also provided other statements to the NRC, and has been interviewed by the NRC on a number of occasions. Access to these documents and statements is similarly essential to determine any other bases (or lack thereof) for Intervenor's allegations and to identify documents that might be introduced as evidence in this proceeding. Needless to say, prior statements by Intervenor may reveal inaccuracies and inconsistencies in his accounts, affecting Intervenor's credibility. Such prior statements may also include remarks exculpating GPC, which may be introduced as admissions. Where a proceeding such as this involves serious allegations and assertions by a single individual, unfettered access to the individual's prior statements is required for a fair and complete hearing.

E. Conclusion

We have weighed all the evidence and arguments in our record. Our prior decision protected Staff's right to continue its investigation. Our current decision also protects that right until the current round of interviews is completed. But it is time to limit further delay in this proceeding by giving GPC its day before

us. Its right to that day is substantial. There is a limit to delay justified by continued and re-continued investigation and "analysis."

IV. PROVISION FOR RECONSIDERATION

We acknowledge that at an earlier point in this proceeding, the Staff offered to make an *in camera* presentation that would permit us to understand the reason for the continuing delay. Hence, it is possible that there are factors present in the investigation that could not be disclosed to us. If, in light of this decision, the Staff concludes that an *in camera* presentation would tip the balance of the four factors, they may make a showing as part of a motion for reconsideration filed on or before December 3, 1993. The first showing should be in writing, containing portions for which *in camera* status is sought. The Staff may also, for good cause shown, request permission to make an oral *in camera* presentation.

V. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 17th day of November 1993, ORDERED that:

1. Georgia Power Company's Motion to Compel NRC Staff Production of Documents, August 9, 1993 [Motion], is denied until December 17, 1993. As of December 18, 1993, the Motion is *granted* and the Staff of the Nuclear Regulatory Commission shall produce the documents mentioned in the Motion on that day.

2. Motions for reconsideration of this Memorandum and Order must be filed and received by us on or before December 3, 1993. A Staff Motion may contain materials for which *in camera* status is claimed, as discussed above.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

James H. Carpenter (by PBB)
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

**Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Thomas D. Murphy**

In the Matter of

**Docket No. 50-312-DCOM-R
(ASLBP No. 93-677-01-DCOM-R)
(Decommissioning Plan)
(Facility Operating License
No. DPR-54)**

**SACRAMENTO MUNICIPAL UTILITY
DISTRICT
(Rancho Seco Nuclear Generating
Station)**

November 30, 1993

The Licensing Board issues a Prehearing Conference Order ruling on proposed contentions submitted by the Environmental and Resources Conservation Organization (ECO) in response to Commission Orders in CLI-93-3 (37 NRC 135), CLI-93-12 (37 NRC 355), and CLI-93-19 (38 NRC 81). ECO submitted contentions in three areas — decommissioning funding, loss of offsite power (LOOP) and the Environmental Assessment/Safety Evaluation Report (EA/SER). The Board accepts two separate funding contentions — determining that they raised significant questions with respect to the viability of the decommissioning funding plan and that material submitted in opposition would have required a ruling on the merits, inappropriate at the contention stage of the proceeding. The Board also grants summary disposition of the one LOOP contention previously accepted by the Commission.

RULES OF PRACTICE: CONTENTIONS

The rules governing the admissibility of contentions (10 C.F.R. § 2.714(b) and (d)) were amended in 1989 to raise the threshold for the admission of contentions. Those rules now require, *inter alia*, a specific statement of law or fact to be raised or controverted, a brief explanation of the bases, a concise statement of facts or expert opinion that support the contention (with references to specific sources and documents), and sufficient information to show that a genuine issue exists with the applicant or licensee on a material issue. On NEPA issues, contentions are to be based, at least initially, on the applicant's or licensee's environmental report. The contention must, if proved, entitle the claimant to some relief.

RULES OF PRACTICE: CONTENTIONS

In adopting a higher threshold for contentions, the Commission was not requiring that an intervenor or petitioner prove its case prior to the admission of its contention. The revised rules are intended to require the intervenor to read pertinent portions of an application, and to state the applicant's position and petitioner's opposing view. They also permit a petitioner to explain deficiencies of an application. However, the mere circumstance that an intervenor may not cite an application document in its contention does not *per se* invalidate the contention.

RULES OF PRACTICE: CONTENTIONS

The scope of permissible contentions is normally bounded by the scope of the proceeding itself. On remand from the Commission, however, the scope of issues is confined to issues identified by the Commission. Beyond that, however, an intervenor may seek to file late-filed contentions, subject to a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(i)-(v), within the scope of the entire proceeding.

RULES OF PRACTICE: CONTENTIONS

The "raised threshold" for contentions must be reasonably applied and is not to be mechanically construed. Rules of practice are not to be applied in an "overly formalistic" manner.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

In considering a late-filed contention, a Licensing Board must balance the five factors set forth in 10 C.F.R. § 2.714(a)(i)-(v). Of these, the preeminent factor has long been recognized as factor (i), good cause for failure to file on time. Where a petitioner or intervenor fails to show good cause, the other four factors must weigh heavily in its favor for a petition or contention to be granted.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

In considering late-filed contentions, a licensing board's balancing of the five factors must be reasonable — taking into account not only a balancing of the lateness but also each of the other factors, including mitigating circumstances, if any. A board has broad discretion in the circumstances of individual cases.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

To be accepted, a late-filed contention must satisfy not only the late-filed factors but also the requirements for contentions. A licensing board need not address these considerations in any particular order, although both are required for admissibility. Analyzing the contention requirements first permits a board to determine whether or not a significant health and safety or environmental question is being advanced, thus assisting the board in considering lateness factor (iii), the contribution to an adequate record to be made by the intervenor.

REGULATORY GUIDES: APPLICATION

The Commission has long accepted contentions challenging the adequacy of regulatory guides.

FINANCIAL ISSUE: DECOMMISSIONING FUNDING

Decommissioning funding costs exclude the cost of removal and disposal of spent fuel (10 C.F.R. § 50.75(c) n.1), but do not clearly exclude costs of interim onsite storage of spent fuel. The cost of casks to store spent fuel in an onsite Independent Spent Fuel Storage Installation do not appear to be excluded.

RULES OF PRACTICE: SUMMARY DISPOSITION

The legal standards governing motions for summary disposition pursuant to 10 C.F.R. § 2.749 were recently reiterated by the Commission in *Advanced Medical Systems, Inc.*, CLI-93-22, 38 NRC 98, 102-03 (1993), *reconsideration denied*, CLI-93-24, 38 NRC 187 (1993).

NEPA: ENVIRONMENTAL ASSESSMENT

NRC regulations pertaining to environmental assessments do not require consultation with other agencies. They only require a "list of agencies and persons consulted, and identification of sources used." 10 C.F.R. § 51.30(a)(2).

RULES OF PRACTICE: CONTENTIONS

A contention that simply alleges that some general, nonspecific matter ought to be considered does not provide the basis for an admissible contention.

NEPA: ENVIRONMENTAL ASSESSMENT

There is no 50-mile presumption for determining areas in which environmental impacts must be evaluated. The 50-mile presumption is applicable in determining injury in fact for standing purposes under certain circumstances. The standing requirement has always been significantly less than for demonstrating an acceptable contention.

RULES OF PRACTICE: CONTENTIONS

Environmental contentions, to the extent possible, must be submitted on the basis of the licensee's Environmental Report (ER) and may not await the Staff's environmental document. The contentions may be amended or expanded if there are data or conclusions in the NRC issuance that differ significantly from data or conclusions in the ER.

RULES OF PRACTICE: APPELLATE REVIEW

An order admitting and denying various contentions is not immediately appealable under 10 C.F.R. § 2.714a where it neither wholly denies nor grants a petition for leave to intervene/request for a hearing.

TECHNICAL ISSUES DISCUSSED

Decommissioning Funding,
Loss of Offsite Power.

SECOND PREHEARING CONFERENCE ORDER (Proposed Contentions; Summary Disposition Motion)

This proceeding involves an application by the Sacramento Municipal Utility District (SMUD or Licensee) for decommissioning of the Rancho Seco Nuclear Generating Station, a nuclear facility located near Sacramento, California. In a Memorandum and Order dated March 3, 1993, CLI-93-3, 37 NRC 135, *reconsideration denied*, CLI-93-12, 37 NRC 355 (1993), the Commission determined that the Environmental and Resources Conservation Organization (ECO) possessed standing (as a matter of discretion) and that it had submitted at least one admissible contention. The Commission further permitted ECO to file additional proposed contentions in three designated areas, subject to various specified conditions.

ECO responded by submitting, within the time periods specified by the Commission, proposed contentions in the three areas defined by the Commission — decommissioning funding, loss of offsite power (LOOP), and the environmental assessment/finding of no significant impact.¹ SMUD and the NRC Staff each submitted responses opposing admission of each of the proposed contentions.² On September 21-22, 1993, the Licensing Board conducted a prehearing conference to consider these filings.³

In addition, on September 7, 1993, SMUD filed a motion under 10 C.F.R. § 2.749 for summary disposition of ECO's original LOOP contention that had been admitted by the Commission.⁴ On September 27, 1993, ECO filed an

¹ ECO's Contention on Licensee's Proposed Decommissioning Funding Plan, dated March 22, 1993 [Funding Contention]; ECO's Contention on SMUD's Consideration of the Loss of Offsite Power, dated April 1, 1993 [LOOP Contention]; ECO's Contentions on the Staff Environmental Assessment (EA), Findings of No Significant Impact, and Safety Evaluation, dated July 12, 1993 [EA Contention].

² Licensee's Response to ECO's Proposed Decommissioning Funding Plan Contention, dated April 1, 1993 [SMUD Funding Response]; NRC Staff Response to ECO's Contentions Regarding the Funding of Decommissioning, dated April 12, 1993 [Staff Funding Response]; Licensee's Response to ECO's Proposed LOOP Contentions, dated April 13, 1993 [SMUD LOOP Response]; NRC Staff Response to ECO's Contention Regarding the Loss of Offsite Power, dated April 21, 1993 [Staff LOOP Response]; Licensee's Answer to ECO's Contentions on the Staff Environmental Assessment, Findings of No Significant Impact, and Safety Evaluation, dated July 27, 1993 [SMUD EA Response]; NRC Staff Response to ECO's Contentions on the Staff Environmental Assessment, Finding of No Significant Impact and Safety Evaluation, dated August 2, 1993 [Staff EA Response].

³ The conference was announced by the Licensing Board's Notice of Prehearing Conference, dated August 31, 1993, published at 58 Fed. Reg. 7306 (Sept. 8, 1993).

⁴ Licensee's Motion for Summary Disposition of ECO's Original LOOP Contention, dated September 7, 1993.

answer in opposition to SMUD's motion,⁵ whereas the Staff filed a response in support of SMUD's motion.⁶ Although we did not consider this motion at the September 21-22 prehearing conference, we do not believe that further argument on this motion is necessary for us to reach a decision. Because of the close relationship of the subject of the admitted contention to the proposed LOOP contention, we here deal both with the LOOP contention and the summary disposition motion.

Based on our review of all of these filings, and our consideration of the arguments proffered at the prehearing conference, we hereby conclude that a portion of ECO's contention on decommissioning funding should be admitted but that no other contention is admissible. We are also granting summary disposition of ECO's original LOOP contention.

A. General Standards

As we observed earlier in this proceeding, the rules governing the admissibility of contentions (10 C.F.R. § 2.714(b) and (d)) were amended in 1989 "to raise the threshold for the admission of contentions." LBP-92-23, 36 NRC 120, 132 (1992), *rev'd on other grounds*, CLI-93-3, 37 NRC 135 (1993). We explained that those rules now require, *inter alia*,

that there be a specific statement of law or fact to be raised or controverted, a brief explanation of the bases of the contention, a concise statement of the "facts or expert opinion" that support the contention, together with references to specific sources and documents of which the petitioner is aware and upon which the petitioner intends to rely, and sufficient information to show that a genuine dispute exists with the applicant (or licensee) on a material issue. On NEPA issues, the contentions are to be based [at least initially] on the applicant's or licensee's environmental report [ER]. Further, the contention must be of consequence in the proceeding and, if proved, entitle the petitioner to relief of some sort.

36 NRC at 132.

Some further guidance is, additionally, warranted. In adopting this higher threshold, the Commission was *not* requiring that an intervenor or petitioner prove its case prior to the admission of its contention. As set forth in the Statement of Considerations,

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.

⁵ECO's Answer in Opposition to SMUD's Motion for Summary Disposition of ECO's Original LOOP Contention, dated September 27, 1993.

⁶NRC Staff Response in Support of Licensee's Motion for Summary Disposition of ECO's Original LOOP Contention, dated September 27, 1993.

54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). In addition, the rules are intended to require the intervenor to read pertinent portions of an application, and to state the applicant's position and the petitioner's opposing view. When asserting that the application and supporting material lack certain facts or do not address a relevant matter, "it will be sufficient for the intervenor to explain why the application is deficient." *Id.* However, as we interpret the revised rules, the mere circumstance that an intervenor may not cite an application document in its contention does not *per se* invalidate the contention — although in particular circumstances it may bear upon the contention's admissibility.

The scope of permissible contentions is normally bounded by the scope of the proceeding itself. Here, the scope of issues comprehended by the Commission's remand orders is narrower: it is confined to the subjects identified by the Commission in CLI-93-3 and CLI-93-12. Beyond that, of course, an intervenor may always seek to file late-filed contentions, which are subject to a balancing of the five factors identified in 10 C.F.R. § 2.714(a)(i)-(v).⁷ Given the Commission's explicit recognition of that circumstance in CLI-93-3, it is clear that, from the standpoint of jurisdiction, we may also consider any such contentions that may fall within the scope of the entire proceeding.

Finally, it is clear that the "raised threshold" incorporated by the Commission into its contention rule must be reasonably applied and is not to be mechanically construed. The Commission has long held that its rules of procedure are not to be applied in an "overly formalistic" manner.⁸ Nothing under the raised threshold appears to contradict that approach.

Thus, failure of an intervenor or petitioner to dot an "i" or cross a "t" should not necessarily undermine the acceptability of a contention, particularly where a significant health and safety or environmental issue is attempted to be raised. In affirming the validity of the Commission's raised threshold, the Court of Appeals only upheld the rule on its face — explicitly noting that the rule could be applied to prevent all parties from raising material issues, that the rule might thus be misapplied, and that it was not ruling on any such instances. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 13 (1993), citing *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990).

Under CLI-93-3, 37 NRC at 154, ECO was required in certain circumstances to address the Commission's requirements for late-filed contentions, which essentially involves addressing the five factors found in 10 C.F.R. § 2.714(a)(1)(i)-(v). These factors are:

⁷ Some portions of the contentions identified by the Commission, to be described in detail *infra*, must likewise satisfy the late-filed factors.

⁸ *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974), citing *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970).

- (i) Good cause, if any, for failure to file on time;
- (ii) The availability of other means whereby [ECO's] interest will be protected;
- (iii) The extent to which [ECO's] participation may reasonably be expected to assist in developing a sound record;
- (iv) The extent to which [ECO's] interest will be represented by existing parties;
- (v) The extent to which [ECO's] participation will broaden the issues or delay the proceeding.

Of the five factors, the preeminent factor has long been recognized as factor (i), good cause for failure to file on time.⁹ Although the regulations call for a balancing test, it has been held that where a petitioner or intervenor fails to show good cause for filing a late petition or contention, the other four factors must weigh heavily in its favor in order for a petition or contention to be granted. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983), citing *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982).

As in other areas, however, in considering late-filed contentions our balancing of the late-filed factors in section 2.714(a) must also be reasonable — taking into account not only a balancing of the lateness but also each of the other factors, including mitigating circumstances, if any. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-47 (1983). Indeed, in balancing these factors, a licensing board has “broad discretion in the circumstances of individual cases.”¹⁰ To be accepted, a late-filed contention must of course satisfy not only the late-filed factors but also the various contention requirements that we have outlined.

There are two approaches we might take in considering both the late-filed factors and contention requirements. On the one hand, we could first evaluate the late-filed factors and then, only if we determined that those factors warranted acceptance of a contention, determine whether the contention requirements were satisfied. We choose alternatively to analyze the contention requirements first, to identify whether or not a significant health and safety or environmental question is being advanced. If so, we would then consider whether the timeliness factors are themselves satisfied. Those factors include as a forceful ingredient the contribution to an adequate record likely to be made by the intervenor. In this way, we can gain further assurance that a significant health and safety or environmental problem is not being swept under the rug by insignificant procedural technicalities. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-9, 37 NRC 433, 436-37 (1993).

⁹ *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

¹⁰ *West Valley, supra*, 1 NRC at 275.

In reviewing the proposed contentions before us, as well as the summary disposition motion on the single admitted contention, we will keep these principles in mind. We turn now to those contentions.

B. Decommissioning Funding

1. *ECO's Contention*

ECO's proposed decommissioning funding contention reads as follows:

SMUD's proposed Decommissioning Funding Plan is inadequate as a matter of fact and of law as detailed below not only (a) because the funding plan is inadequate to meet the cost targets expressed, but also (b) because SMUD lacks the resources to meet those targets, (c) because the mechanism of public and Nuclear [] Regulatory Commission ("NRC") review only once every five years fails to adequately protect the health and safety of the public by failing to alert the NRC Staff and the public to growth in cost estimates and/or slippages in decommissioning funding in a timely manner, and (d) because the funding target itself is grossly underestimated due, among other things, to inadequate estimates of the technical issues to be faced and the technical and manpower resources that will be demanded during the decommissioning task.¹¹

In support of this broad contention, ECO first states that it will rely on the expertise of Dr. A. David Rossin and/or David R. Crespo.¹² Later, it clarified that it was relying primarily on Dr. Rossin.¹³

Next, the contention sets forth fourteen different bases or reasons in support of its general conclusion (one of which was withdrawn at the September 21-22, 1993 prehearing conference¹⁴). Summarized briefly, these are:

1. Increase in long-term debt by 8.8%/year and increase in dependence upon purchased power; and current avoidance of rate increases in favor of long-term indebtedness; collectively creating uncertainties of confidence in the firmness, availability, and cost of power and eventually creating tidal wave of debt that will threaten the viability of the funding plan.
2. Decommissioning cost estimate unreliable because premised on original cost of Independent Spent Fuel Storage Installation (ISFSI) that has been withdrawn and no new design and cost estimate available.

¹¹ Funding Contention at 1-2.

¹² Summaries of the qualifications of these experts were allegedly "previously . . . provided to the Atomic Safety and Licensing Board by affidavit" (Funding Contention at 2); the Board located the affidavit of Mr. Crespo but was unable to locate any dealing with the qualifications of Dr. Rossin. (Dr. Rossin's June 25, 1992 affidavit deals only with the characteristics of ECO as an organization. At the prehearing conference, ECO conceded that Dr. Rossin's qualifications affidavit may not have been filed in the current proceeding (Tr. 187).

¹³ Tr. 309.

¹⁴ Tr. 273.

3. SMUD cost estimates inadequate because premised on NRC decommissioning plan approval by mid-1992, which was not forthcoming. Mis-estimates also reflect poor managerial qualifications which in turn cast doubt on adequacy of cost estimates.
4. Increase in decommissioning liability cost estimates for 1991 reflects adversely on SMUD management competence and dictates semi-annual report to NRC, to be made publicly available.
5. Unreliability of estimated savings to fund decommissioning to be achieved from Conservation and Load Management Programs.
6. Failure of decommissioning plan and associated funding plan to make adequate provision for physical and personnel security and, in particular, to provide a fitness-for-duty program.
7. Withdrawn.
8. Failure to include adequate funds in decommissioning cost estimate and funding plan for measures to identify all onsite areas containing radioactivity.
9. Cost estimate and funding plan inadequate for failing to provide adequate technical basis for assumption of single airborne pathway for release of radioactivity; also failure to provide measures to address potential for releases in the context of accident or terrorism scenarios.
10. Decommissioning Plan and related cost estimates inadequate for determining radionuclide inventory and levels in spent fuel sludge and, accordingly, raise severe questions of adequacy of financial planning for required radioactive decontamination.
11. Lack of long-term overall financing plan, including planned rate increases, as raising questions concerning adequacy of funding plan.
12. Funding inadequate since based on inadequate technical specification bases for spent fuel level and spent fuel temperature; examples of specified scenarios not considered are provided, and failure to include costs of technical corrective measures asserted.
13. Funding Plan premised, *inter alia*, on growth through interest earnings at rates that now are unrealistically high; Funding Plan should consider growth at current interest rates and make provision for possible lower rates.
14. Funding Plan inadequate because possibility that spent fuel pool may not be closed by 1998 (as projected) might lead to increased costs of \$8 million/year from 1999 through 2008 (total \$80 million in 1991 dollars); annual review and five-year revision also inadequate.

2. SMUD and NRC Staff Positions

SMUD and the NRC Staff oppose the admission of each part of the funding contention, as well as the broader contention, on virtually identical grounds. They claim, *inter alia*, that insufficient bases have been pleaded, that insufficient descriptions of the funding problems have been advanced, that SMUD has identified no significant funding issue, and, importantly, ECO has failed to

include citations to those portions of the Funding Plan with which it disagrees. They claim that certain attacks on the Funding Plan are in reality challenges to the Decommissioning Plan (DP) that could have been submitted at the initiation of the proceeding and hence are untimely, without an adequate showing of good cause for the untimeliness. With respect to funding for the ISFSI, they each claim that such consideration is barred by regulation.

We will discuss the particular points raised by SMUD and the Staff in conjunction with our consideration of various portions of the funding contention, to which we now turn.

3. Analysis

As a starting point, we reiterate that ECO intends this contention, with all of its bases, to be viewed collectively as a challenge to the adequacy of the Funding Plan. Even though some or even all of the bases may not themselves reflect significant flaws in the plan, collectively they may constitute a meaningful deficiency in the plan. In our review, we have considered the contention in that context, even though we will discuss each basis, or related groups of bases, separately.

a. Funding Contention, Bases 1, 5, 11, and 13

(i) ECO'S CLAIMS

These bases are analytically similar in their support for the proposition that SMUD allegedly is growing weaker financially, leading to a situation where it will not be capable of fulfilling its funding commitments, as set forth in the Funding Plan. Reasons provided by ECO include an alleged increase in SMUD's long-term debt of 8.8% annually (approximately \$850 million/year contrasted with net earnings of \$37 million¹⁵), an almost doubling of SMUD's dependence on purchased power from 1988 to 1991 to fulfill its production needs, current avoidance of rate increases through issuance of long-term bonds, premise of cost savings through reliance on Conservation and Load Management Program assertedly unreliable because of failure of the program to achieve its goals, failure to have an overall financing plan reflecting growing power needs and anticipated necessary rate increases, and overly optimistic projected earnings based on interest rates higher than are now achievable.

In support of one or more of these supporting bases, ECO cites segments from SMUD's 1991 annual report (supplemented at the prehearing conference with references to SMUD's newly issued 1992 annual report), SMUD's 1991 load

¹⁵Tr. 217, 219, 224, 303-04.

forecast, and general nonspecific references to interest rates (supplemented at the prehearing conference with additional references, in part derived from the NRC Staff response). ECO also reiterates the alleged absence of a long-term financing plan. It concludes that its basic contention is that the Funding Plan is inadequate because "it does not consider many of the factors that need to be considered in order to reach a reasonable estimate of the total funds needed"16

(ii) SMUD AND STAFF POSITIONS

With respect to Basis 1, SMUD and the Staff each rely primarily upon pleading deficiencies. They assert in essence that ECO has failed to make any reference to the Funding Plan itself but rather is relying on statements from other sources (notably, SMUD's annual reports) taken out of context. They add that SMUD's bond rating has in fact gone up over the past few years.¹⁷

They claim with respect to Basis 5 that no nexus has been shown between the financial plan and the Conservation and Load Management Program.¹⁸ SMUD observes that, contrary to ECO's assertions, the Funding Plan makes no reference to the success of the Conservation and Load Management Program, whereas the Staff, acknowledging that ECO's cited basis provides a vague reference to a relationship between the Conservation and Load Management Program and the Funding Plan, asserts that the citation does not support ECO's claim.

With respect to Basis 11, SMUD acknowledges that it has not provided NRC with an overall financial management plan but asserts that none is required or desired by the Staff. The Staff agrees. They each claim that bond-rating agencies perform those reviews for investors and the general public. The Staff also stresses SMUD's inherent rate-setting authority, claiming that such authority "would be more than adequate to compensate for any funding deficiencies." Finally, SMUD asserts that it does indeed have such a plan, which is on file with California regulatory agencies, although never formally submitted to NRC.¹⁹ (The Staff indicated that it performed an independent review of SMUD financial information prior to issuing its SER.²⁰)

Finally, with regard to Basis 13, SMUD and the Staff attack the contention largely for pleading deficiencies in failing to identify the allegedly erroneous interest rates or those rates deemed by ECO to be appropriate. They each claim that the Funding Plan assumes a real rate of return (over inflation) of 3.2% and

¹⁶ Tr. 190.

¹⁷ Tr. 199, 222, 225, 226.

¹⁸ Tr. 250.

¹⁹ Tr. 305.

²⁰ Tr. 308-09.

that these rates will be evaluated every 5 years. Again, they view the 5-year review as invalidating any claim as to the adequacy of interest rates.

(iii) BOARD ANALYSIS

We agree with SMUD and the Staff that each of these bases for ECO's claims includes some pleading deficiencies. Pleadings, however, need not be technically perfect, even under the revised rules governing this proceeding. In particular, perhaps through inadvertent omission on the part of ECO, there is little description of the qualifications of ECO's expert on this question, Dr. A. David Rossin.²¹ On the other hand, based on what ECO provided at the prehearing conference, we are unprepared to dismiss Dr. Rossin as lacking *any* qualifications for this contention. He served as an executive of Commonwealth Edison Company and later as Assistant Secretary of Energy for Nuclear Affairs of the U.S. Department of Energy, and is a past president of the American Nuclear Society — positions in which he is likely to have had exposure to, if not detailed involvement with, financial matters.²²

In any event, collectively, SMUD and the Staff appear to be ignoring the forest for the trees. As the Commission recently observed, although in a somewhat different context, a "compartmentalized reading of [ECO's] pleadings"²³ has led to their positions that no legitimate dispute has been set forth. Although each of these individual bases may not in itself constitute a significant challenge to an aspect of the Funding Plan, collectively the foregoing four bases appear adequate to do so.

First, the circumstance that the Funding Plan is to be reviewed at 1- or 2-year intervals and updated at 5-year intervals²⁴ cannot legitimately serve as a rationale for not looking at alleged current deficiencies in the Funding Plan. For, if that were so, the hearing rights afforded by the Commission's rules and reinforced by CLI-93-3 would be essentially meaningless. We decline to construe the contention rules as mandating or even permitting such a result. In that connection, the results of the reviews need not even be submitted to the NRC and hence would not likely be made available to the public under NRC procedures.²⁵ That NRC might have a right to inspect the documentation of

²¹ See Tr. 186-87, 189, 309.

²² As ECO asserts (Tr. 310-11), the extent of Dr. Rossin's qualifications will, of course, be at issue in an evidentiary hearing or in conjunction with a motion for summary disposition.

²³ See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 94 (1993).

²⁴ Tr. 200.

²⁵ Tr. 347-48.

such reviews at the facility does not provide any meaningful relief to ECO or its members.²⁶

Second, for similar reasons, the mere circumstance that SMUD has the legal authority to set its own rates cannot as a matter of law undercut attempts to demonstrate financial weakness.²⁷ Such a construction would also improperly circumscribe the hearing opportunities offered by NRC to demonstrate (as ECO seeks to do) practical limitations on the exercise of that legal authority.

Third, it is clear that bases or foundations for each of these segments of the contention are set forth. Not only are discernible issues set forth, they have been explained with sufficient clarity to require reasonable minds to inquire further. Cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554 (1978). Although that standard could support admissibility under the earlier rules, it has never been explicitly revoked and can at least be utilized under the revised rules to determine whether material issues have been proffered.

Fourth, many of the objections advanced by SMUD and the Staff are merely disagreements as to the merits of a claim. That is not a ground for dismissing a proposed contention, although it may serve as a foundation for summary disposition pursuant to 10 C.F.R. § 2.749.

Fifth, although the regulations do not require the submission of a financial resource plan, the importance of such a plan is indicated by the fact that the Staff concededly performed a review of SMUD financial information in reaching its conclusions as to the adequacy of the Funding Plan. Indeed, in a nonadjudicatory memorandum (that was provided to the Board and parties), the NRC technical staff indicates that it is pursuing plans to require financial planning estimates to be submitted earlier than is now the case.²⁸ Such a financial plan is clearly pertinent to the issue before us, and it is not available in the NRC docket file for review by ECO. (The availability through California agencies to members of the public in California does not serve as a satisfactory substitute for what ECO is seeking here.)

Finally, these four bases taken together appear to constitute a material portion of the Funding Plan and appear to raise significant questions as to the viability of that plan. The differences in interest rates alleged in Basis 13 could amount

²⁶ Inspection of such revised financial estimates is not part of the routine inspection modules at this time. Tr. 348.

²⁷ See Tr. 193-94, 199.

²⁸ Memorandum for the Chairman, NRC, from James M. Taylor, Executive Director for Operations, dated September 14, 1992, re: Evaluation of Recent Decommissioning Cost Estimates and the Implications for Managing and Storing Spent Nuclear Fuel, transmitted to the Board and parties by copy of letter from Stewart W. Brown, NRR, to Mr. James R. Shetler, SMUD, dated November 17, 1992 (hereinafter, Taylor September 14, 1992 Memorandum).

to \$23 million,²⁹ if not the \$52 million initially asserted by ECO³⁰ — both of which are significant in terms of the overall \$280 million projected cost of the financing plan (particularly when considered along with the additional costs discussed below). Reconciliation of these conflicting claims clearly amounts to a question of fact suitable for resolution through an evidentiary hearing or, if appropriate, summary disposition.

For these reasons, Bases 1, 5, 11, and 13 are hereby admitted (collectively) as support for the decommissioning funding contention.³¹

b. Funding Contention, Basis 4

Under this basis, ECO seeks a semi-annual report by SMUD to NRC, to be made publicly available, premised upon an asserted increase in decommissioning cost estimates of \$75.4 million in 1991 alone (citing SMUD's 1991 financial statements). The increase is also asserted to reflect management incompetence in estimating costs.

SMUD responds by attributing the increase in costs to the substitution of a site-specific cost study for the generic estimate previously relied on by SMUD. It denies that the increase reflects any management incompetence. Moreover, it relies on Reg. Guide 1.159 at 11,³² as support for the 5-year adjustment that it has adopted. It faults ECO for not discussing or criticizing the Reg. Guide time period. For its part, the Staff faults ECO for not pointing to a specific defect in the Decommissioning Plan (DP) or a failure to adhere to 10 C.F.R. §§ 50.75 or 50.82. The Staff also regards ECO's claim as an impermissible attack on the regulations.

We conclude that the reasons set forth in this basis are inadequate to require or even suggest that management is inadequate or that a semi-annual reporting period should be adopted. We are thus not accepting this basis.

However, in the consideration of Bases 1, 5, 11, and 13, which we have accepted, we will permit ECO to assert that a more-frequent reporting period should be adopted (as well as that the reports should be publicly available). This is not an attack on the regulations, as the Staff asserts; the 5-year period does not stem from a regulation but only from a Regulatory Guide implementing that regulation. The Commission has long accepted contentions challenging the adequacy of Regulatory Guides. *See, e.g., Gulf States Utilities Co.* (River Bend

²⁹ Tr. 569.

³⁰ Tr. 329.

³¹ In accepting basis 1, we are excluding the allegation concerning "the principle that the beneficiaries of Rancho Seco could pay the cost of decommissioning to the extent possible . . ." *See* Tr. 221-22. That matter is beyond NRC's jurisdiction.

³² Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" (August 1990), at p. 1.159-11 ("at least once every 5 years" (emphasis supplied)).

Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772 (1977). In any event, the Guide itself does not mandate or prescribe a 5-year period — it merely sets that time period as a maximum. We will thus permit ECO to attempt to establish that a lesser period is appropriate. (For similar reasons, we are permitting adjudication of the reporting period as a part of Basis 14, *infra*.)

Accordingly, we are not accepting the basis advanced for this aspect of the funding contention and thus are rejecting its litigation as a separate item, as sought by ECO. But we will permit adjudication of the acceptability of the current reevaluation period in the context of the previously accepted Bases 1, 5, 11, and 13, as well as Basis 14, which we hereinafter accept.

c. Funding Contention, Bases 2 and 14

(i) ECO'S CLAIMS

These bases are related in that they both involve costs related to the proposed Independent Spent Fuel Storage Installation (ISFSI). Basis 2 portrays SMUD's estimate of the total cost of decommissioning as unreliable, on the ground that it was premised on an original estimate of the cost of an ISFSI that subsequently was withdrawn. ECO cites cost figures for the earlier, withdrawn version and claims that "no new design and accompanying cost estimate supported by actual contract pricing is available."³³

Basis 14, although it does not explicitly mention the ISFSI, inferentially relates to the ISFSI by alleging that the Decommissioning Funding Plan is inadequate for failing to include costs of storing fuel in the spent fuel pool should other spent fuel storage (i.e., the ISFSI) not be available by 1998, as predicted in the Plan. ECO deems these costs to be \$8 million annually, a total of \$80 million by 2008, when funding is to be complete, and asserts that the Funding Plan is deficient in that amount. ECO cites a SMUD response to a Staff inquiry as a basis for the possibility that the ISFSI may not be completed by 1998.³⁴

(ii) SMUD AND STAFF POSITIONS

With respect to Basis 2, SMUD acknowledges that projected ISFSI costs were included in its site-specific decommissioning cost study and that it chose to fund ISFSI costs by deposits into the same fund through which it will fund plant decommissioning. Both SMUD and the Staff claim, however, that ISFSI costs are not within the scope of the decommissioning rule and are

³³ Funding Contention at 3.

³⁴ *Id.* at 10-11, citing DAGM/NUC 92-198 (Aug. 6, 1992).

not considered decommissioning expenses but rather are operating expenses addressed in 10 C.F.R. § 50.54(bb). They cite 10 C.F.R. § 50.75(c) n.1, which states that decommissioning funding costs “do not include the cost of removal and disposal of spent fuel”³⁵

SMUD and the Staff also claim that matters related to the ISFSI, including costs, were considered in a separate proceeding, noticed at 57 Fed. Reg. 1286 (Jan. 13, 1992), in which ECO has not sought to participate.³⁶ Finally, SMUD asserts that, in any event, the modified ISFSI costs are predicted to fall within the same range as the abandoned design. For its part, the Staff additionally asserts pleading deficiencies, claiming that ECO has not identified an expert who will deal with ISFSI costs or provided a precis of testimony or other evidence or, indeed, even adequately asserted that revised ISFSI costs will exceed the budgeted costs.³⁷

With respect to the related Basis 14, SMUD and the Staff each claim that the contention is barred from consideration in this proceeding by 10 C.F.R. § 50.75(c) n.1. Beyond that, SMUD claims that the \$8 million/year cost alleged by ECO can in fact be derived from the site-specific cost study that is included in the Funding Plan. SMUD and the Staff both claim that ECO has failed to plead facts or expert opinion to demonstrate that the ISFSI will not be completed by 1998 (as contemplated by the DP) and that those alternative costs will in fact occur.

(iii) BOARD ANALYSIS

At the outset, it is important to note that ECO's specific claims under Basis 2 are clearly focused on the cost of casks.³⁸ ECO questions the propriety of using cost estimates for an original ISFSI (included in the Funding Plan), in circumstances where the original ISFSI design has been withdrawn and a new design not yet submitted. As we observed in our earlier decision, LBP-92-23, 36 NRC 120, 136 (1992), SMUD in fact asked the Staff to suspend its safety review of the ISFSI pending selection by SMUD of a new cask. The difference in cost between the original ISFSI and a newly designed ISFSI is likely to reflect primarily the difference in cost of casks.

The regulatory provision relied on primarily by SMUD and the Staff appears as footnote 1 to a provision setting forth minimum amounts required to demon-

³⁵ SMUD Funding Response at 20-21; Staff Funding Response at 12-13. The section is quoted in full at p. 217, *infra*.

³⁶ SMUD Funding Response at 21; Tr. 203, 206.

³⁷ Staff Funding Response at 13.

³⁸ See Tr. 209-12.

strate reasonable assurance of funds for decommissioning a reactor (10 C.F.R. § 50.75). It reads as follows:

Amounts are based on activities related to the definition of "Decommission" in § 50.2 of this part³⁹ and do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license [emphasis supplied].

ECO construes this provision not to bar consideration of costs of onsite storage of spent fuel in an ISFSI (including constructing the ISFSI) but rather to extend only to the costs of ultimate removal and disposal of the spent fuel in a spent fuel repository.⁴⁰

On the other hand, to contradict the rather clear language upon which ECO relies, SMUD and the Staff each refer to legislative history which, they claim, demonstrates that the Commission intended to include interim onsite storage in the costs that are barred from consideration. The legislative history cited is at best mixed. Only NUREG-1221 would appear to indicate that interim storage, as well as removal and disposal, is included in the regulatory bar. And even the Staff (although not SMUD) concedes that the costs of purchasing casks and transporting them from the fuel pool to the onsite ISFSI may not be barred from consideration in this proceeding, although it deems these costs to be insignificant.⁴¹

Significantly, NRC's technical staff believes that costs of interim onsite storage *should* be viewed as decommissioning funding costs. In a memorandum to the Chairman of the Commission, James R. Taylor, Executive Director for Operations, has explicitly stated:

Spent fuel management and storage cost estimates are increasing, in large part because of the delay in DOE's spent fuel repository availability date to the year 2010. Clearly, utility costs for spent fuel management and storage until DOE takes title are appropriately considered by the NRC as decommissioning costs. Specifically, they are relevant to releasing a reactor site for unrestricted use and bear on public health and safety [emphasis supplied].⁴²

Moreover, it notes that many licensees' estimates in fact include such costs.⁴³ Indeed, SMUD's estimates included those costs. They are thus incorporated into the Funding Plan before us.

In these circumstances, segmentation of the proposed ISFSI costs into another procedural box appears unfair to ECO. It is not even clear that, for proceedings

³⁹ § 50.2 Definitions. . . . *Decommission* means to remove (as a facility) safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of license.

⁴⁰ Tr. 205-06, 350-51.

⁴¹ Tr. 207-08, 210.

⁴² Taylor September 14, 1992 Memorandum, *supra* note 28, at 2.

⁴³ *Id.* at 1.

pursuant to 10 C.F.R. § 50.54(bb) or 10 C.F.R. Part 72 that arise (as here) from a Part 50 licensing activity, financial matters could even be considered. *See* 10 C.F.R. § 50.33(f). As ECO asserts, the regulatory requirement in 10 C.F.R. § 50.75 n.1 is far from clear. But even if certain financial matters could be considered under that authority, it appears that the cost of casks for storage at an ISFSI may not be included, inasmuch as the casks could very possibly be purchased by the user, not the owner or operator, of the ISFSI.

In any event, in the ISFSI proceeding to which ECO is being steered for Basis 2, such costs were not in fact under consideration. The ISFSI application explicitly stated:

The District's total cost of constructing the ISFSI and purchasing the number of casks required to place the spent nuclear fuel and control components into dry storage is estimated to be between \$13.7 and \$15.8 million, in 1991 base dollars. . . . The collection of these funds, as well as the costs for ongoing ISFSI support activities, are discussed in the "Decommissioning Cost Study for the Rancho Seco Nuclear Generating Station" which was submitted as Appendix B to the RSNBS Proposed Decommissioning Plan. Funds for ISFSI construction and ongoing ISFSI support are included in the current decommissioning funding program for RSNBS. . . .⁴⁴

In other words, if ECO were to have sought to challenge ISFSI costs in the ISFSI proceeding, it would have learned, from the application on file, that those costs were set forth in the underlying documentation for this proceeding. But when it comes to this proceeding to challenge ISFSI costs, it is told that it can only question those costs in the ISFSI proceeding. This is the type of procedural irregularity that could critically undermine the acceptability of the Commission's revised threshold for submitting contentions.

For these reasons, we reject the claim of SMUD and the Staff that the costs that ECO seeks to have considered (in particular, the cost of casks) are barred from consideration in this proceeding. Those financial costs do not appear to be excluded by the regulatory bar of 10 C.F.R. § 50.75(c) n.1. Although ambiguous, that bar appears to cover only "removal and disposal" of spent fuel. Moreover, that the new costs are likely to be comparable to the initial costs, as claimed by SMUD,⁴⁵ is a matter of substance that should not be resolved at the contention stage — particularly where, as here, there is no documented record (available to the public) substantiating such revised costs. Accordingly, we are accepting Basis 2 as a part of the funding contention.

As for Basis 14, that claim does not appear to be an ISFSI claim at all, although it has some bearing on those types of costs. It more accurately reflects

⁴⁴Rancho Seco ISFSI License Application, noticed at 57 Fed. Reg. 1286 (Jan. 13, 1992), at LA-3. *See also* LA-17.

⁴⁵SMUD Funding Response at 22.

potential fuel storage costs that could eventuate if the ISFSI were not timely licensed. It also allegedly represents a substantial sum (\$8 million annually, for as many as 10 years) that could materially affect the adequacy of the Funding Plan. Because its litigability under 10 C.F.R. § 50.54(bb) (as suggested by SMUD and the Staff) is at best questionable, and because these potential costs could impact the adequacy of the Funding Plan, we also accept Basis 14 for litigation.

d. Funding Contention, Basis 3

Under this basis, ECO claims that the SMUD cost estimate was premised upon approval of the DP by mid-1992 and hence, because approval has not yet occurred, is for that reason unreliable. ECO cites SMUD's 1991 annual report as a basis for the expectation but does not explain why the approval date makes a difference. ECO further claims that the mis-estimate reflects adversely on SMUD's management competence.

SMUD and the Staff claim that the asserted delay in approval does not affect the validity of the cost estimates, particularly absent any reasons why it should. They further assert the lack of any basis for the claim that costs are "premiered" on a particular approval date, and the lack of any concrete example of costs that would be affected. (The cited 1991 annual report includes the expectation but in no way relates it to cost.) Further, SMUD and the Staff claim a lack of basis for the allegation concerning management competence.

We agree with the SMUD and Staff positions on this basis. Further, we note that ECO does not have "clean hands" with regard to this particular assertion — for, by initiating both this proceeding and others, it is one of the causes for the delay. For those reasons, we decline to accept this basis for litigation.

e. Funding Contention, Basis 6

This basis — as well as Bases 8, 9, 10, and 12, to be discussed below — are all analytically similar. They each assert a failure to provide adequate funding for certain defined safety measures. We will treat Basis 6 — failure to fund adequate physical and personnel security measures and, in particular, a fitness-for-duty program and vehicle barriers — separately in view of the degree of emphasis accorded to it by ECO.

SMUD challenges Basis 6 for a variety of reasons. It asserts that many of the measures disputed by ECO were approved prior to this proceeding and thus are not within the scope of this proceeding; that the regulation requiring fitness-for-duty programs (10 C.F.R. § 26.2) is not applicable to decommissioned reactors (and, indeed, became inapplicable to Rancho Seco upon issuance of its

possession-only license); and, finally, that to the extent that ECO is generally challenging the security plan, it has presented no real nexus to funding (supported by facts and/or expert opinion) and its challenge accordingly is to the DP and hence is untimely (with no attempt to deal with the lateness factors). It adds that ECO has made no reference to Chapter 8 of the DP ("Plant Security") or to the cost that SMUD is in fact allocating to Plant Security.⁴⁶ SMUD also asserts other pleading defects and concludes that the cost of the one measure that could be applicable (vehicle barriers) would amount to \$100,000–200,000 and, accordingly, is insignificant in the context of the \$280 million Funding Plan.

For its part, the Staff asserts similar reasons, focusing on the basis being a challenge to the DP and hence untimely. The Staff does not mention vehicle barriers but adds that the terrorism claims are precluded from consideration by 10 C.F.R. § 50.13. It acknowledges the lack of applicability of the fitness-for-duty regulations but adds that ECO has shown no connection between such requirements and funding — commenting that the lack of need for full security and for fitness-for-duty programs in fact reduces costs.

We consider this basis to have little relevance to funding and hence to represent a challenge to the DP, not the Funding Plan. As such, it is untimely, without any attempt by ECO to justify such untimely submission. More important, ECO has failed to indicate any fundamental problem with the security plan, other than those that quarrel with the application of defined Commission regulatory requirements to that plan. Therefore, we reject this basis both for lack of significance for the Funding Plan and (based on a balance of timeliness factors, with factors (i), (iii), and (v) against ECO's position) for its untimely submission.

f. Funding Contention, Bases 8, 9, 10, and 12

(i) ECO'S CLAIMS

As under Basis 6, these bases essentially challenge the Funding Plan for assertedly failing adequately to include funding for certain safety-related requirements. Specifically, they claim lack of cost estimates, or inadequate funding, for (1) measures to identify all onsite areas containing radioactivity and for performing a comprehensive cleanup and decontamination or, as appropriate, for erection of barriers (Basis 8); (2) providing an adequate technical basis for SMUD's assumption that there will only be a single airborne pathway for the release of radioactivity, as well as measures to deal with accident or terrorism scenarios (Basis 9); (3) determination of the radionuclide inventory and levels

⁴⁶Tr. 268.

in the spent-fuel sludge, as well as technical bases for dose estimates and variations in the number of filters required (Basis 10); and (4) inadequate technical specification bases for the spent fuel pool level and spent fuel pool temperature (Basis 12).

(ii) SMUD AND NRC STAFF POSITIONS

SMUD and the Staff challenge these bases on the grounds that ECO has failed to provide a credible connection between its safety-related claims and the adequacy of the Funding Plan and, accordingly, that these bases are untimely challenges to the DP, without an adequate showing of good cause for lateness. The Staff portrays this type of allegation as a “back-door” approach to litigating the adequacy of the DP (or, indeed, the previously granted possession-only license).⁴⁷

SMUD also asserts that ECO has provided no support for its assertions that SMUD has not provided assurance that it is in compliance with NRC guidance, noting that ECO has mischaracterized the documents that it cites and has not referenced other pertinent portions of the licensing documentation. SMUD states with regard to Basis 8 that, contrary to ECO’s claim, there are no unidentified contaminated areas on site.⁴⁸ The Staff adds with respect to Basis 9 that ECO has failed to identify the necessary scenario to discuss beyond-design-basis accidents and that discussions of terrorism are precluded by 10 C.F.R. § 50.13.⁴⁹

SMUD additionally notes with respect to Basis 10 that the cost implications for filters are inconsequential inasmuch as they cost only \$55 each (1988 dollars) and only about 18 are required, and that they accordingly can have no material effect on the adequacy of the Funding Plan.⁵⁰ With regard to Basis 12, SMUD refers to its cost estimates that in fact include spent fuel management costs and also claims that such costs are beyond the scope of the proceeding.⁵¹

(iii) BOARD ANALYSIS

None of these bases appear to raise significant issues with regard to funding. Indeed, there is little if any connection to funding. (The \$55 filters have some relationship to funding, but at best it is trivial.) Instead, each of the bases appears to be a “back-door approach” (to use the Staff terminology) to litigating

⁴⁷ Staff Funding Response at 20.

⁴⁸ SMUD Funding Response at 37; Tr. 273.

⁴⁹ Staff Funding Response at 18.

⁵⁰ SMUD Funding Response at 42.

⁵¹ *Id.* at 44.

an aspect of the DP. ECO essentially concedes this to be so.⁵² As such, they are untimely. ECO has made no attempt to justify its untimeliness in this respect although, at the prehearing conference, it noted that some of the documents cited by it were issued subsequent to the DP or, indeed, the issuance of CLI-93-3.⁵³

More important, they do not appear to raise significant safety issues. In many cases, they make allegations concerning information that purportedly is lacking, in the face of information that is in fact present in the DP. Although we are not here insisting on direct citations to the decommissioning or funding plans as a predicate to admissibility, when an allegation of lacking information is made, we assume that no such information is extant. In the present situation, that conclusion is erroneous. We are thus giving weight here to the lack of appropriate citations. For these reasons, we are denying all of these bases.

