

**NUCLEAR REGULATORY COMMISSION  
ISSUANCES**

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

January 1, 2002 — June 30, 2002

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Prepared by the  
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## PREFACE

This is the fifty-fifth volume of issuances (1 – 363) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 2002, to June 30, 2002.

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

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

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

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

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

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

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

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket Nos. 50-336-LA  
50-423-LA**

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

**January 30, 2002**

The Commission denies a petition for reconsideration of a Commission Memorandum and Order finding the Petitioners' sole contention inadmissible.

**RULES OF PRACTICE: RECONSIDERATION PETITIONS**

Reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification. Petitions for reconsideration should not be used merely to re-argue matters that the Commission already has considered but rejected.

**REGULATIONS: INTERPRETATION (10 C.F.R. § 50.36)**

The test for whether a particular set of safety requirements needs to be retained in the technical specifications is not whether one can conceive of a hypothetical scenario of potential injury, no matter the likelihood of harm or degree of

relative significance. Instead, the Commission's policy is to reserve technical specifications for the *most significant* safety requirements.

## MEMORANDUM AND ORDER

The Commission has before it a petition filed by the Connecticut Coalition Against Millstone and the STAR ("Standing for Truth About Radiation") Foundation seeking reconsideration of the Commission's decision in CLI-01-24, 54 NRC 349 (2001). Both Dominion Nuclear Connecticut, Inc. ("DNC"), and the NRC Staff oppose the petition. We deny the petition.

As DNC correctly points out, "reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification."<sup>1</sup> See, e.g., *Central Electric Power Cooperative, Inc.* (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981); cf., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998). Petitions for reconsideration should not be used merely to "re-argue matters that the Commission already [has] considered" but rejected. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-24, 38 NRC 187, 188 (1993); see also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3-4 (1988); *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980).

Here, the Petitioners' reconsideration petition repeats the same claims the Commission rejected in CLI-01-24, which found their sole contention inadmissible. The Petitioners' argument is that the radiological effluent monitoring procedures at issue in this proceeding "are legally required to remain in Technical Specifications." See Petition for Reconsideration of CLI-01-24 (12/17/01) at 6. Exactly as before, the Petitioners claim that if these procedures are removed from the technical specifications, it is conceivable that: (1) a monitoring requirement might be changed; (2) "something" might "fail," as in "a relatively minor accidental or other failure of equipment"; (3) instrument surveillance may "somehow . . . become unduly lax"; and (4) this reduced surveillance may "fail to pick up a release." *Id.* Again, they rely upon a statement by the Licensee's counsel that such a scenario "could not be categorically discounted." *Id.* at 7.

Yet, as the Commission addressed in greater detail in CLI-01-24, simply because monitoring procedures ultimately bear upon safety does not mean

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<sup>1</sup>DNC's Response in Opposition to Connecticut Coalition Against Millstone and STAR Foundation Petition for Reconsideration of CLI-01-24 (Jan. 2, 2002) at 4.

that they must or should remain in technical specifications. It goes without saying that virtually all requirements involving the monitoring of instruments at nuclear power facilities have some connection to safety, but many such safety requirements can be followed and enforced adequately by means of licensee-controlled documents. The test for whether a particular set of safety requirements needs to be retained in the technical specifications is not whether one can conceive of a hypothetical scenario of potential injury, no matter the likelihood of harm or degree of relative significance. Instead, the Commission's policy is to reserve technical specifications for the *most significant* safety requirements. To that effect, applicable Commission regulations outline the types of safety items that must remain in the technical specifications. *See* 10 C.F.R. §§ 50.36, 50.36a.

In short, to argue that particular safety requirements are “legally required” to remain in technical specifications, it is not enough simply to allege that they bear some relation to safety; of course, by their very nature all “safety”-based requirements will. The Petitioners needed to show why the monitoring procedures for routine, low-level, radioactive effluent at issue in this proceeding fall among those most critical safety issues that ought to be retained in technical specifications. They must provide some basis for concluding that there is a significant likelihood — not just a theoretical possibility — that safety at Millstone will be adversely impacted if the procedures are not kept in the technical specifications. They never did so. Their petition for reconsideration now simply reiterates various earlier claims, ignoring the Commission's analysis and disposition of them. Indeed, the Petitioners even repeat misconceptions about these license amendments which the Commission highlighted and corrected in its decision. *See* CLI-01-24, 54 NRC at 355 & n.6, 364 (regarding “setpoints”).

The Petitioners also argue that the Commission's decision fails to “address Millstone realities,” including “Millstone's notoriety as a leading emitter of radionuclides into the environment.” *See* Petition at 8. They attach an unsigned and apparently incomplete statement by Dr. Christopher Busby, dated March 26, 2001. Dr. Busby believes that methods commonly used for calculating allowable radiological doses are incorrect, and that as a result, “reactors are licensed to release radioisotopes on the basis of erroneous models for radiation risk which significantly understate their true risk.” Dr. Busby's views, though, largely reflect a generic objection to commercial nuclear power and to the Commission's regulations on dose limits, issues beyond the scope of these license amendments. His views amount to an impermissible attack on our reactor safety regulations. *See* 10 C.F.R. § 2.758. While Dr. Busby claims that “Millstone is particularly dirty,” he provides no data indicating any current or ongoing problem with violations of effluent release limits at Millstone. Much of Dr. Busby's — and the Petitioners' — references to Millstone's “notoriety” appear based upon historical events from several years ago which have not been linked to Millstone's current

management or radiological effluent program, and therefore do not relate directly to these discrete license amendments.<sup>2</sup>

In sum, the Petitioners have not pointed to any factual or legal error in CLI-01-24. Accordingly, we deny their petition for reconsideration.