4. Conclusion on Funding Contention

For the reasons outlined herein, we are accepting for litigation ECO's funding contention, based on reasons outlined in Bases 1, 5, 11, and 13 (considered collectively), and Bases 2 and 14 (considered collectively). We will permit the remedy sought by Basis 4 to be sought in conjunction with these other bases but in other respects are denying Basis 4. We are also denying Bases 3, 6, 8, 9, 10, and 12. (Basis 7 was withdrawn.)

C. LOOP Contention

1. ECO's Contention

ECO's Proposed Amended LOOP Contention reads as follows:

SMUD's considerations of the LOOP issues in both its Supplement to Application's Environmental Report-Post Operating License Stage ("Supplement") at Paragraph 5.3 and its proposed Decommissioning Plan ("PDP") at Paragraph 3.4 (transmitted by AGM/NUC 91-081 (May 20, 1991)) (a) fail to comply with 10 CFR §§ 50.63 + 51.45 (1992) and the Commission's Station Blackout Rule (53 Fed. Reg. 23203 (June 21, 1988)), (b) that the calculations expressed in the Supplement and the PDP are in part unsupported by and in part contradicted by the calculations furnished ECO by SMUD in accordance with the Commission's Order raising questions [] not only of inadequate NEPA disclosure but also questions of SMUD's integrity and fitness for licensee responsibility pursuant to the Atomic Energy Act of 1954 as amended ("AEA"), and (c) finally, that SMUD's inadequate consideration of LOOP and inadequate preparation to cope with LOOP presents an unacceptable risk to the radiological health and safety of the public.⁵⁴

⁵² Tr. 285, 317-21.

⁵³ Tr. 273-77, 283-84, 285-86.

⁵⁴ LOOP Contention at 1-2.

2. SMUD and Staff Positions

SMUD's response claims that ECO's contention raises untimely issues unrelated to the discussion of LOOP frequency and that ECO's contention does not satisfy the Commission's pleading requirements. SMUD asserts that ECO's contentions are vague and lack legal basis. Particularly, SMUD says that ECO provides no basis to apply the Station Blackout Rule to Rancho Seco, which has been permanently shut down since June 7, 1989.

In its response, the Staff claims that ECO has failed to file a proper contention for litigation on the licensee's calculations of the loss of offsite power. It contends that the Commission in CLI-93-3 did not provide for a general opportunity to litigate matters contained in the DP, but only matters regarding the LOOP probability calculation. The Staff argues that the intervenor may not "bootstrap" itself into now being able to file contentions that deal with matters that are discussed in the DP.⁵⁵

3. Commission Guidance

The Commission has provided us significant guidance in dealing with this proposed contention. In CLI-93-3, *supra*, it stated:

ECO's contention that there is no reference to a particularized study to allow independent verification of the conclusion that the probability of a LOOP is less than once in 20 years is admitted. SMUD is ordered to provide ECO with the basis for its conclusion regarding the frequency of a LOOP. ECO will then be permitted 14 days from service of SMUD's submittal in which to file an amended contention, if it chooses, taking into consideration the information provided by the Licensee in accordance with this order.^[56]

* * * *

When filing this amended contention, ECO need not satisfy the criteria for a late-filed contention.^[57]

* * * *

ECO may file an amended contention related to the LOOP issue as affected by SMUD's submittal with the Licensing Board.^[58]

Thereafter, in ruling on SMUD's motion for reconsideration of CLI-93-3, the Commission provided this guidance:

Although we have already admitted the original contention as we decided in CLI-93-3, we leave for the Licensing Board to determine if the further amendment to the contention

⁵⁵ Staff LOOP Response at 7.

⁵⁶ 37 NRC at 146.

⁵⁷ *Id.* at 146 n.28.

⁵⁸ *Id.* at 154.

is admissible and to determine if a genuine issue of material fact remains regarding the probability of a LOOP. The Licensing Board should also determine if ECO's amended contention raises matters that were not dependent on the analysis of the probability of a LOOP. To the extent that ECO raises issues that could have been raised before because they are not dependent on the new information provided regarding the probability of a LOOP, ECO must meet the criteria for late-filed contentions.^[59]

In a subsequent clarification, the Commission, referring to the SMUD-provided detailed analysis regarding the calculation of the probability of a LOOP, also stated:

Because this was the first time that ECO was provided access to this information ECO was permitted to amend its contention based on this analysis. This particular amendment, based on the newly provided analysis, is not subject to the late-filed criteria contained in 10 C.F.R. § 2.714(a). However, any such amendment must meet the criteria for admissibility in 10 C.F.R. § 2.714(b) and (d).

To the extent that ECO's amended contention may raise new issues that were not dependent on the newly provided analysis of the probability of a LOOP, these new issues are subject to the late-filed criteria in 10 C.F.R. § 2.714(a)(i)-(v).^[60]

ECO filed its amended contention in a timely manner, subsequent to SMUD's filing of its Commission-ordered information on LOOP probability calculations.⁶¹

4. Analysis

ECO provides an eleven-point explanation of its basis for the proposed amended contention. We deal with each of these bases consecutively.

a. LOOP Contention, Basis 1

(i) ECO'S CLAIM

ECO contends that SMUD in the DP and ER claims a coping period of "less than 8 hours" and a minimum need for restoration for power at variously 6 days or 17.7 days. ECO contends that SMUD provides no documentation or calculations to support these conclusory assertions made at pages 3-34 and 3-35 of the DP. ECO states that the calculation supplied by SMUD in SMUD

⁵⁹ CLI-93-12, *supra*, 37 NRC at 360 n.8.

⁶⁰ CLI-93-19, *supra*, 38 NRC at 82 (emphasis added).

⁶¹ SMUD provided ECO with information on SMUD's calculation of LOOP probability by letter dated March 18, 1993, from David R. Lewis, Esq., to James P. McGranery, Jr., Esq. (hereinafter, Lewis Letter).

Calculation No. Z-EDS-E0817⁶² requires a coping period of not more than 4 hours.⁶³

(ii) SMUD POSITION

SMUD responds that ECO's facts are inaccurate and unsupported and the Station Blackout Rule to which the calculation referred in ECO's contention does not apply to decommissioned reactors and, hence, to SMUD. SMUD challenges ECO's contention for a lack of explanation why an operating-reactor coping period should be applicable to a reactor shut down for the past 4 years. In addition, SMUD challenges ECO's facts concerning a coping period of "less than eight hours" by pointing out that page 3-34 of the DP referenced by ECO actually references the time within which SMUD could restore power from either the District or PG&E.

SMUD also challenges ECO's facts concerning the calculations and documentation to support the assertions concerning the need to restore power. SMUD asserts that all the information needed to calculate the time needed to boil the spent fuel pool water are contained in the DP. SMUD asserts that ECO makes no showing that calculations required for the Station Blackout Rule for an operating reactor are necessary for Rancho Seco.⁶⁴

(iii) STAFF POSITION

The Staff claims this basis is beyond that authorized by CLI-93-3 in that it discusses coping with a LOOP rather than the probability of a LOOP. The Staff argues that ECO has not described any dispute with SMUD's LOOP calculations.⁶⁵

(iv) BOARD ANALYSIS

CLI-93-3 permits ECO to submit contentions on information contained in SMUD's response to its order for SMUD to supply information on the calculation of the *frequency or probability* of a LOOP. ECO's Basis 1 raises issues of *coping* with a LOOP,⁶⁶ i.e., restoration of power and taking corrective action to ensure the safety of the plant. These actions were discussed in the DP

⁶² Lewis Letter, Attachment 1, Enclosure E.

⁶³ LOOP Contention at 4.

⁶⁴ SMUD LOOP Response at 8-12.

⁶⁵ Staff LOOP Response at 13.

⁶⁶ LOOP Contention at 4.

at pages 3-34 and 3-35 and in SMUD's Environmental Report (ER) at pages 5-6 and 7, information available to ECO when it filed its original contentions.

ECO argues⁶⁷ that the Commission in CLI-93-3 would allow contentions to be filed without fulfilling the late-filed criteria of 10 C.F.R. § 2.714(a) since documents recently supplied by SMUD were not available for review by ECO.⁶⁸ ECO also argues that safety issues of a LOOP are dependent both on probability and its consequences and since this is the first time it has seen this information, it is fair game for a ripe contention.

The Board disagrees with ECO's reading of the Commission's guidance. The Commission made it clear that issues growing out of filings made as a result of CLI-93-3 must meet late-filed criteria if the issue is one not related to information associated with the calculation of LOOP probabilities. Issues related to coping with the consequences of a LOOP are separate from the issue of calculating the probability (or frequency) that a LOOP will occur. The issue of coping with the consequences of a LOOP is addressed in the DP and ER. By reviewing those documents, ECO had sufficient notice to file a timely contention concerning the simultaneous occurrence of a LOOP and loss of coolant from the spent fuel pool. The Board considers that to raise issues of coping, ECO must justify these issues in accordance with 10 C.F.R. § 2.714(a)(i)-(v). The Board considers this basis, and all the following bases associated with coping with the consequences of a LOOP, to require justification for being late-filed.

Regardless of the timeliness of this basis, SMUD complied with the Commission order to supply its calculation of the frequency of a LOOP. It did so by providing its calculations for complying with the Station Blackout Rule, 10 C.F.R. § 50.63, applicable to Rancho Seco as an operating plant.⁶⁹ ECO takes information supplied as a result of a Commission Order to divulge how SMUD determined the *frequency* of a LOOP and in this basis challenges SMUD's ability to *cope* with the consequences of a LOOP during decommissioning. ECO does not discuss (1) the reason why the SMUD's calculations for coping with a station blackout at Rancho Seco as an operating plant should apply to Rancho Seco during decommissioning; (2) why the calculations of LOOP frequency do not support the DP and ER; or (3) why the statements in the DP and ER concerning the ability of SMUD to cope with a station blackout during decommissioning are not adequate.

⁶⁷ Tr. 400-01, 427-32.

⁶⁸ At the prehearing conference, ECO introduced as a reference DAGM/NUC 93-079 dated April 1, 1993, a document supplied on the record by letter from Thomas A. Baxter to Samuel J. Chilk, dated April 6, 1993 (Tr. 362). This correspondence, concerning Permanently Defueled Technical Specifications, references earlier correspondence on the same subject, DAGM/NUC 92-233 dated September 23, 1992, provided ECO by letter from David R. Lewis to James P. McGranery, dated March 9, 1993. ECO did not establish the relevance of these documents to the LOOP issue in its pleadings or at the prehearing conference.

⁶⁹ Lewis Letter, Attachment 1, Enclosure E.

The fact that the actual calculation for coping with a LOOP during decommissioning is not spelled out (even though relevant and in fact not provided) is not material since information necessary to calculate the time available before fuel is uncovered is available in the DP. Information concerning the need for corrective action in the event of boiloff of spent fuel pool water is available in Chapter 3 of the DP and should have been challenged in ECO's original contentions. ECO has not met the pleading requirements of 10 C.F.R. § 2.714(a), (b), and (d) with this basis since it has not supplied the facts necessary to establish a genuine dispute and to justify being late-filed. Accordingly, we reject this basis as support for ECO's amended contention.

b. LOOP Contention, Basis 2

(i) ECO'S CLAIM

In this basis, ECO claims that SMUD should not be allowed to use a 0.95 reliability factor for its emergency diesel generators in its coping calculations since maintenance on those generators is being reduced, if not eliminated. ECO references an April 1992 document served on the parties in July 1992.⁷⁰

(ii) SMUD POSITION

SMUD states that the 0.95 reliability factor was used in the calculation for the Station Blackout Rule for Rancho Seco as an operating reactor. SMUD states that the analysis of its ability to cope with a station blackout during decommissioning does not rely on the availability of the emergency diesel generators. SMUD claims that this basis does not identify a deficiency in the analysis of its ability to cope with a station blackout during decommissioning.⁷¹

(iii) STAFF POSITION

The Staff claims this basis does not conform to the pleading requirements of 10 C.F.R. § 2.714(b)(2) and is not authorized by CLI-93-3. It adds that reliability of diesel generators does not affect the frequency of a LOOP and that emergency diesel generators are not required by Rancho Seco's possession-only license.⁷²

⁷⁰ SMUD Letter DAGM/NUC 92-086, Response to the Request for Additional Information in Support of the Rancho Seco Decommissioning and Associated Environmental Report, dated April 15, 1992, forwarded to the parties by letter from Thomas A. Baxter dated July 15, 1992 (SMUD Additional Information).

⁷¹ SMUD LOOP Response at 12, 13.

⁷² Staff LOOP Response at 14.

(iv) BOARD ANALYSIS

This basis, like the previous one, raises a coping concern. ECO references a response from SMUD to a question about radiation exposure from the potential use of the onsite diesel generators as peaking units. SMUD's response states there will be no radiation exposure as a result of diesel generator use as peaking units because of the cost of maintaining the units and constraints imposed by air quality standards.⁷³ SMUD does not plan to use, and the Staff does not require SMUD to use, diesel generators during decommissioning.

ECO does not describe how the use of diesel generators (or a diesel generator reliability factor of 0.95 used in a calculation for coping from a station blackout during plant operation) will materially affect SMUD's ability to cope with a station blackout during decommissioning a plant that has been shut down for over 4 years. Table 3-21 of the DP provides time periods for the spent fuel pool at the shutdown Rancho Seco facility to reach 212°F and to vaporize 6.75 feet of spent fuel pool water. These times are in excess of 6 days and 17 days, respectively. ECO has a responsibility to meet the requirements of 10 C.F.R. § 2.714(b)(2) to show in sufficient detail that a genuine dispute exists on a material issue of law or fact. With this basis ECO has done neither. In addition, as with Basis 1, ECO has the responsibility to meet the late-filed requirements of 10 C.F.R. § 2.714(a) for coping concerns. It has not even attempted to do so. Accordingly, the Board does not accept this basis as support for ECO's amended contention.

c. LOOP Contention, Basis 3

(i) ECO'S CLAIM

In this basis, ECO references a September 23, 1992 document concerning Permanently Defueled Technical Specification Revisions.⁷⁴ ECO claims that if spent fuel cooling is lost due to the unavailability of electricity, a spent fuel/radwaste area exhaust fan, which SMUD takes credit for operation, will not be running.⁷⁵

(ii) SMUD POSITION

SMUD asserts that the analysis provided in the September 23, 1993 letter is irrelevant to the LOOP. The letter justifies eliminating a prior commitment

⁷³ SMUD Additional Information at DP-58.

⁷⁴ See Letter from J. Shelter to NRC, re: Revision to Permanently Defueled Technical Specification Bases (DAGM/NUC 92-233, dated September 23, 1992); provided by Letter from David R. Lewis to James P. McGranery, Jr., dated March 9, 1993 (PDTS Revised Bases).

⁷⁵ ECO Proposed Contention at 5.

to put a train of the Decay Heat Removal System into service if the primary spent fuel cooling system is inoperable. The LOOP issue does not affect the choice between placing a train of the Decay Heat Removal System into service or running a spent fuel/radwaste exhaust fan in the event the primary spent fuel cooling system is inoperable. SMUD reiterates that its Decommissioning LOOP analysis assumed no evaporative or ambient heat loss prior to boiling.⁷⁶

(iii) STAFF POSITION

The Staff's position is that this basis does not address the Licensee's calculations and methodologies for the determination of the frequency of a LOOP and, therefore, must be rejected.⁷⁷

(iv) BOARD ANALYSIS

This basis raises another coping concern. The board does not agree with ECO's reading of SMUD's September 23, 1992 letter to the Staff concerning its analysis of the need for the use of the Decay Heat Removal System as a backup to the spent fuel cooling system. The letter clearly addresses the acceptability of the use of the spent fuel/radwaste exhaust fan as a backup to the inoperability of the spent fuel cooling system. The analysis does not address LOOP and ECO does not challenge the analysis on its merits. Although SMUD's analysis addresses spent fuel cooling, the analysis is not relevant to the LOOP inasmuch as SMUD has shown that it has not included evaporative losses as part of its calculation of coping with a LOOP.⁷⁸ As with Basis 1, ECO has the responsibility to meet the late-filed requirements of 10 C.F.R. § 2.714(a) for coping concerns. It has not done so. For each of these reasons, the Board does not accept this basis as support for ECO's proposed amended contention.

d. LOOP Contention, Basis 4

(i) ECO'S BASIS

In this basis, ECO claims that SMUD impermissibly ignores the impact of a LOOP on plant security systems, and ignores the issue of reliability of battery-powered backup for these systems during the period of coping with a LOOP.⁷⁹

⁷⁶ DP at 3-35; SMUD Loop Response at 13-15.

⁷⁷ Staff LOOP Response at 14.

⁷⁸ DP at 3-35.

⁷⁹ LOOP Contention at 5.

(ii) SMUD POSITION

SMUD asserts that ECO provides no basis for its assertion of possible unreliability of battery backup. In addition, SMUD states that this basis is a challenge to the Security Plan approved for decommissioning on July 25, 1991 by License Amendment No. 116.⁸⁰

(iii) STAFF POSITION

Staff argues that this is an impermissible expansion of the issue authorized by CLI-93-3. It claims that this basis on security systems has nothing to do with the probability of a LOOP; does not conform to 10 C.F.R. § 2.714(b)(2); and is not permitted to be raised by CLI-93-3.⁸¹

(iv) BOARD ANALYSIS

This basis raises a coping concern. As with Basis 1, the Board considers that coping concerns must meet the late-filed requirements of 10 C.F.R. § 2.714. ECO does not meet those requirements with this basis. Challenges now to the security plan are untimely. At the prehearing conference, ECO referenced SMUD letter DAGM/NUC 93-079, dated April 1, 1993, as not including information concerning security systems.⁸² This letter concerns changes to Post Defueling Technical Specifications and is not relevant to the LOOP issue or to a security issue.⁸³ In addition, ECO provides no facts or expert opinion as a technical basis for challenging the reliability of the battery-powered backup of the plant security systems. The Board declines to accept this basis as support for ECO's proposed amended contention.

e. LOOP Contention, Basis 5

(i) ECO'S BASIS

In this basis, ECO claims that SMUD impermissibly ignores the occasion of LOOP from sabotage.⁸⁴

⁸⁰ SMUD LOOP Response at 15.

⁸¹ Staff LOOP Response at 15.

⁸² Tr. 407.

⁸³ See note 67.

⁸⁴ LOOP Contention at 5.

(ii) SMUD POSITION

SMUD claims that ECO has pointed to no requirement to evaluate LOOP caused by sabotage. In addition, ECO has not shown that all offsite transmission lines would be simultaneously disabled with a LOOP. ECO has provided no facts, opinion, or other support for its allegation or why its allegation is material. SMUD claims that its analysis in the ER and DP demonstrates that it would have weeks to cope with a LOOP.⁸⁵

(iii) STAFF POSITION

The Staff asserts that 10 C.F.R. § 50.13 does not require design features to protect against sabotage. In addition, it is not an issue permitted to be raised by CLI-93-3.⁸⁶

(iv) BOARD ANALYSIS

This basis concerns the frequency of a LOOP and hence was timely filed. However, design features to protect against sabotage are not required by NRC rules to be submitted. Further, ECO has not shown how SMUD's alleged failure to address sabotage is material to its LOOP contention. Given the hypothetical situation that sabotage could cause a LOOP, ECO has not demonstrated that SMUD is not capable of coping with a LOOP. As we discussed in our analysis of Bases 1 and 2, SMUD has between 6 and 17 days to ensure that the spent fuel pool does not become uncovered. Although ECO has challenged this coping period, for reasons given in our other analyses, we have not accepted that challenge.

We reject this basis both because of its inconsistency with 10 C.F.R. § 50.13 and because ECO has provided no facts or expert opinion to support that it is material nor described how granting this basis would provide ECO relief from its concerns.

⁸⁵ SMUD LOOP Response at 15.

⁸⁶ Staff LOOP Response at 15.

f. LOOP Contention, Basis 6

(i) ECO'S CLAIM

ECO claims that in both the NEPA [ER] Supplement and the DP, SMUD claims that the probability of LOOP at Rancho Seco is "less than once 20 years [sic]." However, if a LOOP can be caused by a 75-mile-per-hour (mph) wind, the SMUD calculations indicate that the frequency of such winds is greater than once in 20 years, namely, every 18.2 years. ECO references the DP, ER, and recently supplied calculation of the frequency of a LOOP.⁸⁷

(ii) SMUD POSITION

SMUD's position in response to this basis is that ECO fails to show that every occurrence of high winds will invariably cause a LOOP at Rancho Seco, and that ECO fails to discuss why SMUD's calculations or the methodology in Regulatory Guide 1.155 are not correct. SMUD points out that, using the calculation accepted by the Staff, the probability of severe winds with velocities between 75 and 124 mph causing a LOOP is about once in 1500 years.⁸⁸

(iii) STAFF POSITION

The Staff argues that ECO has provided no basis for its conclusion that LOOP will occur more frequently than once in 20 years because there are 75-mph winds every 18.5 years.⁸⁹

(iv) BOARD ANALYSIS

This is a timely basis. However, our reading of the record indicates that SMUD's claim that the probability of a LOOP is less than once in 20 years is clearly unsupported. Both the DP, at 3-34, and the ER, ¶5.3.1.2, indicate that the probability of a LOOP evaluated in accordance with the guidelines of Regulatory Guide 1.155 is less than once in 20 years. The calculations furnished to ECO⁹⁰ indicate that the approximate return period for a 75-mph wind is 18.2 years. Using this information and the methodologies of Regulatory Guide 1.155, SMUD calculated a probability of a LOOP based on severe weather at 1.2 E-3.⁹¹

⁸⁷ Lewis Letter, Attachment 1, Enclosure E; LOOP Contention at 5, 6.

⁸⁸ SMUD LOOP Response at 16-17.

⁸⁹ Staff LOOP Response at 15-16.

⁹⁰ Lewis Letter, Attachment 1, Enclosure E.

⁹¹ Lewis Letter, Attachment 1, Enclosure E, Appendix A, page 6 of 24.

ECO does not provide data, expert opinion, or other sources to counter the information extant in the record. It provides no information challenging the calculation that winds greater than 75 mph will occur at a frequency of once every 18.2 years. Nor does ECO provide facts, opinion, or other sources that would lead us to believe that, each time a wind blew greater than 75 mph, a LOOP would occur at Rancho Seco. Thus, ECO has not shown that a genuine dispute exists with the Licensee on a material issue of law or fact, as required by 10 C.F.R. § 2.714(b). The Board concludes that this basis does not support ECO's proposed contention.

g. LOOP Contention, Basis 7

(i) ECO'S CLAIM

ECO claims that SMUD's conclusory analyses are also technically inadequate since they fail to consider loss of coolant during LOOP due to mechanisms other than evaporation, i.e., accidental or intentional (insider and outsider threat) draining of the spent fuel pool.⁹²

(ii) SMUD POSITION

SMUD asserts that ECO has not pointed to a requirement that it analyze the simultaneous loss of coolant and the occurrence of a LOOP. SMUD claims that ECO has not shown how the spent fuel pool can be accidentally or deliberately drained since the lowest penetration to the pool is at the 23-foot level, approximately 9 feet above the top of the fuel assemblies. In addition, ECO does not discuss the expected consequences of such an action.⁹³

(iii) STAFF POSITION

The Staff position is that this basis is not permitted by CLI-93-3, and 10 C.F.R. § 50.13 provides that design features to protect against sabotage are not required. In addition, the pool design makes the accidental drainage impossible.⁹⁴

⁹² LOOP Contention at 6.

⁹³ SMUD LOOP Response at 18-19.

⁹⁴ Staff LOOP Response at 16.

(iv) BOARD ANALYSIS

This basis raises another coping concern. ECO clarified this basis at the Prehearing Conference, offering that the simultaneous loss of coolant and a LOOP could be occasioned by an earthquake.⁹⁵ However, ECO did not provide facts, opinion, or other sources to convince this Board that the Commission should look at such a highly speculative occurrence in view of the Commission's long-standing position that such occurrences need not be evaluated.⁹⁶

In addition, as with Basis 1, the Board considers issues associated with coping to require compliance with the late-filed criteria of 10 C.F.R. § 2.714(a). ECO has not addressed the relevant factors.

Finally ECO has not discussed why this basis is material to the decommissioning of Rancho Seco. SMUD asserts that fuel that has not been in an operating reactor for over 3 years can be air cooled.⁹⁷ Since Rancho Seco fuel has cooled since 1989, ECO fails to explain why this concern is material. The Board considers this basis untimely, inconsistent with regulatory requirements, and not material. We therefore do not admit it in support of ECO's proposed amended contention.

h. LOOP Contention, Basis 8

(i) ECO'S CLAIM

ECO maintains that SMUD fails to address adverse thermal and radioactive conditions and the habitability requirements for all areas where operator access may be required to take compensating measures in the event of loss of water from the spent fuel pool.⁹⁸

(ii) SMUD POSITION

The Licensee asserts that this basis is inaccurate. SMUD claims that both the DP and ER analyze the amount of time necessary to take corrective action to maintain the dose rate at the surface of the spent fuel pool less than 2.5 millirem

⁹⁵Tr. 426.

⁹⁶See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 458-59 (1987), *rev'd on other grounds sub nom. Sierra Club v. NRC*, 862 F.2d 222 (9th Cir. 1988) ("Accidents that contemplate 'sequences of postulated successive failure and engineered safety features' are variously termed 'beyond design-basis,' 'Class 9,' or 'severe' accidents. . . . The Commission considers such accidents 'to be so low in probability as not to require specific additional provisions in the design of a reactor facility.'")

⁹⁷SMUD LOOP Response at 19 n.11. SMUD points out that NUREG-1353, *Regulatory Analysis for the Resolution of Generic Issue 82, "Beyond Design Basis Accidents in Spent Fuel Pools,"* demonstrates that spent fuel after 3 years of storage can be air cooled with no risk of a Zircoloy cladding fire.

⁹⁸LOOP Contention at 6.

per hour. ECO does not allege any facts, opinions, or other sources that would indicate the need for further analysis.⁹⁹

(iii) STAFF POSITION

The Staff position is that ECO gives no basis for concluding that habitability would be affected by a LOOP to prevent protective measures from being taken to resupply water to the spent fuel pool before exposure of the fuel.¹⁰⁰

(iv) BOARD ANALYSIS

This basis raises a coping concern. At the prehearing conference, ECO clarified its challenge to SMUD's capability to cope with an uncovered spent fuel pool. ECO claims that SMUD's plan to use a fire hose and the diesel-powered fire pump to add water is an unexamined issue.¹⁰¹ In the DP at 3-34, 3-35, and 3-70, SMUD describes the time necessary to take corrective action and claims that an alternate power supply can be made available in the time necessary to take action to restore spent fuel pool cooling. In addition, the DP at 2-64 indicates that the fire protection system will be functional during decommissioning. ECO has had sufficient notice at the decommissioning plan stage to file a timely contention on the issue of habitability. As we hold in our analysis of Basis 1 above, issues of coping must meet the late-filed criteria of 10 C.F.R. § 2.714 and ECO fails to do this.

In addition, ECO has not presented any facts, opinions, or other sources to describe why the corrective actions in the DP are not adequate. Further, as we discuss in our analysis of Basis 7 above, if the fuel were to be uncovered, according to the SMUD application, it now has cooled adequately such that it could be air-cooled. We find this basis does not raise a genuine issue with the licensee and does not support ECO's proposed amended contention.

i. LOOP Contention, Basis 9

(i) ECO'S CLAIM

ECO claims that SMUD's analysis also fails in omitting reference to the significance of hot weather as a serious compounding factor in the event of loss of electricity.¹⁰²

⁹⁹ SMUD LOOP Response at 20.

¹⁰⁰ Staff LOOP Response at 16-17.

¹⁰¹ Tr. 442.

¹⁰² LOOP Contention at 6.

(ii) SMUD POSITION

SMUD asserts that ECO does not explain the significance of hot weather or provide support for its characterization as a serious compounding factor. SMUD asserts that its calculations of coping periods do not take credit for evaporative cooling and therefore hot weather is not significant.¹⁰³

(iii) STAFF POSITION

Staff considers that this basis goes to evaporation from the pool and not the frequency of a LOOP. Therefore, it is not permitted by CLI-93-3. ECO makes unsupported conclusions concerning the consequences of a LOOP.¹⁰⁴

(iv) BOARD ANALYSIS

This basis raises a coping concern. ECO complains that it was given no basis to understand the assumptions in SMUD's evaporation analysis so that it can be independently verified. Such calculations would then allow ECO to judge the adequacy of the resultant calculated coping period.¹⁰⁵

We believe that this basis is not material to the proposed LOOP contention. As described in the DP at 3-35, SMUD takes no credit for evaporative heat losses in its calculations. As pointed out at the prehearing conference, sufficient information exists in the DP for ECO to confirm calculations of loss of coolant from the spent fuel pool.¹⁰⁶ Using the information in the DP, at Table 3-21, the Board considers that sufficient time exists in the worst case for SMUD to cope with simultaneous loss of offsite power and a period of hot weather. ECO has presented no claims to refute this information of record.

ECO complains that it was given no methodology for the calculation of loss of coolant from the spent fuel pool. However, ECO fails to address the fact that all the information needed to address this issue and confirm the calculations was supplied with the DP and ER. If ECO had concerns about hot weather and the occurrence of a LOOP, ECO should have raised them with its original contentions, or alternatively, justified the late-filing of its concerns. The Board finds this basis to be unsupported by facts, not material to the proposed amended contention and, in any event, untimely without adequate justification.

¹⁰³ SMUD LOOP Response at 20.

¹⁰⁴ Staff LOOP Response at 17.

¹⁰⁵ Tr. 448-49.

¹⁰⁶ Tr. 457-58.

j. LOOP Contention, Basis 10

(i) ECO'S CLAIM

ECO's 10th basis concludes that SMUD's presentation on the LOOP issue is totally inadequate under both the National Environmental Policy Act (NEPA) and the Atomic Energy Act to allow the NRC Staff and the public to assess independently the adequacy of SMUD's provision against LOOP and the consequences of LOOP.

(ii) BOARD ANALYSIS

At the prehearing conference, ECO agreed with the Board that this basis was nothing more than a summary of all the other bases.¹⁰⁷ As such, it does not constitute a separate basis for us to consider. Nor does it include adequate information to comprise an acceptable basis. We therefore reject this basis.

k. LOOP Contention, Basis 11

(i) ECO'S CLAIM

This last basis claims that SMUD's assessment of fuel degradation effects is inadequate, among other reasons because it does not address "fuel fighting temperatures" above 212°F and SMUD presents no analysis indicating that the fuel cladding could not significantly exceed 212°F in the event of loss of coolant.¹⁰⁸

(ii) SMUD POSITION

SMUD returns to its argument that there are weeks available to take measures to respond to a LOOP before fuel would be uncovered by a loss of coolant. SMUD claims that it is not required to evaluate the temperatures of uncovered fuel because of the ample time to restore cooling in the event of a LOOP. SMUD claims that ECO does not provide a credible scenario leading to uncovering of fuel, and does not allege that temperatures in excess of 212°F would have any adverse effect on the spent fuel.¹⁰⁹

¹⁰⁷ Tr. 465.

¹⁰⁸ LOOP Contention at 7.

¹⁰⁹ SMUD LOOP Response at 21-23.

(iii) STAFF POSITION

The Staff considers this basis to be not understandable, in that it does not define “fuel fighting temperature.” Beyond that, the Staff asserts that ECO fails to raise a litigable issue with this basis since it does not identify any fact or expert opinion to support its claim that such temperatures are relevant to the frequency of a LOOP or that SMUD would not be able to cope with the consequences.¹¹⁰

(iv) BOARD ANALYSIS

This basis is another that raises a coping issue. At the prehearing conference, ECO clarified its concern that boiling water and temperatures above 212°F may have a detrimental effect on the spent fuel.¹¹¹ ECO proffered no facts or expert opinion to bolster its concern or to explain why fuel that has been subject to operating temperatures in the past may suffer adverse effects as a result of uncovering of the fuel. As discussed in our analysis of Basis 7 above, it has been shown that fuel aged longer than 3 years could be air cooled. In addition, SMUD has shown that sufficient time exists to provide corrective action to prevent fuel from becoming uncovered. The DP at 3-35 discusses the fact that no degradation of the fuel is expected since fuel is designed to operate at temperatures significantly greater than 212°F. This issue could have been raised earlier. As with our position on other bases, issues of coping should be justified in accordance with the late-filed criteria of 10 C.F.R. § 2.714(a), and ECO has failed to do that.

The Board considers that this basis is not material and untimely without adequate justification. We decline to accept it as support for ECO’s proposed amended contention.

5. Conclusion on LOOP Contention

Based on our analysis of each of ECO’s bases, individually and collectively, we conclude that ECO’s Proposed Amended LOOP Contention does not raise an issue of material fact or law. ECO’s bases frequently fail to recognize information extant in the DP or ER, and therefore raise issues without sufficient justification for late-filing. The proposed contention goes beyond the guidance of the Commission in CLI-93-3 without appropriately pleading facts, expert opinion, or providing other support for its allegations that there are material

¹¹⁰ Staff LOOP Response at 18.

¹¹¹ Tr. 466-68.

issues of health and safety, or violations of NEPA. For all the reasons discussed above, we deny admission of ECO's Proposed Amended LOOP Contention.

D. ECO's Admitted LOOP Contention and SMUD's Summary Disposition Motion

1. ECO's Contention

ECO's contention that there is no reference to a particularized study to allow independent verification of the conclusion that the probability of a LOOP is less than once in 20 years was admitted by the Commission in CLI-93-3, *supra*, 37 NRC at 146. *See also* CLI-93-19, *supra*. The Commission ordered SMUD to provide ECO with the basis for SMUD's determination in its ER that the probability of a LOOP at Rancho Seco is less than once in 20 years and permitted ECO to file an amended contention related to the LOOP issue as affected by the SMUD submittal.

As ordered, SMUD provided ECO with the appropriate information concerning the probability of a LOOP. As discussed above, ECO timely filed a proposed amended contention. SMUD now seeks summary disposition pursuant to 10 C.F.R. § 2.749 of this admitted contention.

2. Relevant Standards

The Commission has recently reiterated the legal standards to be applied with respect to motions for summary disposition pursuant to 10 C.F.R. § 2.749. After describing analogies of the rule to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the Commission observed:

[10 C.F.R. § 2.749] specifies that summary disposition may be granted only if the filings in the proceeding, including statements of the parties and affidavits, demonstrate both that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. . . .

The party seeking summary judgment bears the burden of showing the absence of a genuine issue as to any material fact. In addition, the Board must view the record in the light most favorable to the party opposing such a motion. Thus, if the proponent of the motion fails to make the requisite showing, the Board must deny the motion — even if the opposing party chooses not to respond or its response is inadequate. However, if the movant makes a proper showing for summary disposition, and if the party opposing the motion does not show that a genuine issue of material fact exists, the Board may summarily dispose of all arguments on the basis of pleadings.

To preclude summary disposition, when the proponent has met its burden, the party opposing the motion may not rest upon "mere allegations or denials," but must set forth specific facts showing that there is a genuine issue. Bare assertions or general denials are not sufficient. Although the opposing party does not have to show that it would prevail on the issues, it must at least demonstrate that there is a genuine factual issue to be tried. The

opposing party must controvert any material fact properly set out in the statement of material facts that accompanies a summary disposition motion or that fact will be deemed admitted.

Moreover, when the movant has satisfied its initial burden and has supported its motion by affidavit, the opposing party must either proffer rebutting evidence or submit an affidavit explaining why it is impractical to do so. If the presiding officer determines from affidavits filed by the opposing party that the opposing party cannot present by affidavit the facts essential to justify its opposition, the presiding officer may order a continuance to permit such affidavits to be obtained, or take any other appropriate action.

Advanced Medical Systems, Inc., CLI-93-22, 38 NRC 98, 102-03 (1993) (citations omitted), *reconsideration denied*, CLI-93-24, 38 NRC 187 (1993).

3. *SMUD's Motion*

SMUD's motion for summary disposition, at 5, argues that SMUD fully complied with the Commission's Order through its detailed response of March 18, 1993¹¹² and now ECO's complaint of the absence of such basis is moot. SMUD argues that there is no longer any dispute of material fact regarding the sources SMUD relied on to calculate the LOOP frequency and it is now entitled to a decision on this matter.

4. *ECO's Position*

ECO responds¹¹³ that even though SMUD has provided some of the bases for its original conclusion in the DP and ER regarding the frequency of a LOOP, its right to explore the context of the documents through discovery and a hearing should not be foreclosed. ECO also argues that this contention should not be separately considered from its amended contention. ECO argues in its amended contention (Basis 6, at 5) that a LOOP can be caused by a 75-mph wind and that such winds occur once every 18.2 years. Therefore, ECO argues, a LOOP can occur at a frequency greater than once in each 20 years.

5. *Staff Position*

The Staff supports the SMUD's motion and points out that the Commission, in both CLI-93-3, 37 NRC at 146, and in a clarification Memorandum and Order, CLI-93-19, 38 NRC at 82, emphasizes that this contention is limited to the particularized study of the LOOP frequency.

¹¹² Lewis Letter, *supra* note 61.

¹¹³ ECO's Answer in Opposition to SMUD's Motion for Summary Disposition of ECO's Original LOOP Contention, dated September 27, 1993, at 2, 3.

6. Board Analysis

The Board agrees with SMUD's and the Staff's position with regard to this contention. SMUD has submitted documents that explain the bases for its conclusion in the DP and ER that the frequency of a LOOP is less than one each 20 years. Specifically, in the Lewis Letter, Attachment 1, at 4, 5, SMUD's calculation of the expectation of a LOOP caused by severe weather is in the range of 1×10^{-3} to 3.3×10^{-3} . ECO does not challenge these facts in its answer. In our analysis above of ECO's proposed amended contention, we found no basis for a genuine or material dispute. Under the requirements of 10 C.F.R. § 2.749, the Licensing Board shall render a decision in favor of the motion being sought if there is no genuine issue as to material fact. We find there is no genuine issue of material fact in this contention and are accordingly granting SMUD's motion.

E. Environmental (EA) and Safety (SER) Contentions

In its EA, the Staff concluded that the environmental impacts of the proposed decommissioning are either bounded by the conditions evaluated in NUREG-0586¹¹⁴ or the FES¹¹⁵ or are in compliance with 10 C.F.R. Part 50, Appendix I, setting forth annual design objectives for offsite releases, or 10 C.F.R. Part 20. Thus the Staff concluded that there are no significant environmental impacts associated with the proposed decommissioning and the proposed action will not have a significant effect on the quality of the human environment.

Pursuant to 10 C.F.R. § 51.31, the Staff then determined not to issue a separate environmental impact statement.¹¹⁶ The Notice of Issuance of Environmental Assessment and the Finding of No Significant Impact (FONSI) were issued simultaneously with the EA and the Staff Safety Evaluation (SER)¹¹⁷ on June 16, 1993. On July 12, 1993, ECO filed contentions related to the Staff EA, FONSI, and SER.¹¹⁸ The contentions and bases as filed are as follows:

¹¹⁴ U.S. Nuclear Regulatory Commission, "Final Generic Environmental Impact Statement on decommissioning of nuclear facilities," NUREG-0586, August 1988.

¹¹⁵ "Final Environmental Statement Related to the Operation of Rancho Seco Nuclear Generating Station Unit 1, Sacramento Municipal Utility District, Docket No. 50-312," U.S. Atomic Energy Commission, March 1973.

¹¹⁶ EA at 23.

¹¹⁷ Safety Evaluation by the Nuclear Regulatory Commission Related to the Order Approving the Decommissioning Plan and Authorizing Decommissioning of Rancho Seco Nuclear Station, Unit 1 Sacramento Municipal District Docket No. 50-312.

¹¹⁸ ECO's Contentions on the Staff Environmental Assessment Findings of No Significant Impact, and Safety Evaluation.

1. ECO Contention 1 (EA Contention)

The Environmental Assessment ("EA") and resulting Finding of No Significant Impact ("FONSI") are inadequate and issued in violation of National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.* (1988), the regulations and other guidance issued by the Council on Environmental Quality ("CEQ") including, but not limited to, 40 CFR Parts 1500-17 and the CEQ 40 most-asked questions (40 Fed. Reg. 18026 (March 23, 1981)) as well as being issued in violation of the substantive and procedural requirements of the Nuclear Regulatory Commission's ("NRC") own regulations as set out in 10 CFR Part 51 (1993).

a. Basis 1

In preparing its environmental assessment, the NRC staff is required to consult relevant agencies and persons. *See* 10 CFR § 51.30(a)(2). The EA at § 6.0 indicates only that the "staff consulted with the State of California regarding the environmental impact of the proposed action." This constitutes inadequate compliance with the NRC's own regulations because (a) there is no indication what the State of California's views were nor any reference to where those views may be found, (b) there is no reference to any consultation with any other relevant authorities such as the Council on Environmental Quality or the U.S. Department of Energy, both of which had previously expressed strong views as to the adverse environmental consequences of decommissioning Rancho Seco and the need for an environmental impact statement (EIS).

b. Basis 2

The Staff document violates 10 CFR § 51.119 (1993) because it does not indicate whether it is a draft or final finding at EA ¶7.0.

c. Basis 3

The Staff document violates 10 CFR § 51.33(b) (1993) because it does not consider whether circumstances exist requiring the publication of a draft FONSI.

d. Basis 4

If the FONSI intended to be final, it violates 10 CFR § 51.34(b) (1993) since a hearing is currently in progress on the proposal and that regulation bars the NRC Staff from issuing a final finding of no significant impact.

e. Basis 5

If it is intended to be a draft FONSI, the Staff document violates 10 CFR § 51.119(a) because it does not include a request for comments, specify where comments should be submitted, or when the comment period expires.

f. Basis 6

The EA's consideration (at para. 5.0) of postulated accidents is totally inadequate because it does not consider non-radiological accidents during the decommissioning process.

g. Basis 7

EA's consideration of the radiological impacts of decommissioning at para. 3.2 is without sufficient factual basis because there is not an engineering analysis of an independent spent fuel storage facility on which to base any of the conclusions with respect to normal emissions or accidental emissions.

h. Basis 8

The EA's non-radiological impact findings are inadequate because there is no discussion of the activities anticipated to be performed by SMUD. There is no discussion, much less qualification, of the environmental, including economic and socioeconomic impacts of the proposed action and there is no discussion of the changes that have taken place in the 20 years since the issuance of the Staff Reference 18.

i. Basis 9

The EA errs in finding that the only relevant demographic and socioeconomic effects that are relevant are within a 13 mile radius of Rancho Seco. *See* EA at para. 3.1.3. The relevant radius is 50 miles as demonstrated by both the SMUD submissions and general NRC practice.

j. Basis 10

The EA's consideration of decommissioning alternatives at para 1.4 is inadequate since it does not consider the alternative of preserving the plant in operable status for possible future use.

2. *The Safety Evaluation Contention*

ECO's safety evaluation contention reads as follows:

Similarly, ECO contends that the NRC Staff lacks a sufficient technical basis to conclude in its Safety Evaluation that there is either reasonable assurance of health and safety or an adequate funding plan because the engineering design, schedule and cost of the Independent Spent Fuel Storage facility are unknown at this time.

3. *SMUD and Staff Positions*

Licensee¹¹⁹ and Staff¹²⁰ both state that none of ECO's proffered contentions on the Environmental Assessment, FONSI, or the Safety Evaluation are admissible. Staff would have the Board deny Bases 6 through 10 and the SER contention because ECO has failed to show that a balancing of the five factors applicable to late-filing favors admission. As to Bases 1 through 5, the Staff, while conceding that ECO's filing was timely (in that it challenges matters that are relevant only to the Staff EA), nevertheless would deny the bases and associated contention because of failure to meet the 10 C.F.R. § 2.714 pleading requirements. The Staff also argues that Bases 1 through 5 are of no consequence and should be rejected inasmuch as not one provides any basis for relief, indicates why an EIS instead of an EA should have been prepared or shows that any matter was not properly considered in the EA.

SMUD submits that all of ECO's EA and SER contentions should be rejected, arguing that ECO fails to make even the slightest showing that any issue is material and that its resolution would make any difference in the outcome of the proceeding. SMUD further argues that nowhere in ECO's pleadings is there any contention that any conclusion in the EA is wrong nor is there any identification of specific information that might alter the conclusions in the EA. SMUD states that half of ECO's contentions (Bases 1 through 5) focus on procedural minutiae and the remainder are vague and unsupported assertions that more information is needed without any explanation as to why.

4. *Board Analysis*

a. *EA Contention Bases 1 through 5*

These bases allege that the Staff violated various portions of its own regulations. The Licensee and Staff describe these allegations as procedural minutiae and/or issues of no consequence. The board generally agrees.

As to Basis 1, NRC regulations pertaining to environmental assessments do not require consultation. The regulations do require "a list of agencies and persons consulted, and identification of sources used."¹²¹ The Staff did this.¹²² The requirements for the issuance of an EA and FONSI are set forth clearly in the regulations (10 C.F.R. §§ 51.30-51.35) and are considerably different from the requirements for an Environmental Impact Statement (EIS). See 10 C.F.R. § 51.70 *et seq.*

¹¹⁹ SMUD EA Response.

¹²⁰ Staff EA Response.

¹²¹ 10 C.F.R. § 51.30(a)(2).

¹²² EA at 23.

We find that the Staff complied with applicable regulations by its listing in the EA of agencies consulted. Nonetheless, we agree with ECO that, beyond the mere list, an EA should also include a brief statement of the consulted agencies' views of the EA. Such a statement need be no more than "no objection," or "agreement," or perhaps, if appropriate, lack of agreement on a particular aspect of the EA. It would enhance the public's awareness of the details of Staff review and hence would contribute to increased NRC credibility.

Because NRC regulations do not impose any such requirement, we are not accepting as an issue the Staff's asserted failure to improve its EA discussion. However, we strongly urge the Commission to take a close look at this matter and, if otherwise appropriate, to propose appropriate amendments to the Rules to accommodate such a purpose. We do not propose that *any* consultation be required — only that, if undertaken, its results be published.

The remaining Bases 2 through 5 assign violations to various Staff actions or inactions pertaining to the draft or final EA or FONSI. The Staff issued a final EA and a final FONSI which, in accordance with the rules, can be modified by the Board and/or the Commission. 10 C.F.R. § 51.34(b). The Staff might have erred in failing to identify the EA clearly as a draft or final as called for in 10 C.F.R. § 51.119. If that indeed be error, however, it was clearly harmless: the only thing lacking was the word "final." There was no request for comments and no mention of a comment period, as would be customary in a draft document. It had all the necessary earmarks of a final document except for the title. As to the draft or final FONSI, the Board attaches little significance to whether the FONSI is identified as a proposed or final FONSI, either of which can be modified by the Board following a hearing or by the Commission.

b. EA Contention Basis 6

ECO alleges that the EA is inadequate because it does not consider nonradiological accidents during the decommissioning process. Both SMUD and the Staff argue that it is not required because the postulated accidents for Rancho Seco were considered to be within the range of accidents evaluated in the Staff's "Technology, Safety, and Costs of Decommissioning a Reference Pressurized Water Reactor Power Station," NUREG/CR-0130, June 1978, which formed the basis for the GEIS chapter on PWRs.^{123, 124} In NUREG/CR-0130, the Staff considered a number of nonradiological accidents and the risk was determined to be insignificant.¹²⁵ SMUD's ER referenced this evaluation and stated that the

¹²³ GEIS at 4-1.

¹²⁴ EA at 21.

¹²⁵ NUREG/CR-1030, Vol. 1, §§ 11.2.3 ("Nonradiological Safety Evaluation"), 11.3.2 ("Safety Evaluation of Construction or Industrial Accidents"), and 11.4.3 ("Nonradiological Transportation Safety Evaluation").

accident potential at Rancho Seco was within the NUREG/CR-0130 considerations.¹²⁶

Additionally, ECO did not specify any accident that should have been, but was not, considered in the EA and accordingly fails to meet the basis and specificity requirements of 10 C.F.R. § 2.714. A contention that simply alleges that some matter ought to be considered does not provide the basis for an admissible contention.¹²⁷ Basis 6 accordingly is denied.

c. *EA Contention Basis 7*

ECO alleges that the EA's consideration of radiological impacts is without sufficient basis because there is no engineering analysis of an independent spent fuel storage installation (ISFSI) on which to base conclusions with respect to normal and accident emissions. Licensee and Staff both argue that this basis is irrelevant, because the ISFSI is the subject of a separate proceeding and is not part of decommissioning.

We found earlier that certain ISFSI funding allegations would not likely be considered as part of the ISFSI proceeding. With respect to environmental or safety questions, however, that conclusion does not follow. As the Commission has stated, decommissioning activities do not include the removal and disposal of spent fuel, which are considered to be operational activities. 53 Fed. Reg. at 24,019. SMUD filed a request for a Materials License for the ISFSI facility under Part 72 on October 4, 1991, and has provided a separate ER for the ISFSI (as well as a separate FSAR). The Staff's consideration of the Part 72 license was noticed in the *Federal Register* on January 13, 1992.¹²⁸ The *Federal Register* notice provided an opportunity for a hearing on request. The matters at issue clearly included the environmental and safety issues that ECO seeks to present here.

ECO did not take the opportunity at that time to seek to intervene on issues related to the ISFSI, and SMUD and the Staff argue that ECO should not now be allowed to raise issues that are properly within the scope of the ISFSI application. At least with respect to environmental and safety issues, the Board agrees. (As for funding matters, as explained earlier, different considerations apply.)

During the prehearing conference, ECO for the first time argued that the ISFSI and the DP are interlocked and the radiological impacts of the ISFSI are an inseparable part of the DP. ECO stated that separating the planned existence and impacts of the ISFSI and the overall decommissioning plan is

¹²⁶ ER at 5-8.

¹²⁷ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978).

¹²⁸ 57 Fed. Reg. 1286 (1992).

an illegal segmentation of the environmental considerations and the radiological considerations.¹²⁹

SMUD argues that ECO had not been foreclosed from raising any cumulative impacts but has failed to identify any cumulative impact that should have been examined but was not. The Licensee also mentions that ECO was not precluded from raising legitimate issues in the ISFSI proceeding but chose not to do so.¹³⁰ SMUD also argues that the ISFSI is not an integral part of the DP, stating that if SMUD had continued to operate Rancho Seco, it would have had to build an ISFSI simply to store the spent fuel generated from operation of the plant. Additionally, SMUD claims that if ECO really believed that there was a cumulative impact that needed to be addressed and called into question the EA, its obligation was to identify that impact and provide a basis supported by facts and/or expert opinion. ECO has failed to do so.

The Board finds that ECO's raising the issue of illegal segmentation of impacts is without substance because ECO has failed to identify any environmental or safety impact of the ISFSI facility that would or could impact on any conclusions concerning the decommissioning of Rancho Seco. Further, ECO's raising the allegation at the prehearing conference was clearly untimely, without any attempt to justify the untimeliness. Absent any specification of potential impact, the allegation of illegal segmentation lacks basis and is rejected.

In sum, because safety and environmental matters related to the ISFSI application are outside the scope of the decommissioning application, and because the illegal segmentation argument lacks any basis, Basis 7 is rejected.

d. EA Contention Basis 8

ECO alleges that the EA's findings are inadequate because there is no discussion of the activities to be performed by SMUD. ECO further states that there is no discussion or quantification of the environmental, including economic and socioeconomic, impacts of the decommissioning and no discussion of the changes that have taken place since the issuance of the Staff's FES on the operation of Rancho Seco in 1973.

Both Licensee and Staff argue that this issue is without basis. The entire EA discusses the decommissioning activities to be performed by or under the direct supervision of SMUD. Section 3.0 of the EA includes discussions of the site and location of the plant (§ 3.1.1), socioeconomic is discussed in the EA at § 3.1.3, as well as in the GEIS at § 5.4 and the ER at § 5.4, and the impact of decommissioning activities on transportation, water use, and water quality at §§ 3.1.7, 3.1.5, and 3.1.8, respectively. ECO makes no showing that any of

¹²⁹ Tr. 527-30.

¹³⁰ Tr. 530.

these matters are misstated and identifies no specific additional information that it says should have been included and might affect any conclusions in the EA. Further, ECO identifies no facts or expert opinion, and references no documents or other sources establishing the existence of a genuine dispute on a material issue of law or fact. Basis 8 is fatally flawed and is rejected.

e. EA Contention Basis 9

ECO alleges that the EA errs in finding that the only relevant demographic and socioeconomic effects are within a 13-mile radius of Rancho Seco. It asserts that the “relevant radius is 50 miles as demonstrated by both the SMUD submissions and general NRC practice.”¹³¹

SMUD responds that the allegation has no basis because the EA makes no such finding, stating that the EA merely reports the number of permanent residents currently within a 13-mile radius, as previously set forth in SMUD’s ER. SMUD notes that, for background purposes, population data for 50 miles were also included in the ER.¹³² Both SMUD and the Staff also argue that the issue has no basis in that ECO does not delineate a single example of any demographic or socioeconomic impact that could be relevant to the decommissioning of the plant but was not considered by the Staff in the EA. Further, ECO identifies no facts or expert opinion supporting the need for any further discussion in the EA, and references no sources or documents on which it intends to rely. The Staff adds that any challenge to the 13-mile discussion should have been filed earlier, inasmuch as the Staff derived its data from SMUD’s ER.¹³³

At the prehearing conference, ECO for the first time identified the source of its 50-mile claim. It referenced the “general NRC practice” of permitting persons residing within 50 miles of a facility to intervene and transmutes that practice into a generic requirement for ascertaining an area within which the Staff must evaluate environmental impacts.¹³⁴

As the Staff observes, there is no such presumption with respect to the determination of areas for evaluating environmental impacts.¹³⁵ Use of the 50-mile premise for standing purposes in construction permit or operating license proceedings was based on the conceivability of effects of a design-basis accident

¹³¹ ER Contention at 6.

¹³² SMUD ER Response at 27.

¹³³ SMUD EA Response at 27-28; Staff EA Response at 21-22.

¹³⁴ Tr. 540, 542.

¹³⁵ Tr. 542-43.

extending that distance, thus providing injury in fact for purposes of standing.¹³⁶ In fact, even for standing purposes, the Commission has limited the presumption to proceedings in which an "obvious potential for offsite consequences" at that distance could eventuate.¹³⁷ No one has demonstrated that this proceeding is one involving potential offsite consequences that could extend as far out as 50 miles. In any event, the requirement for showing injury in fact for standing purposes has always been significantly less than for demonstrating an acceptable contention, even under the lower threshold available under former rules.¹³⁸

Even if we should overlook the lateness of ECO's explaining the basis for its 50-mile claim, the basis is inaccurate and hence insubstantial. Moreover, at the prehearing conference the Board inquired whether ECO could delineate any particular impacts of decommissioning between 13 and 50 miles from the facility that were not considered, and it was unable or unwilling to do so.¹³⁹ Accordingly, we reject the issue as lacking any viable basis.

f. EA Contention Basis 10

ECO alleges that the EA is inadequate because it does not consider the alternative of preserving the plant in operable status for possible future use. This issue is rejected because the Commission has already determined that the Staff need not consider the alternative of preserving the plant in operable status for possible future resumption of operation.¹⁴⁰

g. The SER Contention

Both Staff and Licensee argue that this contention should be rejected on the grounds that it is not relevant to the decommissioning action. As discussed *supra*, the ISFSI facility is the subject of another proceeding in which ECO had opportunity to participate but declined. Licensee states that ECO is incorrect in alleging that the design and scheduling of the ISFSI are unknown. Licensee reports that this information is provided in the revised ISFSI ER.¹⁴¹ ECO

¹³⁶ See, e.g., *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56-57 (1979); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979).

¹³⁷ *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); see also *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 9-12 (1993).

¹³⁸ Cf. *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979).

¹³⁹ Tr. 541-42.

¹⁴⁰ CLI-93-3, *supra*, 37 NRC at 144-45.

¹⁴¹ Revision to the Rancho Seco Independent Spent Fuel Storage Installment Environmental Report. DAGM/NUC 93-008 (June 16, 1993).

makes no attempt to address this information and provides no facts that would indicate any effect on SMUD's decommissioning plan or on the Staff's Safety Evaluation. Both Staff and Licensee point out that the Staff's SER discusses the ISFSI schedule and specifically states that its evaluation of the safety of decommissioning Rancho Seco does not depend on approval of the ISFSI design or on the ISFSI schedule:

Although the Licensee analysis assumes NRC approval of an ISFSI design, this safety evaluation does not depend on that approval. Even if RSNGS were to remain in Custodial-SAFSTOR until Deferred-DECOM, the impacts of RSNGS in Custodial-SAFSTOR are well within the impacts evaluated in the Final Environmental Statement related to the operation of RSNGS.¹⁴²

The schedule, especially the transition from Custodial-SAFSTOR to Hardened-SAFSTOR, and the length of the Custodial-SAFSTOR period directly depends on the licensee ability to get the necessary NRC approvals for dry onsite storage of spent fuel. On the basis of the information submitted by the licensee, the staff finds the proposal acceptable even if approval for onsite storage is not achieved before the DECON phase.¹⁴³

ECO provides no basis to dispute these statements. Based on these statements it is clear that the ISFSI is not relevant to any conclusions in the Staff's Safety Evaluation of SMUD's decommissioning plan. ECO's SER contention is thus denied for lack of basis.

h. Conclusions as to Basis and Specificity

The Board has reviewed each of the 10 bases of ECO's EA contention and the SER contention and has found none to meet the requirements of 10 C.F.R. § 2.714. Accordingly, they are denied. In reaching this decision the Board has also considered whether any issues were raised that, while not meeting the pleading requirements of section 2.714, raise issues of sufficient importance in environmental or health and safety areas that the Board should inquire further. We can discern no such issues among the environmental or safety issues attempted to be raised here.

i. The Lateness Factor

Pursuant to the Commission's Order (*see* CLI-93-3, *supra*, 37 NRC at 154), ECO was required to address the Commission's requirements for late-filed contentions, which essentially involves addressing the five factors found in 10

¹⁴² Safety Evaluation at 2.

¹⁴³ *Id.* at 9.

C.F.R. § 2.714(a)(1)(i)-(v). These factors have been set forth earlier in this Order.

ECO states that factor (i) is satisfied in most cases because the information in the Staff environmental documents was otherwise not available for ECO's review previously, including the fact that the "principal environmental document," the Staff's EA, was not available until, on, or after June 16, 1993. ECO states that factors (ii), (iii), and (iv) favor ECO in that there are no other intervenors in the case to protect or represent ECO's interest and the credentials of ECO's proposed experts show not only a generalized expertise in nuclear power plants but a specialized expertise with respect to Rancho Seco and their testimony can be expected to assist in developing a sound record. As to factor (v), ECO argues that, while it is clear that without ECO's participation there will be no proceeding, the issue of delay should receive little weight since the need for the agency to take the required "hard look" at the environmental alternatives and consequences outweighs the unavoidable delay in satisfying NEPA's purposes.

The Staff agrees that ECO's Bases 1 through 5 could be considered timely because those bases challenge matters relevant only to the Staff EA which was only recently available. The Staff argues that no good cause for late-filing can be shown for Bases 6 through 10 or for the safety contention, principally because the information was available much earlier and could have been acted on previously.¹⁴⁴ Commission regulations provide that environmental contentions, to the extent possible, must be submitted on the basis of the Licensee's ER and may not await the Staff's environmental document. Section 2.714(b)(2)(iii) provides:

On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

Thus, as a matter of law, an intervenor must file contentions on the basis of an applicant's ER, and does not have good cause for delaying its filing until issuance of a Staff document unless it establishes that new or different data or conclusions are contained in that Staff environmental document. No such showing has been made with Bases 6 through 10. ECO has not identified any data or conclusions in the EA that differ significantly from the data or conclusions in Licensee's ER or NUREG-0586. Since Licensee's ER has been available since 1991 and the Generic Environmental Impact Statement (GEIS) on Decommissioning of Nuclear Facilities, NUREG-0586, since August 1988, there is no good cause

¹⁴⁴Tr. 275-78.

for ECO's failure to challenge the substance of the Licensee's report earlier in this proceeding.

SMUD and the Staff also appear to categorize ECO's SER contention as untimely, in that it should have been submitted at an earlier date in the separate ISFSI proceeding. Whether it would be timely in that other proceeding is beyond the purview of this proceeding. And whether jurisdictionally it should have been submitted in that other proceeding, rather than here, also has nothing to do with timeliness here. However, as SMUD also observes, any contention challenging the safety matters in the SER should have been submitted as a challenge to the Licensee's FSAR and thus is currently untimely. In view of the foregoing, the SER contention is rejected both for lack of basis and for untimeliness without adequate justification.

Based on the above discussion, the Board concludes that ECO timely filed its challenges set forth in Bases 1 through 5 of its EA contention. This is not the case, however, for Bases 6 through 10 of the EA contention and for the SER contention. As pointed out by both Licensee and Staff, ECO has failed to make any showing that the Staff's EA differs significantly from SMUD's environmental submissions and/or from the GEIS with respect to the data relied upon or the conclusions reached. There is therefore no "good cause" shown to demonstrate that its contentions could not have been raised earlier based on the ER and/or the GEIS. And, for reasons outlined earlier, there is no significant safety or environmental issue set forth that would warrant our balancing of the timeliness factors to admit these bases.

F. Schedules

As discussed at the prehearing conference (Tr. 573-74), the Board will convene a telephone prehearing conference to establish schedules for discovery on the admitted contentions, the filing of further motions for summary disposition, and, if necessary, evidentiary hearing dates. We will establish the time for such call in the near future.

G. Appeal Rights

This Order is not subject to immediate appeal to the Commission pursuant to 10 C.F.R. § 2.714a. It neither wholly denies nor grants a petition for leave to intervene/request for a hearing. The Commission's Order in CLI-93-3 performed those functions. We express no view with respect to the potential for discretionary Commission review should any party seek such review.

H. Order

For the reasons stated, it is, this 30th day of November 1993, ORDERED:

1. ECO's Funding Contention, Bases 1, 5, 11, and 13 (considered collectively) and Bases 2 and 14 (collectively) are hereby *accepted* for litigation. The remedy set forth in Basis 4 may also be litigated, although the remainder of Basis 4 is *denied*.

2. Bases 3, 6, 8, 9, 10, and 12 of the funding contention, and the LOOP and ER/SER contentions in their entirety, are *denied*.

3. Summary disposition of the previously admitted LOOP contention is hereby *granted*.

4. This Order is an interlocutory order not subject to immediate appeal pursuant to 10 C.F.R. § 2.714a.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 30, 1993



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket No. 30-22060

NUCLEAR ENERGY SERVICES

November 19, 1993

The Director, Office of Enforcement, responds in a Director's Decision to issues raised in a petition filed by Ernest C. Hadley on behalf of Arnold Gundersen (Petitioner) pursuant to 10 C.F.R. § 2.206 and subsequent correspondence from the Petitioner and his wife. The Petitioner requested that action be taken with regard to Nuclear Energy Services (NES). The Petitioner sought, among other things: (1) prompt and decisive enforcement action against NES for procedural and license violations, harassment of Petitioner, and material misstatements made to NRC inspectors; and (2) an immediate review of all pending investigations and the reasons for delay in taking enforcement action against NES. As a basis for this request, the Petitioner asserted that he was terminated from his position as senior vice president with NES after asserting to his management that certain violations had occurred, and that when the Region I inspection report was submitted to NES which erroneously found no merit to his assertions, NES knew, or should have known, that the report contained material misstatements of fact and failed to notify the NRC of such misstatements in violation of 10 C.F.R. § 50.9. The Director has granted in part and denied in part the requests made by the Petitioner. The reasons for the denial are fully set forth in the Decision.

ENFORCEMENT POLICY: ENFORCEMENT OPTIONS

The NRC has several enforcement options available to it, including Notices of Violations, civil monetary penalties, and orders to suspend, modify, or revoke licenses.

ENERGY REORGANIZATION ACT: SCOPE OF NRC ACTIVITIES

Congress explicitly gave to the Department of Labor the authority and responsibility to provide traditional, labor-related remedies to individuals for their losses resulting from discrimination, while reserving to the NRC the authority under the Atomic Energy Act to take enforcement action against NRC licensees and individuals for violations of NRC requirements. It is not within the NRC's authority to provide a personal remedy to individuals for such discrimination.

NRC: ENFORCEMENT ACTION IN DISCRIMINATION CASES

The NRC has the authority to take enforcement action against NRC licensees and individuals for violations of NRC requirements. Such enforcement action is intended to provide a form of "protection" for whistleblowers in that the purpose of such action is to deter such conduct and to send a message to the licensee and other licensees that discrimination against employees for raising safety concerns will not be tolerated.

REQUEST FOR ACTION: SCOPE OF 10 C.F.R. § 2.206

Matters relating to the conduct of NRC employees, including allegations of employee misconduct, are not within the scope of 10 C.F.R. § 2.206. Rather, such matters are within the authority of the NRC Office of the Inspector General.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On August 14, 1992, Ernest C. Hadley, as counsel for Arnold Gundersen (Petitioner), filed a request for enforcement action, which is being treated as a Petition pursuant to 10 C.F.R. § 2.206. The Petitioner sought: (1) prompt and decisive enforcement action against Petitioner's former employer, Nuclear Energy Services (NES), for procedural and license violations, harassment of Petitioner, and material misstatements made to NRC inspectors; and (2) an immediate review of all pending investigations and the reasons for delay in taking enforcement action against NES.

In subsequent correspondence from Mr. Gundersen, Mr. Hadley, and Margaret Gundersen (the Petitioner's wife), these initial requests were restated and additional requests were submitted. These included requests for: (1) immedi-

ate action to protect Mr. Gundersen from continuing harassment by NES as well as financially (May 3, 1993 letter from Ms. Gundersen to Ivan Selin; May 11, 1993 letter from the Petitioner to Ivan Selin); (2) with respect to the lawsuit filed by NES against the Petitioner (i) prompt action to protect the Petitioner from the lawsuit filed by NES (January 28, 1993, and February 9, 1993 letters from the Petitioner to Ben Hayes; February 22, 1993 letter from Ms. Gundersen to Leo Norton); and (ii) issuance of a cease and desist order against NES to stop harassment of the Petitioner (February 22, 1993 letter from Ms. Gundersen to Leo Norton); (3) strong and appropriate action against NES, including revocation of its license (February 22, 1993 letter from Ms. Gundersen to Leo Norton); (4) a response by NRC to NES' dispute over the facts outlined in a 1992 NRC inspection report (February 9, 1993 letter from the Petitioner to Ben Hayes); a meeting with NRC to discuss the evidence and outline enforcement action (November 16, 1992 letter from the Petitioner to Senator Joseph I. Lieberman); (5) a ruling by the NRC that the settlement agreement signed by the Petitioner and NES on December 20, 1990, is illegal and therefore null and void (February 12, 1993 facsimile to Ben Hayes); (6) discipline of an NRC employee for intimidation of Ms. Gundersen (February 22, 1993 letter from Ms. Gundersen to Leo Norton); and (7) a full investigation into NRC's "cozy relationship" with NES (February 22, 1993 letter from Ms. Gundersen to Leo Norton).

II. BACKGROUND

On April 18, 1990, Petitioner advised NES management that radioactive materials had been stored improperly at an NES facility. Petitioner documented these matters in memoranda to responsible NES managers, including the executive vice president. On April 20, 1990, he sent a revised memorandum to the executive vice president. He was later removed from the Radiation Safety Board and terminated by NES on May 21, 1990. On June 8, 1990, Mr. Gundersen filed a complaint with the Wage & Hour Administration (W&H) of the Department of Labor (DOL) pursuant to section 210 of the Energy Reorganization Act of 1974, as amended (now section 211), asserting that he was terminated for raising legitimate safety violations, and requested that DOL investigate his complaint and secure any remedies to which he may have been entitled.

Petitioner also advised the NRC of his safety concerns. These issues were inspected by the NRC in July 1990, and a report was issued on October 24, 1990, concluding that NES had not violated any Commission regulations.

On July 12, 1990, W&H ruled that discrimination was not a factor in Petitioner's termination and advised Petitioner that, if he wished to appeal that finding, he was required to file an appeal with the DOL Chief Administrative Law Judge within 5 days of the date of that letter. Petitioner did not file an

appeal of that decision with the Department of Labor but, on advice of counsel, did file an appeal with the U.S. Court of Appeals for the Second Circuit on September 4, 1990. On December 13, 1990, the Court of Appeals ordered that that appeal be dismissed. Thereafter, on December 20, 1990, Petitioner entered into a settlement agreement with NES.

The settlement agreement's stated purpose was to resolve any and all disputes or potential disputes between Petitioner and NES. It did not "constitute an admission by [NES] of a violation of any federal or state constitution, statute or regulation." In the agreement, Petitioner acknowledged that his allegations about discrimination by NES were investigated by the U.S. Department of Labor which "failed to substantiate the charges and found that [Petitioner's] termination resolved [sic] from an overall reduction in personnel and subsequent cost savings to the firm." The settlement agreement stated, among other things, that the Petitioner waived his "right to bring or pursue any judicial action, administrative agency action, any contractual action, any statutory action or procedure . . . arising from his employment with [NES] and separation therefrom." In a February 12, 1993 letter to the NRC, the Petitioner claimed that the settlement agreement contained paragraphs that were illegal and, therefore, null and void.

Following these claims, on May 7, 1991, NES advised Igor I. Sikorsky, then the Petitioner's attorney, that a lawsuit would be filed against Petitioner for compensatory and punitive damages. The complaint in the lawsuit, filed on May 13, 1991, asserted that Mr. Gundersen had maliciously and intentionally defamed NES and made intentional misrepresentations whereby he tortiously interfered with NES' business relations, and that he had breached the settlement agreement.

On June 22, 1992, Petitioner filed another complaint with the Department of Labor, requesting that it void its earlier determination, and find in his favor based, in part, on the fact that the initial determination of DOL was based on material false statements made by NES. On July 28, 1992, W&H disagreed, finding that Petitioner had failed to file within the 5 days allowed for an appeal and that the misstatements claimed by Petitioner were not related to the original DOL findings. An Administrative Law Judge recommended dismissal of the case on September 25, 1992, and the Secretary of Labor agreed with the ALJ's recommendation and dismissed the case on January 19, 1993. The Secretary's decision was not appealed by either party.

On August 14, 1992, Ernest C. Hadley filed the present petition with the NRC, requesting actions as described above. The NRC acknowledged receipt of this petition on August 31, 1992, and requested information from the Petitioner concerning the Court of Appeals' action.

During the pendency of the DOL matters and the NRC review of them, some of Petitioner's safety concerns were reinspected by the NRC and found to have merit. A Notice of Violation was issued to NES on June 12, 1992,

citing seven violations relating to NES' radiation safety program. Since the reinspection of NES' activities revisited the safety issues raised by Petitioner, and since the Notice of Violation constitutes the appropriate enforcement action for the findings of that reinspection, the following discussion will only briefly address these violations and the resulting enforcement action and, instead, will focus on the alleged violations relating to discrimination against Petitioner and the other claims Petitioner has made concerning the issues raised in the correspondence outlined in the introduction above. It will not discuss in any detail the radiation safety issues which, as a result of the inspection and Notice of Violation described above, have already been addressed. However, the Staff has reviewed the Notice of Violation and confirmed that the Licensee's corrective actions are an appropriate response to the violations identified.¹

The NRC Office of Investigations also investigated the Petitioner's allegations concerning discrimination by NES. The report of investigation was issued June 14, 1993, and concluded that the Petitioner was laid off as a result of a legitimate business decision, and that his allegation of discrimination could not be substantiated.

III. DISCUSSION

The following discussion will address the issues raised by Petitioner in the order first outlined in the Introduction above.

A. Initial Requests

1. In his August 14, 1992 petition, Mr. Gundersen requested prompt and decisive enforcement action against NES for procedural and license violations, harassment of Petitioner, and material misstatements made to NRC investigators.

The NRC has several enforcement options available to it, including Notices of Violations, civil monetary penalties, and orders to suspend, modify, or revoke licenses. The Notice of Violation issued on June 12, 1992, described above, cited NES for license violations identified by an NRC inspection conducted as a result of allegations by Petitioner. The violations found by the NRC reinspection of NES-licensed activities warranted a Notice of Violation, but they did not rise to the level of significance that would have resulted in a civil penalty being issued. (See NRC Enforcement Policy, 10 C.F.R. Part 2, Appendix C.) This enforcement action is considered appropriate for the violations identified and is

¹ In preparing a response to an NES letter, dated August 14, 1992, that took issue with the Notice of Violation (Notice), the Staff reviewed this Notice. The Staff is satisfied that the violations occurred as stated and that the related severity levels were correct for those violations. See March 11, 1993 letter to NES.

dispositive of the matter relating to the Petitioner's request for action relating to procedural and license violations. Therefore, to the extent that the Petitioner is requesting enforcement action for the safety violations in addition to that which has already been taken, the request is denied.

With respect to his claim of harassment, Petitioner has filed two complaints with the Department of Labor (DOL), the federal agency responsible for providing remedies for the person filing the claim. Petitioner also filed an appeal of the first DOL decision with the Court of Appeals, as described above. The proceeding in each of these actions resulted in a dismissal of Petitioner's claim of discrimination. As stated above and as described further in an NRC letter to the Petitioner on June 14, 1993, Congress explicitly gave to DOL the authority and responsibility to provide traditional, labor-related remedies to individuals for their losses resulting from discrimination, while reserving to the NRC the authority under the Atomic Energy Act to take enforcement action against NRC licensees and individuals for violations of NRC requirements. It is not within the NRC's authority to provide a personal remedy for the Petitioner as an individual.

With respect to whether NRC should issue an enforcement action against NES for its allegedly discriminatory action, the NRC has reviewed both the actions of the Department of Labor and the findings of its own investigation. The Staff notes that the DOL has issued a decision finding that discrimination was not a factor in NES' action against Petitioner, and the Court of Appeals for the Second Circuit ordered that the Petitioner's appeal of this finding be dismissed. The DOL also denied Petitioner's appeal of its original finding, concluding that the appeal was not timely filed. Thus, we have no information from the DOL process that would establish that Petitioner was discriminated against. Moreover, the NRC Office of Investigations investigated the allegation of discrimination and concluded that discrimination was not a factor in the action taken by NES against Petitioner. Taking all this into consideration, I find no basis to issue an enforcement action for discrimination in this case. Accordingly, this portion of the Petitioner's request is denied.

The NRC Office of Investigations (OI) has investigated Petitioner's claim of misstatements made by NES to NRC inspectors and concluded that there was insufficient evidence to substantiate this allegation. After reviewing the OI report in this regard, I have concluded that Petitioner's claim that NES made material misstatements lacks merit. Accordingly, the Petitioner's request for enforcement action against NES for material misstatements made to the NRC is denied.

2. In the August 14, 1992 petition, Mr. Gundersen also asked for a review of all pending investigations and the reasons for delay in imposing an enforcement action against NES. The OI investigation referenced above was the only pending NRC investigation and it is now closed. OI did not conclude that discrimination occurred or that NES misled NRC inspectors, and we have no basis to further

review that investigation or initiate additional investigations into these matters. Accordingly, this portion of the request is denied.

With respect to the delay in imposing enforcement action, the Staff waited until the OI investigation was completed and its report was issued before making a decision on enforcement action. There was no basis to take action earlier on this matter.

B. Additional Requests

In subsequent correspondence, while reiterating the above requests, Petitioner made several additional requests described in the Introduction to this Decision. These additional requests are addressed as follows:

1. With respect to the Petitioner's request for immediate action to protect him, to the extent that the Petitioner is requesting that the NRC provide him with financial protection, as explained above, Congress has given to DOL the responsibility to provide personal, labor-related remedies to individuals for losses resulting from discrimination. The NRC is without direct authority to provide such a remedy to an employee, but, instead, has the authority to take enforcement action against NRC licensees and individuals for violations of NRC requirements. Such enforcement action is intended to provide a form of "protection" for whistleblowers in that the purpose of such action is to deter such conduct and to send a message to the licensee and other licensees that discrimination against employees for raising safety concerns will not be tolerated. However, in this case, as explained above, the NRC has found that NES did not discriminate against Mr. Gundersen for raising safety concerns, and there is no basis for taking enforcement action for any violation of NRC's whistleblower regulations. Accordingly, the Petitioner's request for immediate action to protect him in this case is also denied.
2. With respect to Petitioner's request for: (i) prompt action regarding a lawsuit filed by NES against Petitioner, and (ii) issuance of a cease and desist order against NES to stop harassment of the Petitioner (presumably relating to the lawsuit filed by NES), based on the information available to the NRC, we have found no violation in NES' filing and pursuing the civil suit and we have no basis on which to take action with regard to that civil suit. Therefore, these portions of the Petitioner's additional requests are denied.
3. The request for strong and appropriate action against NES, including revocation of its license, was considered as part of the request for enforcement action contained in the Petition and described above. As explained above, the NRC has found that the Petitioner has not provided

a basis for taking any enforcement action against NES beyond those taken and reflected in the Notice of Violation.

4. The Petitioner requested a response by NRC to NES' response disputing the facts outlined in the NRC's 1992 inspection report. On March 11, 1993, the NRC responded to NES' August 14, 1992 letter in which NES disputed the findings of the NRC inspection. The NRC staff concluded in that March 11 letter that NES had provided an insufficient basis to revise the NRC inspection report or to alter the original conclusions and sustained the finding that violations had occurred. Since a response to NES has already been issued, this portion of the Petitioner's additional requests in effect has been granted.
5. The Petitioner requested a ruling by the NRC that the settlement agreement signed by the Petitioner and NES on December 20, 1990, contained paragraphs that were illegal and, therefore, null and void. In particular, Mr. Gundersen asserts that certain provisions of the settlement agreement restrict his ability to raise safety concerns in violation of 10 C.F.R. § 30.7. A review of the paragraphs in question reveals that they refer only to the terms of the settlement, and not to the safety concerns that he raised, a condition that must be satisfied for finding that the agreement is a violation of section 30.7. With respect to this issue, in a letter dated March 24, 1993, I stated that the settlement agreement may possibly prohibit Mr. Gundersen from exercising his rights under section 211. Following an exchange of documents from NES and Mr. Gundersen and a review of a deposition taken from Mr. Gundersen on November 10, 1992, which the Petitioner states supports his position, the Staff is unable to conclude that the settlement agreement restricted Mr. Gundersen from raising safety issues. Rather, the restriction applied only to discussing the terms of the settlement and employment issues. Therefore, this portion of the request is denied.
6. The Petitioner's wife requested discipline of an NRC employee for intimidating her during testimony given at a public meeting on February 3, 1993. Matters relating to the conduct of NRC employees, including allegations of employee misconduct, are not within the scope of 10 C.F.R. § 2.206. Rather, such matters are within the authority of the NRC Office of the Inspector General (OIG). In this case, after considering this request, the OIG concluded that the allegation was too general and lacking in sufficient background to pursue.
7. The Petitioner's wife requested a full investigation into NRC's so-called "cozy relationship" with NES. As stated above, requests for such investigations are outside the scope of section 2.206 and are within the authority of the NRC Office of the Inspector General (OIG). Therefore, this portion of the request is denied. We note, however, that OIG has

investigated charges involving NRC employees and NES. OIG reported the results of this investigation in OIG Report No. 91-72A.

IV. CONCLUSION

As explained above, with the exception of the Petitioner's request that the NRC respond to NES' response disputing the facts outlined in the NRC's 1992 inspection report, the Petitioner has not raised any issues that would warrant the requested actions. Therefore, for the reasons given above, the Petitioner's requests are denied except as noted with regard to the request for a response to NES' response to the June 12, 1992 Notice of Violation, which has been granted. As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary for the Commission's review.

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 19th day of November 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-293
(License No. DPR-35)

BOSTON EDISON COMPANY
(Pilgrim Nuclear Power Station)

November 19, 1993

A petition, dated October 30, 1991, requested the Commission to reconsider an earlier Commission approval of a task force recommendation that the NRC not reconsider its "reasonable assurance" finding regarding emergency preparedness at the Pilgrim Nuclear Power Station. The Petitioner set forth ten bases for that request. Subsequently, the Petitioner raised additional concerns, some of which are related to matters raised in the petition, in correspondence with a Commissioner's office, the Office of the Secretary of the Commission, and the Chairman. The Director of the Office of Nuclear Reactor Regulation has considered all of the matters raised in the petition, as deemed supplemented by relevant additional matters raised in the subsequent correspondence, and has denied the petition.

❷ **DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206**

INTRODUCTION

The Petition

On October 31, 1991, Jane Fleming filed a petition requesting that the U.S. Nuclear Regulatory Commission reconsider its July 30, 1991 decision giving unanimous approval of a task force recommendation that it was not necessary

for the NRC to reconsider its reasonable assurance finding regarding emergency preparedness for the Pilgrim Nuclear Power Station.¹

Background

The events leading up to the Commission's approval of July 30, 1991, which Ms. Fleming asks the Commission to reconsider, are as follows:

On September 6, 1990, the NRC held a public meeting in Plymouth, Massachusetts, to obtain information from public officials and private citizens regarding the current state of offsite radiological emergency planning and preparedness around the Pilgrim Nuclear Power Station. During the meeting, twenty-five persons, including Commonwealth and local officials and private citizens, testified and tendered documents regarding issues and concerns about emergency preparedness (EP) for the Pilgrim Station.

On September 12, 1990, NRC's Executive Director for Operations (EDO) informed the Commission that he was establishing a special task force to review the assertions and documents presented to the Staff at the public meeting on September 6, 1990. On September 24, 1990, the EDO forwarded the charter for the task force to the Commission; the charter included the following five specific tasks:

1. Identify Pilgrim offsite EP issues in dispute.
2. Determine the factual status of issues in dispute.
3. Describe the current status of offsite EP for Pilgrim.
4. Identify and assess the significance of existing EP problems.
5. Recommend whether the NRC should reconsider its reasonable assurance finding (that adequate protective measures can and will be taken in the event of a radiological emergency at the Pilgrim Nuclear Power Station).

The Task Force

The Pilgrim Task Force comprised staff from the NRC and the Federal Emergency Management Agency (FEMA) supported by contractors. Factual information for the review was obtained primarily by task force teams working with state and local officials responsible for emergency preparedness in the area of the Pilgrim Nuclear Power Station.

Although staff from both the NRC and FEMA participated in the effort, the task force activity was not intended as a substitute for NRC's normal regulatory

¹Ms. Fleming presented her paper to the Commission on October 30, 1991. It was docketed the following day.

oversight of Pilgrim EP or as a substitute for FEMA's ongoing review of offsite EP for the Pilgrim Station.

The task force categorized information from the September 6, 1990 public meeting into about twenty topics; these topics were then assigned to field teams for fact finding. The task force field teams started work on October 31, 1990.

Before issuing its final report and recommendation, the task force published a draft report for comment on May 28, 1991. It conducted a public meeting to receive comments on June 12, 1991. On June 18, 1991, the task force presented its final report and recommendation to NRC's Executive Director for Operations, who forwarded them to the Commission.

The Commission

On July 30, 1991, the Commission unanimously approved the task force recommendation that it was not necessary for the NRC to reconsider its reasonable assurance finding regarding emergency preparedness for the Pilgrim Nuclear Power Station.

The Asserted Bases for the Petition

As stated above, on October 31, 1991, Jane Fleming filed a petition asking the Commission to reconsider its decision approving the task force recommendation.

She also requested that the Commission set the "120 day clock." Although Ms. Fleming did not cite section 50.54(s)(2)(ii) of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 50.54(s)(2)(ii)), I interpreted the request to mean, in accordance with the regulation, that the NRC should find that the state of emergency preparedness at Pilgrim does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency and, if the deficiencies are not corrected within 4 months of that finding, the Commission should determine whether the reactor should be shut down until such deficiencies are remedied or whether other appropriate enforcement action should be taken.

As bases for her request, Ms. Fleming asserted that the task force did not achieve the goals set out in its charter, that the task force was disbanded before the final recommendation was made, that the task force ignored established NRC policy, that the Commission overlooked areas of concern, and that the Commission's approval could not properly have been based on the findings provided by the task force.

Ms. Fleming further alleged that emergency planning for Pilgrim Station is in violation of 10 C.F.R. § 50.47 and is not in accordance with NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency

Response Plans and Preparedness in Support of Nuclear Power Plants." Ms. Fleming asserted ten bases for this allegation: (1) the reception center to the north is not adequate, (2) transportation is not adequate, (3) monitoring of schoolchildren is not adequate, (4) monitoring of the handicapped is not adequate, (5) decontamination of the handicapped is non-existent, (6) planning for evacuation of Saquish-Gurnet and Clark's Island is not adequate, (7) interfacing of plans is not adequate, (8) public information is not adequate, (9) direct torus vent interfacing with emergency planning issues is not resolved, and (10) congregate care facilities are not under agreement.

On November 7, 1991, Ms. Fleming telephoned David Trimble of Commissioner Curtiss' staff to raise a new concern about the egress route from Saquish-Gurnet. In addition, Ms. Fleming telefaxed to Mr. Trimble a copy of her comments on the State's preparations for the graded exercise for Pilgrim scheduled for December 12, 1991.

Ms. Fleming expressed to Mr. Trimble a belief that her comments on the planned graded exercise were relevant to the issues raised in her petition. I have treated the information that Ms. Fleming [communicated] to Mr. Trimble as a supplement to Ms. Fleming's petition and have considered this material in preparing my response to the petition.

On November 15, 1991, Ms. Fleming forwarded to William M. Hill, Jr., of the Commission's office of the Secretary a copy of a memorandum from Grant C. Peterson, Associate Director for State and Local Programs, FEMA, to Russell F. Miller, Inspector General of FEMA concerning Ms. Fleming's allegation to FEMA regarding the Pilgrim Offsite Emergency Preparedness Task Force. In a cover note to Mr. Hill, Ms. Fleming expressed her belief that the information she was providing supported the position she had taken in her petition. I have treated the material provided by Ms. Fleming on November 15, 1991, as the second supplement to her petition and have considered this material in preparing my response to the petition.

DISCUSSION

A. The Commission's Interpretation of Its Emergency Planning Regulations

The Commission's regulation governing emergency plans for nuclear power reactor applicants seeking operating licenses, 10 C.F.R. § 50.47, states in paragraph (a)(1) that no operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. For operating reactors, 10 C.F.R. § 50.54(s)(2)(ii) requires the following:

If . . . the NRC finds that the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency . . . the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate.

The NRC bases its findings in both of these cases on a review of the FEMA findings and determinations as to whether state and local emergency plans are adequate and capable of being implemented, in addition to the NRC assessment as to whether the licensee's emergency plans are adequate and capable of being implemented. Paragraph (b) of 10 C.F.R. § 50.47 lists sixteen standards that must be met by the onsite and offsite emergency response plans in order for the NRC to make a positive finding that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

The Commission has defined the phrase "adequate protective measures in the event of a radiological emergency" on several occasions. In *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 30 (1986), the Commission stated:

Our emergency planning regulations are an important part of the regulatory framework for protecting the public health and safety. But they differ in character from most of our siting and engineering design requirements which are directed at achieving or maintaining a minimum level of public safety protection. *See, e.g.*, 10 C.F.R. § 100.11. Our emergency planning requirements do not require that an adequate plan achieve a preset minimum radiation dose saving or a minimum evacuation time for the plume exposure pathway emergency planning zone in the event of a serious accident. Rather, they attempt to achieve reasonable and feasible dose reduction under the circumstances; what may be reasonable or feasible for one plant site may not be for another.

More recently, the Commission addressed the intent of its emergency planning requirements in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-2, 31 NRC 197, 217 (1990). There the Commission stated:

Emergency plans are to be evaluated on their own merits, against the sixteen planning standards of 10 C.F.R. § 50.47(b), with presumptive validity accorded to FEMA's expert judgments on offsite planning; that the evaluation does not entail consideration of dose consequences that might be calculated under various hypothetical circumstances; and that a plan judged against those planning standards is considered generally comparable to any other plan that has been found adequate.

On an appeal brought by the Commonwealth of Massachusetts and other petitioners, *Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission*, 924 F.2d 311 (D.C. Cir. 1991), the Court of Appeals for the D.C. Circuit addressed the Commission's interpretation of its emergency planning regulations. The court stated:

Section 182(a) [of the Atomic Energy Act] does not expressly require that "adequate protection" be judged by a single standard for different categories of safety features. In fact, we have repeatedly emphasized the broad discretion available to the agency in devising appropriate standards and have held that "adequate protection" permits the acceptance of some level of risk. See *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 117-18 (D.C. Cir. 1987). It is for the NRC to determine whether a level of, or approach to, risk reduction is acceptable for offsite planning that may not be adequate for plant siting and design engineering.

Thus, in reviewing emergency plans, the question is not whether the plan is perfect, but whether it provides for "reasonable assurance of adequate protection of the public health and safety." It is in this context that I have reviewed Ms. Fleming's request for reconsideration of the NRC's approval of the emergency plan for the Pilgrim Nuclear Power Station.

B. The Allegation That the Task Force Failed to Meet Its Charter

The petition addresses the matter of whether the task force met its charter. This concern is expressed in the petition as follows:

There are too many areas in which the task force simply failed to make factual findings or in which it otherwise fell far short of its full charter obligations.

a. Describing the current status of offsite EP.

As just one example of this, the task force neglected to mention in its findings that the "quick fix" is only an interim measure, for 4 to 6 months. This may be just long enough to get Boston Edison Company (BECO) through the exercise, but planning is for an accident that may happen at any time, not just for an exercise 4 to 6 months hence. Sheet II, also in the packet before you, gives a number of aspects in which the task force's supposed description of the current status of emergency planning are not correct.

b. Identifying and assessing the significance of existing EP problems.

The lack of assessment of the current Letter of Agreement format mentioned above is a prime example. Sheet III, before you, identifies several others.

c. Accepting "solutions" that do not comport with Federal regulation and guidelines.

A number of "solutions" accepted by the task force indicate a strong desire to accommodate the utility; but not to protect the public or to comport with Federal regulation and Guidelines. The now well-known quick fix is one of the more blatant examples. Sheet IV, again in the packet before you, describes a number of others.

d. Disbanding before making an independent recommendation as to whether the NRC should reconsider its "reasonable assurance" findings.

Ms. Fleming's allegation that the task force failed to meet its charter is unsubstantiated.

The task force meticulously followed its charter, which the EDO sent to the Commission on September 24, 1990, and revised on September 26, 1990. The task force published the charter in section 1.2 of its report (NUREG-1438). The task force was diligent in fulfilling its charter obligations; these were not intended to substitute for NRC's normal regulatory oversight of emergency preparedness (EP) at Pilgrim or to substitute for FEMA's ongoing review of offsite EP for Pilgrim Station. The scope of the task force work was limited by its charter to determining the factual status and assessing the significance of issues raised at a public meeting on September 6, 1990, and corollary issues that the task force identified in the course of its fact-finding work. Specifically, the task force did not attempt to conduct a comprehensive review of offsite emergency plans such as FEMA might perform as part of its certification process under Part 350 of Title 44 of the *Code of Federal Regulations*. These practical limitations on the scope of task force activities are clearly stated in section 1.4 of the task force report.

In response to Ms. Fleming's allegation that the task force accepted temporary (quick fix) "solutions," it should be pointed out that the task force charter explicitly states that:

The review should also consider compensatory measures that local and State entities may have established to address weaknesses while working towards a permanent resolution.

Ms. Fleming alleged that the "lack of assessment of the current LOA (letter of agreement) format" is a "prime example" of task force failure to identify and assess the significance of existing emergency preparedness problems. Ms. Fleming raised this concern along with others in a day-long meeting with the task force on January 30, 1991. The transcript of that meeting is cited as document PT-52 in the list of references in Appendix A of the task force report (NUREG-1438). It is available in the NRC Public Document Room in Washington, D.C., and the local public document room in the public library in Plymouth, Massachusetts. Ms. Fleming's concern involved a proposed new format which was neither final nor in effect at the time the task force conducted its review. The task force conducted a very thorough and detailed assessment of the *existing* LOAs between offsite officials and transportation providers. The task force found that, although some of the existing LOAs were not clear, concise, or consistent, as a group they were adequate to meet the guidance of NUREG-0654.

Ms. Fleming refers to her "Sheet IV" as containing examples of solutions accepted by the task force indicating "a strong desire to accommodate the utility" rather than protect the public health and safety. In "Sheet IV," among other things, Ms. Fleming attacked Commonwealth and BECo officials for agreeing "that 32 persons are adequate to handle the Wellesley Reception Center."

She challenged the veracity of private companies that provide transportation resources in support of emergency planning. She also challenged FEMA's qualification to work with the Commonwealth on problems involving field monitoring teams. No bases have been provided to show that the 32 persons at the Wellesley Reception Center would not be an adequate staff or to question the sincerity of the private transportation companies or the qualifications of FEMA. "Sheet IV" provides no basis for Ms. Fleming's unsupported allegations.

C. The Allegation That the Task Force Was Disbanded Before a Final Recommendation Was Made

Concerning the allegation that the task force was disbanded before a final recommendation was made, the petition makes the following statement:

The statement "the Commission . . . approved the task force recommendation . . ." does not accurately portray the sequence of events that occurred.

My understanding is that the Task Force, as a body, was disbanded before any final recommendation was made. Although the EDO had the right to recall and seek advice and opinions from individual members, the Task Force as an entity did *not* exist. Therefore, the independence that the "Task Force" as a body enjoyed was no longer in place when the EDO, as an individual, formulated the final recommendation that there was no need for the NRC to reconsider its reasonable assurance finding regarding emergency preparedness for Pilgrim Station. There was no recommendation of an independent "Task Force" for the Commission to approve.

Ms. Fleming's allegation regarding the task force's recommendation and the Commission's approval of it is without any basis in fact. Rather, the facts are to the contrary and are as follows:

On June 18, 1991, *all* NRC members of the task force formally concurred on SECY 91-190, "Final Report and Recommendation of the Task Force on Pilgrim Offsite Emergency Preparedness (EP)." As stated in that paper, "FEMA personnel fully participated in the compilation of the task force report and concur in its assessments." However, since FEMA is not authorized under its rules to make a direct recommendation to the Commission, FEMA members of the task force presented instead a separate statement on the results of FEMA's own review process. That statement, in a letter of June 18, 1991, from Grant C. Peterson (FEMA) to James M. Taylor (NRC), conveyed a FEMA finding that "adequate protective measures can be taken offsite to protect the health and safety of the public in the event of a radiological emergency at the Pilgrim Station." The FEMA letter was incorporated as Enclosure 4 to SECY-91-190.

In summary, SECY-91-190 contains the June 18, 1991 recommendation of the task force, which the EDO forwarded to the Commission on June

24, 1991, and which was approved by the Commission on July 30, 1991. Thus, the task force was not disbanded before a final recommendation was made. All these documents are available to the public.

D. The Allegation That the Task Force Ignored Established NRC Policy

The allegation that the task force ignored NRC policy is stated in the petition as follows:

The task force ignored established NRC policy.

The NRC is the ultimate authority on Emergency planning, as has been upheld by the court's [sic] on numerous occasions. As the NRC I.G. audit explained, the NRC's policy is that a fundamental flaw can be ascertained from a review of the plan itself, and should be corrected when found. As illustrated by the examples from Sheet 1 which you have before you, the task force ignored this NRC policy, and instead embraced FEMA's philosophy that deficiencies are identified solely through an exercise.

The facts surrounding the issue raised by Ms. Fleming's allegation charging that the task force ignored established NRC policy do not support the allegation. Rather, they establish that the allegation had no basis.

The task force report (NUREG-1438) identified a number of planning matters that were being resolved and improvements that were being made by officials and agencies responsible for offsite emergency planning and preparedness for Pilgrim Station. None of these, including areas identified by the task force as warranting attention before the next exercise, were considered serious enough to bear upon the question of reasonable assurance. In fact, the task force recommendation in SECY-91-190 reflected the judgment that problems bearing on reasonable assurance had already been satisfactorily resolved through actions taken by the Commonwealth of Massachusetts, local communities, and BECo. Nevertheless, the task force considered it reasonable and prudent for FEMA to monitor progress where commitments had been made and improvements undertaken.

Accordingly, throughout the task force report one finds statements such as "FEMA will evaluate" or "FEMA will monitor." None of these statements indicate any failure in the plan, but rather relate to additional FEMA duties under the FEMA-NRC Memorandum of Understanding, 50 Fed. Reg. 15,485 (1985). Moreover, in considering Ms. Fleming's request that the NRC make an adverse finding under its regulations in 10 C.F.R. § 50.54(s), I note that that very regulation states "the NRC will base its finding on a review of the FEMA findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented" (10 C.F.R. § 50.54(s)(3)).

In summary, the NRC found the plan adequate. Further, it is reasonable and prudent to monitor progress being made in offsite emergency preparedness for the Pilgrim Station and altogether proper for this to be done by FEMA.

E. The Allegation That Others Have Acted on Information Since the Commission's July Approval of the Task Force Recommendation

This allegation is explained in the petition as follows:

- a. As shown by the information in the Packet before you, FEMA's I.G. has found that my concerns on the adequacy of staffing and monitoring at the Wellesley Reception Center, and adequacy of transportation, in particular for handicapped, were valid; and have requested that specific corrective actions be taken. (See footnote 3) This Commission's decision clearly overlooked these areas of concern.
- b. During dialogue I had with the task force concerning the new LOA format, it promised to "pursue" my questions and concerns. Despite its guarantee that it would do so "The task force did not review the new LOA format." These LOA's are useless letters of intent. In time, thanks to the review and assessment of Dave Rodham, of MEMA, a new and approved LOA will be implemented. Today, because the task force failed to conduct its promised review of the LOA format; the public has no "reasonable assurance" that the necessary transportation will be provided. (See footnote 4)
- c. The NRC I.G. is currently considering a number of other concerns I have raised regarding the task force assessment of emergency planning. (See footnote 5) The Office of Investigation is investigating what only can be characterized as BECo lies.

In short, others have considered and found valid a number of important points that the Commission decision apparently did not consider in its Decision, even though I and others have presented them to you and your staff in the past.

Contrary to the allegation stated in the petition, the facts surrounding these matters are as follows.

a. FEMA IG

On September 27, 1991, William C. Tidball, FEMA's Acting Assistant Inspector General for Inspections, responded to Ms. Fleming's allegations. That letter contained the following statement:

After investigating these issues, we found no issue that would result in a reversal of FEMA's finding that offsite radiological emergency planning and preparedness were adequate to protect the public health and safety in the event of an accident at the Pilgrim plant.

This statement is clear and unequivocal, and summarizes the conclusion drawn by the FEMA OIG regarding Ms. Fleming's allegations.

b. MEMA Implementing New Improved Letters of Agreement

As stated in the task force report (NUREG-1438), at p. 2-133:

The task force found that the transportation letters of agreement were executed with all transportation providers (except those facilities providing their own transportation) and as a group were adequate to meet the guidance of NUREG-0654.

This is the important conclusion drawn by the task force.

The task force report goes on to state the following:

Maintenance of the letters of agreement by Massachusetts Civil Defense Agency (MCDA) was inadequate. When this report was prepared, BECo and MCDA were renewing the letters of agreement using a new format that they expected would ensure uniformity and clarity of commitments. The task force did not review the new LOA format. However, MCDA has provided draft procedures to FEMA that address the maintenance of letters of agreement. Contingent upon implementation of such procedures, this aspect of the maintenance of transportation arrangements is resolved. FEMA will monitor the implementation of this procedure.

In summary, the task force identified maintenance of the LOA's — not format — as a matter of some concern, noting nevertheless that BECo and MCDA (now MEMA) were introducing a new format. Accordingly, followup action and monitoring by FEMA seemed appropriate and was focused on the LOA maintenance procedure.

c. NRC OIG and OI

By letter of October 22, 1991, Frank J. Congel, Director, Division of Radiation Protection and Emergency Preparedness, NRR, informed Ms. Fleming that the staff had reviewed concerns she had expressed to the Chairman's office about the way emergency planning issues for the Pilgrim Nuclear Power Station were being handled. That letter contained the following statements:

The staff reviewed your concerns and the documentation you provided and concluded that the substance of the issues raised had been considered by the Pilgrim Offsite Emergency Preparedness Task Force.

With respect to your concerns on how the task force dealt with the issues, we have conveyed your concerns and documents to the NRC Inspector General's office for whatever action is deemed appropriate. The NRC Office of Investigations has also been notified of your concerns regarding statements made by the licensee.

In transmitting this Petitioner's information to the NRC Office of the Inspector General and Office of Investigations, respectively, the NRC Staff did not recommend investigations. This does not preclude self-initiated actions by those offices. The NRC information that the Staff provided to NRC's OIG and OI does not call into question the adequacy of offsite emergency planning and preparedness for Pilgrim Station.

F. The Allegation That the Commission's Approval Could Not Properly Have Been Based on the Findings Provided by the Task Force

In her petition, Ms. Fleming alleged in the following words that the Commission's approval could not properly have been based on the findings provided by the task force:

The Commission's "approval" could not properly have been based on the findings provided by the task force.

This is the fundamental basis of my petition. There are too many areas in which the task force simply failed to make factual findings or in which it otherwise fell far short of its full charter obligations.

Ms. Fleming's allegation charging that the Commission's approval could not properly have been based on the task force's findings is unsubstantiated. In making this allegation, Ms. Fleming fails to recognize that the task force findings did not constitute the sole basis for the Commission's decision which this petition asks the Commission to reconsider. This is clearly stated in the following comments by Chairman Carr accompanying his vote on June 28, 1991, which have been made available to the public:

I approve the recommendation of the task force not to reconsider the NRC's reasonable assurance finding regarding emergency preparedness for Pilgrim Station.

I base this approval on several considerations:

- (1) The Federal Emergency Management Agency (FEMA) has, on June 18, 1991, confirmed to the agency that FEMA "finds that adequate protective measures can be taken offsite to protect the health and safety of the public in the event of a radiological emergency at [the Pilgrim Station] site."
- (2) The task force has determined the factual status of issues in dispute through an extensive review of documents, inspections of facilities, and meetings with local officials and other interested parties.
- (3) Notwithstanding the fact that five areas of offsite emergency preparedness were found by the task force to require attention before the next exercise, the general level of emergency preparedness at the site meets the requirements of the agency's regulations.

- (4) It is not necessary for an adequate assurance finding that all aspects be found to be in full compliance. In this case, those aspects that need attention have adequate follow-up actions and responsible parties have been identified.
- (5) Attention to emergency preparedness for this site will continue through the required quarterly status reports to the Commission by the staff.

In summary, the Commission based its decision on findings of the task force on specific issues as well as broader FEMA findings and information provided by officials responsible for offsite emergency planning and preparedness for the Pilgrim Nuclear Power Station. In alleging that "there are too many areas in which the task force simply failed to make factual findings," the Petitioner fails to recognize the scope and limitations of the task force work, which are clearly spelled out in section 1.4 of the task force report. As stated therein, on page 1-3:

Although staff from both NRC and FEMA participated in this effort, the task force activity was not intended as a substitute for NRC's normal regulatory oversight of Pilgrim EP nor as a substitute for FEMA's ongoing review of offsite EP for the Pilgrim Station. Specifically, the task force did not attempt to conduct a comprehensive review of offsite emergency plans such as FEMA might perform as part of its certification process under Part 350 of Title 44 of the Code of Federal Regulations (CFR).

G. Petitioner's Objections to Task Force Findings

Ms. Fleming's petition includes four "sheets" (lists) of statements extracted from the task force report (NUREG-1438). Ms. Fleming alleged that these sheets of excerpts indicate, respectively:

- (1) Task force dependence on exercise and FEMA to make determination whether or not a flaw exists.
- (2) Task force flaws describing the current status of EP.
- (3) Task force flaws in identifying and assessing the significance of EP problems.
- (4) Acceptance of certain solutions by the task force to accommodate the utility, but not to protect the public.

I fail to find the grounds for Ms. Fleming's assertions in the material excerpted from the task force report. Regarding the first assertion, and corresponding sheet of excerpts, the task force report identified a number of planning matters that were being resolved and improvements that were being made by officials and agencies responsible for offsite emergency planning and preparedness for Pilgrim Station. The task force concluded that none of these were serious enough to bear upon the question of reasonable assurance of adequate protection of the

public health and safety. Nevertheless, it was considered prudent for FEMA to monitor progress where commitments had been made and improvements undertaken, and the next exercise provided a good opportunity to assess that progress.

Petitioner's remaining assertions and corresponding sheets of excerpts from the task force report reflect dissatisfaction with various findings and judgments of the task force. Nevertheless, Petitioner's views are not shared by Commonwealth officials responsible for offsite emergency planning for Pilgrim Station, as evidenced by the following comment from the Director, Massachusetts Civil Defense Agency and Office of Emergency Preparedness (now the Massachusetts Emergency Management Agency), to the task force on June 12, 1991:

In general, we agree with the findings and are engaged in a continuing process to improve the plans for Pilgrim offsite emergency preparedness. As you are aware, we have solved multiple issues, especially during the last few months that were of concern to the task force. This was as a result of a tremendous cooperative effort between FEMA, local government, other State agencies, the utility, the Executive Office of Public Safety and our own MCDA staff. We will, of course, keep FEMA informed as we continue to address any and all items in which interested parties and the task force had a concern.

This comment was contained in a memorandum to the task force which was also enclosed with SECY-91-190 and made available to the public.

On October 30, 1991, the Commission met in open session and heard directly from officials responsible for offsite emergency preparedness for the Pilgrim Nuclear Power Station. (Ms. Fleming attended this meeting, and at the end of the meetings she addressed the Commission and presented her petition.) During the meeting, the Commonwealth of Massachusetts reaffirmed its satisfaction with the task force report.

In remarks prepared for that meeting and sent to the Secretary of the Commission by letter of October 28, 1991, Mr. A. David Rodham, Director of the Massachusetts Emergency Management Agency, made the following statement:

As you are well aware, State and local public employees, officials and volunteers spent many hours with the task force members providing information which reflected the status of the program. The task force's report, NUREG-1438, has provided the basis for quantifying and closing out the remaining issues.

Thus, notwithstanding Petitioner's dissatisfaction with findings and judgments of the task force, as reflected in NUREG-1438, it is evident that the task force report was judged sound by Commonwealth officials responsible for offsite emergency planning and accepted by them as a guide for resolving emergency preparedness issues for the Pilgrim Nuclear Power Station. Accordingly I conclude that Petitioner's remarks about the task force and its report are

unfounded. Petitioner's complaint that the task force accepted "certain solutions" has already been discussed in the context of the task force charter which required the task force to consider compensatory measures addressing weaknesses. In that regard, as well as the other aspects of its work, the task force was faithful to its charter.

H. Ten Specific Allegations

In her petition, Ms. Fleming cited ten specific "reasons" why the Commission should reverse its decision regarding emergency preparedness for Pilgrim Station. I have considered each of them and conclude that they are not supported by the recorded facts, as discussed below.

1. Petitioner alleges that the reception center to the north is not adequate.

The facts do not substantiate this allegation. On the contrary, as stated on page 2-94 of its report, the task force toured the Wellesley Reception Center on November 7, 1990, and confirmed that the reception center and its associated emergency operations center were equipped to function. The task force also noted that the center would be evaluated in the December 1991 exercise (NUREG-1438 at p. 2-96).

In remarks prepared for the Commission meeting of October 30, 1991, Mr. Richard H. Strome, FEMA Regional Director, provided further information on this subject as follows:

There are new developments concerning the Wellesley Reception Center and Massachusetts Emergency Management Agency Area II. At one time, both these facilities used members of the Massachusetts National Guard for functions requiring rapid mobilization. The task force found the use of the Guard for this type of function unacceptable because of their long mobilization response time. As a result, the Commonwealth instituted an interim solution using BECo staff and also, for Wellesley, staff from State agencies. On October 8, 1991, FEMA was informed by the Commonwealth that instead of using BECo and State agency staff as the initial response group at Wellesley, it will now use members and associates of the Massachusetts Radiological Defense Officers Society. One training session, including classroom and hands-on training, has already taken place for the new group. When sufficient staff have been assembled, the Massachusetts National Guard will assume monitoring and decontamination duties at the reception center.

Mr. Strome also noted that this matter had been raised through FEMA's independent Office of the Inspector General. In his words:

The Inspector General has completed his inquiry. He did not take issue with FEMA's actions concerning staffing levels at the Wellesley Reception Center. He requested that FEMA's State and Local Programs and Support Directorate provide an update after the December

exercise and when a generic standard is developed by the Federal Radiological Preparedness Coordinating Committee for portal monitors, such as those used at Wellesley.

The subject reception center is adequate.

2. Petitioner alleges that transportation is not adequate.

Petitioner's assertion focuses principally upon letters of agreement with transportation providers which she characterizes as "worthless letters of intent."

This assertion is unsubstantiated. The matter of transportation letters of agreement is treated in section 2.13.2 of the task force report. The task force assessment is stated on page 2-133 of NUREG-1438 as follows:

The task force found that the transportation letters of agreement were executed with all transportation providers (except those facilities providing their own transportation) and as a group were adequate to meet the guidance of NUREG-0654. Some letters of agreement were not clear, concise, or consistent. It was unclear whether some letters were signed by someone authorized to commit resources for the provider. Maintenance of the letters of agreement by MCDA was inadequate. When this report was prepared, BECo and MCDA were renewing the letters of agreement using a new format that they expected would ensure uniformity and clarity of commitments. The task force did not review the new LOA format. However, MCDA has provided draft procedures to FEMA that address the maintenance of letters of agreement. Contingent upon implementation of such procedures, this aspect of the maintenance of transportation arrangements is resolved. FEMA will monitor the implementation of this procedure.

Moreover, in reviewing material provided by Ms. Fleming on November 15, 1991, as the second supplement to her petition, I note that it includes a copy of a memorandum of November 4, 1991, from Grant C. Peterson, FEMA Associate Director, to Russell F. Miller, Inspector General. Attached to that memorandum is another document labeled "Response to Document Marked Enclosure and Entitled 'Buses' or the Lack Thereof." Rather than supporting Ms. Fleming's petition, this FEMA document is an exhaustive analysis that refutes her allegation and substantiates a conclusion that transportation resources are adequate.

3. Petitioner alleges that monitoring of schoolchildren is not adequate.

Apparently Ms. Fleming objects to the concept of monitoring schoolchildren at reception centers if that should be necessary. However, this issue was squarely addressed by the task force on page 2-43 of its report, which states:

The task force finds that the concept of monitoring school children at reception centers is acceptable. This is the State's option and is not unique to Pilgrim emergency planning or to that of Massachusetts.

I find no reason to disagree with the task force conclusion that the provisions for monitoring schoolchildren are adequate.

4. Petitioner alleges that monitoring of handicapped is not adequate.

This allegation is unfounded. Evacuees are typically monitored at reception centers. The task force confirmed that each of these centers at Wellesley, Bridgewater, and Taunton was accessible to handicapped persons. (See NUREG-1438 at 2-97, 2-103, and 2-106, respectively.)

5. Petitioner alleges that decontamination of handicapped is non-existent. She cites as a basis for this allegation the following statement from page 2-125 of the task force report:

Hospitals — Understandings of commitments regarding the support that hospitals would provide are inconsistent.

Petitioner also cites a letter of March 7, 1991, from Robert M. Hallisey of the Massachusetts Department of Public Health to Chief Carl D. O'Neil, Civil Defense Director of Duxbury. In her petition, Ms. Fleming characterizes this letter as follows:

A March 7, 1991 (the day after the trip), letter from "BECO" Bob Hallisey of Massachusetts Dept. of Public Health to Carl O'Neil of Duxbury stated, in section 5, entitled *Hospitals Handling of Injured and Handicapped Population*, that the hospitals under agreement are strictly for injured contaminated; and that a non-injured contaminated person is not included in this grouping. To make this point perfectly clear — There is no decontamination in place for handicapped people (See enclosed copy of letter).

The Petitioner refers to a letter that reinforces the task force finding that understandings of commitments were inconsistent regarding the support that hospitals would provide. This inconsistency, however, is not related to the decontamination of handicapped persons, as the Petitioner infers. Rather, it involves having some hospitals host nursing home residents. This is quite clear in the full statement from page 2-125 of the task force report, which Ms. Fleming only partially quotes in her petition. The full statement reads as follows:

Hospitals — Understandings of commitments regarding the support that hospitals would provide are inconsistent. Hospitals, assigned by State and town planners to receive nursing home residents or other group home residents, need to reaffirm their understanding of the commitments in their letters of agreement.

The letter from Mr. Hallisey to Chief O'Neil, which Ms. Fleming enclosed with her petition, is actually dated March 13, 1991. The relevant section of the letter reads as follows:

Hospital Handling of Injured and Handicapped Populations

As you know, Chief O'Neil, this is one area of great confusion and concern to the individuals. It is our understanding that hospitals only accept injured or sick individuals and our programs

have been directed toward assuring that there is sufficient capability at these hospitals to handle all contaminated, injured. It is not our intent that large numbers of individuals would be sent to hospitals for this monitoring activity. Individuals who are not injured do not need to be sent to the hospital for monitoring and subsequent decontamination if necessary. We have conducted surveys of hospitals to find out the number of injured and contaminated individuals that can be handled at the hospitals. We need to all strive to educate the public and emergency planning individuals relative to the fact that a contaminated individual is not necessarily an injured individual, nor does that individual necessarily need to go to a hospital.

As shown in Mr. Hallisey's letter (referenced above), and by FEMA staff meeting notes of May 16, 1991 (PT-208), and a May 17, 1991 memorandum from the Director of MCDA to FEMA (PT-200), the State clarified its intention with regard to the monitoring and decontamination of nursing home residents.² According to the State, nursing home evacuees would be monitored and subsequently decontaminated, if necessary, at host nursing homes.

On this basis, the Petitioner's assertion that there is no decontamination in place for handicapped people is incorrect.

6. Petitioner alleges that planning for evacuation of Saquish-Gurnet and Clarks Island is not adequate.

It is generally acknowledged that Gurnet-Saquish³ and Clarks Island can present special problems for egress. Local authorities recognize this and take it into account in emergency planning for these areas. Gurnet-Saquish is a narrow beach area located at the end of the Duxbury Beach peninsula in the Town of Plymouth (but physically connected to the Town of Duxbury) between 4 and 5 miles north of the Pilgrim Station. Saquish Neck is a barrier spit extending in a westward arc from the foot of Gurnet Point. Under certain tidal conditions, the egress routes from the Saquish Neck portion of the beach become flooded and such finding could delay evacuation.

Section 2.7 of the task force report (NUREG-1438) contains an extensive analysis and discussion of the flooding phenomenon associated with egress routes from the Saquish Neck. The task force assessment of this issue included the following on page 2-75 of its report:

The NRC and FEMA believe that emergency plans that meet the planning standards and guidance criteria of NUREG-0654 are flexible enough to accommodate possible delays in evacuation that may result because of natural phenomena; however, the actual amount of

² The references PT-208 and PT-200, along with other task force references, are described in Appendix A of the Pilgrim Task Force report, NUREG-1438, "Findings on Issues of Offsite Emergency Preparedness for Pilgrim Nuclear Power Station" (June 1991). These referenced documents are available to the public in NRC's Public Document Room in Washington, D.C., and in the Local Public Document Room in the public library in Plymouth, Massachusetts.

³ Ms. Fleming refers to the area of concern as "Saquish-Gurnet." As the task force report refers to it as "Gurnet-Saquish," I have followed that usage.

flexibility is difficult to establish and cannot be quantified. The NRC and FEMA require that the emergency plans and procedures include practical and feasible measures to account for expected natural conditions. For Saquish Neck, these include provisions to evacuate the area at the Alert stage of an emergency, the development of a specific implementing procedure for the area (Plymouth IP-15), warning sirens with loudspeakers, and radio communications with Plymouth's emergency response organization. In addition, there are efforts under way for coordination with the Town of Duxbury for assistance during an emergency. The task force concludes that the provisions in the current emergency plans provide acceptable flexibility for the evacuation of Gurnet-Saquish.

Clarks Island is located in the Town of Plymouth about 5 miles north-northwest of the Pilgrim plant. The Plymouth Assessor's Office gave the task force a printout listing eight residences on Clarks Island (PT-150). Unlike egress from Saquish Neck, which is affected at high tide, egress from Clark's Island is affected at low tide. The task force report includes the following description of provisions for dealing with this situation:

Provisions for alerting and notifying the residents of Clarks Island are included in both the Plymouth and Duxbury emergency plans. The plans call for Clarks Island to be closed at the Alert stage and for the Plymouth Harbormaster to coordinate with the Duxbury Harbormaster to ensure that the Clarks Island population is advised of the closing or other protective action. Since Clarks Island is in the portion of Emergency Planning Zone (EPZ) Subarea 12 assigned to Duxbury, the Duxbury Harbormaster is responsible for establishing contact with the residents of Clarks Island by VHF radio, CB radio, or telephone to notify them of the emergency (Duxbury IP-11, Draft 6, April 5, 1990). If these means fail, the Duxbury Harbormaster is to dispatch a boat to notify the residents by using the public address system. (The nautical chart for the area — NOAA 13253 — shows a relatively deep channel approaching the northeast side of the island.) In addition, two tone alert radios have been provided to the residents on Clarks Island [NUREG-1438 at p. 2-83].

On the basis of these considerations, the task force concluded that the emergency plans provided "acceptable measures for accounting for the low tide situation at Clarks Island" (NUREG-1438 at p. 2-83).

Although I acknowledge that tidal conditions may complicate the evacuation of Saquish Neck and Clarks Island, should that ever be necessary, I nevertheless conclude that reasonable steps have been taken to address such contingencies in emergency planning for these places.

7. Petitioner alleges that interfacing of plans is not adequate.

Although Ms. Fleming did not elaborate on this point in her petition, the Pilgrim Task Force identified coordination of plans and procedures as an area warranting attention. The task force finding in this regard is summarized on page 1-6 of its report as follows:

Plans and implementing procedures for the Massachusetts Civil Defense Agency (MCDA) and the Department of Public Health and MCDA Area II need to be made consistent with those of the local communities.

- Transportation procedures need to be better coordinated among MCDA Area II, transportation providers, and the towns.
- State plans need specific procedures to guide officials who must make protective action decisions.

This finding was also presented to the Commission in SECY-91-190 together with the response of the Commonwealth of Massachusetts that the responsible parties were addressing the finding appropriately, and it would be resolved. The Commission was also informed that FEMA would follow up on this and other items warranting attention and would give the Staff information for quarterly status reports on these open items.

In his prepared statement for the Commission's meeting of October 30, 1991, A. David Rodham, the Director of the Massachusetts Emergency Management Agency, said the following on this topic:

Commonwealth Plans and Procedures

There are two areas under this topic which warrant discussion. The first is the coordination of transportation procedures. Transportation procedures have been looked at very carefully by the NRC task force, FEMA Region I and FEMA Headquarters personnel, and the planners who work with these procedures on a day to day basis. The changes which were identified during this review have been updated or will be updated to provide for more accurate and effective procedures. In addition, MEMA and Boston Edison are presently developing an administrative maintenance procedure to ensure consistent revision to the transportation procedures and data. The second area is the development of procedures on protective action decision-making. The specific procedures which provide guidance for protective action decisions are currently being reviewed by FEMA and will be evaluated during the December exercise.

In remarks prepared for that same meeting, Mr. Richard H. Strome, FEMA Regional Director, stated the following:

The fifth area identified by the task force report concerned a lack of consistency between State and local procedures, especially in two areas: (1) transportation procedures and (2) procedures to guide officials who must make protective action decisions.

Concerning transportation procedures, a transportation working group met in the Massachusetts Emergency Management Agency Area II office in Bridgewater, Massachusetts, from September 9-18, 1991, to update the task force assessment of the adequacy of transportation resources and to re-examine the process for managing them. The group was composed of staff of FEMA, NRC, and FEMA contractors. They met with representatives of the Massachusetts Emergency Management Agency and BECo. On October 4, 1991, the Massachusetts Emergency Management Agency issued a report responding to issues raised by the group. FEMA is still in the process of analyzing its findings and the Massachusetts Emergency Management Agency response.

Concerning the area of protective action decision guidelines, on October 1, 1991, FEMA received a revised version of the Massachusetts Radiological Emergency Response Plan and

the Massachusetts Department of Public Health Procedures contained in the Nuclear Incident Advisory Team (also called NIAT) Handbook. These documents are designed to provide, among other things, guidelines and procedures for officials who must make protective action decisions. FEMA is in the process of reviewing the revised documents. The performance of Commonwealth officials in the December exercise will be evaluated against these planning documents.

In conclusion, since information regarding this matter is well documented in the task force report (NUREG-1438), in SECY-91-190, and in subsequent status reports, and has been duly considered by the Commission, I find no basis for this allegation.

8. Petitioner alleges that public information is not adequate. The petition includes the following notes on this subject:

2.14 Public Information — 2-151 — “FEMA will continue to review the public information materials annually.”

The “public information materials” include “Facts About Radiation” which the NRC has already found flawed. Since when is FEMA expert in Radiation and the world of nuclear?

It is not clear why Petitioner is dissatisfied with the public information regarding emergency planning for the Pilgrim Nuclear Power Station. As the task force stated on page 2-151 of its report:

The purpose of public information material is to provide information to the public before an accident that it can use to protect itself from the consequences of an accident. The task force did not review the public information calendar for overall adequacy, since FEMA had done so. Comments on the draft calendar are reflected in the FEMA review, dated September 7, 1990. In the final calendar, BECo addressed all the comments either by correcting inconsistencies, clarifying unclear passages, or removing sections (such as a section identifying host schools) where information was not final.

True, the task force expressed concern about one statement in the public information material, as follows:

The section, “Facts About Radiation,” contains the statement, “In large doses, radiation may cause observable health problems such as flu-like symptoms or may increase the chance of health problems later in life.” However, flu-like symptoms are the prodrome or symptoms of the onset of the acute radiation syndrome. Accordingly, without further elaboration, this discussion of health effects is incomplete.

(The reference to “flu-like symptoms” has been removed from the 1992 calendar.)

The task force conclusion appears on that same page of the report as follows:

On balance, the task force concludes that the 1991 calendar meets the basic requirements of Planning Standard G and the guidance of Evaluation Criterion 1. FEMA will continue to review the public information materials annually.

I find no basis in Ms. Fleming's petition for taking issue with the task force conclusion.

9. Petitioner alleges that direct torus vent interfacing with emergency planning issues are not resolved. Ms. Fleming's petition includes the following comments on this topic:

2-167 Task force assessment (direct torus vent): ". . . the task force is not certain that the declaration of an emergency and notification of offsite authorities would always precede activation of the DTVS. . . . The task force considers it important that BECo develop and implement appropriate controls for its staff responsible for emergency classification." The public certainly feels this is important as well; who is making sure something is done?

During its review of this issue involving the DTVS, the task force noted that a general emergency would be declared at Pilgrim when the primary containment hydrogen and oxygen concentrations exceed deflagration levels or if those concentrations could not be determined to be below deflagration levels. The operators, under these conditions, are directed to vent and purge the primary containment. The task force noted that the licensee's emergency action level (EAL) scheme, however, did not specify that the declaration of the general emergency would be based on the hydrogen and oxygen concentration levels in the containment *prior* to its venting.

The task force also concluded that, lacking additional documentation, the existing emergency and associated DTVS procedures may not result in the proper emergency classification and offsite notifications preceding the activation of the DTVS (NUREG-1438 at p. 2-167).

The Boston Edison Company (BECo) acknowledged this task force finding in BECo letter 91-075, dated June 6, 1991, which was incorporated along with other comments received on draft NUREG-1438 in Appendix F of the final report. The following appears as a footnote on page 2 of the BECo letter:

One of the task force's recommendations addresses Boston Edison's procedures for emergency classification, offsite notification and use of the direct torus vent. Task force report at p. 2-165. Although Boston Edison believes that existing controls are adequate to ensure that emergency classification and offsite notification will precede use of the direct torus vent, we will discuss this issue further with the NRC staff.

On November 29, 1991, BECo submitted a revised version of its Emergency Plan Implementing Procedure Manual, which incorporated the necessary clarifications to EALs 3.5.1.4 and 3.5.2.4, that directs the operator to declare a general emergency based on hydrogen and oxygen concentrations in the con-

tainment prior to its venting.⁴ On March 30, 1992, BECo submitted to the NRC the revised portion of the Pilgrim Nuclear Power Station procedure for venting the primary containment.⁵

Thus, I conclude that this matter concerning direct torus venting and emergency planning has been properly resolved by the licensee and the NRC.

10. Petitioner alleges that congregate care facilities are not under agreement. The petition includes the following comments on this topic:

2.96. . . . "No letters of agreement exist with regard to the congregate care centers. This item is being pursued by MCDA (now MEMA) and will be evaluated by FEMA in the 1991 exercise."

Evaluate what?? This certainly does not comport with NUREG 0654 II A. 3. page -32-

2-97. . . . "FEMA and the NRC do not require letters of agreement between the State and the Red Cross." (Maybe they don't but NUREG 0654 clearly does. [A.3, pg-32])

Congregate care is not directly related to protective actions taken in the event of a radiological emergency. Congregate care, which refers to the provision of temporary housing and basic necessities for evacuees, is somewhat ancillary to more fundamental emergency planning and preparedness measures taken to protect the public in the event of a radiological emergency. The term "congregate care center" refers to a facility for temporary housing, care, and feeding of evacuees which should be located at least 5 miles, and preferably 10 miles, beyond the boundaries of the EPZ.

While noting that there were no letters of agreement with regard to congregate care centers, the task force report explains that adequate congregate care facilities are designated in comprehensive emergency management plans and umbrella agreements with the Red Cross.

Furthermore, as stated on page 2-97 of the task force report:

FEMA and the NRC do not require letters of agreement between the State and the Red Cross relating to their support services in a radiological emergency.

The Commission addressed this point in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 888 (1987). There, the Commission denied Intervenor's request to reopen the record on the lack of an agreement between the utility and the American Red Cross (ARC) for its participation in emergency response, because the

⁴ BECo letter 91-142 from G.W. Davis to U.S. NRC, November 29, 1991, License DPR-35, Docket Number 50-293, "10 C.F.R. 50, Appendix E.V.: Submittal of Revised Emergency Plan and Emergency Plan Implementing Procedures."

⁵ BECo letter 92-035 from Roy A. Anderson to U.S. NRC, March 30, 1992, License DPR-35, Docket No. 50-293.

ARC's charter and policy require it to assist in emergency response whether or not there is an agreement.^{6,7}

The NRC and FEMA do not discourage agencies and support organizations from extending their planning and preparedness as far as they deem prudent and practicable, which may include agreements and arrangements beyond those specifically described in federal regulations and guidance. However, such actions and measures are not considered necessary or essential to adequate radiological emergency planning and preparedness. Thus, this allegation has no merit.

I. Emergency Planning and Preparedness Is a Dynamic Process

Ms. Fleming supplemented her petition with telefaxed information on November 8, 1991, that described coastal damage caused by the northeast storm of October 30, 1991. Ms. Fleming asserted that Saquish Neck was now currently accessible only by boat and expressed concern that evacuation would not be possible during storm conditions. She also criticized exercise planning activities described in a letter of October 16, 1991, from A. David Rodham, Director, MEMA, to Patricia Dowd, Board of Selectmen, Duxbury.

Storm damage is typical of the kind of problems that demand continuing efforts and attention from local, state and federal agencies responsible for offsite emergency planning and preparedness. Persons, circumstances, and conditions affecting emergency planning and preparedness for licensed nuclear power plants are continually changing. Moreover, as noted in my earlier discussion of Gurnet-Saquish, the task force pointed out that emergency plans meeting the criteria of NUREG-0654 are flexible enough to accommodate possible delays in evacuations that may result from natural phenomena.

As far as exercises are concerned, NRC regulations in Appendix E, 10 C.F.R. Part 50 require each licensee at each site to exercise its emergency plan annually and to exercise with offsite authorities so that state and local emergency plans for each operating reactor site are exercised biennially with full or partial participation by state and local governments within the plume exposure pathway EPZ. Such exercises are intended to provide training for participants and to

⁶The American Red Cross and the Massachusetts Emergency Management Agency executed a new letter of agreement on April 3, 1992.

⁷The Commission's licensing boards have looked at letters of agreement. In *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-85-14, 21 NRC 1219 (1985), the Licensing Board addressed the concept at length in the context of evaluating a contention alleging that a reasonable assurance finding could not be made absent full documentation of the existence of appropriate letters of agreement with support organizations and agencies. See *id.* at 1366-68.

identify weak or deficient areas that need correction. The NRC requires that weaknesses or deficiencies be corrected.

CONCLUSION

Ms. Fleming has failed to provide a basis for the relief she requests, namely that the Commission reconsider its approval of the task force recommendation that the NRC need not reconsider its reasonable assurance finding regarding emergency preparedness for Pilgrim Station. Because Ms. Fleming has not provided any basis for disturbing the reasonable assurance finding, her petition is denied.

A copy of this Decision will be filed with the Secretary for the Commission to review as provided in 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 19th day of November 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selln, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 93-01-Misc

STATE OF NEW JERSEY

**(Department of Law and Public Safety's
Requests Dated October 8, 1993)**

December 3, 1993

The Commission denies the petition for leave to intervene and request for an adjudicatory hearing filed by the State of New Jersey on the legality of barge shipments because there is no pending application for a license or permit for either the Philadelphia Electric Company or the Long Island Power Authority related to the fuel shipments. Moreover, even if there were such a proceeding, New Jersey failed to satisfy Commission rules governing intervention in hearings or reopening of proceedings.

RULES OF PRACTICE: INTERVENTION (STANDING)

Intervention is not available where there is no pending "proceeding" of the sort specified in section 189a.

ATOMIC ENERGY ACT: CLASS OF LICENSE

A general license is a license under the Atomic Energy Act that is granted by rule and may be used by anyone who meets the term of the rule, "without the filing of applications with the Commission or the issuance of licensing documents to particular persons." 10 C.F.R. § 70.18. NRC rules establish many

general licenses, including a general license for NRC licensees to transport licensed nuclear material in NRC-approved containers. 10 C.F.R. § 71.12.

**ATOMIC ENERGY ACT: REQUIREMENT OF HEARING;
REQUIREMENT OF LICENSE**

There would be no point to the NRC's general licensing scheme if a licensee's mere use of a general license triggered individual licensing proceedings.

**RULES OF PRACTICE: INTERVENTION PETITION (PLEADING
REQUIREMENTS); UNTIMELY INTERVENTION PETITIONS**

Good cause is the weightiest of the late intervention standards. Lacking a favorable showing on good cause, a petitioner must show a compelling case on the remaining factors. New Jersey gave short shrift to the remaining four factors.

MEMORANDUM AND ORDER

Introduction

In this Order the Commission denies the petition for leave to intervene and request for an adjudicatory hearing filed on October 8, 1993, by the State of New Jersey Department of Law and Public Safety ("New Jersey").

New Jersey seeks a hearing on the legality of a series of barge shipments along New Jersey's coast. The shipments involve a total of 33 barge trips to move 560 slightly irradiated nuclear fuel assemblies from the Shoreham nuclear power plant in New York to the Limerick nuclear power plant in Pennsylvania. Several trips had been completed at the time of New Jersey's request; the remainder are ongoing and should be concluded during 1994.

As we amplify below, there is not now, nor was there at the time of New Jersey's request for a hearing, any pending application for a license or permit for the Philadelphia Electric Company ("PECo"), owner of the Limerick plant, or for the Long Island Power Authority ("LIPA"), owner of the Shoreham plant, related to the fuel shipments. Accordingly, there are no "proceedings" in which New Jersey may intervene or be provided a hearing. Moreover, even were there an ongoing proceeding related to the fuel shipments or a closed proceeding that could in some manner be resuscitated, New Jersey has failed to satisfy our rules governing intervention in hearings or reopening of proceedings.

The shipment of the Shoreham fuel was also the subject of a request for NRC action filed by New Jersey under 10 C.F.R. § 2.206. The request is currently under consideration by the Director of the Office of Nuclear Materials Safety and Safeguards. On October 22, 1993, the Director denied that portion of the request seeking immediate action. Previously, in connection with a lawsuit that New Jersey filed to halt the Shoreham-to-Limerick barge shipments, the United States District Court for the District of New Jersey, the United States Court of Appeals for the Third Circuit, and the United States Supreme Court each denied requests to enjoin the shipments.

Background

In a scheduling order issued on October 14, the Commission stated that New Jersey appeared to seek (1) late intervention for “good cause” and a hearing on PECO’s license amendment (dated June 23, 1993) allowing PECO to receive and possess Shoreham’s fuel, and (2) intervention and a hearing on LIPA’s “transfer and transportation of the Shoreham fuel.” Unpublished order, October 14, 1993 (quoting New Jersey’s 10/8/93 filing at 44 and 46). The Commission’s October 14 order sought comment by the parties on: (1) whether at this time either matter referenced by New Jersey gives rise to an opportunity for a hearing under section 189 of the Atomic Energy Act; and (2) if so, whether New Jersey’s submission meets the applicable standards for intervention under 10 C.F.R. § 2.714.

The Commission set an expedited briefing schedule allowing for initial and responsive comments by New Jersey, PECO, LIPA, and the NRC Staff. On October 20, New Jersey, PECO, and LIPA filed responses. The NRC Staff filed its response, as scheduled, on October 22. Thereafter, on October 26, LIPA and New Jersey filed replies.¹

Positions Presented

New Jersey seeks a hearing on the grant of PECO’s license amendment allowing it to receive and possess LIPA’s fuel and on LIPA’s use of its general license under 10 C.F.R. § 71.12 to transport the fuel. New Jersey also maintains that the NRC must notice an opportunity for a hearing on a license for LIPA to transfer fuel to PECO. New Jersey believes that late intervention is permissible

¹By failure to observe the Commission’s rules on formal requirements for documents — i.e., by single-spacing rather than double-spacing its reply brief — New Jersey significantly exceeded the permitted length of the document. See 10 C.F.R. § 2.708(b). No party having requested that the filing be rejected, we accept it with the admonition that in fairness to all parties, any further ignoring of the Commission’s rules may lead to appropriate sanctions. See 10 C.F.R. § 2.709.

here because it did not receive certain knowledge of the coastal barge shipments in time to come to the Commission sooner. New Jersey does not dispute that it has failed thus far to fulfill specific requirements that govern intervention under our rules.

LIPA and PECO, as well as the NRC Staff, argue in essence that at this time there is no live "proceeding" on the transport of the Shoreham fuel and therefore no right of New Jersey to intervene. These parties also oppose late intervention. While there are differences among LIPA, PECO, and the NRC Staff on the precise balancing of the late intervention factors, they all agree that the balance tilts clearly against intervention.

Analysis

I. WHETHER UNDER SECTION 189 OF THE ATOMIC ENERGY ACT ANY OPPORTUNITY FOR A HEARING ON THE SHOREHAM FUEL MATTER ARISES AT THIS TIME IN THE PECO OR LIPA DOCKETS

The Atomic Energy Act's hearing provision, section 189a (42 U.S.C. § 2239(a)), states that an opportunity for a hearing must be offered in "any *proceeding* . . . for the granting, suspending, revoking, or amending of any license or construction permit or application to transfer control . . ." (emphasis added). Intervention is not available where there is no pending "proceeding" of the sort specified in section 189a. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67 (1992). PECO, LIPA, and the NRC Staff have amply demonstrated that there is no pending proceeding here.

A. PECO License Amendment to Receive and Possess Slightly Irradiated Fuel

License amendments are one of the specified agency actions that give rise to an opportunity for a hearing under section 189a. Accordingly, on March 31, 1993, the NRC published notice of PECO's proposed amendment to allow it to use slightly irradiated fuel at Limerick, and asked anyone who intended to request a hearing to do so by April 30. *See* 58 Fed. Reg. 16,851 (1993). The NRC received no requests for a hearing. The NRC granted PECO's license amendment on June 23. *See* 58 Fed. Reg. 36,449 (1993).

Not until October 8, 1993, did New Jersey come to the Commission with its request for intervention and a hearing on the PECO license amendment. The request came more than 6 months after the NRC had first solicited hearing

requests, nearly 4 months after issuance of the amendment itself and 2 to 4 months after New Jersey became aware of the proposed barge shipments (depending on whose version of events one credits). By any definition the PECO license amendment proceeding was over at the time of New Jersey's hearing request. Section 189a does not provide for a hearing opportunity in closed cases. *See Comanche Peak*, CLI-92-12, 36 NRC at 67.

Even if an already-completed section 189a proceeding somehow could be restarted, a number of factors cut against doing so here. *Cf. Cities of Campbell v. Federal Energy Regulatory Commission*, 770 F.2d 1180, 1191-92 (D.C. Cir. 1985) (agency discretion to reopen closed matter "reserved for extraordinary circumstances"). First, PECO's license amendment issued months ago, and the 60-day judicial review period established by the Hobbs Act (28 U.S.C. § 2342) — during which a final agency decision arguably remains alive and subject to revision by agency adjudication — expired on August 22, well before New Jersey sought a hearing. *Cf. Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650 (1980). Second, with LIPA and PECO now well into their series of shipments (and stays having been denied), starting a section 189a hearing now seems unlikely to lead to meaningful relief. Finally, as we explain below, New Jersey has not offered "good cause" for coming to the Commission so late.

In sum, the NRC decision to grant the PECO license amendment may no longer be revisited in a section 189a hearing. New Jersey has advanced various legal arguments against the PECO license amendment in two existing forums: a pending federal court case (now in the court of appeals) and a pending petition for NRC action under 10 C.F.R. § 2.206. It is those forums, not a late-starting agency adjudicatory hearing, to which New Jersey now must look for relief.²

B. LIPA's General License to Transport Fuel

New Jersey's request for a hearing on LIPA's authority to transport and transfer the Shoreham fuel rests on a misconception of what a general license is and how it operates. A general license is a license under the Atomic Energy Act that is granted by rule and may be used by anyone who meets the terms of the rule "without the filing of applications with the Commission or the issuance

² The NRC views New Jersey's judicial challenge to NRC actions as outside the court's jurisdiction. The federal district court agreed with the NRC's jurisdictional position, and the court of appeals recently affirmed. *New Jersey v. LIPA*, Civ. No. 93-4269 (GEB) (D.N.J., Oct. 12, 1993), *aff'd*, No. 93-5613 (3d Cir., Dec. 1, 1993).

New Jersey's section 2.206 petition, on the other hand, was filed with the right forum, the NRC itself, and conceivably could lead to agency adjudicatory hearings were the NRC to find cause to believe that the PECO license amendment was issued improperly. In that case, the agency might begin an enforcement action against PECO under 10 C.F.R. § 2.202, where New Jersey, on a proper showing, could intervene (presuming PECO requested a hearing). It is also possible that the NRC would decide to take "other action as would be proper" (10 C.F.R. § 2.206(a)).

of licensing documents to particular persons.” 10 C.F.R. § 70.18. NRC rules establish many general licenses (e.g., 10 C.F.R. §§ 31.9, 40.21, 70.19), including a general license for NRC licensees to transport licensed nuclear material in NRC-approved containers. 10 C.F.R. § 71.12.

Thus, contrary to New Jersey’s submission, LIPA was not required to obtain an individual license or license amendment for transporting the Shoreham fuel to PECO.³ LIPA already had authority to transport the fuel under the general license created by 10 C.F.R. § 71.12. It is well established, of course, that an administrative agency may proceed by generic rule rather than by case-by-case adjudication. See, e.g., *American Hospital Ass’n v. National Labor Relations Board*, 111 S. Ct. 1539, 1543 (1991). In such situations the rule establishing the general license, in effect, *replaces* individual licensing proceedings. There would be no point to the NRC’s general licensing scheme if, as New Jersey apparently believes, a licensee’s mere use of a general license triggered individual licensing proceedings.

New Jersey suggests that the NRC’s issuance and amendment of a certificate of compliance for the Shoreham fuel’s shipping cask open the door to a section 189a hearing opportunity. But, assuming (without deciding) that a certificate of compliance triggers a section 189a hearing opportunity, New Jersey has neither offered good reason for demanding a hearing so late (the cask’s longstanding certificate of compliance was amended slightly on August 19, 1993) nor explained in any detail what litigation over the cask design would accomplish, as NRC rules demand. See 10 C.F.R. § 2.1205(c), (d).⁴ Indeed, New Jersey’s papers nowhere suggest that the cask is in any way defective or unsafe. New Jersey’s main grievance — the routing of the barge shipments — has nothing to do with the cask’s certificate of compliance, which issues to the cask vendor, not to LIPA or PECO.

In sum, we cannot agree that New Jersey can challenge LIPA’s use of its general transport license in an adjudicatory hearing or that New Jersey properly has sought a hearing on the certificate of compliance issued for the Shoreham

³ Nor was LIPA required to obtain a special license to transfer the Shoreham fuel. As the possessor of the Shoreham license, it is already authorized to transfer the fuel to another licensee, such as PECO, pursuant to an NRC rule. See 10 C.F.R. § 70.42(b)(5).

⁴ Where (as here) the NRC has issued no *Federal Register* notice, NRC rules on materials licenses require prospective intervenors (1) to seek a hearing within 30 days after receiving “actual notice” of the agency action or within 180 days after agency action, whichever is earlier (10 C.F.R. § 2.1205(c)(2)), and (2) to “describe in detail” the timeliness of the hearing request and how the result of a hearing would affect the intervenor’s concerns (10 C.F.R. § 2.1205(d)). Here, New Jersey did not submit any hearing request to the NRC until its October 8 letter — much more than 30 days after New Jersey (by its own admission) had received actual notice of the Shoreham-to-Limerick barge shipments — and to this date has not “described in detail” how litigation over the cask design would affect its concerns.

shipping cask. We therefore cannot agree that a hearing on the transport and transfer questions is necessary under section 189a.

II. WHETHER NEW JERSEY'S SUBMISSION MEETS THE APPLICABLE STANDARDS FOR INTERVENTION UNDER 10 C.F.R. § 2.714

Given that our analysis shows that there is no section 189a proceeding in which New Jersey may intervene, we need not reach the second question briefed by the parties. However, for completeness, we shall address how New Jersey's petition would fare under our standards for untimely intervention set forth at 10 C.F.R. § 2.714(a)(1)(i)-(v).

The first and principal test for late intervention is good cause for lateness. This factor addresses not only why the Petitioner did not file in the time provided in the notice of opportunity for hearing, but why it did not file as soon thereafter as possible. *See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1048 (1983). Here, on the basis of documentation by LIPA, PECO, and NRC Staff, we conclude that New Jersey had sufficient awareness as early as June (or possibly May) 1993 of a significant likelihood of barge shipments off its coast. This awareness would have allowed New Jersey to request intervention and a hearing prior to issuance of the PECO license amendment. Common sense suggests that objections at the earliest possible stage can be accommodated more easily than those raised months later.

Not only did New Jersey not file promptly upon learning of the barging option, it failed to file promptly upon learning on August 9 that barging was the chosen option. Our concern is not that New Jersey was "sleeping on its rights" altogether (*see* New Jersey's October 26 filing at 3) — it apparently did initiate a number of meetings and ultimately brought suit in federal district court — but rather that it saw no need to bring us in the first instance its complaint with the administrative handling of this matter. As experienced litigators, New Jersey's attorneys presumably knew that bypassing the NRC in favor of bringing suit in the district court, whose jurisdiction was questionable, was at New Jersey's peril.

Even were we to agree *arguendo* that New Jersey needed some time to decide on a legal course of action after learning of the definite choice by LIPA and PECO to ship by barge, the time by which New Jersey was able to file complete papers and a brief before the United States District Court on September 21 sets an outside limit to the time in which we might have expected a comprehensive

filing here addressing all the matters required under our rules.⁵ New Jersey filed nothing with the Commission, however, until October 8, *after* the NRC had raised entirely predictable jurisdictional objections in the district court. New Jersey, in short, has offered no good cause for its untimely effort to initiate a hearing process at the NRC.

Good cause is the weightiest of the late intervention standards. Lacking a favorable showing on good cause, a petitioner must show a compelling case on the remaining factors. See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), *reconsideration denied*, CLI-89-6, 29 NRC 348 (1988), *aff'd sub nom. Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990). New Jersey has given short shrift to the remaining four factors, and we will not address them at length.

We cannot weigh the third factor — the extent to which an intervenor's participation “may reasonable be expected to assist in developing a sound record” — in New Jersey's favor. New Jersey has not set out with the required particularity the precise issues it intends to cover, a summary of evidence or the identity of its witnesses. See *Comanche Peak*, CLI-88-12, 28 NRC at 611 (citing cases). Indeed, New Jersey acknowledges as much, promising a future cure.

Nor can we count the fifth factor — the potential to “delay” the proceeding or “broaden” the issues — on New Jersey's side of the ledger. Obviously, while one perhaps cannot meaningfully “delay” a hearing that never began, convening a hearing at this late date would “delay” final resolution of the license amendment's validity and “broaden” the issues by creating litigation where none existed.

As to the second and fourth factors, we agree with NRC Staff that there is no “other means” for New Jersey to protect its interest (second factor) and that, because there is no proceeding, there is no “existing party” representing New Jersey's interest. But, in the totality of the surrounding circumstances, the weight we give these factors is slight. See *Comanche Peak*, CLI-93-4, 37 NRC

⁵ For example, New Jersey did not fully provide required information on the contentions that it wishes to litigate, did not provide responses on several of the factors of section 2.714, and to this date has not addressed the necessary factors for a motion to reopen. As the Commission stated just recently:

in order to obtain a new hearing when the record has been closed, as in this case, a potential intervenor must “satisfy [both] the late intervention and reopening criteria.” CLI-93-1, 37 NRC at 3. While neither the late intervention nor the reopening regulations specifically mandate that the two separate criteria be addressed in the *same pleading*, our decisions require that both be addressed when a petitioner seeks to intervene late in a proceeding for which the record has closed [I]t is in the petitioner's interest to address both sets of standards contemporaneously

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 161 (1993) (emphasis in original; footnote omitted).

at 74 (citing cases). They cannot possibly overcome New Jersey's failure to demonstrate "good cause" for lateness.

Finally, New Jersey seeks to excuse its tardiness by pointing to cases where the NRC has permitted intervention 6 weeks to 4 years out of time. *See* New Jersey's October 26 filing at 3. But those cases are easily distinguished as involving lengthy construction permit or operating license proceedings where hearings already had been granted and were just beginning or, although under way, were far from completion. The present case is entirely different: there is no ongoing hearing for New Jersey to enter as simply an additional party.

Conclusion

For the foregoing reasons, we deny New Jersey's request for intervention and for adjudicatory hearing.

It is so ORDERED.

For the Commission⁶

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of December 1993.

⁶ Commissioner Remick was not present for the affirmation of this Order; if he had been present he would have approved it.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Jerry R. Kline
Frederick J. Shon

In the Matter of

Docket No. 30-32240-CivP
(ASLBP No. 93-681-01-CivP)
(EA 93-082)
(Byproduct Material License
No. 11-27085-01)

TWIN FALLS CLINIC &
HOSPITAL

December 8, 1993

Where settlement of a matter as proposed by the parties is in the public interest, it should be approved by the Licensing Board.

ORDER
APPROVING AND INCORPORATING STIPULATION
FOR SETTLEMENT OF PROCEEDING AND
SETTLING AND TERMINATING THE PROCEEDING

Upon consideration of the Joint Motion for Order Approving and Incorporating Stipulation for Settlement of Proceeding and Settling and Terminating the Proceeding, and upon consideration of the Stipulation for Settlement of Proceeding executed by the NRC Staff and Twin Falls Clinic & Hospital, we find that settlement of this matter as proposed by the parties is in the public interest and should be approved. Accordingly, before the taking of any testimony and

without trial or adjudication of any issue of fact or law, and upon the consent of the parties, the Stipulation for Settlement of Proceeding is hereby approved and incorporated into this Order, pursuant to section 81 and subsections (b) and (o) of section 161 of the Atomic Energy Act, as amended, 42 U.S.C. §§ 2111, 2201(b), and 2201(o), and is subject to the enforcement provisions of the Commission's regulations and chapter 18 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2271, *et seq.* This proceeding is hereby terminated.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 8, 1993

ATTACHMENT A

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 030-32240-CivP
(EA 93-082)
(Byproduct Material License
No. 11-27085-01)

TWIN FALLS CLINIC &
HOSPITAL

STIPULATION FOR SETTLEMENT OF PROCEEDING

I.

On August 6, 1993, the Staff issued an Order Imposing Civil Monetary Penalty (Civil Penalty Order) in the amount of \$5,000 to Twin Falls. The Civil Penalty Order followed the issuance of a Notice of Violation and Proposed Imposition of Civil Penalty dated May 20, 1993 (Notice of Violation). Twin Falls Clinic & Hospital requested a hearing in connection with the Civil Penalty Order on August 11, 1993.

The subject of the Civil Penalty Order is Twin Falls' failure to establish and implement a Quality Management Program as required by 10 C.F.R. § 35.32. The base penalty for this failure, as outlined in Appendix C to Part 2 — General Statement of Policy and Procedure for NRC Enforcement Actions, 10 C.F.R. Part 2, App. C, is \$2,500. This base penalty was escalated 100%, bringing the penalty imposed to a total of \$5,000, because the Staff concluded that Twin Falls had received specific prior notice of the requirement imposed by 10 C.F.R. § 35.32 and had failed to act on such notice. *See* 10 C.F.R. Part 2, App. C, § VI.B.2(d).

Twin Falls admitted in its response to the Notice of Violation that it had in fact failed to comply with the Quality Management Program regulation, due to "human error." However, Twin Falls has taken issue with the amount of the penalty imposed.

An inspection of Twin Falls was conducted in March 1993 concerning whether Twin Falls had implemented a Quality Management Program, which was required by regulation to be in place by January 1992. Following the inspection, which confirmed that Twin Falls had not implemented a Quality Management Program, the Staff issued the Notice of Violation to Twin Falls accompanied by a letter that stated in part that "NRC's inspection determined that the nuclear medicine department's files contained NRC correspondence which informed [Twin Falls] of the revision of 10 CFR Part 35 and the effective date of the rule." The letter continued to inform Twin Falls that the base penalty for failure to establish and implement a Quality Management Program was being escalated because Twin Falls had received information concerning the Quality Management Program requirement, but had failed to act upon it.

Upon further investigation, the Staff has determined that while several notices and informational mailings regarding the Quality Management Program requirement were sent to Twin Falls from as early as July 1991 through 1992, the inspection of Twin Falls in March 1993 in fact did not reveal that Twin Falls had received that correspondence. In view of the Staff's determination, the statement in the letter transmitting the Notice of Violation that "NRC's inspection determined that [Twin Falls'] files contained NRC correspondence" was not accurate.

Given that the Notice of Violation was issued based on an erroneous understanding of the evidence gathered by the inspection, the Staff is willing to reduce the penalty to the base amount. Twin Falls, acknowledging that it had in fact violated 10 C.F.R. § 35.32, is willing to pay the base penalty of \$2,500; thus, the parties are willing to compromise and settle this matter by Twin Falls paying a total civil monetary penalty of \$2,500.

In consideration of the terms and provisions of this Stipulation, Twin Falls is willing to withdraw its request for a hearing with prejudice and otherwise waive its hearing and appeal rights regarding this matter; the Staff is willing to deem payment of \$2,500 by Twin Falls as full resolution of the Civil Penalty Order.

The parties have entered into this Stipulation for the settlement of this proceeding, which is subject to the approval of the Atomic Safety and Licensing Board, before and without the taking of any testimony or trial or adjudication of any issue of fact or law. The parties further acknowledge that the terms and provision of this Stipulation, once approved by the Atomic Safety and Licensing Board, shall be incorporated by reference into an order, as that term is used in subsections (b) and (o) of section 161 of the Atomic Energy Act of 1954, as amended (Act), 42, U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 *et seq.*

II.

NOW THEREFORE, IT IS STIPULATED AND AGREED by and between the NRC Staff and Twin Falls Clinic & Hospital as follows:

1. Payment by Twin Falls Clinic & Hospital of a civil penalty of \$2,500, in accordance with paragraph 2 below, shall constitute full satisfaction of the Order Imposing Civil Monetary Penalty, dated August 6, 1993.

2. Within 30 days of the date of approval of this Stipulation by the Atomic Safety and Licensing Board, Twin Falls Clinic & Hospital shall pay a civil penalty in the amount of \$2,500, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States. Payment by mail should be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, D.C. 20555.

3. Twin Falls Clinic & Hospital withdraws with prejudice its request for and otherwise waives its right to a hearing in connection with this matter, and waives any right to contest or otherwise appeal this Stipulation once approved by the Atomic Safety and Licensing Board.

FOR THE NRC STAFF:

FOR TWIN FALLS CLINIC & HOSPITAL:

(/s/ Steven R. Hom) 11/22/93

(/s/ Brent Bodily) 11/ /93

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Presiding Officer
Jerry R. Kline, Special Assistant

In the Matter of

Docket No. 40-08027-MLA
(ASLBP No. 91-623-01-MLA)
(Source Material License
No. Sub-1010)

SEQUOYAH FUELS CORPORATION

December 15, 1993

The Presiding Officer issues a Memorandum and Order allowing the Sequoyah Fuels Corporation to withdraw its license renewal application and to terminate the license renewal proceeding.

**RULES OF PRACTICE: WITHDRAWAL OF LICENSE
APPLICATION**

Although the power of a presiding officer to grant a withdrawal on prescribed terms and conditions under 10 C.F.R. § 2.107(a) involves discretionary judgment, the Commission's regulation is modeled on Rule 41(a)(2) of the Federal Rules of Civil Procedure and its exercise is reviewable for any abuse. *See LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976).

**LICENSING BOARDS: DISCRETION IN MANAGING
PROCEEDINGS (WITHDRAWAL OF APPLICATION)**

In supporting conditions on the withdrawal of an application, the record must reveal that the proceeding demonstrates some legal injury to a private or public

interest that the conditions are designed to eliminate. *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978-79 (1981).

LICENSING BOARDS: JURISDICTION

The jurisdiction and power of a presiding officer in specific cases are limited by the authority delegated by the Commission. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

The discretionary responsibility of the presiding officer to consider imposing conditions on a license withdrawal must be exercised with due regard to the legitimate interests of all parties in the proceeding. See *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); see also *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir. 1963).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

The purpose of the rule to dismiss proceedings on conditions is "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Alamance Industries, Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961).

RULES OF PRACTICE: DISMISSAL OF PROCEEDINGS

The common law rule supporting the withdrawal regulation reflects that an applicant has an unqualified right to have an action dismissed unless the dismissal would legally prejudice other parties in a way other than by instituting a future proceeding of the same kind. See *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 19-21 (1935).

RULES OF PRACTICE: WITHDRAWAL OF LICENSE APPLICATION

Even if a withdrawal request comes *after* the issuance of a hearing notice, 10 C.F.R. § 2.107 interposes no obstacle to an applicant's ability to withdraw a renewal application.

RULES OF PRACTICE: INTERPRETATION

Regulations should be construed to avoid absurd results and provide expression to their intended purpose. *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (WITHDRAWAL OF APPLICATION)

Conditions imposed on a license renewal application withdrawal by a presiding officer must not only bear a relationship to the conduct and legal harm at which they are aimed, but the harm must be documented in the record. See *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-05 (5th Cir. 1976).

LICENSE AMENDMENT: DECOMMISSIONING PLAN

Because the licensee's request to conduct decommissioning in accordance with an overall decommissioning plan generally has been considered a license amendment request, interested parties have been able to exercise hearing rights under section 189(a) of the Atomic Energy Act. See *Kerr-McGee Corp. (West Chicago Rare Earths Facility)*, CLI-82-2, 15 NRC 232, 237 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). But see Commission Staff Requirements Memorandum, Chilk to Parler and Taylor, June 30, 1993, where hearings on a reactor decommissioning plan are considered wholly a matter of Commission discretion.

MEMORANDUM AND ORDER

(Withdrawal of Application and Termination of Proceeding)

The Sequoyah Fuels Corporation (SFC) has moved to withdraw a pending license renewal application, without prejudice, and terminate this proceeding.¹ The

¹ Motion for Withdrawal of Application and Termination of Hearing, July 12, 1993.

Native Americans for a Clean Environment (NACE) and the Cherokee Nation (hereinafter referred to jointly as Intervenor) submitted a joint response raising no objection to the withdrawal concerning the Licensee's "production-related" activities. However, they oppose dismissal of the proceeding on "nonproduction" activities under the pending license.² The State of Oklahoma's Department of Wildlife Conservation (State), another participant in the proceeding, filed a motion requesting the imposition of conditions on the withdrawal.³ The Staff and SFC both take issue with Intervenor's request concerning nonproduction activities and the license conditions proposed by the State.⁴ In addition to the motion and responses on the withdrawal petition, a conference was held to obtain clarification of the pleadings and to develop an adequate record. Questions were submitted to the parties, and SFC and the Staff were required to respond to relevant questions posed by the Intervenor. The Staff also responded to additional questions from the Presiding Officer.⁵

Background

Since 1970 SFC has operated an NRC-licensed nuclear fuel processing facility located 2.5 miles southeast of Gore, Oklahoma, near the confluence of the Illinois and Arkansas Rivers. The site area is comprised of an 85-acre industrial site and about 2000 acres of peripheral agricultural lands, grasslands, and forests. Water from the rivers has been impounded in the vicinity of the plant to form the Robert S. Kerr Reservoir which receives liquid effluents discharged from the site. SFC Holding Company, a parent of SFC, owns an additional plot of some 10,000 acres about 11 kilometers (7 miles) west of the facility, where raffinate spreading occurs.⁶

The plant was licensed for the conversion of uranium oxide (U_3O_8) into uranium hexafluoride (UF_6) in February 1970. In 1987 the license was amended to permit operation of a second process for the reduction of depleted UF_6 to UF_4 . The industrial part of the site holds five principal buildings used for manufacturing, warehousing, and offices. In addition to uranium processing,

² Native Americans for a Clean Environment's and Cherokee Nation's Opposition to Sequoyah Fuels Corporation's Motion for Withdrawal of Application and Termination of Hearing, and Request for Prehearing Conference, July 26, 1993. "Nonproduction," which is not defined, apparently includes all activities authorized under the SFC license relating to decommissioning.

³ Oklahoma Department of Wildlife Conservation's Request That Conditions Be Placed on the Application to Withdraw filed by Sequoyah Fuels Corporation, July 29, 1993.

⁴ NRC Staff's Answer to Sequoyah Fuels Corporation's Motion for Withdrawal of Application and Termination of Hearing, August 9, 1993; Response to NACE and Cherokee Nation Opposition to Oklahoma Department of Wildlife Conservation Request for Conditions, and to NRC Staff Answer, August 23, 1993.

⁵ See Conference Transcript, October 7, 1993; Presiding Officer Memoranda and Orders, October 8 and November 5, 1993; SFC's and Staff's Responses to Conference Questions (Oct. 15 and 21, 1993); Staff Response to Memorandum and Order (Nov. 12, 1993); SFC Response (Nov. 17, 1993).

⁶ Raffinate is a liquid byproduct of plant processing which is applied as a fertilizer.

the site has facilities used for production of fluorine from hydrofluoric acid (HF), bulk storage of chemicals and fuels, storage of yellowcake, and a number of retention ponds used for impoundment of fluoride-contaminated wastes, untreated raffinates, and liquid fertilizer. During the life of the plant, the licensed uranium conversion processes required storage and use of hazardous chemicals such as HF, nitric acid (HNO₃), sulfuric acid (H₂SO₄), ammonia (NH₃), tributylphosphate, and hexane. Plant processes and water treatment systems were used to recover or neutralize acids and solvents before entry into offsite effluent discharges. Discharge of chemicals, radium, and uranium in offsite effluent waste streams is regulated by the NRC license and federal and State of Oklahoma discharge permits.

Raffinates were treated by neutralization and precipitation of heavy metals from liquid wastes in clarifier basins. After sedimentation of metal sludges, the remaining liquid, consisting of dilute neutralized solutions of ammonium nitrate, was applied as a fertilizer. Considerable fertilizer solution remains in storage ponds at the site after the recent cessation of operations, and application to site land is expected to continue for several years until the supply is exhausted.

The liquid fluoride waste was treated to induce precipitation of solid fluorides in clarifier basins. Overflow from the basins was added to a combination waste stream and discharged offsite.

Offsite discharges of a combination waste stream are made into a local ephemeral stream that ultimately flows into the Kerr Reservoir across a narrow strip of Corps of Engineers' property. The combination stream includes industrial wastewater effluents such as cooling water, treated scrubber discharges, treated sanitary waste, and boiler blowdown water. Chemical and heavy metal discharges are monitored at an outfall.

The SFC license was renewed for 5 years in 1985 and a 10-year extension was requested on August 29, 1990. Under NRC's regulations, existing licenses do not expire until an agency determination is made on timely applications for renewal.⁷

After requests for a hearing on SFC's license renewal application were received,⁸ a Presiding Officer was designated⁹ and a hearing granted.¹⁰ The areas of concern listed by the parties included apprehension over management competence, threats to the environment, public health and safety from the facility operations, and noncompliance with regulatory requirements. The parties agreed

⁷ 10 C.F.R. § 40.43(b).

⁸ Native Americans for a Clean Environment, Request for Hearing, September 28, 1990.

⁹ 55 Fed. Reg. 46,744 (Nov. 6, 1990).

¹⁰ Presiding Officer, Memorandum and Order, January 24, 1991. In addition to NACE, the State of Oklahoma (Department of Wildlife Conservation) and the Cherokee Nation were admitted as participants in the proceeding.

that a hearing on the issues would only be meaningful after the Staff completed safety and environmental reviews, then scheduled for January 1992.¹¹

On February 16, 1993, the Licensee changed its plans about operating. SFC notified the NRC of the Corporation's decision to cease operations of its facilities by July 31, 1993, and requested termination of its license. Its notification also submitted a preliminary plan for completing decommissioning (PPCD).¹² The Staff subsequently advised the parties in this proceeding that it was discontinuing review of the license renewal application. See Board Notification 93-04 (Mar. 1, 1993).

Party Positions

1. Licensee's Position

The Licensee contends that the proceeding should be mooted and the withdrawal of the license application granted without prejudice or the imposition of conditions.¹³ Citing the general rule that dismissals are ordinarily granted without prejudice, SFC maintains that no demonstrable legal harm — the test for imposing terms or conditions — would emanate to any party or the public interest from the withdrawal of its application.¹⁴ The Licensee argues that any request for the Presiding Officer to delay the license renewal withdrawal to hold hearings on issues raised during the proceeding or subsequent NRC licensing actions could not properly be granted under the Commission's regulations. These matters, and decommissioning activities, in SFC's view, are beyond the jurisdiction of the Presiding Officer. They can only be confronted in future NRC licensing actions or by seeking redress in other administrative proceedings.¹⁵

2. Intervenors' Position

In referring to the Commission's regulations on granting withdrawals as discretionary, the Intervenors aver that a withdrawal is not permissible in this case on grounds that SFC has continuing responsibilities under the existing

¹¹ After a number of operating deficiencies, inspection and enforcement actions by the NRC, with the scheduling of Staff reviews being delayed, a revision of the License Renewal Application was submitted on September 9, 1992.

¹² SFC Letter to Bernero at 2, February 16, 1993.

¹³ The pertinent NRC regulation provides: "The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the Presiding Officer may prescribe. 10 C.F.R. §2.107(a).

¹⁴ Motion for Withdrawal at 4-5; see *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981).

¹⁵ SFC Motion for Withdrawal at 4-7.

license and the issues in the case are not moot. In a somewhat diffuse presentation, the Intervenor's allege that the regulation requiring Commission notification of license termination (10 C.F.R. § 40.42(b)) does not suspend a license renewal proceeding. However, if it were to be considered as having been suspended, the Licensee nevertheless did not satisfy regulatory requirements to submit a completed NRC-314 form concerning the disposition of materials, a radiation survey report or a plan to complete decommissioning. And, if the Licensee were permitted to withdraw its application, SFC, in their view, would have to be considered as not having filed an application for license renewal. The license then, it is contended, would have previously expired with SFC unable to comply with 10 C.F.R. § 40.42(c)(1) requirements. These requirements call for completing a number of decommissioning activities prior to license expiration.

The Intervenor's argue further that the Commission's rule continuing licenses beyond their expiration date (10 C.F.R. § 40.42(e)) is not applicable here. The Intervenor's contend that the time of SFC's license has already been extended under 10 C.F.R. § 40.43(b) when the renewal application was filed and that application is still pending in this case. Consequently, it does not become *necessary* (as required by section 40.42(e)) to have it extended under this regulation regarding license termination. In other words, that extension is only necessary where a license expires without a request for renewal pending. Intervenor's also allege that SFC does not meet another condition of this latter regulation inasmuch as it authorizes the extension of the license term only for possession of "residual source material present as contamination." Intervenor's point to the Licensee's preliminary plan for the completion of decontamination where an amount of bulk source material is also shown to be present on the site.¹⁶

Finally, in the Intervenor's view, the issues in this case have not been mooted by SFC's decision to stop production at its facilities, but are of a continuing nature under the pending license renewal application. The rationale advanced is that, since SFC has not submitted a plan to decommission and intends to conduct decommissioning activities for the next 5 years before doing so, the issues concerning these activities have not been mooted and remain alive for adjudication, citing *Pacific Gas and Electric Co.* (Humboldt Bay Power Plant, Unit 3), LBP-86-1, 23 NRC 25 (1986). According to the Intervenor's, these issues include the adequacy of decommissioning funding, adequacy of SFC's groundwater monitoring plan, risks of raffinate disposal, adequacy of SFC's contingent emergency plans and the adequacy of SFC's management and programs to ensure safe operations. Due to the levels of contamination at the facility, it is alleged that the public interest requires a hearing on these issues

¹⁶Intervenor's Opposition at 10-15.

and activities. And further, NRC's obligation under the National Environmental Policy Act (NEPA) to evaluate the existing level of contamination and its environmental impacts would also be subverted by a dismissal of the proceeding. To permit operating without litigating these issues would be tantamount, in the Intervenor's view, to permitting operation under an expired license without a renewal review. To terminate the license without such a review would contravene the provisions of section 40.43(b) and violate Intervenor's legal rights to a hearing under section 189a of the Atomic Energy Act.¹⁷

In the face of the motion to withdraw from a license renewal proceeding and terminate its license, Intervenor insists instead on a hearing on the license renewal to consider the nonproduction activities that the Licensee will perform under its existing license. As Intervenor would have it, the Licensee, unable to comply literally with end-of-license conditions of 10 C.F.R. § 40.42, must continue to seek renewal in order to determine the propriety of its nonproduction activities. Otherwise, Intervenor contends, SFC would have its license extended, without consideration of the issues raised against renewal, for at least the 5-year period, or until it files a final decommissioning plan.¹⁸ By that time, the Intervenor alleges, most of these issues would have been mooted because the decommissioning activities would have been completed. If, however, these activities are reviewed in a contested proceeding, Intervenor contends that the Presiding Officer could establish a new date for the expiration of SFC's license to enable the Licensee to be in compliance with the termination of license regulatory requirements in section 40.42.¹⁹

In summary, the Intervenor argues that since the Licensee cannot comply with the regulations concerning the expiration and termination of licenses, and with continuing responsibilities relating to issues that have not been mooted, a hearing on the license renewal application is required to be held and a new date established for the SFC license to expire. The Intervenor requests a prehearing conference to identify concerns germane to a revised license renewal proceeding, and to establish the scope and schedule for the hearing. As an alternative, although opposing any conditional withdrawal, should the Presiding Officer permit SFC to withdraw its license renewal application, a prehearing conference is requested to determine what issues must be litigated for the purpose of imposing conditions on such withdrawal.²⁰

¹⁷ *Id.* at 15-23.

¹⁸ The Intervenor mistakenly characterizes the time planned by SFC to submit a final decommissioning plan as covering 5 years. As Licensee points out, it actually is a 3½-year (late 1996) period. See SFC Response to Conference Questions at 10 n.6. SFC does propose a 5-year period for NRC to complete approval of the final plan.

¹⁹ See Tr. 191-98; Intervenor's Opposition at 12-17, 23-24.

²⁰ Intervenor's Opposition at 23-24.

3. *State Position*

The State does not oppose SFC's motion for withdrawal but does request the imposition of the following conditions: (1) that the Licensee be required to complete a biomonitoring assessment tailored to its decommissioning activities;²¹ (2) that SFC provide funding adequate to complete decommissioning and correct natural resource damage caused by non-source-material contamination (the State also requests an opportunity to review and comment on the financial assurances required); (3) that SFC obtain a water quality certification from the State as required by federal and state law; (4) that decommissioning protect against non-source-material contamination; and (5) that, prior to approval of a decommissioning plan, SFC's operations be required to safeguard environmental resources. The State additionally requests an opportunity to comment on all operational activities conducted by SFC prior to the completion of its decommissioning plan.²²

4. *Staff Position*

The Staff contends that SFC's license renewal application withdrawal should be granted without further hearings or conditions.²³ It argues that efforts to continue the license renewal proceeding are inappropriate since SFC's motion to withdraw and proceed with decommissioning has rendered the proceeding moot. And it alleges that the Intervenor's alternative request to continue the proceeding to determine what conditions should be imposed for the termination of the case has also been mooted by SFC's action. The Staff declares that Intervenor's reliance on *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site) (May 4, 1979) (unpublished)²⁴ is misplaced since, unlike the instant case, dismissal of a license renewal application and termination of a proceeding at the time of the *Sheffield* decision would have deprived the NRC of jurisdiction. Under current regulations (section 40.42), the Staff avers, the Commission's regulatory authority now continues until decommissioning has been completed.²⁵

²¹ The State requests an opportunity to provide a biomonitoring plan tailored to SFC's decommissioning activities and attached to its motion a plan prepared in anticipation of SFC's continued operation. See State Request at 3-4 and Exhibit A.

²² State Request at 3-7.

²³ Staff Answer at 7-19. Although additional time was granted the Staff to consider whether conditions should be imposed by the Presiding Officer concerning SFC's decommissioning funding, the Staff subsequently decided to pursue the matter outside of the hearing process under its own independent regulatory responsibilities. See Staff Supplemental Answer at 2-3.

²⁴ *Aff'd*, ALAB-606, 12 NRC 156, 158 (1980).

²⁵ Staff Answer at 7-8.

The Staff opposes the five conditions proposed by the State mainly on grounds of prematurity and relevance. Most of the State's concerns, the Staff indicates, may be raised when SFC submits its decommissioning plan. Thus, objection is raised to the State's request for the Presiding Officer to impose conditions requiring a biomonitoring plan, water quality certifications under federal and state law, and the safeguarding of environmental resources. In connection with the request that SFC be held responsible for removing hazardous wastes (not source material), the Staff states that jurisdiction over such wastes is in the Environmental Protection Agency (EPA). Finally, on grounds of vagueness, the Staff opposes the State's requested condition concerning adequate SFC funding for decommissioning.²⁶

5. SFC Response

In responding to the pleadings of Intervenors, the State, and the Staff, the Licensee reiterates its basic position that the Presiding Officer's only authority and responsibility in this proceeding is to determine whether conditions should be imposed upon SFC's withdrawal of its license application. And in the absence of demonstrable legal harm to any party or the public interest, the withdrawal of its license application should be approved by the Presiding Officer without conditions, and the proceeding terminated as moot. SFC argues that there is no demonstrable legal harm here. The Licensee is merely performing licensed activities that are limited, as a consequence of its notification of termination, to activities related to decommissioning and control of access to restricted areas. The Staff, SFC avers, has the continuing responsibility to ensure that the Licensee complies with all regulatory requirements and restrictions and, to this end, the license cannot be terminated under section 40.42(e) until decommissioning is completed. Consequently, no legal harm can ensue to the Intervenors or public.²⁷ SFC also discounts the precedential value of the *Sheffield* case cited by Intervenors. SFC argues that the regulation extending licenses until terminated by the Commission was not in existence at the time of that decision. Had the case been decided otherwise, the agency would have lost jurisdiction over it.²⁸

The Licensee characterizes Intervenors' reliance on the *Humboldt Bay* case as a misreading in Intervenors' contention that the submission of a decommissioning plan rendered the license renewal in that proceeding moot. It is SFC's view that, like the present case, it was the Licensee's decision to withdraw its

²⁶ *Id.* at 10-18; also see Staff Supplemental Answer at 2 n.1.

²⁷ See SFC Response at 3-9.

²⁸ See *id.* at 9-11.

application that rendered the proceeding moot, and not the filing of a decommissioning plan.²⁹

On the Intervenor's claims that SFC has not complied with applicable regulatory requirements relating to the expiration and termination of Part 40 licenses, SFC responds again that the Staff and not the Presiding Officer has regulatory jurisdiction over decommissioning and control of the Licensee's activities. The Licensee states that the Staff is exercising its regulatory authority and has recognized SFC's notification of ceasing operations of its facilities. The Licensee further claims to have met the technical requirements of section 40.42, that the regulation must be read "reasonably" to accommodate premature closings, and that available "preliminary" survey data have been supplied to the NRC. The Licensee states that it has taken action to remove its licensed product and begin decommissioning.³⁰ SFC also indicates that it is in compliance with a proposed Commission rule on "Timeliness in Decommissioning of Materials Facilities," which provides clarification for meeting the requirements on furnishing survey information.³¹

Issues

The controversy framed by the pleadings presents a review of a presiding officer's authority and responsibility under the Commission's regulations in 10 C.F.R. §§ 2.107(a) and 40.42: Is a presiding officer's jurisdiction in a proceeding concerning a license application's withdrawal request restricted to the imposition of terms or conditions on the applicant's withdrawal and limited to proscribing only those terms directed at redressing a demonstrable legal harm?

Neither the Intervenor nor the State acknowledge any limitations on the Presiding Officer's authority in this proceeding. The Intervenor asserts a regulatory power of the Presiding Officer to deny a withdrawal motion and to hold hearings on license renewal to consider decommissioning activities authorized under the existing license. Where, as allegedly the case here, regulatory requirements have not been met, Intervenor asserts that the authority also exists to establish a new license extension (expiration) date to coincide with the completion of licensed decommissioning activities and the submission of a final decommissioning plan.

Intervenor raises the question whether SFC's filing of its preliminary plan for the completion of decommissioning, with a final plan forthcoming a number of

²⁹ *Id.* at 12-14. The *Humboldt Bay* decision is cited by both SFC and Intervenor in support of their respective positions. As the decision is silent on whether the withdrawal of an application would have been granted in the absence of a decommissioning plan, it does not appear to provide support for either party.

³⁰ SFC Response at 16-21 & n.15.

³¹ 58 Fed. Reg. 4099, 4102 (Jan. 13, 1993).

years in the future, complies with regulatory demands or can be viewed as an effort to eliminate hearings for interested persons, organizations, or members of the public. In the same vein, does such a filing defer the necessity for obtaining a water quality certificate until a final plan is submitted? And can the lack of adequate financial assurances to carry out decommissioning pose obstacles to a license renewal withdrawal motion? Would the denial of conditions requested by the State legally prejudice that party or would an SFC withdrawal result in legal harm to it?

Decision

1. Jurisdiction

It is a well-settled doctrine that a presiding officer's responsibility in considering motions for withdrawal of license renewal applications is not unfettered. Although the power to grant a withdrawal on prescribed terms and conditions under section 2.107(a) involves discretionary judgment, its exercise is reviewable for any abuse.³² The Appeal Board has noted that in supporting conditions on the withdrawal of an application, the record must reveal that the proceeding demonstrates some legal injury to a private or public interest that the conditions are designed to eliminate.³³

It is also clear that the jurisdiction and power of a presiding officer in specific cases are limited by the authority delegated by the Commission.³⁴ However, even though the withdrawal of an application for renewal of a license generally has the effect of mooted the issues between the parties, the discretionary responsibility of the presiding officer to consider imposing conditions on such withdrawal is an important duty that must be performed. And the performance of that duty must be exercised with due regard to the legitimate interests of all parties in the proceeding.³⁵

It has been observed that the purpose of the rule to dismiss proceedings on conditions is "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions."³⁶ Nevertheless, the common law rule supporting the withdrawal regulations reflects that an applicant has an unqualified right to have an action dismissed unless the dismissal would legally prejudice other parties in a way other than by instituting a future

³²The Commission rule is similar to Rule 41(a)(2) of the Federal Rules of Civil Procedure. See *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (1976).

³³*Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 978-79 (1981).

³⁴*Public Service Co. of Indiana* (Marble Hill Nuclear Generating Stations, Units 1 and 2), ALAB-316, 3 NRC 167 (1976).

³⁵See *supra* note 32; see also *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir. 1963).

³⁶*Alamance Industries, Inc. v. Filene's*, 291 F.2d 142, 146 (1961).

proceeding of the same kind.³⁷ In NRC adjudicatory history, there have not been a substantial number of contested license application withdrawal cases. In those proceeding that have occurred, most have been concerned with reactor construction permits and site restoration.³⁸

2. Regulatory Requirements

NRC's regulatory requirements controlling the expiration and termination of licenses do not appear to contemplate a situation where, as here, a licensee who has filed for license renewal, suddenly and unexpectedly notifies the Commission of a cessation of its operational activities and requests termination of its license.³⁹ The applicable regulation (section 40.42) instead appears to consider that a licensee, at the time it notifies the Commission of a decision to terminate activities, will not only cease operating and dispose of source material but will immediately submit a plan for the completion of decommissioning.

The regulations call for the submittal of decommissioning cost estimates and a plan for ensuring adequate funds to complete decommissioning.⁴⁰ In the matter before us, SFC has submitted neither a decommissioning plan nor a plan acceptable to the Staff ensuring the adequacy of funds to complete it.⁴¹

SFC's preliminary plan for completion of decommissioning calls for the submission of an initial plan to complete decommissioning during calendar year 1995 and a final plan toward the end of 1996. The plan also contemplates NRC approval of the final plan by the end of 1998, its implementation through the end of the year 2002, and license termination following that date.⁴² In short, a 9-year period is contemplated under SFC's current proposal to complete decommissioning of its licensed facility. This is a facility characterized currently as having an unknown degree of contamination.⁴³ It appears, therefore, that under this schedule, Intervenor and the State will not have an opportunity to

³⁷ See *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 19-21 (1935).

³⁸ E.g., *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 2 and 3), LBP-81-33, 14 NRC 586 (1981).

³⁹ It should be noted that less than one week after a status conference on the license renewal application was held by the Presiding Officer (Nov. 17, 1992), and attended by top officials of SFC and wherein no mention was made of a cessation of operations, the NRC was informed that the Licensee was discontinuing its activities and had entered into a contract with a newly created partnership to carry out its contractual obligations. Letter, Sheppard to Bernero, November 23, 1992. Apparently, negotiations looking to a discontinuance of SFC operations were under way prior to July 1992. See Commission Briefing on Status of General Atomic-Sequoyah Fuels Facility at 43-44, December 21, 1992.

⁴⁰ See 10 C.F.R. § 40.42(c)(2)(i) and (iii)(D).

⁴¹ See Order issued to SFC and General Atomics, October 15, 1993. The Licensee, in the notice of termination of activities (February 16, 1993) did file a preliminary plan to complete decommissioning and an indication of financial resources for it.

⁴² *Id.*, Preliminary Plan for Decommissioning, Figure 9-1.

⁴³ In a Demand for Information issued on December 29, 1992, at 2, the Staff referenced the contamination of the SFC facility, soil, and groundwater as requiring remediation. The Staff quotes the Licensee's estimates of several million cubic feet of material and soil as contaminated. See NUREG-1444, at A-190.

confront the Licensee's decontamination program with their safety, health, and environmental concerns for an extended period of time, if at all.

A central question in this proceeding then is whether, when the concerns of Intervenor and the State may be adjudicated only in the distant future, if at all, a hearing can be held or terms and conditions imposed on the license withdrawal to protect their interests now. Both the Licensee and Staff argue in the negative based on an alleged want of jurisdiction over decommissioning matters.

The recommendations of the Intervenor, which, in contrast to the State, do not call for conditions to be imposed on the withdrawal, are considered here first. Again, the Intervenor's position runs the following trail: The Licensee has not complied with the requirements of section 40.42. It has not filed a decommissioning plan or other documents required under section 40.42(b). Nor has it met the requirements of section 40.42(c), if it should be considered to have its renewal application withdrawn. In such a situation the filing of a notice requesting a termination of its license under section 40.42(b) does not suspend or terminate a license renewal proceeding, and to permit SFC to conduct nonproduction activities at the facility until a decommissioning plan is finally filed would permit operation without a license review and violate Intervenor's right to a hearing under section 40.43(b). Further, section 40.42(e) is not applicable to the present case since, where a license renewal application has been filed, it never becomes *necessary* to have the license continue by virtue of that section since it already continues under section 40.43(b) by reason of the pending license renewal application.⁴⁴

Accordingly, in the Intervenor's view, a license renewal hearing must be held on those SFC preliminary plan site activities to be performed prior to the submission of its final decommissioning plan. In that hearing, Intervenor will be able to litigate their concerns, which have not been mooted on these non-production activities, and the Presiding Officer can then authorize an extension of the existing license to a future date to permit the Licensee to comply with regulatory requirements for the termination of its operations. Intervenor submit that the regulations contemplate the foregoing procedure.⁴⁵

The first weakness in Intervenor's legal scenario is their contention that the Commission, and thus the Presiding Officer, has discretion to deny an improper request for withdrawal of a license application. If a withdrawal request comes *after* the issuance of a hearing notice, section 2.107 interposes no obstacle to an applicant's ability to withdraw a renewal application. The only discretion in play here involves the possible imposition of terms or conditions to accompany such a withdrawal.

⁴⁴ See Tr. 103-06, 189-201; Intervenor's Opposition at 10-17.

⁴⁵ Tr. 190.

The Intervenor claim the *Sheffield* case as precedential authority for denying a dismissal in situations where licensees have continuing responsibilities.⁴⁶ It appears clear in that case, however, that the Licensing Board refused to permit a withdrawal of a renewal application because an order to show cause why the licensee should not continue at the site, and for which a hearing had been requested on that Order, was pending before the Commission.⁴⁷ Consequently, the issue before the Board had the potential of being subsumed by the matter before the Commission.

The Intervenor's second mistake is based on a disjointed reading of several NRC regulations, which deal with the expiration, termination, and renewal of material licenses. In sum, the various sections of these prescriptions (section 40.42) are *in pari materia* and should be construed together, not separately and distinctly, as Intervenor's interpretation would have it.⁴⁸ In the main, Intervenor would have us subscribe to the proposition that the notification and termination regulations in question have limited applicability to a licensee's premature termination of operations. In this view, SFC's effort has not qualified under section 40.42(b), cannot qualify under section 40.42(c), and is not relevant to section 40.42(e).

First, it must be clarified that no claim has been made that section 40.42(b) terminates a renewal application.⁴⁹ The regulation merely requires a notification and request for license termination (which SFC complied with) when a licensee has made a termination decision. Further, Intervenor's assertion that SFC failed to comply with section 40.42 because it has not supplied a completed NRC-314 form (disposition of materials) or radiation survey does not comport with a reasonable interpretation of what that provision requires. In fact, the agency only expects such a final report at the completion of decommissioning and will accept preliminary documentation characterizing the site's condition that is sufficient to permit NRC to evaluate a decommissioning plan.⁵⁰ And there is no allegation that SFC has not furnished that information.

The section covering a continuation of licenses beyond expiration dates (section 40.42(e)) would seem to have only one purpose — that being that it maintains the agency's jurisdiction over licensees (like SFC) involved in decommissioning activities. No reasonable explanation has been forthcoming from Intervenor on why that provision would cover cases where licenses have

⁴⁶ Intervenor's Opposition at 10-12.

⁴⁷ *Id.*, Attachment on *Sheffield* case. It should be noted that Intervenor's indication that the Appeal Board affirmed this decision is misleading. See Intervenor's Opposition at 11. The Appeal Board decision makes clear the withdrawal of license matter was not before it. *Sheffield*, 12 NRC at 163 n.17.

⁴⁸ See *Erlenbaugh v. United States*, 409 U.S. 239 (1972).

⁴⁹ See Intervenor's Opposition at 13.

⁵⁰ Proposed Rule on Timeliness in Decommissioning of Materials Facilities, 58 Fed. Reg. at 4102; see SFC Response at 18-19 and SFC Response to Conference Questions at 5-6.

expired without a renewal application being filed, but not those where a renewal application has been applied for and subsequently withdrawn with a termination notice submitted under section 40.42(b). Absent such a license continuation provision, in this instance the existing license, past its due date for renewal, would have expired and, with no decommissioning plan in operation, the NRC's responsibility for ensuring the removal of contaminated material with appropriate controls would be jeopardized. This result could not have been intended by the Commission in adopting this regulation.

The next error in the Intervenor's case centers on the position that section 40.42 cannot be applicable to this case since the Licensee could not comply with all its requirements when it notified the NRC of the cessation of its operations. This view considers as an insurmountable flaw the fact that on or before the expiration date of the license, SFC did not file a decommissioning plan or fulfill the demands of subsections (c)(1) and (c)(2) concerning the disposal of source material and reporting the results of a radiation survey.⁵¹

To meet Intervenor's expectations in this case — for a license renewal hearing — would constitute a new and adventuresome exercise in a presiding officer's jurisdictional authority. Such a decision not only would require a licensee to continue an unwilling involvement in a license renewal proceeding, but would minimize and perhaps negate the NRC Staff's regulatory role in approving and overseeing current decommissioning activities.⁵² Further, it could delay the decontamination of critical areas and hamper the conduct of an important public policy. No interpretation can support this procedure as being within the power of the Presiding Officer in imposing terms and conditions on the withdrawal of a license renewal application. Nor can the proposition that such a procedure was contemplated by the Commission's rules be supported. Regulations should be construed to avoid absurd results and provide expression to their intended purpose.⁵³

3. *Regulatory Compliance*

Although a valid claim of incomplete compliance with regulatory requirements can be raised as it has been in the circumstances of this case, it seems clear that the dictates of section 40.42(b) to notify the Commission of a decision to terminate licensed activities has been implemented here. The words of the regulation, "promptly, in writing," only serve to emphasize this obligation. The Licensee contends that the provisions of section 40.42 must be read reasonably

⁵¹ See Intervenor's Opposition at 12-14; Tr. 196-98.

⁵² The Staff recently reported its continuing oversight program of SFC's decommissioning activities. See NRC Staff Response to Memorandum and Order (Nov. 12, 1993).

⁵³ *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938).

with due consideration given to the circumstances existing when the notification was filed.⁵⁴

As indicated previously, the difficulty posed by the facts of this case arises from the failure of the regulations to specifically provide for those circumstances where a licensee abruptly ceases operations when a renewal application is pending. And that difficulty is compounded where the facility and site in question are contaminated to perhaps a substantial, but unknown degree.⁵⁵ However, the scope of regulations, like statutes, should be interpreted by determining their purpose through a consideration of their context, structure, and scheme. Here, that consideration leaves no room for concluding that section 40.42 would not be applicable to a premature closing of licensed materials facilities.⁵⁶ If that conclusion were to be unacceptable, and the licensee not permitted to conform reasonably to that section's requirements, the agency would be cast in the role of dictating business decisions in requiring continued although unwanted licensed operations. Even though the current state of the regulations concerning license terminations need clarifications, this does not negate their general adaptability to the situation before us.

Over the last 15 years, the Commission has come to realize that each type of nuclear facility requires decommissioning activities tailored to the problems specific to the facility in question. As recently as 1990, the Commission identified over forty of its materials licensees' sites that would not fit the mold of routine decommissioning and that warranted "special attention." The NRC instituted a Site Decommissioning Management Plan (SDMP) to identify and resolve issues associated with the timely cleanup of these sites. By 1992, the Commission approved an Action Plan to describe the NRC's case-by-case approach for accelerating remediation of the SDMP sites.

However, during this time period, the Commission also recognized inherent difficulties associated with a case-by-case approach to timely decontamination and decommissioning. Such an approach often required the Commission to issue *orders* to establish schedules for timely action. Since the Commission viewed timeliness in decommissioning as a generic issue rather than an enforcement issue, there was clearly a need for definitive regulations that specify acceptable time periods for decommissioning nuclear facilities when licensed activities have ceased.

On January 13, 1993, the Commission issued a proposed rulemaking to require timely decontamination and decommissioning by nuclear licensees. The proposed rule establishes specific requirements for (1) timely decommissioning

⁵⁴ Sequoyah Fuels Corporation's Response to Conference Questions at 1-4.

⁵⁵ SFC has been notified by the Staff that due to large areas of contaminated soils, *inter alia*, the Sequoyah site will be included in the 1993 Update of the Commission's Site Decommissioning Management Plan. See Letter, Bachmann to Administrative Judges, October 29, 1993.

⁵⁶ *United States v. Cooper Corp.*, 312 U.S. 600, 607 (1941); see also *Choteau v. Burnet*, 283 U.S. 691 (1931).

of the entire site at the end of all licensed activity at the site, and (2) timely decommissioning of separate buildings and outdoor areas where licensed activities have ceased. The proposed rulemaking purports to clarify some of the same issues brought to the fore by SFC's decision to terminate its license during the pendency of its license renewal application by addressing license termination, expiration, revocation, denial of renewal, and their relationship to each other.⁵⁷ The proposed rule also makes clear that decommissioning and timeliness criteria apply to all licensees for whom the authorization to perform licensed activities has expired, regardless of whether the expiration was voluntary or involuntary.⁵⁸ The question remains whether the proposed rule will provide adequately for premature license termination.

In the facts of this case, however, it is clear that the Intervenor's objective — adjudication of nonproduction activities in a renewed license hearing — would have us construct an artificial forum to compel the SFC to continue the pursuit of that which it declines, and has no current obligation, to do — the litigation of decommissioning activities permitted under its license.

Nothing is more basic in NRC adjudicative proceedings than that jurisdiction is limited to the matters in controversy among the parties.⁵⁹ The issues referenced by Intervenor — adequacy of funding decommissioning, adequacy of a groundwater monitoring plan, safety and environmental risks of raffinate disposal, adequacy of contingency emergency plan and the adequacy of SFC's management to conduct safe operations — are matters and issues that can only be engaged, if at all, in a differently designated proceeding. These are matters relating to decommissioning and, as such, are beyond this Presiding Officer's present jurisdiction. Here SFC's withdrawal motion — outside of consideration of conditions on the withdrawal — disposes of the controversy. Thus, there is no foundation to support, as the Intervenor's request, a conference to establish the scope of license renewal hearing.⁶⁰

Unlike Intervenor, the State requests the imposition of conditions, mostly in the environmental area, on SFC's withdrawal motion.⁶¹ Basically, the State asks for assurances through a monitoring program that the Licensee will protect and repair damages to the natural resources of the area during decommissioning and will provide the necessary finances to complete decommissioning. It also requests SFC compliance with federal and state water quality certification

⁵⁷ 58 Fed. Reg. at 4100.

⁵⁸ *Id.* at 4101.

⁵⁹ *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-830, 23 NRC 59, 60 n.1 (1986); see 10 C.F.R. § 2.1251(d).

⁶⁰ Intervenor also requested a prehearing conference to assist in determining the imposition of conditions on an SFC license withdrawal decision. This request received no consideration, however, since Intervenor concludes their request with the statement that such conditions would be inappropriate. See *Intervenor's Opposition* at 24.

⁶¹ See *State Request* at 3-7. The State withdrew its requested condition dealing with hazardous waste in agreeing that such material is solely within EPA's jurisdiction; see *Tr.* 218.

requirements. Except for the assurances requested on financial commitments and possibly the water quality certification permits, the State's concerns focus on the Licensee's activities and performance during decommissioning. As indicated, *supra*, these matters are beyond the scope of this Presiding Officer's authority and consequently must be denied. In order for these matters to be considered, they would also have to meet the test that the conditions requested must not only bear a relationship to the conduct and legal harm at which they are aimed, but the harm must be documented in the record.⁶² That test cannot be met here.

The two other withdrawal conditions requested require additional comment. The financial assurance obligation for financing decommissioning was required to be complied with as a part of the license renewal proceeding. SFC, in fact, was to produce this assurance in a revised decommissioning funding plan to be submitted on November 30, 1992.⁶³ The revised plan was not submitted as promised, and on December 29, 1992, the NRC issued a Demand for Information requiring SFC and its parent corporation, General Atomics (GA), to submit a Decommissioning Plan and a Decommissioning Funding Plan. The Licensee responded to the Demand by referencing its notification of the termination of activities under its license filed the same date (Feb. 16, 1993). As indicated, that notification included its preliminary plan to complete decommissioning and a suggested plan for ensuring the availability of adequate funds for that purpose.⁶⁴

As of the date of this decision, the Staff has not approved or commented upon SFC's preliminary plan and has issued an Order requiring the Licensee and GA to provide additional financial assurances for decommissioning.⁶⁵ In essence, the condition requested by the State and the Commission's Order are directed at the same objective — financial assurances to complete decommissioning. Since this matter will be considered in a subsequent adjudicative proceeding, the complex details and extent of decommissioning financing will be more appropriately reviewed and resolved in the context of that proceeding. Accordingly, the request for a condition in this area is denied here.

4. *Water Quality Issues*

In resolving the request pertaining to a water quality certification, a review of the development of this issue seems pertinent. Counsel for the State of Oklahoma raised the issue early in this proceeding whether SFC had obtained

⁶² *LeCompte*, 528 F.2d at 604-05.

⁶³ Revision 1, License Renewal Application at 6-1, 2 (Sept. 30, 1992).

⁶⁴ Letter, SFC to Bernero at 5-6, February 16, 1993.

⁶⁵ NRC Order to Sequoyah Fuels Corporation and General Atomics, October 15, 1993. A hearing has been requested by both organizations on this Order.

a valid water quality certification from the State, as required by the provisions of section 401(a)(1) of the Clean Water Act. During the Presiding Officer's conference on October 7, 1993, the State pursued the issue further, clarifying its arguments. The State alleges that an application for a 401 certification is required at the time of authorizing an activity that might impact water quality in the State, and in the case of SFC, such certification must be obtained each time the NRC renews SFC's nuclear license.⁶⁶ Moreover the State alleges that SFC has never acquired a 401 certificate in the past and that it still lacks a valid certificate at this time.⁶⁷

SFC offered somewhat conflicting statements concerning the certificate. It argued that it was issued a certificate "a long time ago,"⁶⁸ although members of the SFC management could not recall at the time of the conference what SFC's water quality responsibilities were under the 401 certification process.⁶⁹ However, SFC stated that the validity of its current license as issued previously or renewed previously is not affected by the State's concerns about any 401 certification.⁷⁰ The conference ended with neither a clear resolution of this issue nor an explanation of how the presence or absence of the 401 certificate affected SFC activities prior to the time it submits its decommissioning plan.

On November 5, 1993, the Presiding Officer issued a Memorandum and Order requesting information from the Staff relating to three issues, one of which concerned the 401 certification process. That three-part question queried the Staff: (a) Has SFC ever obtained a 401 water quality certification? (b) does SFC currently have a 401 water quality certification? and (c) must a 401 water quality certification be in place prior to *any* decontamination efforts by the Licensee? The Staff's answer to part (a) relied solely on a legal interpretation made by the NRC Assistant General Counsel early in 1989 that SFC had come into compliance with the certification requirement by having received a "functionally and legally equivalent" section 401 certification from the State.⁷¹ The Staff's response further asserted that the "functionally and legally equivalent" 401 certification was a Disposal Permit numbered WD-75-074 which was issued by the State in October of 1988 and which was to expire in September of 1993.⁷² As to part (c) of the Presiding Officer's question, the Staff simply stated that there is no specific NRC regulation that a 401 certificate be in place

⁶⁶ Tr. 112, 113, 118, 119, 211, 212.

⁶⁷ Tr. 109.

⁶⁸ Tr. 116.

⁶⁹ Tr. 111.

⁷⁰ Tr. 117.

⁷¹ NRC Staff's Response to Memorandum and Order (Requesting Information) (Nov. 12, 1993) at 3. The letter is from S. Treby, NRC Assistant General Counsel for Rulemaking and Fuel Cycle, to Dean A. Couch, General Counsel, Oklahoma Water Resources Board, dated February 1, 1989.

⁷² *Id.*

prior to decontamination efforts and that the Staff could not address what State requirements may exist.⁷³

SFC filed its own response to the Presiding Officer's questions. In that response, it fully agrees with the Staff that the NRC Assistant General Counsel's legal opinion should prevail, i.e., that there was a functional and legally equivalent certification issued by the State in the past. However, we learn subsequently in SFC's response that this 401 certification may not be the 401 certification alluded to by either the State or the NRC Staff. The certificate that SFC cites was issued by the Oklahoma Water Resource Board on September 14, 1988, for NPDES Permit No. OK 0000191. SFC claims that this certificate was "issued for the SFC facility by the U.S. Environmental Protection Agency ('EPA') and is currently in effect."⁷⁴ That is not the same certificate referenced by the Staff as the financial and legal equivalent to a 401 certificate.⁷⁵ As to part (c) of the Presiding Officer's question, SFC again raises what amounts to a regulatory defense based upon its filing a notification of termination of activities pursuant to section 40.42(b). In SFC's own words,

[s]ince the conduct of these decontamination efforts under the present NRC license does not require the grant of any additional authority by the NRC, such [decontamination] efforts cannot give rise to the need for any further Section 401 certification.^[76]

Even though the State did not respond to the Staff's reply, what is apparent from the foregoing is that there remains, on the record, a strong disagreement between the State of Oklahoma (which regulates the Clean Water Act program in the State), the Staff of the NRC, and SFC itself as to whether SFC is in compliance with that Act. The State says it is not, and even if it was in compliance, SFC's certificate expired in September 1993. The Staff says the SFC holds a functionally and legally equivalent certificate but sidesteps the issue of whether or not it remains in effect since it was set to expire in September 1993.⁷⁷ SFC argues that since it is no longer seeking a federal licensing action, no section 401 certification is currently required. SFC also infers that since its nuclear license remains in effect under the provisions of section 40.42, its 401 certification remains in effect as well, but it does not set forth any regulatory authority for the statement, and it fails to address the fact that it references a different permit from that found by the Staff to be a functional and legal equivalent to a 401 certificate.

⁷³ *Id.* at 4.

⁷⁴ SFC Response to November 5, 1993 Memorandum and Order (Requesting Information) (Nov. 17, 1993) at 2-3.

⁷⁵ *Id.* at 4 & n.2. The Staff's functional and legal equivalent certificate was referenced to Disposal Permit No. WD-75-074 issued in October 1988. Staff Response at 3 and attached letter from S. Treby to D. Couch. SFC's 401 certificate is referenced to NPDES Permit No. OK 0000191 issued in September 1988.

⁷⁶ *Id.* at 5.

⁷⁷ Staff Response to Memorandum and Order at 3-4.

At this juncture, it remains unclear how either the 401 certification, or the lack thereof, affects SFC's nuclear license, as that license continues during this interim decontamination and decommissioning period. However, the issue persists, unfortunately, beyond this Presiding Officer's jurisdiction.

5. *Public Participation in Decommissioning*

A basic issue raised in this proceeding, as previously indicated, concerns the omission of participation by the Intervenor and the State, and a public discussion of their concerns, during an extensive period of time before the Licensee's decommissioning plan is submitted and approved by the Commission.

The present state of regulatory guidance for a licensee curtailing operations prior to license expiration provides little illumination to either licensees or members of the public. And this is particularly obvious if the termination of licensed operations is done abruptly. In the normal case, the regulations appear to contemplate a cessation of operations to occur simultaneously with the license expiration date and the requirements of section 40.42(c) including submission of a decommissioning plan to be complied with at that time. In this case, however, that information is being provided "to the extent practicable"⁷⁸ (emphasis added), with delivery of a plan for decommissioning delayed for a 3-year period.⁷⁹ Again, the Licensee contends that in view of the obligatory regulatory requirement of section 40.42(b) commanding prompt notification to the NRC when a decision is reached to terminate activities, the decommissioning and information submittal provisions of section 40.42 must be read reasonably.⁸⁰ In the light of the overall purpose of this regulation, this is a practical judgment that cannot be quarreled with.

One of the pacing tasks in SFC's decommissioning efforts is the development and implementation of a site characterization plan, an activity designed to determine the extent, location, and movement of existing contamination. This effort is considered essential to evaluate the risks of alternatives for disposition of contaminated material, facilities, or equipment.⁸¹ The SFC's current plan for site characterization consumes a 3 1/2-year period.⁸² As previously noted, the Staff has listed the Sequoyah site in the agency's Site Decommissioning Management Plan. The agency's Action Plan for these sites calls for the submission of a site characterization plan within 12 months after the commencement of decommissioning, which coincides with the cessation of operations.⁸³

⁷⁸ SFC Letter of Notification to NRC at 3, February 16, 1993.

⁷⁹ *Id.*, Figure 9-1.

⁸⁰ SFC's Response to Conference Questions at 1-2, October 15, 1993.

⁸¹ See Tr. 85-86, 127-29.

⁸² See SFC Preliminary Plan for the Completion of Decommissioning, Figure 9-1.

⁸³ See 57 Fed. Reg. 13,391 (1992); SFC Preliminary Plan for Decommissioning, Figure 9-1.

Although the agency's Action Plan does not contain enforceable standards, and with timeliness in decommissioning considered an issue, the proposed rule currently under consideration recommends that licensees like SFC would have 12 months after notification of terminating operations to submit a final decommissioning plan and 18 months to complete it. This compares with SFC's current plan of some 5 years to prepare its final decommissioning plan and four more to implement it.

The Staff was questioned during the recent conference on time delays in decommissioning and indicated that additional site characterization work was required at the Sequoyah site.⁸⁴ SFC has previously performed extensive site characterization activities at the Sequoyah facilities and surroundings.⁸⁵ These efforts covered groundwater contamination, uranium migration pathways, site and environmental characterizations, and plans for monitoring air and liquid effluent releases and involved extensive site characterization. That effort raises questions on whether the lengthy period currently proposed by SFC for this purpose is reasonable.

The submittal and consideration of decommissioning plans is a matter, as indicated, beyond the jurisdictional limits of this Presiding Officer. The question presented in this proceeding, nevertheless, is whether a protracted decommissioning schedule can effectively preclude the participation of Intervenor and the State through having their safety and environmental concerns effectively mooted. Or put another way, can those concerns be protected by conditions placed on the licensee's withdrawal of its renewal application. The Presiding Officer thinks not.

Under the present state of NRC's regulations, interested members of the public and other governmental entities are able to scrutinize the decommissioning activities of a licensee in an adjudicatory proceeding only if the licensee seeks an amendment to its existing license. Because the Licensee's request to conduct decommissioning in accordance with an overall decommissioning plan generally has been considered a license amendment request, interested parties have been able to exercise hearing rights under section 189(a) of the Atomic Energy Act.⁸⁶ A lengthy decommissioning schedule, like the one here, if approved by the Staff, with the Licensee's continued ability to carry on permitted decom-

⁸⁴ Tr. 127-30.

⁸⁵ The site characterization work is documented in "Facility Environmental Investigation Plan" (Oct. 15, 1990); "Main Process Building Investigation Final Findings Report" (Dec. 15, 1993); "Environmental Report" (Aug. 8, 1990); "Responses to NRC Inquiry on Environmental Assessment" (Sept. 4 and Oct. 30, 1992) and a revised "Environmental Program for Sequoyah Facility" (Sept. 30, 1992) which included a 1990-91 "Facility Environmental Investigation."

⁸⁶ See *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 237 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). *But see* Commission Staff Requirements Memorandum, Chilk to Parler and Taylor, June 30, 1993, where hearings on a decommissioning plan approval are considered wholly a matter of Commission discretion.

missioning activities under its existing license, might have the effect of mooted some of the allegations made in the Intervenor's and State's complaints now before the Presiding Officer. However, since the Commission will be soon considering a final rule on the timeliness of materials licenses decommissioning, the particular circumstances involved in this proceeding will be in front of the Commission for consideration if changes are to be made.

Conclusion

The Presiding Officer concludes that the end of this proceeding has produced the results prayed for in the original concerns of the Intervenor — the cessation of SFC's licensed activities. The license here to operate has been terminated and the activity on resource material is limited solely to decommissioning and restricting entry to the site. Further, Intervenor and the State may have a future opportunity to contest any decommissioning activities beyond those called for in the existing license when a plan for them is submitted to the Commission.⁸⁷ And the Commission's regulatory remedies for administrative actions and relief are available in the interim period.⁸⁸ The Staff, during their review of SFC's preliminary decommissioning plan, may also require additional license amendments for decommissioning activities, which could open other hearing opportunities to scrutinize the Licensee's operations.⁸⁹ The Staff's current review apparently covers most of the areas that the parties have expressed concern over — monitoring, environmental impact, raffinate program, financial assurances.⁹⁰

In light of the foregoing, therefore, it is concluded that Intervenor's argument in opposition to the withdrawal of the license renewal application is without merit and the request by the State to impose conditions on the license withdrawal must be denied. Therefore, the Licensee's motion to withdraw its application for license renewal is granted and this proceeding is hereby terminated.

Order

1. The motion of Sequoyah Fuels Corporation for withdrawal of its license renewal application and the termination of the proceeding is granted.
2. The request of Native Americans For a Clean Environment and the Cherokee Nation for a prehearing conference to consider issues for a revised

⁸⁷ See *supra* note 86.

⁸⁸ See 10 C.F.R. § 2.206.

⁸⁹ See Tr. 160-61. The Staff recently asked SFC to request license amendments in connection with SFC's decommissioning. See Uttal Letter to Administrative Judge, December 2, 1993.

⁹⁰ See Tr. 97, 100, 137, 162.

license renewal hearing on nonproduction activities of the Sequoyah Fuels Corporation is denied.

3. The request of the Oklahoma Department of Wildlife Conservation to place conditions on the Sequoyah license withdrawal concerning a biological evaluation, natural resource damage correction, non-source-material contamination, decommissioning funding guarantees, and water certificate requirements is denied.

4. In accordance with 10 C.F.R. §§ 2.1251(a) and 2.786, this Decision constitutes the final action of the Commission 30 days after the date of issuance on December 15, 1993, unless any party petitions for Commission review or the Commission takes review of the decision *sua sponte*. Commission review of this Order may be sought by filing a petition for review within 15 days after service of this Decision. Any other party to the proceeding may, within 10 days after service of a petition for review, file an answer supporting or opposing Commission review. Requirements regarding the length and content of a petition for review and the length and content of an answer to such a petition are specified in 10 C.F.R. § 2.786(b)(2)(3).

Be It So ORDERED.

James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 15, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Harry Foreman
Ernest E. Hill

In the Matter of

Docket No. 30-16055-CivP-R
(ASLBP No. 93-682-01-CivP-R)
(Civil Penalty)

ADVANCED MEDICAL SYSTEMS, INC.
(One Factory Row,
Geneva, Ohio 44041)

December 14, 1993

MEMORANDUM AND ORDER

On September 30, 1993, the Commission issued CLI-93-22, 38 NRC 98, which reversed this Board's summary disposition of one violation as set forth in LBP-91-9, 33 NRC 212 (1991) and remanded to the Board "for further proceedings consistent with this order all issues related to that violation." (CLI-93-22, 38 NRC at 100.)

In LBP-91-9, the Board concluded that no genuine issue of material fact existed with regard to whether AMS failed to comply with the provisions of 10 C.F.R. §20.201(b) prior to two entries into a hot cell on November 6 and 21, 1984. The Board's reasoning was based on several facts: there was a substantial underestimation of actual doses received during those entries; on the days of the entries only a hand-held survey instrument was used at the door of the hot cell to determine estimated exposure rates; on the days of the entries, a remote probe used to detect and remove radioactive pellets was uncalibrated.

In remanding this issue, the Commission provides guidance that outlines the direction the Board must now take. The Board is directed to “consider not only the result from the radiation level readings but also the procedures AMS used to survey for radiation hazards.” (38 NRC at 109.) “[T]he scanning for pellets [is to be] considered when determining if a genuine issue remains regarding the adequacy of the survey.” (*Id.* at 110.) “[S]ection 20.201 requires consideration of more than just quantitative measurements of radiation levels [i]t also requires . . . consideration of physical surveys of the location of materials and equipment.” *Id.*

Moreover, the Commission directs the Board “before commencing with any evidentiary hearing on this matter, [to] direct the parties to address the question of whether, in light of our findings on appellate review, a genuine issue remains regarding the adequacy of AMS’ survey.” (*Id.* at 111.)

In deference to the Commission’s instructions, the Staff shall file its motion regarding the adequacy of the AMS survey and the possible termination of this proceeding with the Board by close of business, January 14, 1994. AMS shall respond with its answer and any motion by close of business, January 28, 1994.¹

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 14, 1993

¹The Commission stated that its decision to remand Violation 2 to the Licensing Board may ultimately necessitate a modification of the severity level and/or penalty amount, if the Staff fails to prove the occurrence of Violation 2. (38 NRC at 118-19.) Therefore, the Commission remanded the issue of the appropriateness of the severity level and penalty amount to the Licensing Board for further proceedings consistent with the disposition of Violation 2. (*Id.* at 119.) Accordingly, this issue will be taken up separately from and subsequently to the filing of motions regarding Violation 2, if necessary.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

U.S. DEPARTMENT OF ENERGY
(Hanford Site)

December 2, 1993

The Director, Office of Nuclear Material Safety and Safeguards, denies a petition filed by the Confederated Tribes and Bands of the Yakima Indian Nation requesting that the Director of the Office of Nuclear Material Safety and Safeguards exercise his authority to require a license application from the U.S. Department of Energy (DOE) with respect to certain high-level radioactive wastes at the Hanford Site in the State of Washington and to expedite regulation thereof in accordance with the provisions of 10 C.F.R. Part 30 or other applicable chapters of the *Code of Federal Regulations*. As basis for the request, the Petitioner asserts that DOE currently is in violation of Part 30 requirements for a license since "various near surface geologic repositories, referred to as cribs, ditches, trenches, and single shell tanks," but meeting the 10 C.F.R. Part 60 definition of "geologic repository," have received and currently hold in "long-term storage" or "disposal," "high-level radioactive waste."

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

Application of section 202(4) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5842(4), to determine NRC's jurisdiction with respect to certain storage tanks at Hanford turns upon the intention of Congress or DOE at the time the facilities were authorized and not on the likelihood that the tanks might in fact be used for long-term storage.

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

DOE has advised NRC that it intends to retrieve and process the high-level wastes in both single-shell and double-shell tanks for disposal in an offsite repository. Should DOE undertake to dispose of these wastes *in situ*, then the NRC would exercise its regulatory authority, as applicable, under section 202(4).

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

The legislative history with respect to section 202(4) of the Energy Reorganization Act of 1974 is clear that Congress did not intend for NRC to regulate any existing facilities, at least until such time as they might be authorized for use as long-term storage or disposal facilities.

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

The cribs, ditches, and trenches are not "facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste" and they are not subject to the licensing or related regulatory authority of the NRC pursuant to section 202(4) of the Energy Reorganization Act of 1974.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

INTRODUCTION

By a petition dated July 9, 1991, the Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Indian Nation or Petitioner) filed a request, pursuant to 10 C.F.R. § 2.206, that the Director of the Office of Nuclear Material Safety and Safeguards exercise his authority to require a license application from the U.S. Department of Energy (DOE) with respect to certain high-level radioactive wastes at the Hanford Site in the State of Washington and to expedite regulation thereof in accordance with the provisions of 10 C.F.R. Part 30 or other applicable chapters of the *Code of Federal Regulations*. The petition asserts, in support of this request, that DOE currently is in violation of 10 C.F.R. Part 30 requirements for a license since "various near surface geologic repositories, referred to as cribs, ditches, trenches, and single shell tanks," but meeting the 10 C.F.R. Part 60 definition of "geologic repository," have received

and currently hold in "long-term storage" or "disposal," "high-level radioactive waste." The petition was signed by Mr. Russell Jim, Manager, Environmental Restoration/Waste Management Program of the Yakima Indian Nation, on behalf of Petitioner.

By letter to Mr. Jim dated March 21, 1992, I acknowledged receipt of the petition. Notice of receipt was published in the *Federal Register* on April 2, 1992 (57 Fed. Reg. 11,343). I subsequently determined that additional information was needed concerning DOE activities at Hanford, and on August 19, 1992, I wrote to DOE to request such information. A copy of this letter was sent to Mr. Jim. DOE provided its response on April 13, 1993. Based on the information obtained from DOE, and for the reasons given below, I have now concluded that the Petitioner's request should be denied.

BACKGROUND

The petition addresses "near surface geologic repositories, referred to as cribs, ditches, trenches, and single shell tanks" that are alleged to be used, or to have been used, for the "long-term storage" of "high-level radioactive waste" at the Hanford Site. The issue that I must resolve is whether any of the facilities at the Hanford Site meet this description and, if so, whether they are subject to regulation by the U.S. Nuclear Regulatory Commission (NRC). The Petitioner has identified, as the applicable provision of law, section 202(4) of the Energy Reorganization Act of 1974, 42 U.S.C. 5842(4), which reads in part as follows:

SEC. 202. . . . the Nuclear Regulatory Commission shall . . . have licensing and related regulatory authority pursuant to chapters 6, 7, 8, and 10 of the Atomic Energy Act of 1954, as amended, as to the following facilities of the Administration:

. . .

(4) Retrievable Surface Storage Facilities and other facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste generated by the Administration, which are not used for, or are part of, research and development activities.¹

I agree with the Petitioner that this is the applicable statutory provision and I will proceed, therefore, to consider whether any or all of the activities, of the types identified by the Petitioner, at the Hanford Site are within the scope of this law.

¹The "Administration" refers to the Energy Research and Development Administration, the functions of which were transferred to the Secretary of Energy pursuant to section 301 of the Department of Energy Organization Act, Pub. L. No. 95-91, 42 U.S.C. § 7151.

DISCUSSION

The petition deals with two quite different kinds of facilities — those in which wastes are currently being stored pending future treatment or disposal activity (i.e., the single-shell tanks) and those in which wastes have been disposed of with no specific intention to further treat or recover them (i.e., the cribs, ditches, and trenches). I conclude that neither of these kinds of facilities involves activities that are presently subject to the jurisdiction of NRC.

The Single-Shell Tanks

The issue of NRC's jurisdiction, under section 202(4), with respect to certain storage tanks at Hanford was resolved in *Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission*, 606 F.2d 1261 (D.C. Cir. 1979). The Court of Appeals there concluded that the application of section 202(4) turns upon the intention of Congress or DOE at the time the facilities were authorized and not on the likelihood that the tanks might in fact be used for long-term storage. Applying this standard, the Court found that double-shell storage tanks for which funds for construction were authorized in appropriations acts for fiscal years 1976 and 1977 were not authorized for long-term storage and, accordingly, "they are not within the licensing authority of NRC."

As the single-shell tanks were constructed between 1944 and 1964,² their status was not specifically adjudicated in *NRDC*. I have no doubt, however, that those tanks were viewed at the time of their construction as being intended for short-term management alone, and as such they would not be subject to NRC jurisdiction.³ And DOE has declared that it is continuing "storage and maintenance" of the wastes in those tanks, with a view to further decisions when sufficient data become available.⁴ In this regard, DOE recently completed a re-assessment of its plans for the management of all Hanford tank wastes⁵ and DOE has advised NRC that it intends to retrieve and process the high-level wastes in both the single-shell and double-shell tanks for disposal in an offsite

²U.S. Department of Energy, Final Environmental Impact Statement (FEIS), "Disposal of Hanford Defense High-Level, Transuranic and Tank Wastes, Hanford Site, Richland, Washington," December 1987 (DOE/EIS-0113), 2:A.2.

³My understanding conforms to the views reflected in the legislative history when the Energy Reorganization Act was passed. See, in particular, the reference in the Senate Report to the "temporary tanks in AEC storage facilities." S. Rep. No. 93-980, 93d Cong., 2d Sess. 60 (1974).

⁴FEIS, *supra* note 2, at 1:1.12.

⁵U.S. Department of Energy, Strategy Plan for Management of Hanford Tank Wastes, WHC-EP-0501, Rev. 1, March 31, 1993.

repository.⁶ Notwithstanding these plans, DOE may experience difficulties in waste retrieval and some wastes may remain in storage in these tanks. Should DOE undertake to dispose of these wastes *in situ*, then the NRC would exercise its regulatory authority, as applicable, under section 202(4).

Moreover, the legislative history is clear that Congress did not intend for NRC to regulate any existing facilities, at least until such time as they might be authorized for use as long-term storage or disposal facilities. As cited by the Court in *NRDC*, the reporting Senate Committee declared that “it is not the intent of the committee to require licensing of such storage facilities [for long-term storage of high-level radioactive wastes] which are already in existence or of storage facilities which are necessary for the short-term storage of radioactive materials incidental to . . . R. & D. activities.” See *NRDC*, 606 F.2d at 1267. The same report contrasted “the wastes which are leaking from temporary tanks in AEC storage facilities,” which would not be subject to NRC regulation, with “new facilities now being planned for long-term storage,” which would have to meet NRC licensing standards. *Id.* Similarly, in the Conference Report cited by the Court, it was noted that facilities for long-term storage of high-level wastes were not then in existence — a clear indication that the Hanford tanks were not the type of facility that the statute was designed to reach. *Id.*

The Cribs, Ditches, and Trenches

In its letter of April 13, 1993, the Department of Energy provides some information regarding the wastes that the Atomic Energy Commission (predecessor to DOE) had authorized to be discharged into near-surface facilities. The information suggests, but does not conclusively demonstrate, that the material that was so discharged was not “high-level radioactive waste” within the meaning of the Energy Reorganization Act.⁷ In the final analysis, however, this makes no difference. As I have already noted, NRC has jurisdiction only as to facilities or activities that were to be authorized subsequent to enactment of the Energy Reorganization Act. DOE informs us that the liquid wastes in question were discharged over a period of time beginning in the 1940s and ending in the 1960s and that such disposal at the site was considered permanent. Under these circumstances, I must conclude that the cribs, ditches, and trenches are not “facilities authorized for the express purpose of subsequent long-term storage

⁶ Letter from J.C. Tseng, Director, Office of the Hanford Program, U.S. Department of Energy to R.L. Ballard, Chief, Geology and Engineering Branch, Division of High-Level Waste Management, U.S. Nuclear Regulatory Commission, May 18, 1993.

⁷ See Nuclear Regulatory Commission, “States of Washington and Oregon: Denial of Petition for Rulemaking,” 58 Fed. Reg. 12,342 (Mar. 4, 1993).

of high-level radioactive waste” and that they are not subject to the licensing or related regulatory authority of the NRC.

I observe, as the Conference Report did in 1974, that the absence of NRC regulation does not reduce in any way the responsibility of DOE to ensure that all storage or disposal of radioactive waste must be completely acceptable from the standpoint of the public health and safety and the protection of the environment. *See NRDC*, 606 F.2d at 1267-68. DOE obligations in this regard are reflected in the Atomic Energy Act, the National Environmental Policy Act, the Federal Facilities Compliance Act, and other laws.

CONCLUSION

The petition provides no basis for NRC to require submittal of a license application from the DOE for HLW on the Hanford site. The cited statute and NRC regulations do not apply to the HLW in storage or the other wastes in permanent disposal at the Hanford site and provide no basis for the requested action. Therefore, I find no basis in the petition for requiring a license application from DOE. Accordingly, the petition of the Yakima Indian Nation is denied in its entirety.

FOR THE NUCLEAR
REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 2d day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-271

VERMONT YANKEE NUCLEAR
POWER CORPORATION
(Vermont Yankee Nuclear Power
Station)

December 14, 1993

The Director of the Office of Nuclear Reactor Regulation denies petitions filed with the Nuclear Regulatory Commission (NRC) Staff by Michael J. Daley on behalf of the New England Coalition on Nuclear Pollution (Petitioner) on April 8, 1993, and April 11, 1993, requesting the NRC to take immediate action to require that the Vermont Yankee reactor remain in cold shutdown until plant management can provide proof that the emergency diesel generators at the plant are able to meet their safety function. Petitioner sought relief based on assertions that (1) diesel generator "A" was damaged by overload conditions suffered during testing in August through October of 1990; (2) the "B" unit also suffered under the same testing regime; (3) one of the causes of the repeated failures of the "A" unit in the summer of 1992 was the damage from this testing; (4) the overloading resulted from inappropriate actions taken in response to an NRC-identified violation indicating that the emergency diesel generators had for 20 years not been tested at loads consistent with the maximum expected accident load; and (5) the foregoing raises a number of questions that must be immediately answered if Vermont Yankee is going to be allowed to depend on these machines to fulfill the regulatory requirements for adequate onsite emergency backup power systems.

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: Design basis emergency diesel generator capacity; definition of load for emergency diesel generators, including

real load, reactive load, power factor; diesel generator cylinder liner failure, including role of overload in causing, role of fatigue (from operation) in causing, resulting from original manufacturing flaws in liners, and likelihood of recurrence/probability of existence of other hidden flaws; relation of surveillance and other testing to detection of cylinder liner flaws in emergency diesel generator; and overload of other equipment.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letters dated April 8, 1993, to Thomas T. Martin, Regional Administrator, Region I, and April 11, 1993, to Ivan Selin, Chairman of the U.S. Nuclear Regulatory Commission (NRC), on behalf of the New England Coalition on Nuclear Pollution (Petitioner), Michael J. Daley requested enforcement action regarding the Vermont Yankee Nuclear Power Station (VYNPS). Both letters were referred to the Office of Nuclear Reactor Regulation for consideration pursuant to 10 C.F.R. § 2.206, and have been treated together as a single petition requesting enforcement action.

The petition asked the NRC to take immediate action to require that the reactor at the VYNPS, owned and operated by the Vermont Yankee Nuclear Power Corporation (the Licensee), remain in cold shutdown until plant management can provide proof that the emergency diesel generators (EDGs) at the plant are able to meet their safety function.

The petition sought relief based on the assertions that (1) EDG "A" was damaged by overload conditions suffered during testing in August through October 1990; (2) EDG "B" also suffered under the same testing regime; (3) one of the causes of the repeated failures of EDG "A" in the summer of 1992 was the damage from this testing; (4) the overloading resulted from inappropriate actions taken in response to an NRC-identified violation indicating that the EDGs had for 20 years not been tested at loads consistent with the maximum expected emergency load; and (5) the foregoing raises a number of questions that must be answered immediately if Vermont Yankee (VY) is going to be allowed to depend on these machines to fulfill the regulatory requirements for adequate onsite emergency backup power systems. In addition, the Petitioner asserted that a recent VY report casts doubt on the ability of the Licensee's current surveillance and maintenance programs to ensure that the EDGs can meet their safety function.

The Petitioner's request that the Commission take immediate action to require that the VY reactor remain in cold shutdown was denied for the reasons expressed in my letter to the Petitioner of June 21, 1993.

The NRC Staff review of the issues raised in the petition is now complete pursuant to section 2.206. For the reasons set forth below, the petition is denied.

II. BACKGROUND

During the period August 6, 1990, through October 3, 1990, the NRC Staff conducted a safety systems functional inspection (SSFI) at the VYNPS. The SSFI team reviewed the Licensee's surveillance testing of the station's EDGs pursuant to the plant Technical Specifications (TSs). The team concluded that the surveillance procedure, which called for the test to be conducted at a power factor of 1.0, did not take into consideration the actual generator electrical current that would result from the lagging power factor of the emergency loads. Most of the emergency loads are reactive or inductive loads, such as electric motors. They cause the current to lag behind the voltage in generators and transmission lines. Thus, the reactive loads require more current than purely resistive loads for any given power level with a constant voltage value. This increased current in the generator will lead to increased heating without increasing the mechanical load on the diesel engine that drives the generator. This phenomenon is a well-known characteristic of electric power systems. It is quantified by the term "power factor," which is the ratio of the mechanical load (or real load) in kilowatts (kW) to the total electrical load (or reactive load plus real load) on the generator in kilovolt-ampere (kVA). A power factor of 1.0 signifies no reactive load. Increasing reactive load reduces the power factor. A realistic test power factor would be between 0.8 and 0.9. The team concluded that the test had not adequately demonstrated the operability of the EDGs in accordance with TS 4.10.A.1a, which requires that the monthly EDG test be conducted at the "expected maximum emergency load."

While the Licensee's contractor was determining the appropriate test load for compliance with the TS during August through October 1990, the Licensee revised the surveillance procedure to require, on an interim basis, testing at a higher real load (3200 kW vs. 2750 kW), although still with a power factor of 1.0. The Licensee considered this value to be electrically equivalent to the calculated maximum emergency load of 2751.2 kW at a power factor of 0.85. The "A" EDG was tested twice at the interim load of 3200 kW. The "B" EDG was tested three times at this load. Correspondence from the manufacturer (Fairbanks Morse) on September 12, 1990, in response to a Licensee request for guidance, stated that the maximum load at which the Licensee's EDGs can be run for 1 hour without reducing the standard maintenance interval is 3025 kW. Therefore, the Licensee's tests at 3200 kW had exceeded the mechanical load limit specified for the engines (real power in kW).

Following recognition of the diesel overloads, the Licensee conducted inspections of key load-bearing components of the diesel engines (e.g., piston pins and bushings, connecting rods, main bearings) according to manufacturer recommendations. Minor deficiencies, which appeared to be unrelated to the overload conditions, were identified and corrected. The NRC Staff reviewed the Licensee's response to the original SSFI test load concern, the determination of adequate EDG test loads, and the response to the engine overload conditions. The Staff expressed concerns regarding the interface between the Licensee's engineering support group and plant operations personnel. Specifically, the Staff was concerned about the time required to incorporate the engineering analysis in plant procedures, and the adequacy of the technical review of the determination of the interim test load. The Staff expected that the Licensee would have (1) identified the surveillance procedure for the EDGs as potentially needing modification based on the engineering analysis (it was not so identified) and (2) incorporated the results of the analysis into the procedure by the time of the inspection. These concerns were documented in Inspection Report 50-271/90-10.

Between October 1990 and May 1992, the EDGs at VY were operated on a monthly basis at between 2500 and 2750 kW at a power factor of 0.85 (approximately the expected maximum emergency load including both real and reactive load) pursuant to TS 4.10.A.1a. No evidence of faults related to the overloads was observed during this period.

During the monthly surveillance test of the "A" EDG in May 1992, the Licensee declared the engine inoperable due to low jacket coolant pressure and discolored coolant water. Upon investigation, the Licensee discovered a crack in the #7 cylinder liner. The Licensee replaced the liner. During the monthly surveillance test of the "A" EDG in June 1992, the Licensee declared the engine inoperable again due to low jacket coolant pressure. Upon investigation, the Licensee discovered a crack in the #10 cylinder liner. The Licensee then replaced all of the cylinder liners in the "A" EDG. The new cylinder liners are of a new design and made of materials having improved characteristics compared with the original cylinder liners. In addition, the new cylinder liners were tested before installation by fluorescent magnetic particle testing, and no flaws were found.

On August 12, 1992, the Licensee issued Licensee Event Report (LER) 92-017 which reported the EDG cylinder liner failures of May and June 1992 and the Licensee's planned corrective actions. On February 19, 1993, the Licensee issued LER 92-017, Revision 1, which provided its conclusion that the cause of the liner failures was "original flaws in the cylinder liner castings . . . propagated through the cylinder wall from a combination of fatigue cycles, below specification tensile strength, . . . and engine overload conditions . . . in 1990."

On April 6 through April 8, 1993, the NRC Staff inspected VY's EDG maintenance and surveillance programs, including the Licensee's actions to

resolve previously identified problems (including the overloads and cylinder liner failures). On the basis of their review, the inspectors identified seven unresolved items that warranted further investigation to determine whether or not violations had occurred. These items related primarily to inadequacy of documentation needed to "permit proper management review or identification and correction of deficiencies." (See Inspection Report No. 50-271/93-10.) The inspectors also cited one violation of the Commission's regulations regarding quality assurance records for the replacement cylinder liners in the "A" EDG. The inspectors evaluated these issues in conjunction with all of their findings and in light of the performance history of the Licensee's EDGs (including the overloads and cylinder liner failures), and concluded that, as set forth below, there is reasonable assurance that the EDGs are capable of performing their safety function.

III. DISCUSSION

The following discussion addresses the issues raised in the petition, including specifically numbered questions posed in the petition. This discussion also addresses the assertions of the petition regarding the history of the failures of the "A" EDG in the summer of 1992 and its implications for the reliability of the Licensee's EDGs with respect to the regulatory requirements.

A. Effect of Overloads on EDGs at VY

The petition asserts that the "A" EDG was damaged by the overloads described above, that the "B" EDG experienced similar overload conditions, and that the "A" EDG suffered repeated failures, in part due to the damage caused by the overloads. The Staff has concluded that the "A" EDG was inoperable due to through-wall cracks in the #7 and #10 cylinder liners, as described above. One factor contributing to the cracks was the overload conditions; these overload conditions caused propagation of existing flaws in the cylinder liners but did not initiate those flaws. Rather, flaws that existed before the overloads were exacerbated by the overload conditions.

Cylinder liners #7 and #10 contained manufacturing defects before the overload conditions occurred. Routine fatigue cycles before the overload conditions caused some propagation of these flaws. The overload conditions accelerated the flaw propagation. Immediately following the overloads, the flaws remained embedded (i.e., not through-wall), and the engine was operable. Further fatigue cycles from operation of the EDG over the next 19 months (primarily monthly surveillance runs) propagated the flaws until they became through-wall during the surveillance test runs on May 29, 1992, for cylinder

#7, and June 23, 1992, for cylinder #10, when they were discovered. It is unlikely that the flaws became through-wall before these dates because, if that had been the case, the failure indications (including low jacket coolant pressure and discolored jacket coolant) would have appeared during an earlier surveillance test. In addition, the flaw propagation rate may have been accelerated by substandard material tensile strength (observed in tests performed after the failed cylinder liners were removed). Therefore, the Staff concluded that the overload conditions did not initiate the cylinder liner cracks in the "A" EDG in 1990. Rather, the failures of the cylinder liners in 1992 were caused by flaws in the liners that existed before the overloads occurred. Had the manufacturing defects not been present, the liners would not have failed following the overloads. As stated above, all the cylinder liners in the "A" EDG were replaced upon the failure of the liners in cylinders #7 and #10; based on the new design, material construction, and testing of the replacement cylinder liners, and in view of the failure of the original defective cylinder liners only after 20 years of service, the Staff concludes that there is no basis to conclude that the new cylinder liners will fail prior to the expiration of the license.

The "B" EDG has experienced significantly fewer operating hours, and therefore fewer fatigue cycles, than the "A" EDG. In addition, its operating history since the last overload event in October 1990 indicates that the engine is fully operable. To date, the "B" EDG has operated satisfactorily in monthly surveillance tests for more than 3 years after the overloads. Given that the "B" EDG has undergone significantly fewer fatigue cycles than the "A" EDG and in view of the role of fatigue cycles in causing the propagation of existing flaws in the cylinder liners, as more fully discussed below, the Staff concludes that there is reasonable assurance that the "B" EDG will meet its safety function and that the Licensee's decision to defer the periodic overhaul of that engine and replacement of the cylinder liners to the 1993 refueling outage was acceptable. The Licensee overhauled the "B" EDG during the September 1993 refueling outage. The Licensee replaced all the cylinder liners in the "B" EDG during the overhaul. The original cylinder liners have been examined by fluorescent magnetic particle testing and hardness testing, and the Licensee found neither flaws nor low tensile strength in those liners. This demonstrates that the overload events would not cause cylinder liner failure.

B. Design-Basis EDG Capacity

As discussed in the background section (above), in August 1990 an NRC SSFI team reviewed the Licensee's EDG surveillance program. At that time, VY's EDG surveillance procedure required a test load of 2500-2750 kW. The Licensee conducted the surveillance tests at a power factor of 1.0. The Vermont Yankee Final Safety Analysis Report (FSAR) indicates that the expected maximum

emergency load is 2751.2 kW. VY's TS 4.10.A.1a requires that the EDGs be run during monthly surveillance tests "at expected maximum emergency load." The inspection team noted that the test conditions did not account for the additional heat generation in the generator caused by the reactive nature of the typical emergency loads. This additional heating, however, would not affect the mechanical load on the engine.

In response to the team's finding, the Licensee undertook an engineering analysis to determine the appropriate test conditions, including a reduced power factor of 0.85 with correspondingly higher generator currents. In the interim, the Licensee decided to test the engines at 3200 kW with a power factor of 1.0 to approximate the expected maximum emergency generator currents. A test at this real load would produce a similar amount of heat in the generator as a test at the expected real and reactive loads. The Licensee failed to note at that time that 3200 kW would exceed the rated mechanical load of the engine.

The petition asserts that the overloads resulted from inappropriate Licensee response to an NRC-identified violation, indicating that the EDG had not been tested at loads consistent with the maximum expected accident load. The loads at which the EDGs had been tested prior to August 1990 were consistent with the expected maximum emergency mechanical load on the diesel engine. The Licensee's use of a power factor of 1.0 resulted in test currents, and therefore generator heat loads, less than those resulting from the expected maximum emergency loads (total electrical load). The Licensee now tests the EDGs at 2500-2750 KW and a power factor of 0.85. These test conditions realistically approximate the expected maximum emergency loads as specified in the VY FSAR and in accordance with Regulatory Guide (RG) 1.9, Revision 3, "Selection, Design, Qualification, and Testing of Emergency Diesel Generator Units Used as Class 1E Onsite Electric Power Systems at Nuclear Power Plants." Although the Staff concluded that the Licensee's previous test conditions violated the TS in that they did not realistically approximate the expected current and resultant heat generation in the generator during an emergency, the Staff also concluded that the EDGs had been tested at currents that demonstrated sufficient mechanical, electrical, and heat removal capacity to provide confidence in the ability of the generators to perform their safety function during the relatively short period until the Licensee could determine more appropriate test conditions.

C. Petitioner's Specific Questions

The petition asserts that the foregoing assertions regarding overloading and the design capacity of the "A" and "B" EDGs raise questions "that must be answered immediately if VY is going to be allowed to depend on these machines to fulfill the regulatory requirements for adequate onsite emergency backup

power systems." The Staff has reviewed the questions and assertions in the petition and the technical issues surrounding the overload events of 1990, the cylinder liner failures of 1992, and VY's decision to postpone the overhaul and cylinder liner replacement in the "B" EDG until the fall 1993 refueling outage.

The Petitioner's questions are all based on the conclusion that the "A" EDG was damaged as a consequence of being overloaded during surveillance testing in 1990. The basis for this conclusion is the Petitioner's interpretation of the root cause findings regarding cylinder liner cracks that were reported in LER 92-017, Revision 1, dated February 19, 1993. As discussed in section A above, the Staff acknowledges that the overloads of the "A" EDG may have increased the rate of propagation of existing flaws, but does not agree that the overloads initiated the flaws or were the sole cause of the propagation of those flaws. This position is discussed in more detail below.

In LER 92-017, Revision 1, the Licensee states that the root cause of the through-wall cylinder crack propagation was a *combination* of fatigue cycles, below-specification cast-iron tensile strength, and engine overload conditions that caused *original* flaws in the cylinder liners to propagate. Propagation of these original flaws into through-wall cracks would have occurred at some point due to fatigue cycles from engine operation, even if the overloads had not occurred. At most, the overloads caused the rate of propagation to increase. Overloading of the "A" EDG was not the cause of flaw initiation and, without the pre-existing flaws, the overload conditions to which the Licensee's EDGs were subjected would not have significantly contributed to premature cylinder liner failure. As stated above, the Licensee replaced all the cylinder liners in the "A" EDG upon the failure of the liners in cylinders #7 and #10 and replaced all the cylinder liners in the "B" EDG during the overhaul of that EDG in the September 1993 refueling outage, which was recently completed. Based on the new design, material construction, and testing of the replacement cylinder liners, and in view of the failure of the original defective cylinder liners only after 20 years of service, the Staff has reasonable assurance that the cylinder liners will function as designed and the EDGs will operate if called upon to fulfill their safety function.

As further set forth below in the discussion of the Petitioner's specific questions, the Staff concluded that the combination of maintenance, inspections, and surveillance testing conducted by the Licensee since October 1990, provides reasonable assurance that the diesel generators at the VYNPS will perform their intended safety function upon demand, and that they meet the regulatory requirements for adequate onsite emergency backup power systems.

- Q1. "What other flaws with catastrophic potential might remain undiscovered in both generators as a result of the 1990 overload conditions? Given the inability of previous testing to identify the cylinder flaws,

what new testing procedures can be applied to provide assurance that hidden flaws are revealed?"

- A1. As stated previously, the EDG overloading incidents did not initiate the cylinder liner flaws, but rather accelerated their propagation. Accordingly, the Staff is not aware of any flaws that were caused by the EDG overloading. If any further liner failures were to occur, they would be discovered during the Licensee's next scheduled monthly surveillance testing.

The Commission's regulations at Appendix B to 10 C.F.R. Part 50 require that the Licensee take reasonable measures to identify material and manufacturing defects before installing such components as cylinder liners in safety-related equipment. However, it is possible that the original flaws in the "A" EDG cylinder liners existed only as stress risers (stress concentrations in the cylinder liner material resulting from the manufacturing process) following manufacturing, and developed into discernible cracks only after experiencing fatigue from some number of EDG operating cycles. Given this, these flaws would not have been found before placing the cylinder liners in service, even using today's more advanced nondestructive examination (NDE) techniques. To compensate for such a possibility, the regulations also require the Licensee to implement maintenance and surveillance programs which will, with high confidence, prevent, or identify and replace, failed or failing components before they can cause a significant failure of the EDG. The Staff notes that the Licensee's EDG surveillance testing, required by TSSs, was successful in identifying the cylinder liner cracks at VY.

- Q2. "Why did the LIMITED inspection conducted in October 1990 fail to identify the 'original flaws' (LER 9[2]-017-01) in the cylinder walls?"
- A2. The EDG inspections conducted in October 1990 were limited to load-bearing components which are directly affected by mechanical overloading of the engine. Had there been any damage as a result of the overloads, it would have been evident on one or more of these components. (The components of interest are those that are most sensitive to mechanical overload and include piston pins and bushings, connecting rods, and main bearings.) Cylinder liners (without original flaws) are not significantly affected by overloading and would not normally be inspected for the effects of an overload. The ability of the cylinder liners to withstand overload conditions has been adequately demonstrated by tests at the EDG vendor's facilities and, to a lesser extent, at VY. In addition, the original flaws in the cylinder liners had not developed into through-wall cracks at the time of the 1990

inspections, and would not have been discovered if a visual inspection had been conducted at that time.

Q2a. "Why did all surveillance and maintenance activities during the ensuing 2½ years fail to find this problem before it resulted in gross failure indications?"

A2a. Maintenance and surveillance activities during the 19 months after the overloads did not identify the cylinder liner flaws because the flaws had not propagated through wall until May 1992. During this time, the EDGs were operable. NDE procedures might have identified the flaws earlier, but such inspection would have required complete engine disassembly. Without any indication of the presence of such flaws, extensive engine disassembly was not warranted. The Staff notes that the original flaws were discovered as soon as they propagated through wall and that the liners were replaced before they could cause a significant EDG failure.

Q2b. "Was Vermont Yankee's desire not to jeopardize its capacity factor and its record-setting operations responsible for its decision not to undertake more thorough (though time-consuming and costly) investigations?"

A2b. The Staff did not assess the impact of economic factors in the Licensee's decision in this case. The Staff reviews the adequacy of a licensee's decision based on the technical merits to determine whether a licensee's actions are adequate to protect the public health and safety.

Immediately after the overload events, there was no information that indicated the existence of material weaknesses or manufacturing defects that could have been exacerbated by the overload conditions. Diesel engine inspections were conducted based on the manufacturer's recommendations. The Staff found that, following the overloads, the Licensee examined the load-bearing components that would be most vulnerable to damage from the loads applied. Finding no adverse effect on these components, there was no reason for the Licensee to suspect flaws in other components less susceptible to damage from mechanical overloads. Accordingly, the Staff concluded that the Licensee's inspections and subsequent testing provided reasonable assurance that the EDGs would perform their intended safety functions and, therefore, that the Licensee's decisions were adequate. The Staff does not know whether such factors as cost or capacity factor figured into any of the Licensee's decisions in this case.

Q2c. "How can the public have confidence in Vermont Yankee surveillance practices and NRC oversight to assure operability of safety systems

when these practices failed to identify the damage done to the machines by the overloading?"

A2c. As stated above, the Staff does not agree with the Petitioner's assertion that the cylinder liner flaws in the "A" EDG at VY were initiated by the overloading. With regard to surveillance practices, it was during surveillance testing of the "A" EDG that the Licensee observed an operational anomaly that ultimately led to identifying and correcting the cylinder liner through-wall cracks. Since the cylinder liner cracks were not caused by the overloading, and since their existence was discovered during surveillance testing, the Staff concludes that the VY surveillance practices were effective in identifying and correcting these flaws before a significant EDG failure occurred and that they provide adequate assurance of the ability of the EDGs to perform their safety functions upon demand.

Q3. "Given the pivotal safety role of the emergency diesel generators, why were the defects in the original components not identified at the time of manufacture, or by over 20 years of maintenance? What other unidentified flaws might exist in the units, or in other plant equipment with equally vital safety functions?"

A3. As discussed in the response to Question 1 (above), the original flaws in the cylinder liners may not have been detectable at the time of manufacture. With regard to the original flaws not being detected in nearly 20 years of maintenance, it took that long for the original flaws to propagate into through-wall cracks that could be identified during surveillance testing. Before that, the original flaws were not detectable by visual means. The flaws could have been previously detected during the service period of the engine only by inspection means that would have required extensive disassembly of the engine. Before May 29, 1992, when the Licensee observed low jacket coolant pressure and discolored jacket coolant water during surveillance of the "A" EDG, there was no indication that flaws existed in the cylinder liners. Since there was no information suggesting the existence of such flaws, extensive disassembly was not warranted.

Regarding other equipment, the Commission's regulations in Appendix B to 10 C.F.R. Part 50 require that licensees take reasonable measures to identify flaws in equipment or components prior to installation, and implement maintenance and surveillance programs to identify and replace those components that have developed flaws in service. (See the response to Question 1, above.) As demonstrated by the discovery of the flaws in the "A" EDG cylinder liners, these programs have accomplished their purpose.

- Q4. "What other equipment used in normal plant operations and for back-up safety purposes has suffered similar abuses? Can the NRC provide assurance that potentially dangerous conditions have all been identified and corrected in these instances?"
- A4. The EDGs are the only safety-related equipment for which the loading is controlled in a manner that could lead to overloading (although they are expected to be controlled without overload.) Therefore, it is extremely unlikely that there are any "potentially dangerous conditions" associated with other safety-related equipment. The Staff is not aware of similar mechanical overloads being applied to other equipment at VY.
- Q5. "Vermont Yankee recently canceled plans to do a major overhaul of the "B" generator. Given the new evidence contained in the root-cause analysis of LER 92-017-01, is it prudent to postpone *any* service of this machine?"
- A5. The Petitioner is incorrect in asserting that the overhaul of the "B" EDG was canceled; it was postponed from March 1993 to September 1993. In this question, the Petitioner refers to "new evidence contained in the root-cause analysis of LER 92-017-01." The Staff interprets this to be another reference to the Petitioner's conclusion that the EDGs were damaged by the 1990 overloads. As stated previously, the Staff does not agree that the overloads initiated the flaws or were the sole cause of the propagation of those flaws. The Staff position is supported by the results of thorough inspections of both EDGs. The absence of any abnormal indications on the "B" EDG, coupled with successful surveillance tests for nearly 3 years, provided more than adequate assurance that overhaul of the "B" EDG could be delayed until the next refueling outage without compromising safety. Moreover, the cylinder liners in the "B" EDG were replaced with new liners during the September 1993 refueling outage. As stated in the discussion section above, examination of the old liners showed no damage that could be related to the overload events.
- Q6. "Did the NRC act prudently in allowing continued operation of Vermont Yankee in August 1990 after identification of a violation indicating that the emergency diesel generators' ability to handle expected emergency load had never been empirically verified?"
- A6. The Staff disagrees with Petitioner's assertion that "the emergency diesel generators' ability to handle expected emergency load had never been empirically verified." Additionally, the Staff acted prudently in allowing continued operation of VY in August 1990 for the following reasons:

- A. The expected maximum emergency load was, and still is, 2751.2 kW. Power factor has no significant bearing on real load, and 2751.2 kW represents the real load the "A" and "B" engines are expected to carry during an emergency, regardless of power factor. The engines at VY had been tested at approximately expected maximum emergency load for nearly 20 years. There was no reason to question the ability of the engines to carry the expected real load.
 - B. EDGs "A" and "B" were tested at or near 3200 kW in August 1990. Although not necessary, this testing provided assurance that the EDGs could handle not only the expected maximum emergency load, but also the associated generator heat load and a substantial mechanical overload. Therefore, there was no reason for requiring that the plant be shut down.
- Q7. "What assurances can be made that the current testing regime in fact demonstrates the units' ability to meet expected emergency loads?"
- A7. Once each month under the current testing regime, each engine is started and operated for at least 1 hour while carrying the expected maximum emergency load. RG 1.9, Revision 3, "Selection, Design, Qualification, and Testing of Emergency Diesel Generator Units Used as Class 1E Onsite Electric Power Systems at Nuclear Power Plants," requires that an EDG load run test demonstrate 90 to 100% of the continuous rating of the EDG. This testing regime is intended to provide assurance of the EDG's ability to operate reliably at its continuous rating. The EDGs at VY are tested at a minimum value of 2500 kW, or 91% of the expected maximum emergency load, consistent with the guidance in RG 1.9. This provides the necessary assurance that they can operate at the expected maximum emergency load of 2751.2 kW.

CONCLUSION

The Petitioner requested that the NRC take immediate enforcement action to require that the reactor at the VYNPS remain in cold shutdown until the licensee could provide proof that the EDGs at the plant were able to meet their safety function. Enforcement action as requested by the Petitioner is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). For the reasons discussed above, I find no basis for taking such action. Rather, on the basis of the review

efforts by the NRC Staff, I conclude that no substantial health and safety issues have been raised by the Petitioner. Accordingly, the Petitioner's request for action pursuant to 10 C.F.R. § 2.206 is denied.

A copy of this Decision will be placed in the Commission's Public Document Room, Gelman Building, 2120 L Street, NW, Washington, DC 20555, and at the Local Public Document Room, Brooks Memorial Library, 224 Main Street, Brattleboro, VT 05301.

A copy of this Decision will also be filed with the Secretary for the Commission's review as stated in 10 C.F.R. § 2.206(c) of the Commission's regulations.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 14th day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-293

BOSTON EDISON COMPANY
(Pilgrim Nuclear Power Station)

December 14, 1993

A petition, dated May 26, 1993, requested the Commission to take immediate action to delay the scheduled startup of the Pilgrim Nuclear Power Station, or, in the alternative, to order its immediate shutdown if the Pilgrim Station was permitted to start up before the petition could be acted upon. The petition contended that hardware modifications were necessary to eliminate errors in reactor water-level measurement because the system in place at Pilgrim does not adequately measure the water level of the reactor vessel and thus constitutes an unacceptable risk to the health and safety of the public. The Director of the Office of Nuclear Reactor Regulation has considered all of the matters raised in the petition, and has denied the petition.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

INTRODUCTION

On May 26, 1993, Mr. Ernest C. Hadley (Petitioner) filed a petition in accordance with 10 C.F.R. § 2.206 with the Nuclear Regulatory Commission (NRC or Commission) on behalf of We the People, Inc., of the United States. This petition was referred to the Director, Office of Nuclear Reactor Regulation (NRR), for consideration.

The petition requested immediate action to delay the scheduled startup of the Pilgrim Nuclear Power Station (PNPS) operated by the Boston Edison Company (Licensee), or, in the alternative, to order its immediate shutdown if the Pilgrim

Station were permitted to start up before the petition could be acted on, pursuant to section 2.206.

The Petitioner requested that the PNPS not be permitted to operate until the Licensee completes hardware modifications designed to eliminate errors in reactor water-level measurement. The Petitioner contends that the system in place at the Pilgrim facility does not adequately measure the water level of the reactor vessel and thus constitutes an unacceptable risk to the health and safety of the public. The Petitioner alleges that the NRC Staff informed the public in February 1993 that the NRC had based its determination that continued operation of boiling water reactors (BWRs), such as the Pilgrim facility, did not pose a safety threat based upon generic studies performed by the Boiling Water Reactor Owners Group (BWROG). These studies showed that water-level errors would be measured in inches and would be self-correcting within a short period of time. The Petitioner alleges that these assurances were given despite the fact that on January 21, 1993, Washington Nuclear 2 (WNP-2) reported a significant event in which a water-level error lasted for more than 1 hour. It is further alleged that this error was significantly larger than those previously observed.

Additionally, the Petitioner alleges that it requested from the NRC information used by the Pilgrim Licensee to make its operability determination for the water-level measurement system as required by the technical specifications for the Pilgrim facility. Because the NRC failed to provide this information, the Petitioner concludes that such information either does not exist or would not withstand independent scrutiny.

Finally, the Petitioner refers to a meeting of the Advisory Committee on Reactor Safeguards (ACRS) held on May 12, 1993, which included the BWROG. It is the Petitioner's understanding that during a closed session of that meeting, the BWROG and the NRC Staff confirmed that water-level measurement errors could be on the order of 27 feet and that neither the BWROG nor the NRC Staff any longer believes the error will correct itself with the passage of time.

I have now completed my evaluation of the petition. For the reasons given in the discussion below, the Petitioner's request for action is denied.

BACKGROUND

On May 27, 1993, promptly upon receipt of the petition, members of my staff contacted the Petitioner by telephone to inform it that the NRC Staff had considered the information presented in the petition and that it had determined not to grant the immediate relief sought. A letter to Petitioner, dated June 22, 1993, documented that decision and informed it that the NRC would take additional action with regard to the specific issues raised in the petition within a reasonable time.

DISCUSSION

In August 1992, the NRC Staff issued Generic Letter (GL) 92-04 requesting that licensees submit a planned schedule for long-term corrective action that may include hardware modifications, and that licensees notify the NRC of certain short-term actions taken to address concerns about errors in level indication related to rapid depressurization. Actions addressed in the letter included periodic monitoring of level instrumentation leakage and implementation of procedures and operator training. Licensees were required to respond to GL 92-04 by September 27, 1992. The NRC Staff agreed to extend the deadline for the submission of plans for long-term actions to July 1993 in order to allow the BWROG to complete a test program that is discussed in more detail below. The Pilgrim Licensee implemented the short-term actions, which were verified by an NRC inspection.

To assist in resolution of the water-level issue, on August 12, 1992, the BWROG initiated a program, which included testing, to assess the potential errors in water-level instrumentation that could result from rapid depressurization events. In February and March of 1993, the NRC Staff visited the Electric Power Research Institute (EPRI) test facility in Charlotte, North Carolina, where the BWROG reference leg de-gas tests were conducted, to observe the reference leg de-gas tests and to discuss the technical details of the testing program with the BWROG. The NRC Staff also conducted a quality assurance inspection at Continuum Dynamics Inc. (CDI), in Princeton, New Jersey, on May 4 and 5, 1993. CDI performed the testing for the BWROG at the EPRI test facility. During the inspection, the NRC Staff collected raw test data from the reference leg de-gas test. These raw test data are the basis of the 27-foot value that was discussed at the ACRS meeting on May 12, 1993. It should be noted that the magnitude of the 27-foot error is not directly applicable to the Pilgrim plant, because the magnitude of any error is plant specific, but the 27-foot value is demonstrative of the significant effects of this phenomenon.

The NRC Staff has considered these data relative to the actions requested in GL 92-04 and concluded that the effectiveness of the short-term actions implemented by the Pilgrim Licensee in response to GL 92-04 is not changed by these test results. This is because the actions of GL 92-04 were based on the assumptions that maximum theoretical calculated errors could occur and would not be self-correcting and that significant errors would not occur until depressurization below 450 psig; the test data did not invalidate either of these two assumptions.

The NRC Staff also evaluated the significance of the event that occurred at WNP-2 on January 21, 1993.¹ This event demonstrated that water-level errors can occur even during slow depressurization. The NRC Staff issued NRC Information Notice 93-27 on April 8, 1993, to alert licensees to this event. The NRC Staff also requested the BWROG to perform a generic evaluation of level indication errors during normal reactor pressure vessel depressurization. The BWROG submitted a report on May 20, 1993, discussing the effect of level errors on automatic safety system response and operator actions during transients and accidents initiated from reduced pressure conditions of plant cooldown. This report indicated that operator actions would be necessary to mitigate a drain-down event if significant errors were present in multiple-level instruments.

Following its review of this report, the NRC Staff issued NRC Bulletin 93-03 on May 28, 1993. This bulletin requested each BWR licensee to implement short-term compensatory actions within 15 days to address concerns related to errors during slow depressurization. These actions were intended to ensure early detection of potential errors in level indication by requesting enhanced monitoring of level indication and supplemental operator training, and also to minimize evolutions that could result in draining the reactor vessel.

The Staff recognizes that Pilgrim was allowed to restart on June 2, 1993, before implementation of these short-term compensatory actions; however, this was considered acceptable due to the time dependency of the generation of noncondensable gases. During the 15 days following issuance of NRC Bulletin 93-03, when short-term actions were requested to be completed, it was not likely that gases would build up to a high concentration in the reference legs; therefore, it was not likely that significant errors in the level instrumentation would result. This is because gas buildup is a relatively slow process, and following a restart after a cold shutdown, as occurred at Pilgrim, the gas concentration in the reference legs is low because the reference legs have been depressurized. The NRC Staff concluded that continued operation of the PNPS was acceptable, both for the short time period prior to implementation of the short-term compensatory measures, and following implementation of compensatory measures as requested by Bulletin 93-03 and with the actions already completed by Boston Edison in response to GL 92-04, until a permanent hardware modification was made.

With regard to the Petitioner's allegation that the NRC failed to provide information used by PNPS to make its operability determination, the Licensee's operability evaluation was, however, reviewed by the Resident Inspector and that review is documented in Inspection Report 50-293/92-23, which stated,

¹The Petitioner stated that on January 21, 1993, WNP-2 reported this event. A report was received from the Licensee on January 21; however, the report did not discuss the level indication errors that occurred after the reactor scram. The NRC was informed of the significant level errors that occurred February 10, 1993, after the public meeting that was held in Plymouth, Massachusetts. A written report was received on February 17, 1993.

"The NRC Staff also independently reviewed the bases for BECO's operability determination, and agreed with its conclusions." The report is available at the local public document room located at Plymouth Public Library, 11 North Street, Plymouth, MA 02360.

The Staff has continued to monitor the Licensee's actions regarding this issue. It should be noted that the Pilgrim plant was shut down in July 1993, and the Licensee installed a hardware modification to their level instrumentation before plant restart from that outage. This modification provides a continuous backfill which prevents noncondensable gases from building up in the reference leg. Thus, the concern that noncondensable gases will lead to level indication errors is resolved.

CONCLUSION

The institution of proceedings in accordance with section 2.206, as requested by the Petitioner, is appropriate only where substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). PNPS has completed all the action items outlined in Bulletin 93-03 and GL 92-04. Therefore, because I feel the changes already made in response to Bulletin 93-03 and GL 92-04 resolve the concerns raised, I decline to take any further action with respect to the issues in this Director's Decision. Further, this Director's Decision explains why the NRC Staff did not consider that the resumed operation of PNPS prior to installation of the continuous backfill modification raised a significant risk to the public health and safety. Accordingly, insofar as the Petitioner has requested action pursuant to 10 C.F.R. § 2.206 beyond that which has already been taken by the Licensee, the petition is denied.

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary for the Commission to review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 14th day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-324
50-325

CAROLINA POWER AND LIGHT
COMPANY
(Brunswick Steam Electric Plant,
Units 1 and 2)

December 14, 1993

A petition, dated April 28, 1993, requested the Commission to immediately shut down the Brunswick Steam Electric Plant on the basis of asserted receipt of allegations from a Brunswick employee. The petition alleged that operations at Brunswick Steam Electric Plant had reached crisis proportions, setting forth five statements as the bases for that conclusion and Petitioner's request for immediate shutdown. The Director of the Office of Nuclear Reactor Regulation has considered all of the matters raised in the petition, and has denied the petition.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On April 28, 1993, Mr. Stephen M. Kohn (the Petitioner) filed a petition with the U.S. Nuclear Regulatory Commission (NRC) on behalf of the National Whistleblower Center requesting that actions be taken regarding the Brunswick Steam Electric Plant, Units 1 and 2 (BSEP or Brunswick), of the Carolina Power & Light Company (CP&L or the Licensee). The Petitioner requested that the NRC immediately shut down BSEP on the basis of asserted receipt of allegations from a BSEP employee. In these allegations, the Petitioner

characterized CP&L's operation of BSEP as having reached crisis proportions. Specifically, the Petitioner stated that (1) there has been a complete breakdown in the quality assurance (QA) program overseeing the integrity of the plant's vendor manuals; (2) there has been a breakdown in the plant's security system, which may leave the facility open to terrorist attack; (3) there has been harassment and intimidation of employees who raise safety-related concerns to their management; (4) there has been a failure of CP&L to train the contractors it has employed in the proper QA procedures and a failure to implement a QA program in the work assignments of the contractors; and (5) there has been a breakdown in the plant's preventive maintenance program.

On June 7, 1993, I informed the Petitioner that the petition had been referred to my office for the preparation of a Director's Decision. I further informed the Petitioner that the NRC Staff had previously evaluated several of the concerns addressed in these allegations. I denied the Petitioner's request for immediate action because there was insufficient evidence provided in the petition or known to the NRC Staff to conclude that there was a substantial public health and safety hazard in allowing the continued operation of BSEP. At the time, the NRC Staff was still evaluating the allegations addressed in the Petitioner's letter and had not reached any final conclusions on any of the above concerns. Therefore, I informed the Petitioner that the NRC would review the petition in accordance with 10 C.F.R. § 2.206 and issue a final decision within a reasonable time.

My Decision in this matter follows.

II. DISCUSSION

The NRC Staff has conducted a thorough evaluation of each of the concerns raised in the petition. Each of the concerns is addressed below.

A. Breakdown in the Quality Assurance Program for Vendor Manuals

The Petitioner asserts that there has been a complete breakdown in the Quality Assurance program in the area encompassing the plant's vendor manuals, which increases the risk of incorrect or defective parts having been installed in the plant over a 10-year period.

The NRC Staff reviewed a similar allegation filed in early 1993, which dealt, in part, with vendor manual adequacy. During that review, the NRC Staff concluded that the Licensee was aware of deficiencies in its vendor manual program, as well as their engineering data base system (EDBS), and had taken compensatory measures to prevent related errors while they made improvements to the program. These compensatory measures dealt primarily with actions to ensure that the appropriate, quality-verified, parts are utilized during maintenance

and modifications. These measures include, but are not limited to, reviews of the original purchase orders, field verification of installed components, review of applicable drawings, as well as direct contact with the vendors. The CP&L procurement engineers also use a contracted vendor service, Visual Search Micro Form (VSMF), to assist in verifying the purchase requirements. This VSMF service maintains all applicable vendor catalogs and industry codes/standards and is required by contract to update the data files every 60 days. In the unlikely event that these program controls do not preclude installation of an incorrect part, the Licensee conducts post-maintenance operational tests to verify that the associated component or system meets design requirements and is acceptable to return to service. These measures have been reviewed by the NRC Staff, the results of which are documented in Inspection Report Nos. 324,325/93-19 and 93-27. Based on the results of routine maintenance inspections performed in this area, the NRC Staff has determined that the aforementioned program controls significantly reduce the risk of rendering a safety system inoperable due to the installation of an incorrect or defective part.

In the Brunswick Three-Year Plan, submitted to the NRC on December 15, 1992, CP&L committed to expeditiously complete the ongoing design-basis documentation program and the upgrades in the EDDBS and vendor manual programs. The NRC Staff will continue to closely monitor the completion of each of these initiatives and the Licensee's compensatory measures regarding the use of correct information in purchase-order specifications and during maintenance and modification endeavors.

Based on the completed inspections in this area and the assessment of the Licensee's corrective actions taken in response to the identified deficiencies, the NRC Staff has concluded that the issues raised by the Petitioner have been satisfactorily addressed by the Licensee and do not present a risk to the health and safety of the public.

B. The BSEP Is Vulnerable to Terrorist Attack

The Petitioner has alleged that the facility may be open to a terrorist attack because of a breakdown in its security system. Although the Petitioner did not specify the aspects in which it believed that BSEP is vulnerable to a terrorist attack, the NRC Staff has reviewed the inspection history relative to physical security and has identified the following recent issue.

In January 1990, NRC safeguards personnel, assisted by U.S. Army Special Forces personnel, conducted a regulatory effectiveness review to evaluate the potential sabotage vulnerability of BSEP. The NRC Staff found no safeguards inadequacies that would give an external adversary unimpeded access to the safety-related vital equipment necessary for the safe shutdown of the reactors.

This conclusion was documented in a letter from the NRC to the Licensee, dated February 16, 1990.

Since 1990, the NRC Staff has conducted fifteen inspections of the Licensee's entire safeguards program. During that period, the NRC Staff identified deficiencies in the Licensee's maintenance of its security equipment. A special NRC inspection was performed in early 1992 to evaluate the Licensee's management and prioritization of resources in several areas, including plant security. The NRC Staff found that the Licensee's routine maintenance of aging security hardware was deficient. In its Systematic Assessment of Licensee Performance (SALP), the NRC downgraded BSEP to a Category 2 rating in the security area due to the failure to repair and maintain security hardware and systems. However, in a December 30, 1992 letter to the Licensee (SALP Report No. 92-30), the NRC found that the overall security program was acceptable and, in fact, improvements were identified during the later portion of the SALP period of November 1991 to October 1992.

More recently, during NRC Inspection No. 50-324,325/93-07, conducted February 22-26, 1993, No. 92-24, conducted August 17-21, 1992, and No. 92-08, conducted March 23-27, 1992, the NRC Staff observed that the Licensee has upgraded its maintenance of the BSEP security equipment. The Licensee had dedicated four technicians to work on security hardware, significantly reducing the need for compensatory security measures for out-of-service equipment. The Licensee also has upgraded barriers, lighting, and the camera assessment of perimeter alarms.

Because of these findings, the Staff assesses the BSEP security program as satisfactory in meeting the NRC criteria, and the Petitioner has not raised a significant health and safety issue. The allegation of the facility being vulnerable to a terrorist attack was not substantiated.

C. Harassment and Intimidation of Employees

The Petitioner alleges that there has been harassment and intimidation of employees who have raised safety concerns to their management. Although the Petitioner did not provide any details as to specific occurrence, the NRC Staff reviewed all of its records regarding alleged discrimination for protected activities going back to 1986.

Since 1986, the NRC has been notified of nine complaints from present or former CP&L employees who have alleged harassment, intimidation, discrimination, or other actions adversely affecting employment for having identified safety concerns to CP&L or contractor management. Seven of those complainants were CP&L contractor personnel and two were CP&L employees. The complainants in seven of the nine cases formally filed their employee discrimination complaint with the U.S. Department of Labor (DOL).

In the initial determination for the seven cases in which complaints were filed with DOL, the DOL District Director found in favor of the complainant in three cases. Two of the seven cases were subsequently settled, and two were dismissed without prejudice at the request of the complainant. The decision not to take enforcement action in the two settled discrimination complaints was based on a review of the DOL investigative record and information provided by the Licensee in response to a request for specific information related to both settled complaints. The Staff review included a review by the Office of Investigations in one of the settled complaints. The NRC concluded that there is insufficient evidence of harassment and intimidation to warrant NRC enforcement action in these cases. The remaining three cases filed with DOL were each the subject of an administrative hearing before a DOL Administrative Law Judge (ALJ). The ALJ found for the respondent in two of those cases and the third is currently pending an administrative hearing.

The complainants in the two of nine cases, who did not file a complaint with DOL, submitted their complaints directly to the NRC in March 1990 and February 1993, respectively. Those two complaints were investigated by the NRC Office of Investigations (OI). With regard to those two complaints, the OI investigators found that there was insufficient evidence of wrongdoing. Additionally, the NRC Staff is currently reviewing an allegation received in May 1993 that may involve a potential discrimination issue.

The Licensee has instituted the Quality Check Program that provides CP&L and contractor employees a mechanism to report concerns, anonymously if desired, in addition to the normal means for reporting safety concerns through the line management. Employees can submit their concerns by depositing a completed quality check report in one of several secured containers for that purpose at the BSEP, by mailing the report to the Quality Check Program, or by a personal or telephonic interview. CP&L has actively publicized this program through plant procedures, staff supervisory training, general employee training, discussion of the program by plant management at various plant staff meetings, policy statements, posters describing the program placed at various locations throughout the plant, and articles about the program in several plant publications, brochures, and in-plant television. In a recent NRC inspection that will be documented in Inspection Report No. 50-324,325/93-53, the Staff found that all plant personnel surveyed during the inspection were aware of the existence of the Quality Check Program and how to report concerns.

On the basis of the review of the employee discrimination cases at BSEP and CP&L's responses to NRC inquiries related to those cases, the NRC Staff has found that there is no pervasive problem related to employee discrimination and no chilling effect from these cases. The Staff concludes that there is no significant health and safety issue associated with this concern.

D. Failure to Train Contractors in QA Procedures and Failure to Implement QA Program for Contractors

The Petitioner asserts that CP&L has failed to train thousands of contractors on QA procedures and has failed to implement a QA program governing the work of contractors.

The NRC Staff, as part of its regular inspection program, inspects the Licensee's general employee training (GET) program. All CP&L employees and contractor personnel are required by the CP&L Physical Security Plan to complete the GET before being authorized unescorted access to the protected areas of the facility. The GET is provided in two courses; Level I and Level II. Level I training is required for permanent site employees and individuals on long-term (greater than 6 months) assignments to the plant. Level I training includes instruction in the areas of security, industrial safety, radiological controls, and quality performance. The training associated with quality performance includes, but is not limited to, instruction pertaining to personal quality performance, NRC inspections and investigations, the quality check program, the corporate quality assurance program, self-assessment, the STAR (Stop, Think, Act, and Review) program, and independent verification. The completion of Level I training is a prerequisite for Level II training which consists of instruction in various aspects of radiological controls. Successful completion of Level I and II training and the successful completion of written and practical examinations is required before personnel are authorized unescorted access to the protected area. Annual retraining is required of all personnel.

During an inspection performed in this area in May 1993, and documented in Inspection Report No. 50-324,325/93-23, the NRC Staff concluded that the content and quality of the training was adequate to familiarize an individual with the knowledge and skills needed to work safely at a nuclear plant.

During a subsequent inspection performed in this area in September 1993, and documented in Inspection Report No. 50-324,325/93-42, the NRC Staff concluded that individuals assigned to the facility for periods of less than 6 months, may not receive GET training. Therefore, these individuals may not receive training associated with BSEP QA process. It should be noted, however, that if these individuals perform any safety-related work, they do so under the auspices of an assigned escort and under the controls of either the Licensee's QA program or the contractor's QA program, as defined in the CP&L contract. The contractor's QA program is reviewed and approved by the Licensee and contains criteria as stringent as the Licensee's program. The Licensee has committed, in Brunswick Technical Specifications § 6.8, "Procedures and Programs," to NRC Regulatory Guide 1.33, "Quality Assurance Program Requirements (Operation)." This regulatory guide endorses the procedures in the American National Standards Institute (ANSI) Standard 3.2, "Administrative Controls and Quality

Assurance for the Operational Phase of Nuclear Power Plants.” The ANSI standard permits the performance of quality activities by contractors to be under either the Licensee’s QA program or a contractor’s program that is periodically audited by the licensee.

The NRC is fully aware of CP&L’s past failure to apply appropriate QA and quality control (QC) practices with regard to contractors. Previous failures in this area that were detected in early 1992 and documented in Inspection Report No. 50-324,325/92-12 resulted in the NRC taking significant enforcement action (severity level III violation with the imposition of a civil penalty of \$225,000 for inadequate seismic qualification of EDG building walls). However, during the extended shutdown of both units, CP&L has demonstrated improved control of work activities, including implementation of appropriate QA practices.

Based on completed inspections in this area and an assessment of the Licensee’s corrective actions taken in response to the identified inadequacies, the NRC Staff has concluded that the issues raised by the Petitioner have been satisfactorily addressed by the Licensee and do not pose a risk to the health and safety of the public.

E. Breakdown in the Preventive Maintenance Program

The Petitioner asserts that there has been a breakdown in the plant’s preventive maintenance program.

A breakdown in the site preventive maintenance program had been identified in NRC Inspection Reports Nos. 50-325,324/92-19 and 92-21, and by the Licensee in its Nuclear Assessment Department (NAD) Report No. B-SA-92-05. The resident inspectors identified that preventive maintenance task items (PMs) were performed at approximately 180 different frequencies, which made them difficult to track and manage. The inspectors determined that the Licensee was not always requiring a technical basis to defer PM performance. The inspectors also identified that the Licensee was unable to readily identify PM failure history, or in some cases, the last time the PM was successfully performed. NRC Inspection Report No. 50-325,324/92-12 identified additional concerns that were the result of poor PM practices (i.e., corroded bolts, instrument racks, and cable trays, as well as other deferred maintenance issues).

The Licensee has initiated several efforts to address weaknesses in the PM program. The number of different schedular frequencies has been reduced from 180 to 25; thereby simplifying preventive maintenance tracking. The Licensee now requires a technical basis for all deferred PMs. CP&L is also evaluating PMs for consolidation and assignment of technically appropriate intervals to further improve program management.

Prior to the startup of BSEP, Unit 2, all outstanding Unit 2 PMs were analyzed by an independent third party, Failure Prevention Incorporated, under contract

with CP&L. The NRC evaluated those PMs that were deferred, and determined that none would affect the safe operation of Unit 2. The Unit 1 PM backlog is scheduled to be completed prior to restart, with the goal that no PMs will be deferred.

The Licensee has placed a high priority on improving the preventive maintenance program and has included it in the Brunswick Three-Year Plan that the NRC Staff has reviewed and found satisfactory. The development of a reliability-centered maintenance program is also included in this initiative. Based on the required pre-startup corrective maintenance efforts, in conjunction with the current preventive maintenance program, the NRC Staff has concluded that the concerns have been adequately addressed by the Licensee, and no threat to the health and safety of the public exists from them. In addition to the reports addressed above, results of NRC preventive maintenance inspections are also documented in Inspection Report Nos. 50-325,324/93-01, 93-10, 93-11, 93-16, 93-17, 93-19, and 93-30.

III. CONCLUSION

The NRC Staff has reviewed each of the concerns raised by the Petitioner and noted that several of the concerns addressed in these allegations have been the subject of previous evaluations by the NRC. Therefore, the Petitioner's allegations have been partially substantiated. The NRC Staff has conducted a detailed evaluation of the areas encompassed by these concerns as part of the extensive inspection activities related to the decision to authorize the restart of BSEP, Unit 2.

While several of the Petitioner's concerns describe problems that have occurred at BSEP, the Licensee was previously aware of the problems and had already taken appropriate corrective actions. The NRC Staff has assessed each of the specific issues and found that the corrective actions were appropriate and responsive to the NRC requirements. The NRC Staff's review did not reveal any substantial health and safety issues that call into question the continued safe operation of BSEP, Unit 2, or the restart of BSEP, Unit 1. With regard to the alleged harassment and intimidation of employees who raise safety concerns, the NRC has reviewed each of the complaints filed by CP&L and contract employees since 1986. From its review of the details of the complaints, the NRC Staff did not find that a pattern of harassment and discrimination existed at BSEP or observe any chilling effect from those instances where the Licensee had taken specific personnel actions.

The institution of proceedings in response to a request pursuant to 10 C.F.R. § 2.206 is appropriate only when substantial health and safety issues have been raised. (*See Consolidated Edison Co. of New York (Indian Point, Units 1,*

2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984)). This standard has been applied to determine if any action is warranted in response to the petition. For the reasons stated above, no basis exists for taking any action in response to the petition. Accordingly, no action pursuant to section 2.206 is being taken in this matter.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland
this 14th day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket Nos. 50-352
50-353
50-322SHIPMENTS OF FUEL FROM
LONG ISLAND POWER AUTHORITY'S
SHOREHAM NUCLEAR POWER STATION
TO PHILADELPHIA ELECTRIC COMPANY'S
LIMERICK GENERATING STATION

December 23, 1993

The Director, Office of Nuclear Material Safety and Safeguards, denies a petition filed on behalf of the New Jersey Department of Environmental Protection and Energy requesting that the Nuclear Regulatory Commission (Commission): (1) amend Long Island Power Authority's (LIPA) license and approval of LIPA's decommissioning plan to specifically address the transfer and transport of LIPA's fuel to Philadelphia Electric Company (PECo); (2) perform an Environmental Assessment (EA) pursuant to 10 C.F.R. § 51.30, and determination based on the EA, pursuant to 10 C.F.R. § 51.31, regarding the proposed transfer and transport of the fuel by barge from LIPA to PECo, which addresses the risks associated with the shipment of the fuel along and through New Jersey's coastal zone; (3) perform a Consideration of Alternatives in accordance with Section 102(2)(E) of the National Environmental Policy Act (NEPA) and 40 C.F.R. § 1509.9(b) which addresses alternative means of transporting fuel from LIPA to PECo; and (4) immediately stay PECo's June 23, 1993 license amendments, the Certificate of Compliance regarding the IF-300 issued to Pacific Nuclear Systems, and LIPA's license and general license to transfer the fuel pursuant to 10 C.F.R. § 71.12 pending completion of the above actions and compliance with the consistency process under the Coastal Zone Management Act (CZMA). The Petitioner further requested that

the Commission take immediate action to halt ongoing shipments of fuel from LIPA's Shoreham Nuclear Power Station to PECO's Limerick Generating Station pending consideration of the merits of the petition. As basis for the requests, the Petitioner asserts that: (1) the NRC failed to consider alternatives under NEPA for the proposed action; (2) the NRC failed to perform an EA for the transfer and barge transport of LIPA's fuel; (3) the NRC's EA for PECO's license amendments was inadequate; (4) the NRC violated NEPA by segmenting the approval of the transfer and transport by barge; (5) the NRC failed to require LIPA to obtain necessary approvals; and (6) the NRC violated the CZMA by failing to require necessary consistency reviews.

NATIONAL ENVIRONMENTAL POLICY ACT: FEDERAL ACTION

Under the existing regulatory scheme, a licensee's transport of nuclear fuel is by general license. No NRC approval of the specific route by which the Shoreham fuel is transported to Limerick is required. Because route selection is a private decision not requiring federal approval, no route-specific NEPA analysis is necessary. The Commission has held that where a licensee can act without NRC approval, there is no federal action requiring an environmental review under NEPA.

NATIONAL ENVIRONMENTAL POLICY ACT: GENERIC ISSUES

Generic NRC resolution of environmental issues — and the consequent preclusion of case-specific reviews — is fully lawful.

NATIONAL ENVIRONMENTAL POLICY ACT: GENERIC ISSUES

The S-4 Table, 10 C.F.R. § 51.52, specifically provides that it applies when "irradiated fuel is shipped from the reactor by truck, rail, *or barge*" (emphasis added). The provisions of the Table encompass the environmental impacts of the shipment of fuel from one reactor to another regardless of whether those impacts are being contemplated as part of NRC action concerning the reactor receiving the fuel or the reactor from which the fuel is being shipped.

NATIONAL ENVIRONMENTAL POLICY ACT: CONSIDERATION OF ALTERNATIVES

Because the shipment of fuel falls within the "envelope" of environmental consequences that have already been analyzed (and found nil) either generically or in the original impact statements for the specific plants at issue here, NEPA

does not require any further evaluation of alternatives. Thus, no NRC analysis of other potential routes or means for transporting the Shoreham fuel to Limerick is required.

GENERAL LICENSE TO TRANSPORT LICENSED MATERIAL

A general license to transport licensed material is conferred under 10 C.F.R. § 71.12 to any licensee of the Commission, as long as certain provisions are met, provided the licensee obtains approval of the package under other provisions of Part 71.

NATIONAL ENVIRONMENTAL POLICY ACT: FEDERAL ACTION

Since the transfer of the fuel from LIPA to PECO is expressly authorized by 10 C.F.R. § 70.42, which provides that any licensee may transfer nuclear material to an individual authorized to receive such material under terms of a specific or general license issued by the Commission, LIPA is not required to obtain NRC approval to transfer the fuel to PECO.

COASTAL ZONE MANAGEMENT ACT

The main purpose of the Coastal Zone Management Act is to encourage and assist states in preparing and implementing management programs to preserve, protect, develop, and restore the resources of the coastal zone of the United States.

COASTAL ZONE MANAGEMENT ACT

Where a state has an approved program, the Coastal Zone Management Act provides for submission of a consistency certification to obtain a "required Federal license or permit."

COASTAL ZONE MANAGEMENT ACT

The NRC did not issue any license or permit for LIPA's selection of a coastal route. Route selection, except in circumstances not applicable here, is a decision made by a private entity. It is not an activity for which LIPA or PECO applied for a "required Federal license or permit." 16 U.S.C.A. § 1456(c)(3)(A) (Supp. 1993) Because the NRC does not regulate the route selection, no NRC action fell within the Coastal Zone Management Act.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On October 8, 1993, Mr. Fred DeVesa, Esq., Acting Attorney General of New Jersey, filed a petition with the Commission, on behalf of the New Jersey Department of Environmental Protection and Energy (NJDEPE or Petitioner), requesting that the Commission take immediate action to halt ongoing shipments of fuel from Long Island Power Authority's (LIPA's) Shoreham Nuclear Power Station to Philadelphia Electric Company's (PECo's) Limerick Generating Station, pending consideration of the merits of the petition. Specifically, the petition requests that the Commission: (1) amend LIPA's license and approval of LIPA's decommissioning plan to specifically address the transfer and transport of LIPA's fuel to PECO; (2) perform an Environmental Assessment (EA), pursuant to 10 C.F.R. § 51.30, and determination based on the EA, pursuant to 10 C.F.R. § 51.31, regarding the proposed transfer and transport of the fuel by barge from LIPA to PECO, which addresses the risks associated with the shipment of the fuel along and through New Jersey's coastal zone; (3) perform a Consideration of Alternatives, in accordance with section 102(2)(E) of the National Environmental Policy Act (NEPA) and 40 C.F.R. § 1509.9(b), which addresses alternative means of transporting fuel from LIPA to PECO; and (4) immediately stay PECO's June 23, 1993 license amendments, the Certificate of Compliance regarding the IF-300 issued to Pacific Nuclear Systems, and LIPA's license and general license to transfer the fuel, pursuant to 10 C.F.R. § 71.12, pending completion of the above actions and compliance with the consistency process under the Coastal Zone Management Act (CZMA).

The Petitioner asserts, in support of these requests, that the U.S. Nuclear Regulatory Commission has violated NEPA, the CZMA, and the Atomic Energy Act (AEA) by allowing the transfer and transport of LIPA's fuel to proceed absent any consideration of the potential effects on New Jersey's coastal zone, any case-specific environmental impact analysis, or any consideration of alternatives to the means of transport. Specifically, the Petitioner asserts that: (1) the NRC failed to consider alternatives under NEPA for the proposed action; (2) the NRC failed to perform an EA for the transfer and barge transport of LIPA's fuel; (3) the NRC's EA for PECO's license amendments was inadequate; (4) the NRC violated NEPA by segmenting the approval of the transfer and transport by barge; (5) the NRC failed to require LIPA to obtain necessary approvals; and (6) the NRC violated the CZMA by failing to require necessary consistency reviews.

By letter to Mr. DeVesa dated October 22, 1993, I acknowledged receipt of the petition and informed the Petitioner that the request that the Commission

take immediate action to halt ongoing shipments of fuel from Shoreham Nuclear Power Station to PECO's Limerick Generating Station is denied. I indicated in that letter that the Petitioner made no showing that there is any reason to believe that the shipments pose an immediate or substantial danger to public health and safety, and that the Commission has concluded on several occasions that its regulations for certifying shipping packages for radioactive material (10 C.F.R. Part 71) are adequate to protect the public against unreasonable risk in the transport of these materials. The shipping package used to transport the Shoreham fuel, the IF-300, has been properly certified as meeting the Commission's standards.

In addition, I noted that the IF-300 shipping package was certified for highly irradiated spent fuel up to 35,000 megawatt days per metric ton (MWD/MTU); the Shoreham fuel, by comparison, has a low degree of irradiation of 87 MWD/MTU (less than 1% of the value for which the package is certified).

Review of this denial was raised with the Commission by the Petitioner in its letter of November 5, 1993. In a letter of November 18, 1993, responding to Petitioner's request, the Commission stated that after its consideration of the reasons for my denial of the immediate action, it found no reason to disturb my conclusion that the shipments pose no immediate or substantial danger to the public health or safety.

In the acknowledgment letter of October 22, 1993, I also informed the Petitioner that the Commission would respond to the alternative request that the Petitioner be granted late intervention and a hearing on PECO's license amendment allowing it to receive and possess Shoreham's fuel, and asserting that the Commission erred in not offering intervention and a hearing on LIPA's transfer and transportation of Shoreham fuel. By Memorandum and Order dated December 3, 1993, the Commission denied Petitioner's petition for leave to intervene and request for an adjudicatory hearing, noting that there are no "proceedings" in which the Petitioner may intervene or be provided a hearing and that, even if there were such a proceeding, the Petitioner has failed to satisfy the Commission rules governing intervention in hearings or reopening of proceedings.¹ I furthermore indicated that the remainder of the petition had been referred to me pursuant to 10 C.F.R. § 2.206 of the Commission's regulations and that the NRC would take appropriate action, within a reasonable time, regarding the concerns raised in the petition.

I have decided not to take any action under section 2.206. Petitioner has offered no technical or other factual information calling into question the safety of the fuel shipments. Petitioner principally raises legal or policy arguments, which are unpersuasive for the reasons discussed below.

¹ *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289 (1993).

My Decision in this matter follows.²

II. BACKGROUND

The Shoreham Nuclear Power Station in Wading River, New York, is being decommissioned pursuant to the NRC's Order Approving Decommissioning Plan and Authorizing Decommissioning of the Facility of June 11, 1992. The Shoreham facility has never been commercially operated, although 30 hours of low-power testing were performed in 1987. As part of the decommissioning, the Long Island Power Authority — a corporate municipal instrumentality and political subdivision of the State of New York — is arranging for the removal of the slightly irradiated nuclear fuel used during the low-power testing.³ LIPA's status as an NRC licensee entitles it — under a general NRC license conferred by rule — to transport, or to deliver the fuel to a carrier for transport, in an NRC-certified shipping cask. 10 C.F.R. § 71.12(a).⁴

By February 1993, decommissioning had progressed to the point that the only remaining matter was the removal of the fuel at issue here. On March 1, 1993, LIPA entered into a Fuel Disposition Agreement with PECO and General Electric, pursuant to which PECO agreed to accept delivery of fuel from Shoreham, and therefore complete its decommissioning.

On June 23, 1993, the NRC amended PECO's Facility Operating License Nos. NPF-39 and NPF-85 for the Limerick Generating Station, a two-unit nuclear power reactor located near Pottstown, Pennsylvania. These amendments permit PECO to receive, possess, and use the slightly irradiated fuel originally intended for use at Shoreham Nuclear Power Station. Prior to issuing the amendments, the NRC evaluated the environmental impacts associated with the Limerick facility license amendments, pursuant to NEPA and the NRC's regulations requiring EAs. 10 C.F.R. § 51.21. In its (EA), dated May 11, 1993, the NRC concluded "that the proposed action will not have a significant effect on the quality of the human environment." 58 Fed. Reg. 29,010, 29,012 (May 16, 1993).

² Prior to seeking relief from the NRC, the Petitioner filed a lawsuit in Federal District Court in New Jersey seeking similar relief. The District Court dismissed the claims against the NRC on jurisdictional grounds and the U.S. Court of Appeals for the Third Circuit recently affirmed the dismissal. See *New Jersey v. Long Island Power Authority*, No. 93-4269 (D.N.J., Oct. 12, 1993), *aff'd*, No. 93-5613 (3rd Cir., Dec. 1, 1993.) Some of my description and analysis of the controversy is drawn from the government briefs filed in that lawsuit. The NRC Staff, while for convenience adopting useful material from the government's court briefs, has re-examined the issues itself and reaches the conclusions discussed below. Cf. *Career Education, Inc. v. Department of Education*, 6 F.3d 817, 820 (D.C. Cir. 1993).

³ This fuel is considered "special nuclear material" under the AEA and NRC regulations because it contains uranium that is enriched in the U-235 isotope. See 42 U.S.C. § 2014(aa); 10 C.F.R. § 50.2.

⁴ That section provides: "A general license is hereby issued to any licensee of the Commission to transport, or to deliver to a carrier for transport, licensed material in a package for which a license, certificate of compliance, or other approval has been issued by the NRC."

On or about July 7, 1993, LIPA submitted to the Coast Guard an "Operations Plan for Marine Transportation of Fuel Shipment from Shoreham, New York to Eddystone, Pennsylvania" (Operations Plan). The Operations Plan details a plan for the transportation of fuel by barge from the Shoreham facility to the Eddystone Power Station located on the Delaware River, in Eddystone, Pennsylvania. The captain of the Port for Long Island Sound responded to this submission in a letter dated July 27, 1993.

The planned barge route for the shipments is around the tip of Long Island, south through the Atlantic Ocean, 15 miles off the New Jersey coast, around Cape May, and through New Jersey State waters in the Delaware Bay and up the Delaware River, docking in Eddystone, Pennsylvania. The slightly irradiated fuel is being shipped in thirty-three separate shipments over a period of approximately 8 months, beginning on September 25, 1993. The nuclear fuel is then shipped by rail from Eddystone to the Limerick facility. As of December 13, 1993, seventeen shipments have arrived at Limerick.

The fuel is being transported in an NRC-approved cask certified pursuant to 10 C.F.R. Part 71. On August 19, 1993, the NRC issued an amendment to the certificate of compliance for radioactive materials packages to nonparty Pacific Nuclear Systems for its "IF-300" shipping cask.⁵ The Shoreham fuel is being shipped in the IF-300 cask, which is authorized for fuel that has experienced reactor burnup of 35,000 MWD/MTU even though the fuel to be shipped from Shoreham has a reactor burnup of only 87 MWD/MTU of uranium (i.e., less than 1% of the value for which the cask is approved). Similarly, the cask being used for shipment of the Shoreham fuel is authorized for fuel having a total decay heat of up to 11,720 watts per cask. The fuel involved in this shipment has a decay heat of approximately 34 watts per cask. In short, the casks are designed to contain safely material of over 100 times the radioactivity of the fuel being shipped from Shoreham.

On or about August 9, 1993, LIPA submitted an "Application for a Certificate of Handling" (a "COH") to the State of New Jersey, consistent with N.J.A.C. § 7:28-12, which prohibits the transport of certain radioactive materials into or through New Jersey without first obtaining a COH issued by New Jersey.

New Jersey sent a letter dated September 15, 1993, to the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce demanding a CZMA consistency review of the Coast Guard's response to LIPA's Operations Plan. NOAA responded by requesting comments and the position of the Coast Guard and LIPA. On September 28, 1993, New Jersey submitted its reply to NOAA in response to LIPA's and the Coast Guard's positions. After consideration of the positions submitted on October 1, 1993, NOAA concluded

⁵The IF-300 cask design was first approved about 20 years ago, but required modification of the support structure within the cask to accommodate the shipment of 17 Shoreham fuel assemblies.

that the shipments by LIPA do not involve the issuance of a federal license or permit by the Coast Guard as defined in the CZMA and, therefore, the shipments are not subject to consistency review.

III. DISCUSSION

A. Applicable Law and Regulations

Petitioner's NEPA claims address two distinct bodies of law: substantive standards established under the AEA and federal transportation safety statutes that govern the transportation of reactor fuel; and procedural requirements imposed by NEPA that govern the manner in which agencies take account of the environmental effects of proposed actions.

1. *Federal Regulation of the Transportation of Radioactive Materials*

The federal government regulates the transport of radioactive materials under standards devised and administered by the NRC and by the U.S. Department of Transportation (DOT). A 1979 Memorandum of Understanding (MOU) between the NRC and the DOT, adopted to promote "consistent and comprehensive regulations and requirements for the safe transportation of radioactive materials," delineates these agencies' respective roles.⁶ The agreement gives the NRC, acting under the authority of the AEA and other statutes, a narrower role than the DOT. The NRC, in consultation with the DOT, is charged with "develop[ing] safety standards for design and performance of packages: for certain higher-level radioactive materials," including nuclear reactor fuel. 44 Fed. Reg. at 38,690.⁷ The DOT, acting under authority of the Hazardous Materials Transportation Act (HMTA) (49 U.S.C. § 1801 *et seq.*)⁸ is responsible for developing, in consultation with the NRC, standards for classifying and labeling radioactive materials, packaging certain low-level radioactive materials, and handling containers of radioactive materials during transport. In addition, the agreement assigns the DOT general responsibility for developing "all other

⁶ See "Memorandum of Understanding Between the U.S. DOT and the U.S. NRC for Regulation of Safety in the Transportation of Radioactive Materials," 44 Fed. Reg. 38,690 (1979); see also *Shipments of High-Level Nuclear Power Plant Waste Through and to Illinois*, DD-83-12, 18 NRC 713, 713-16 (1983) (elaborating on the division of responsibility between the NRC and DOT).

⁷ The NRC bears primary responsibility for packaging used to transport "fissile materials and for quantities of other radioactive materials (other than [low specific activity] materials) exceeding Type A limits." *Id.* The partially irradiated reactor fuel at issue here contains uranium-235. It therefore qualifies as a "fissile material" as that term is defined in the NRC packaging regulations. (See 10 C.F.R. § 71.4.)

⁸ HMTA empowers the Secretary of Transportation "to protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. § 1801.

safety requirements except those" specifically assigned to the NRC. 44 Fed. Reg. at 38,690.

Together, these regulations are designed to ensure safety in transporting radioactive materials through adequate containment of the radioactive material, adequate control of the radiation emitted by the material, and prevention of nuclear criticality (i.e., prevention of a nuclear chain reaction). Primary reliance for safety in transport of radioactive material is placed on the packaging. The NRC regulations establishing the requirements for packaging, preparation for shipment, and transportation of licensed material are set forth in 10 C.F.R. Part 71. The other parts of Title 10 that most directly pertain to radioactive material transportation are Parts 20, 70, and 73, which deal with "Standards for Protection Against Radiation," "Special Nuclear Material," and "Physical Protection of Plants and Materials."

Under the MOU, the NRC administers regulations for "Type B" radioactive materials packages. The Shoreham fuel is being transported in Type B packages. NRC approval for the package design requires a finding that the package can withstand the performance tests in Part 71 without releasing its contents, without emitting radiation in excess of strictly defined limits, and without occurrence of a nuclear chain reaction. *See* 10 C.F.R. Part 71, Subparts E and F.

NRC's Part 71 regulations provide a "general license" that authorizes any licensee of the Commission to transport or to deliver to a carrier for transport, licensed materials in approved packages. 10 C.F.R. § 71.12; *see also* 49 C.F.R. § 173.416. This general license may only be used by NRC licensees with programs in place to ensure compliance with NRC operating requirements. 10 C.F.R. § 71.12(b). The NRC issues "certificates of compliance" to designers of packages for transport of nuclear material that meet the NRC safety criteria in 10 C.F.R. Part 71.

Except in circumstances not applicable here, NRC regulations do not provide for review of the routes over which radioactive materials are to be transported.⁹ While the regulations augment packaging and operating requirements, in some limited situations, with rules limiting routes and modes of transportation,¹⁰ nothing in the regulations applicable to the type of nuclear material at issue here requires case-specific administrative review of transportation routes.

⁹ The NRC's Part 73 regulations, which prescribe measures for the protection of special nuclear material against theft and sabotage, require advance approval by the NRC of transportation routes for certain highly irradiated reactor fuel — defined as material capable of delivering an external radiation dose in excess of 100 rems per hour at a distance of 3 feet under unshielded conditions. 10 C.F.R. § 73.37(a)(1), (b)(7). The Shoreham fuel, which has an external radiation dose of less than 25 rems per hour at 3 feet unshielded, falls far short of this standard. Long Island Power Authority Security Plan for the Shipment of Fuel from the Shoreham Nuclear Power Station to the Limerick Generating Station, Rev. 1, June 15, 1993, at 5.

¹⁰ *See, e.g.*, 10 C.F.R. § 71.88 (NRC restrictions on air transport of plutonium).

2. *Evaluation of the Environmental Effects of Agency Actions Under NEPA*

Under section 102(2)(C) of NEPA, when a federal agency undertakes a “major federal action significantly affecting the quality of the human environment,” it must prepare an environmental analysis of that action. 42 U.S.C. § 4332(2)(C). The environmental analysis ensures that an agency has considered the potential environmental consequences before undertaking a major federal action; and it affords the public access to information on those consequences. *See Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); NEPA does not control the substantive choice that an agency makes once it has adequately examined potential environmental consequences.

In 1978, the Council on Environmental Quality (“CEQ”) established, by regulation, a general framework for federal agency compliance with NEPA. *See* 40 C.F.R. Part 1500. These regulations, which the courts have looked to for guidance in applying NEPA,¹¹ direct federal agencies to identify three categories of actions for NEPA purposes: Actions that normally do not require case-specific analysis; actions that normally require an EA to determine whether they will significantly affect the environment, but not necessarily a detailed “Environmental Impact Statement” (EIS); and actions that normally require an EIS. *See* 40 C.F.R. § 1507.3. Actions within the first class are said to be “categorically excluded” from NEPA provisions requiring detailed, case-specific environmental analysis.¹²

NRC has promulgated its own regulations implementing NEPA.¹³ *See* 10 C.F.R. Part 51. They include provisions for sorting NRC licensing and regulatory actions into the categories described by the CEQ. *See* 10 C.F.R. § 51.21.

B. Petitioner’s Claims

Petitioner’s NEPA claims are concerned with how NEPA might apply to a hypothetical barge-routing decision that, in Petitioner’s view, some federal regulators should make. But NEPA only requires analysis associated with an action the federal agency actually proposes to take that is “major” and that

¹¹ *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

¹² *See* 40 C.F.R. §§ 1507.3(b)(2)(ii), 1508.4; *see also Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990); *National Trust for Historic Preservation v. Dole*, 828 F.2d 776, 780 (D.C. Cir. 1987); *City of Alexandria v. Federal Highway Administration*, 756 F.2d 1014, 1018 (4th Cir. 1985).

¹³ The NRC does not consider itself bound by the CEQ regulations, but has committed “to take account” of them. 10 C.F.R. § 51.10(a); *see* Final Rule 49 Fed. Reg. 9352, 9359-60 (1984); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 725, 743 (3d Cir. 1989).

might significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The requirements of NEPA are triggered when there is a proposal for “major federal action.” Without such an “overt action,” the environmental analysis requirements do not come into play.¹⁴

Petitioner, apparently, would prefer that federal regulators promote transportation safety not only through general packaging and operating requirements, but also through case-by-case reviews of transportation routes, focusing on the comparative risks of alternative routes. The State’s complaint really lies not with the implementation of existing regulations, but with perceived deficiencies in the overall regulatory scheme.

Under the existing regulatory scheme, a licensee’s transport of nuclear fuel is by general license. No NRC approval of the specific route by which the Shoreham fuel is transported to Limerick is required. Because route selection is a private decision not requiring federal approval, no route-specific NEPA analysis is necessary. In *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207-08 (1990), the Commission held that where a licensee can act without NRC approval, there is no federal action requiring an environmental review under NEPA. In that case the challenged action was the decision not to operate the Shoreham facility. Here the action was the selection of a transport means and route of the fuel shipments from Shoreham. In either case there was no federal action triggering NEPA or requiring submission of a consistency certification under CZMA, and no basis to say that an AEA, NEPA, or CZMA review was necessary. See also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 70 (1991).

Petitioner is free to argue that existing regulations are inconsistent with authorizing statutes when seeking redress through appropriate means, such as a petition for rulemaking under 10 C.F.R. § 2.802(a) for changes to the NRC packaging and transportation regulations. Even if there were merit in the Petitioner’s asserted deficiencies in the current regulatory scheme, however, I am not empowered to alter it in response to a 10 C.F.R. § 2.206 petition. Moreover, Petitioner has not offered any safety reason to alter the terms or conditions of the NRC licenses authorizing the transfer and the transport of the Shoreham fuel. In order to obtain further NRC review of the Shoreham shipment, Petitioner advances a number of arguments that challenge the adequacy of the NRC’s environmental review of its transportation regulations in general and of the PECo amendment in particular. Each of those arguments is addressed below.

¹⁴ See *Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission*, 934 F.2d 327, 334 (D.C. Cir. 1991); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1245, 1246 (D.C. Cir. 1980).

1. Petitioner's Claim That the NRC Failed to Consider Alternatives Under NEPA

Petitioner claims that the NRC failed to comply with NEPA requirements because alternative means of transporting LIPA's fuel from Shoreham to Limerick were not analyzed. In Petitioner's view, the NRC was required to consider the mode and route by which the fuel is shipped in the EA of PECO's amendment permitting receipt and possession of the fuel.

The Staff's EA of PECO's amendment concluded that the receipt and use of Shoreham's fuel at the Limerick plant would have no significant environmental effects. This conclusion rested in part upon a finding that any impact from the transportation of fuel is within the bounds of Table S-4.¹⁵ The S-4 Table is premised upon a generic determination that the transport of nuclear fuel to and from power reactor sites would not cause significant environmental effects. Transportation of nuclear fuel was an anticipated necessary event in connection with licensing each nuclear reactor. Three basic safety requirements were established to ensure safety in transport: adequate containment of the material; adequate control of the radiation emitted by the materials; and prevention of nuclear criticality, i.e., that no nuclear chain reaction occurs. For irradiated fuel in transit, the means to satisfy the safety objectives lie primarily in the protection provided by an NRC-certified cask. *See generally*, 10 C.F.R. Part 71.

The original expectation was that unirradiated nuclear fuel would be brought in for initial operation of each reactor and for refueling, and that fully used irradiated spent fuel would be removed from the site for disposal. Comprehensive generic studies demonstrated that transportation in accordance with NRC requirements would be extremely safe. The environmental effect of transporting unirradiated nuclear fuel to the reactor and irradiated fuel in certified casks from the reactor was determined to be minimal. To avoid wasteful repetition of litigation in individual proceedings, the NRC established generic values for the environmental impacts of fuel transport in its S-4 Rule, 10 C.F.R. § 51.52.

Generic NRC resolution of environmental issues — and the consequent preclusion of case-specific reviews — is fully lawful. For example, the NRC evaluated generically the environmental impact of the fuel cycle in Table S-3. The Supreme Court upheld the NRC's "generic method" as "clearly . . . appropriate." *Baltimore Gas and Electric Co.*, 462 U.S. at 101. The Court pointed to the "[a]dministrative efficiency" and "consistency of decision" furthered by generic environmental review. *Id.*; *see also Ecology Action v. AEC*, 492 F.2d 998, 1002 (2d Cir. 1974).

¹⁵ *See* U.S. Atomic Energy Commission, WASH-1238, "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants" (1972); *see also* NUREG-0170, "Final Environmental Statement on the Transportation of Radioactive Material by Air and Other Modes" (1977).

The regulation implementing the S-4 Table provides that the transportation of fuel and radioactive wastes shall be considered in the environmental report prepared for the construction permit stage of a nuclear reactor. 10 C.F.R. § 51.52. That statement does not imply that the effects of transportation need not be considered later on, at the operating license stage or at the time of an amendment that requires an environmental review under NEPA.¹⁶ Likewise, the statement does not imply that the S-4 Table is not applicable at such times.

When, as in this case, a federal action requires analysis of environmental effects of transporting irradiated fuel, the NRC must consider whether the potential consequences are within the "envelope" of those that have already been evaluated. The analysis supporting the S-4 Table considered the environmental effects that would be expected over the operating life of a reactor. WASH-1238 at 3. The S-4 Table is the means to evaluate the impacts of particular fuel shipments that are made during operation of the plant. The "envelope" of environmental impacts therefore includes shipments of fuel that occur during operation of the plant. Indeed, for it to have any useful purpose, application of the Table cannot be limited to the construction permit phase of a reactor since no fuel shipments can be made until after construction is complete.

The analysis that formed the basis of the S-4 Table took into account shipments by barge. Accident probability was estimated on the basis of 310 million barge miles to be about 1.8 accidents per million miles. WASH-1238 at 68. An extreme accident was found to be so unlikely as to be incredible. *Id.* Overall, the probability of a barge accident was found to be lower than for truck or rail for each category of accident considered. *Id.* at 70. Moreover, the likelihood of cargo damage in the event of a barge accident was determined to be much lower than in the case of rail accidents. In sum, the potential consequences of a barge accident were thoroughly considered and found to be less than those of either a rail or truck accident. Petitioner's desire for more specific information does not provide any basis for concluding that the analysis was inadequate or that another environmental analysis is necessary.

The risk analysis in Table S-4 is applicable here despite the fact that fuel is only slightly irradiated and partially spent fuel, rather than fully spent fuel. Table S-4 is equally applicable to the shipment of fully irradiated spent fuel between reactors as to the shipment of such fuel from a reactor for waste disposal. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 793 (1985); *accord, Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544 (1986). The language of the S-4

¹⁶ At the operating licensing stage, each applicant is required to submit an environmental report specifically addressing the environmental effects of the transportation of fuel and waste to the extent that they differ from those considered in the final environmental impact statement prepared in connection with the construction permit. 10 C.F.R. § 51.53(a) and *see* 10 C.F.R. § 51.25 with regard to the Staff's need to prepare an EIS or EA.

Rule does not explicitly cover the transfer of the barely used fuel rods from Shoreham to Limerick simply because it was not originally anticipated that a reactor would be shipping out slightly irradiated fuel after low-power testing to another reactor. The fact that LIPA is shipping slightly irradiated fuel is a distinction that increases the conservatism of section 51.52 (*see* Table S-4) as to the level of safety and environmental impact of the transportation event. Thus, the circumstances of this shipment of irradiated fuel make it predictably much safer than the typical approved safe transport of irradiated fuel.

In short, this fuel shipment is well within the bounds of the shipments encompassed by the S-4 Rule and by the original EIS's for both Shoreham and Limerick. The fuel was in use for 3 days at power under 5%, in contrast to typically irradiated spent fuel that had supported full-power operation for 3 years. Due to the fact that the fuel had cooled down for several years, it is considerably safer, in the highly unlikely event of an accident, than if it had only been cooled for the minimum 90-day period authorized by the rule.

Because this shipment falls within the "envelope" of environmental consequences that have already been analyzed either generically or in the original impact statements for the specific plants at issue here, NEPA does not require any further evaluation of alternatives. Thus, no NRC analysis of other potential routes or means for transporting the Shoreham fuel to Limerick is required.

The decision by LIPA to transport the fuel by barge instead of rail or any other means does not impose any NEPA requirements on the NRC. NEPA requirements are triggered only by federal action. The determination of the route and mode by which the fuel is to be transported is within the purview of LIPA and PECO, not the federal government. Thus, the cases cited by Petitioner in support of its claim that alternative routes must be considered for the shipping of nuclear materials are inapposite. In both of those cases, a federal agency — the Department of Energy — directed the shipment of the materials. *See Sierra Club v. Watkins*, 808 F. Supp. 852 (D.D.C. 1991), and *Public Service Co. of Colorado v. Andrus*, 825 F. Supp. 1483 (D. Idaho 1993). The decisions regarding the routing and means of transporting nuclear materials were, therefore, federal actions requiring NEPA review. In this case, by contrast, those decisions were made by private parties.

2. *Petitioner's Claim That the NRC Failed to Perform an EA for the Transfer and Barge Transport of LIPA's Fuel*

Petitioner claims that the NRC should have performed an EA of the transfer and transport of the Shoreham fuel as part of the issuance of a general license to transport licensed material. A general license to transport licensed material is conferred under 10 C.F.R. § 71.12 to any licensee of the Commission, as long as certain provisions are met, provided the licensee obtains approval of

the package under other provisions of Part 71. The premise for Petitioner's claim is that because the general license issued pursuant to section 71.12 is not categorically excluded from NEPA review, its environmental impacts must be reviewed.

The NRC's NEPA review of the general license to transport fuel was performed generically in the Final Environmental Statement (FES) issued as part of a comprehensive review of the Commission's rules and procedures pertaining to transportation.¹⁷ That review was initiated by the NRC soon after its inception under the Energy Reorganization Act of 1974. The purpose of the NRC's generic evaluation was to consider the environmental impacts of all transportation of radioactive materials within the United States, specifically including all fuel cycle shipments. In addition, the FES provided technical data necessary for the NRC to reevaluate the existing rules governing transportation of radioactive materials. Thus, while the Petitioner is correct in asserting that LIPA's general license to transport fuel is not categorically excluded, an environmental review of that license has been performed.

LIPA's general license to transport fuel was not issued for the transport of fuel from Shoreham to Limerick. Rather, the general license is conferred by regulation for all shipments of nuclear fuel in NRC-certified casks. Under that license, LIPA is authorized to transport its nuclear fuel without obtaining NRC approval for each specific shipment.¹⁸ As stated by the Commission, "[a] general license . . . is granted by rule and may be used by anyone who meets the terms of the rule, 'without the filing of applications with the Commission or the issuance of licensing documents to particular persons' Thus . . . LIPA was not required to obtain an individual license or license amendment for transporting the Shoreham fuel to PECO." CLI-93-25, 38 NRC at 293-94. Because no NRC approval for this shipment was required, no case-specific NEPA review is necessary.

3. Petitioner's Claim That the NRC's EA for PECO's License Amendment Was Inadequate

Petitioner claims that the NRC's EA of PECO's amendments¹⁹ was inadequate because it relied on the S-4 Table. In Petitioner's view, the S-4 Table does not

¹⁷ See NUREG-0170, "Final Environmental Statement on the Transportation of Radioactive Material by Air and Other Modes" (December 1977). Preparation of the FES was directed as part of a reevaluation of the NRC's transportation regulations which was initiated as part of a rulemaking proceeding concerning air transportation of radioactive materials. 40 Fed. Reg. 23,768, 23,769.

¹⁸ Moreover, NRC approval of the route selected by LIPA to ship its nuclear fuel is not required. The NRC only requires case-specific review of the routing of shipments involving certain highly irradiated materials not present here. See 10 C.F.R. § 73.37(a)(1), (b)(7).

¹⁹ The amendments revised PECO's operating license to allow receipt and possession, but not to separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station. Under section 51.21, this action required an EA.

account for the environmental effects of barge shipments, in general, because it was not premised on data specific to barges or of the Shoreham shipment in particular. Petitioner also argues that the S-4 Table does not apply to PECO's amendment because it pertains only to transportation of fuel being removed from a reactor site for disposal.

The S-4 Table, 10 C.F.R. § 51.52, specifically provides that it applies when "irradiated fuel is shipped from the reactor by truck, rail, *or barge*" (emphasis added). The provisions of Table S-4 encompass the environmental impacts of the shipment of fuel from one reactor to another, regardless of whether those impacts are being contemplated as part of NRC action concerning the reactor receiving the fuel or the reactor from which the fuel is being shipped. *See Catawba*, ALAB-825, 22 NRC at 793; *accord, Shearon Harris*, ALAB-837, 23 NRC at 544.

The study that provided the data for Table S-4 analyzed the effects of transportation by barge. *See* discussion at pp. 377-78, *supra*. Because barge shipments were clearly contemplated in the development of the S-4 Table and in the implementing regulation, application of Table S-4 to the Shoreham shipment was proper.

Furthermore, the environmental effects of the Shoreham shipment are within the "envelope" of risks encompassed in the S-4 Table. The factors that affect risk were considered in the EIS and are incorporated into the provisions of the rule.²⁰ For example, the environmental survey that supported the S-4 Rule estimated the likelihood that a loaded cask would be involved in an accident when transported *by barge* as only once in 170 reactor years. In contrast, the likelihood of an accident when transported by truck was estimated as once in 20 reactor years. WASH-1238 at 45. Even in the event of an accident, the probability of a release of radiation was found to be so small as to be practically incredible. *Id.* at 47.

4. *Petitioner's Claim That the NRC Violated NEPA by Segmenting the Approval of the Transfer and Transport by Barge*

Petitioner's claim that the NRC improperly segmented approval of the Shoreham shipment route fails because it is based on a false premise — that LIPA's

²⁰ Petitioner relies on *Limerick Ecology Action*, *supra* note 13, to argue that transportation of fuel and wastes cannot be treated generally. In *Limerick*, the Court invalidated an NRC generic policy statement that precluded consideration of severe-accident-mitigation design alternatives in individual licensing proceedings. The Court found that precluding consideration of such a matter must be premised on a judgment that the issue could not affect the ultimate decision, i.e., whether to license the plant. 869 F.2d at 737. Because the NRC had not made that judgment, the Court found that precluding the matter from consideration was an abuse of discretion. *Id.* at 738. In this case, by contrast, the NRC has determined that transporting fuel and waste in NRC-certified containers will, in all likelihood, have no significant environment impacts regardless of the mode of transport. Where impacts may differ from site to site but never rise to the level of a significant impact at any site, generic NEPA consideration is appropriate.

decision to ship the fuel by barge along the New Jersey coast is subject to NRC approval. As discussed above, LIPA is authorized to transport fuel under a general license as long as it uses NRC-approved casks. Except in a very limited number of circumstances, not applicable here, NRC approval of specific shipments is not required. Because there is no federal action associated with LIPA's decisions in this matter, no NEPA requirements are triggered. Thus, the simple answer to Petitioner's claim is that NRC approval is not being segmented because NRC approval is not necessary.²¹

5. *Petitioner's Claim That the NRC Failed to Require LIPA to Obtain Necessary Approvals*

Once again, Petitioner argues that the NRC should have required LIPA to obtain approval of the decision to ship the fuel by barge along the New Jersey coast. According to the Petitioner, although LIPA is permitted to transport fuel under its general license, LIPA must obtain NRC approval to *transfer* the fuel to PECO. Petitioner concludes that the NRC must perform an environmental analysis before approving the transfer, presumably to consider alternative means of transporting the fuel.

NRC regulations, however, do not require such approval. Transfer of the fuel from LIPA to PECO is expressly authorized by 10 C.F.R. § 70.42, which provides that any licensee may transfer nuclear material to an individual authorized to receive such material under terms of a specific or general license issued by the Commission. LIPA's authority to transfer the Shoreham fuel to PECO under that general license was explicitly acknowledged by the Commission in CLI-93-25, 38 NRC at 294 n.3. Because NRC regulations authorize both the transfer and the transport of nuclear materials by licensees in general, specific approval of individual shipments is not required. *Id.* at 294.

The environmental impacts of transporting radioactive materials were considered by the NRC in conjunction with the issuance of the Shoreham operating license²² and the generic evaluation of NRC transportation regulations. Thus, the environmental implications of these shipments have been fully considered by the NRC. This is true even when the shipment is transported in order to effectuate the "transfer" of fuel from one plant to another.

²¹ Because no federal action approving LIPA's decision to transport fuel by barge is necessary, this case is distinguishable from *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231 (1980). In that case, the Court expressed the concern that segmentation could delay the preparation of an impact statement required by federal action until after the status quo had been changed to an extent that the view of the agency would be distorted. *Id.* at 240.

²² See "Final Environmental Statement Related to Operation of Shoreham Nuclear Power Station," September 1972, at 5.3.

6. *Petitioner's Claim That the NRC Violated the Coastal Zone Management Act by Failing to Require Consistency Reviews*

The main purpose of the CZMA is to encourage and assist states in preparing and implementing management programs to preserve, protect, develop, and restore the resources of the coastal zone of the United States.²³ Accordingly, the CZMA grants to states the opportunity to develop coastal management programs in order to coordinate not only state and local planning, management, and development activities, but federal activities as well.

Most significantly for the claims of the instant petition, where a state has an approved program, the CZMA provides for submission of a consistency certification to obtain a required federal license or permit.²⁴

After final approval by the Secretary of a state's management program, any applicant for a *required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state* shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed

16 U.S.C.A. § 1456(c)(3)(A) (Supp. 1993) (emphasis added).

Part 930 of 15 C.F.R. sets forth the regulations governing consistency determinations.

The Petitioner points out that the regulations (15 C.F.R. § 930.53(b)) require that states develop a list of federal license and permit activities that are likely to affect the coastal zone. Consistent with this requirement, the State of New Jersey developed a list that included NRC "[p]ermits and licenses required for the construction and operation of nuclear facilities under the Atomic Energy Act of 1954, Sections 6, 7, 8 and 10."²⁵ Based on this listing, the Petitioner claims that the NRC should have obtained consistency certifications.²⁶

²³ See S. Rep. No. 753, 92nd Cong., 2d Sess. 1 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4776.

²⁴ New Jersey's Coastal Management Program was approved in September 1980.

²⁵ New Jersey Coastal Management Program (August 1980), at 248.

²⁶ A consistency certification is required to be submitted to the licensing agency with respect to an application for a federally licensed activity affecting the coastal zone. Section 930.57 of 15 C.F.R. provides in part:

Consistency certifications

(a) When satisfied that the proposed activity meets the Federal consistency requirements of this subpart, all applicants for Federal licenses or permits subject to State agency review shall provide in the application to the Federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the State's approved management program. At the same time, the applicant shall furnish to the State agency a copy of the certification.

The flaw in the Petitioner's argument is that the activity it is concerned about is the coastal route that was selected by LIPA for the transportation of the Shoreham fuel. This route is not regulated by the NRC. No application was made for the coastal route. The NRC did not issue any license or permit for LIPA's selection of a coastal route. Route selection, except in circumstances not applicable here, is a decision made by a private entity. It is not an activity for which LIPA or PECO applied for a "required Federal license or permit." 16 U.S.C.A. § 1456(c)(3)(A) (Supp. 1993). Because the NRC does not regulate the route selection, no NRC action fell within the CZMA. Accordingly, Petitioner's claim is without merit.

IV. CONCLUSION

For the reasons discussed above, the Petitioner has provided no basis for its request to halt the ongoing shipments of fuel from LIPA's Shoreham Nuclear Power Station to PECO's Limerick Generating Station or the related requests concerning the adequacy of LIPA's decommissioning plan and the compliance of the NRC with NEPA, AEA, and CZMA. Furthermore, no basis exists for taking any action in response to the petition as no substantial health or safety issues have been raised by the petition. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). Accordingly, no action pursuant to section 2.206 is being taken in this matter.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 23d day of December 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket No. 50-271

VERMONT YANKEE NUCLEAR POWER
CORPORATION
(Vermont Yankee Nuclear Power
Station)

December 28, 1993

A petition, dated September 1, 1993, requested the Commission to reconsider the August 2, 1993 proposed civil penalty assessed against the Vermont Yankee Nuclear Power Corporation for operating the Vermont Yankee Nuclear Power Station outside Technical Specifications from October 15, 1992, until April 6, 1993. The petition requested reconsideration based upon four assertions regarding the actions of the Licensee and the NRC's response to these actions. The Director of the Office of Enforcement has considered all of the matters raised in the petition and has denied the petition.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206**I. INTRODUCTION**

On September 1, 1993, Messrs. Michael Daley and Jonathan M. Block filed a letter with the Executive Director for Operations of the U.S. Nuclear Regulatory Commission (NRC), on behalf of the New England Coalition on Nuclear Pollution (Petitioner). The letter requests, pursuant to 10 C.F.R. § 2.206, that the NRC reconsider the civil penalty assessed against the Vermont Yankee Nuclear Power Corporation (Licensee) for operating the Vermont Yankee Nuclear Power Station (VY) outside Technical Specifications (TS) from October 15, 1992 to April 6, 1993. The letter is being treated as a petition under the

NRC's regulations contained in section 2.206, and has been referred to me for a response. By letter dated October 12, 1993, this Office acknowledged receipt of the request for reconsideration and indicated that a response would be provided within a reasonable time.

II. BACKGROUND

In a letter dated August 2, 1993, Mr. T. Martin, the NRC Region I Regional Administrator, issued a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) (EA 93-112) in the amount of \$50,000 to the Licensee for three violations associated with the operation of VY in a condition prohibited by its TS. Specifically, contrary to TS 3.3.C.3, on October 15, 1992, the Licensee determined, as a result of a surveillance test, that the average scram time for the three fastest control rods in one two-by-two control rod array was 0.391 second (thus, greater than 0.379 second for the required drop-out from position No. 46). The reactor was not brought to hot shutdown, but continuously operated at power in this condition until April 6, 1993. Additionally, contrary to 10 C.F.R. Part 50 Appendix B, Criteria XI and XVI, upon occurrence of the unsatisfactory scram time on October 15, 1992, the Licensee failed to adequately evaluate the test results and failed to take adequate corrective actions for the one unsatisfactory scram time. Collectively, these violations were classified as a Severity Level III problem and a civil penalty equal to the base civil penalty of \$50,000 was proposed after offsetting mitigation for the Licensee's corrective actions with escalation for the Licensee's declining overall performance. In a letter dated August 24, 1993, the Licensee responded to the Notice and paid the civil penalty.

Briefly, the Petitioner requests reconsideration of the enforcement action based on the view that: (A) the seriousness of the event was greater than that determined by the NRC; (B) the Licensee failed to adequately respond to a number of questions posed by the NRC in the cover letter to the May 24, 1993 inspection report documenting the review of the issue; (C) the Licensee has consistently failed to heed and learn from the industry practices, which in this case involved industry and NRC guidance on the materials used in scram solenoid pilot valves; and (D) the NRC failed to effectively penalize the Licensee in relation to the income generated during the period the plant operated in violation of the TS.

III. DISCUSSION

A. Inadequate Assessment of the Seriousness of the Violations

To support the view that the seriousness of the events at issue was greater than that determined by the NRC, the petition cited an internal NRC memorandum

from M.W. Hodges to Ellis W. Merschoff, dated May 26, 1987, that discusses the potential consequences of slower-than-required control rod scram times. The 1987 memorandum, actually dated May 28, 1987, has been reviewed and the scenario compared with the VY case that is the subject of the enforcement action in question. The scenario cited in the 1987 memorandum involved 119 of 121 control rods experiencing scram insertion times of 12 to 16 seconds when the TS allowed a scram insertion time of no more than 7 seconds. The VY problem initially involved a small variation (0.012 second) from the time requirement for the initial 4.51% of control rod movement of a single control rod array. Additionally, despite this problem with the single array being unable to meet the insertion time for the first few percent of rod travel, all the control rods at VY were able to meet the time requirements for full insertion. Accordingly, the issue at VY is much less significant than the issue discussed in the memorandum (had the scenario discussed in the memorandum occurred during power operations). However, notwithstanding the low potential safety consequences of the actual degradation at VY (the variation of 0.012 second from the TS requirement for a single control rod array from a single position is not by itself significant), as noted in the NRC's August 2, 1993 letter, that violation, in combination with the failure to recognize the underlying condition as a TS violation and the failure to correct the violation, raises the overall significance of this occurrence. Hence, the NRC classified the combined problem at Severity Level III and issued the Civil Penalty.

With regard to the failure to recognize and correct the TS violation, the Petitioner also argues that the NRC improperly assessed those situations when determining the severity level of the issue. The Petitioner states that the Licensee did not shut down VY, did not report the situation to the NRC, and then, when "more controls rods were slow" in April of 1993, requested that the NRC exercise enforcement discretion rather than require the plant to comply with its license requirements and shut down. The Petitioner has accurately characterized the Licensee's initial response to the discovery of the scram insertion time problem in this case. The question that needed to be answered to assess the proper severity level, however, was whether the Licensee knew at the time of occurrence that the out-of-specification condition identified in October of 1992 was in fact in violation of the TS. Based on the inspection that was conducted and the discussions at the enforcement conference, the NRC concluded that the Licensee should have recognized that the test results violated the TS but failed to do so because Licensee personnel misunderstood the applicability of the TS to the testing of the individual control rod arrays and erroneously concluded at the time that no plant shutdown was required. Given the erroneous determination by the Licensee, a shutdown was not initiated and no report was made to the NRC.

The citations for the TS violation and the 10 C.F.R. Part 50, Appendix B, Criterion XI violation resulted from the Licensee's erroneous determinations. Subsequently, when the Licensee requested enforcement discretion, it was the NRC's questioning that prompted the Licensee to evaluate and determine the root cause of the degrading scram times. Thus, while it was the Licensee that identified the October 1992 problem, the NRC issued the 10 C.F.R. Part 50, Appendix B, Criterion XVI violation for inadequate corrective action, in part, because, in the NRC's view, prior to requesting enforcement discretion, the Licensee should have ascertained the root cause of the problem on its own initiative, which would have led to the earlier identification of the October 1992 TS violation.

As stated in section IV of the NRC Enforcement Policy (10 C.F.R. Part 2, Appendix C) "Severity Level I and II violations are of very significant regulatory concern. In general, violations that are included in these severity categories involve actual or high potential impact on the public." As discussed above, the actual impact of the violations in this case was minimal. Additionally, while the Licensee's continuing failure to recognize and correct the problem could have eventually had a potential high impact on the public in the event of an accident, that threshold had not been reached. As of April 1993, control rod drive performance had degraded only slightly more from what was required by the TS. Based on subsequent analysis performed by the Licensee, scram times were still well within the performance envelope necessary to protect the reactor. Nevertheless, collectively these violations represented a significant regulatory concern which resulted in the NRC classifying the problem at Severity Level III. Based on the overall significance of the violations, I believe that classification of the violations as a Severity Level III problem was appropriate and that an increase in the civil penalty based on increasing the severity level would not be proper in this case.

B. Failure to Adequately Respond to NRC Questions

The Petitioner's assertion that the Licensee had not answered questions 2-5 of the NRC's May 24, 1993 letter was based "on an examination of available materials VY submitted to the NRC." From that statement, it is unclear whether the Petitioner had the opportunity to read the Licensee's August 24, 1993 response to the Notice, which clearly addresses a number of the questions at issue. Specifically, question two, regarding the specific reasons VY was not shut down, and question three regarding the delay in taking corrective actions, are directly addressed in the Licensee's response. Question four, regarding the results of the Licensee's historical review, is indirectly answered when the Licensee, in part, responded to the corrective action violation by stating "Our subsequent root cause analysis has shown that our various testing and

plotting methodologies were flawed and produced historical trends that were of questionable value." This response indicates that the historical review suggested in the question "to determine if there were previous Technical Specification violations" could not meaningfully be done.

With regard to question five concerning the Licensee's design control process, the issue was discussed at the enforcement conference. A specific violation was not identified in this area and, therefore, a written response was not required. However, this subject relates to the Petitioner's third area of concern, the alleged failure of the Licensee to learn from the industry experience, practice, and guidance with regard to scram insertion times. That issue is addressed in Subsection C, below.

In summary, I find that the questions in the NRC's May 24, 1993 letter were adequately addressed, and I find no basis for reconsidering the civil penalty based on the Petitioner's concern in this area.

C. Failure to Properly Use Industry Information

In support of the assertion that the Licensee has failed to learn from the industry experience, the Petitioner indicates that, based on a search of NUDOCS (an NRC document storage and retrieval system), "VY apparently never read or implemented the legal requirements of IE 78-14 [sic], Deterioration of Buna-N Components in ASCO Solenoids (Dec. 19, 1978). . . ." With respect to this assertion, I would note: first, documents such as IE Bulletin 78-14 do not impose "legal requirements," other than, in most cases, the requirement to respond to the NRC's request for information; and second, that the Licensee responded to IE Bulletin 78-14 by letter dated February 5, 1979. Review of that response indicates that the Licensee adequately addressed the concerns of the Bulletin.

In support of its position, the Petitioner asks a series of questions:

- (1) How did VY manage to substitute a different manufacturer's component (Viton O-Rings) in the pilot solenoids without consulting GE, ASCO or the NRC?;
- (2) Why did the components fail after VY had found them to be environmentally qualified as safety-grade? and;
- (3) How did the on-site inspectors fail to notice any problem with scram insertion times during any routine surveillance conducted between October 1992 and April 1993?

As to the first question, the Licensee did not need the permission of any of those entities to change the materials in the solenoid pilot valves. Rather, the Licensee had to meet all 10 C.F.R. Part 50, Appendix B requirements and perform any analysis that might be required under 10 C.F.R. § 50.59. In order

to satisfactorily accomplish those tasks, consultations with ASCO and GE might have been appropriate, but such consultations were not required. NRC approval would only be required in this instance if an unreviewed safety question, as defined in section 50.59, were found to exist.

With regard to the second question, I would note that the meaning of the phrase "environmentally qualified as safety-grade" is unclear. The term "safety-grade" is not defined in the petition but is assumed to mean that the material or component must meet the requirements of Part 50, Appendix B. A component that is environmentally qualified is a component that meets the requirements of 10 C.F.R. § 50.49. However, not all environmentally qualified components are necessarily Part 50, Appendix B components or "safety-grade." In any event, I assume that the Petitioner's intent was to question how a certain type of component shown to be "safety-grade" could, on a generic basis, begin to fail in service?

It must be recognized that Part 50, Appendix B components have finite service lives that vary from component to component. In this case, the Licensee, at the time, did an inadequate job of accounting for the service life of certain components used in the scram solenoid pilot valves (SSPV) which resulted in questions regarding the deterioration of the components, apparently due to thermal degradation. That deterioration, in turn, contributed to the out-of-specification scram times and the issuance of the TS violation. The components in question, from the point of view of service life, were Buna-N diaphragms and not the Viton O-rings. All of the SSPVs were replaced or refurbished in April 1993, which resolved the questions concerning the service life of the particular materials that had been installed. With regard to the issue of whether the material problems were programmatic, further information indicates that changes in scram time testing methodology may have had a more significant effect upon recorded scram times than did age-related degradation of the Buna-N diaphragms. Nevertheless, additional evaluations of the design and manufacturing of the materials are being conducted by ASCO and General Electric, and will be followed up by NRC inspection.

In summary, the NRC acknowledges that the Licensee had a problem with components made of Buna-N material. However, the NRC does not agree that the existence of such a problem indicates that the Licensee had failed to learn from and assess industry information. Rather, the NRC found the Licensee to have had an adequate written program, which was inadequately implemented, and found that the Licensee had an inadequate test program, both of which resulted in the NRC taking enforcement action.

Based on the inspections performed, the NRC did not find the change to the Viton O-rings to be a contributor to this event or to be an issue that required immediate resolution. The Viton O-ring modification is an issue that might indicate weaknesses in the Licensee's design control process. The NRC

inspector was unable to close out that issue during the inspection because time only allowed him to specifically review the circumstances surrounding the control rod problem. The Viton O-ring issue will be pursued further in a future inspection, and enforcement action will be taken, if appropriate.

With regard to the final question, Region I personnel have advised that the onsite NRC resident inspectors did not notice any problem with any routine scram insertion time surveillance performed between October 1992 and April 1993. This test is one that is required to be performed relatively infrequently (every 4 to 8 months) on only 50% of the control rods at a time. The NRC resident inspectors observed only portions of the October 1992 test and did not (nor were they required to) review the final test data. Because of the required periodicity, the test was not performed again until April 1993.

In summary, the Licensee's actions with regard to industry experience and replacement of the SSPV material does not appear improper other than as described in the enforcement action (EA 93-112) and I find no basis to reconsider the civil penalty in this regard.

D. The Civil Penalty Did Not Effectively Penalize the Licensee

The Petitioner asserts that based on the net income generated during the time period VY was operated in violation of the TS, "a \$50,000 penalty is no penalty at all." Further, the Petitioner raises the question, "Given the large number of serious, unanswered questions in the investigation of this violation of safety rules, why is Mr. Martin able to mitigate the penalty in this case?"

Section 234 of the Atomic Energy Act of 1954 limits the maximum civil penalty the NRC can assess for each violation. As discussed in section VII.A of the NRC Enforcement Policy, civil penalties approaching the statutory limit are reserved for only the most significant violations. For other significant non-deliberate, nonrecurring violations, the NRC normally assesses civil penalties in accordance with sections VI.B.1 and 2 of the NRC Enforcement Policy. Civil penalties determined using this guidance rarely penalize reactor licensees at a level approaching the direct financial benefit derived by the licensee from operation of the plant during the time period of the violation(s). Rather, penalties that are assessed under the Enforcement Policy are normally set at a level which is judged to be sufficient to prompt the licensee to undertake timely and extensive corrective actions and to avoid similar violations in the future. Further, the assessment of any civil penalty can have longer-term effects such as influencing the size of future civil penalties and the NRC's appraisal of overall plant performance through the Systematic Assessment of Licensee Performance.

As established earlier, the NRC concluded that the Licensee should have recognized the problem but did not deliberately operate VY in violation of the TS. Therefore, the NRC assessed the civil penalty based on the normal

Enforcement Policy methodology, which does not attempt to penalize the Licensee with a civil penalty that is somehow tied to, or based on, the economic benefit that accrued to the Licensee from its operation of the plant in violation of the requirements.

With regard to the Petitioner's question about how the civil penalty could be mitigated given "the large number of serious, unanswered questions," I conclude that the discussions above have addressed those issues. While the Petitioner did not take issue with the specific bases for the application of the Enforcement Policy's civil penalty escalation and mitigation factors in this case, the Petitioner did take issue, in general, with this civil penalty. Therefore, a review of the application of the escalation and mitigation factors was performed. The mitigation of the civil penalty for corrective actions was found appropriate as was the offsetting escalation for Licensee performance.

The enforcement approach used in this case was consistent with established NRC enforcement practices and the Enforcement Policy and the questions posed by the Petitioner have been addressed. Therefore, I find no basis to reconsider the civil penalty in this case.

IV. CONCLUSION

In conclusion, I deny the petition because the Petitioner has failed to provide a valid basis upon which the civil penalty should be increased in this case. Denial of the petition in this case is consistent with section XIII of the Enforcement Policy which states that closed enforcement actions will normally only be reopened if significant new information is received.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by that regulation, the Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 28th day of December 1993.



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ADVANCED MEDICAL SYSTEMS, INC.

ENFORCEMENT ACTION; MEMORANDUM AND ORDER AFFIRMING IN PART AND REVERSING IN PART ATOMIC SAFETY AND LICENSING BOARD'S ORDER, AND REMANDING ISSUES; Docket No. 30-16055-CivP (Civil Penalty); CLI-93-22, 38 NRC 98 (1993)
ENFORCEMENT ACTION; ORDER; Docket No. 30-16055-CivP (Civil Penalty); CLI-93-24, 38 NRC 187 (1993)

ENFORCEMENT ACTION; MEMORANDUM AND ORDER; Docket No. 30-16055-CivP-R (ASLBP No. 93-682-01-CivP-R) (Civil Penalty); LBP-93-26, 38 NRC 329 (1993)

BALTIMORE GAS AND ELECTRIC COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 72-8, 50-317, 50-318; DD-93-14, 38 NRC 69 (1993)

BOSTON EDISON COMPANY

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Termination of Proceeding); Docket No. 50-293-OLA (ASLBP No. 93-678-03-OLA) (Facility Operating License No. DPR-35); LBP-93-19, 38 NRC 128 (1993)

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-293; DD-93-17, 38 NRC 264 (1993); DD-93-20, 38 NRC 351 (1993)

CAROLINA POWER AND LIGHT COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-324, 50-325; DD-93-21, 38 NRC 356 (1993)

CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 50-440-OLA-3; CLI-93-21, 38 NRC 87 (1993)

REQUEST FOR ACTION; SUPPLEMENTAL DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-440 (License No. NPF-58); DD-93-15, 38 NRC 159 (1993)

FIVE STAR PRODUCTS, INC. and CONSTRUCTION PRODUCTS RESEARCH, INC.

ENFORCEMENT ACTION; MEMORANDUM AND ORDER; OI Docket No. 1-93-027R; CLI-93-23, 38 NRC 169 (1993)

GEORGIA POWER COMPANY, et al.

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket Nos. 50-424-OLA-3, 50-425-OLA-3; CLI-93-16, 38 NRC 25 (1993)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Case Management); Docket Nos. 50-424-OLA-3, 50-425-OLA-3 (ASLBP No. 93-671-01-OLA-3) (Re: License Amendment; Transfer to Southern Nuclear); LBP-93-15, 38 NRC 20 (1993)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Discovery Motion); Docket Nos. 50-424-OLA-3, 50-425-OLA-3 (ASLBP No. 93-671-01-OLA-3) (Re: License Amendment; Transfer to Southern Nuclear); LBP-93-18, 38 NRC 121 (1993)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Georgia Power Motion to Reconsider Scope of Proceeding); Docket Nos. 50-424-OLA-3, 50-425-OLA-3 (ASLBP No. 93-671-01-OLA-3) (Re: License Amendment; Transfer to Southern Nuclear); LBP-93-21, 38 NRC 143 (1993)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Renewed Motion to Compel Staff Production of Documents); Docket Nos. 50-424-OLA-3, 50-425-OLA-3 (ASLBP No. 93-671-01-OLA-3) (Re: License Amendment; Transfer to Southern Nuclear); LBP-93-22, 38 NRC 189 (1993)

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- REQUEST FOR ACTION; MEMORANDUM AND ORDER; Docket Nos. 50-321, 50-366, 50-424, 50-425; CLI-93-15, 38 NRC 1 (1993)
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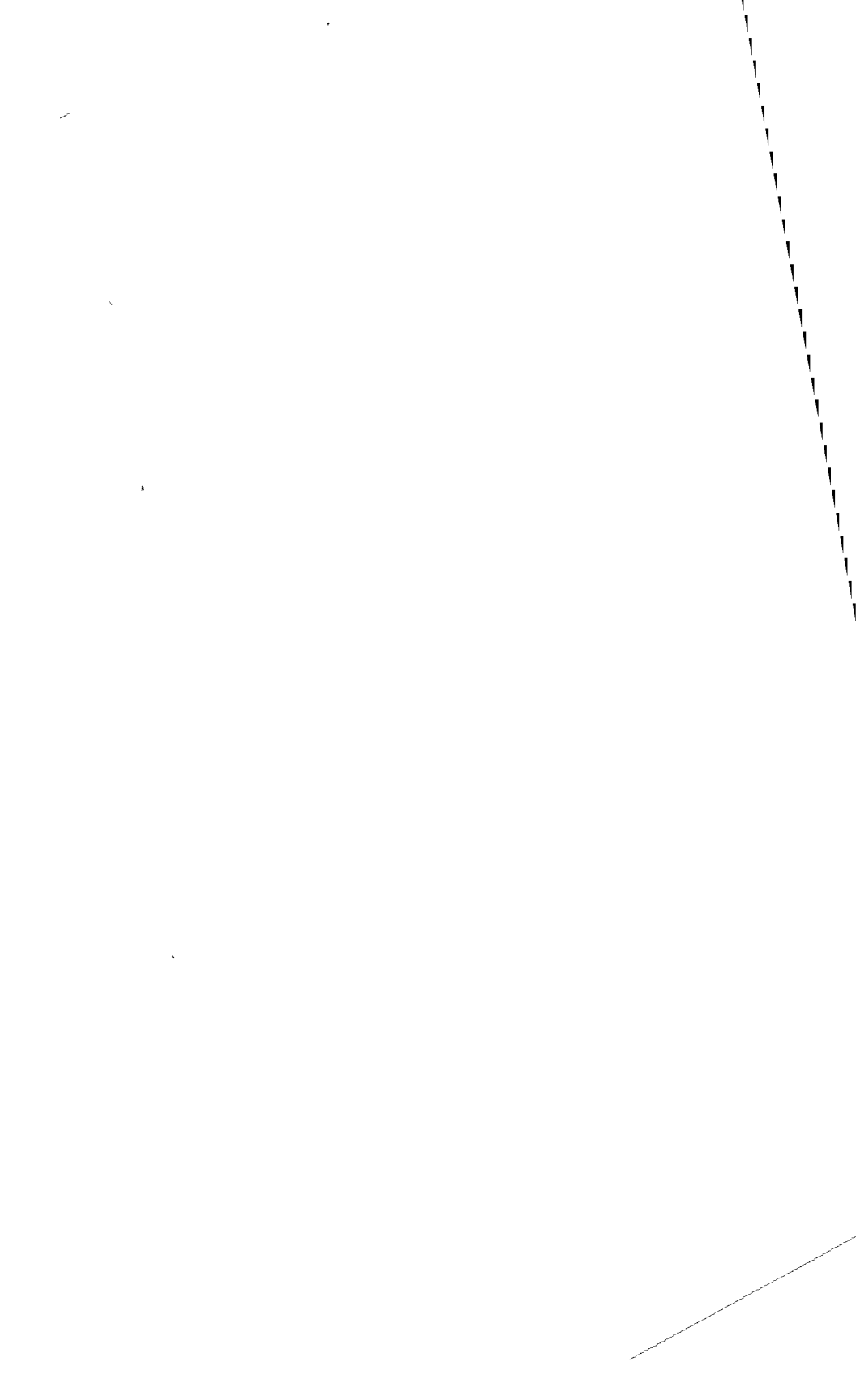
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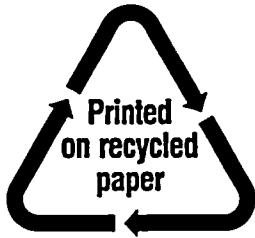
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