### CONCLUSION

For the reasons given in this Decision, the Petitioners' petition for reconsideration of CLI-01-24 is *denied*.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 30th day of January 2002.

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<sup>2</sup>In a footnote, the Petitioners also refer vaguely to the testimony of Mr. Clarence Reynolds, which took place in an unrelated state court proceeding on March 12, 2001. The Petitioners, however, did not provide the testimony, and the Commission has no basis to conclude that it has any relevance to the requested license amendments. Moreover, the testimony of Mr. Reynolds could have been raised or submitted at the time of the Petitioners' earlier appeal and therefore is untimely and inappropriate as a basis for reconsideration. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355 (1993).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 70-03098-ML**

**DUKE COGEMA STONE &  
WEBSTER  
(Savannah River Mixed Oxide Fuel  
Fabrication Facility)**

**January 30, 2002**

In this proceeding to authorize construction of a mixed oxide (“MOX”) fuel fabrication facility, the Commission denies the motion of Georgians Against Nuclear Energy to reconsider CLI-01-28, 54 NRC 393 (2001), which denied a petition to suspend the proceeding based on the terrorist attacks of September 11, 2001.

**RULES OF PRACTICE: RECONSIDERATION MOTIONS**

Reconsideration motions “are an opportunity to request correction of [an] error by refining an argument, or by pointing out a factual misapprehension or a controlling decision or law that was overlooked. New arguments are improper.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000) (affirming Licensing Board’s holding); *id.*, LBP-98-17, 48 NRC 69, 73-74 (1998). *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139-40 (1994). GANE has not demonstrated any factual or legal error in CLI-01-28 that warrants our reconsideration of the order.

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING;  
ABEYANCE OF PROCEEDING**

The proposed MOX facility would not actually accept any radioactive feedstocks until 2005. Thus, we face no immediate health and safety issue warranting a delay in proceedings.

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING;  
ABEYANCE OF PROCEEDING; TERRORISM**

**COMMISSION AUTHORITY**

The Commission has directed the NRC Staff to perform a comprehensive review of all aspects of our security requirements in light of the events of September 11, 2001. CLI-01-28, 54 NRC at 400. That review might lead to rules or policies affecting the proposed MOX facility. If it does, we have time enough to act. Under current NRC regulations, we have authority to require DCS to make any necessary modifications to the facility. *See* Atomic Energy Act of 1954, § 161b, 42 U.S.C. § 2201(b), and 10 C.F.R. §§ 2.202, 70.32(b), 70.76, and 70.81(a). The Commission will not hesitate to require licensees and applicants to change construction plans or operations when the health and safety of workers or the public are at stake.

**MEMORANDUM AND ORDER**

This case involves the application of Duke Cogema Stone & Webster (“DCS”) for authorization to construct a mixed oxide (“MOX”) fuel fabrication facility. On December 28, 2001, the Commission denied the petition of the Nuclear Control Institute and Intervenor, Georgians Against Nuclear Energy (“GANE”), to suspend this proceeding based on the terrorist attacks of September 11, 2001. *See* CLI-01-28, 54 NRC 393 (2001). We deny GANE’s motion for reconsideration of that order.

**I. BACKGROUND**

In our recent denial order, we recited the background for GANE’s petition to suspend. *See id.*, 54 NRC at 397-98. We also pointed out that we had instituted a full-scale review of our terrorism-related rules and policies. We concluded that “the pendency of that review does not call for a halt in licensing proceedings, particularly where (as here) the proceeding is at an early stage and no actual

licensing action is imminent.”<sup>1</sup> *Id.* at 397. On January 7, 2002, GANE filed its Motion for Reconsideration of CLI-01-28 (“Motion”). DCS and the NRC Staff filed responses opposing GANE’s motion.<sup>2</sup>

## II. DISCUSSION

Reconsideration motions “are an opportunity to request correction of [an] error by refining an argument, or by pointing out a factual misapprehension or a controlling decision or law that was overlooked. New arguments are improper.”<sup>3</sup> GANE offers four arguments in its Motion. None of them persuades us, under this standard, to reconsider our decision in CLI-01-28.

GANE first asserts that the Commission apparently overlooked the schedule for the MOX facility. Pointing to the NRC Staff’s projected September 30, 2002 date for its Safety Evaluation Report, GANE states that it is possible for construction of the MOX facility to begin in less than 9 months. GANE says that this possibility contradicts our statement that “there will be no construction or operation there for years, even assuming DCS gains the NRC’s approval of the license application.” *See* CLI-01-28, 54 NRC at 399. But GANE ignores the context of our statement, particularly the clarification of the contested language in the very next sentence: “DCS would not begin construction of the MOX facility until late in 2002 and will not even *file* its application for possession and use of special nuclear material until July 2002.” *Id.* at 399-400. The Commission is and was fully aware of the MOX schedule. Our point was that the proposed facility would not actually accept any radioactive feedstocks until 2005. Hence, we reasoned, we faced no immediate health and safety issue warranting a delay in proceedings. We adhere to that view today.<sup>4</sup>

Second, GANE suggests that our statement that the MOX proceeding will require resolution of many issues having nothing to do with terrorism is in error. *See id.* at 400. GANE attempts to connect almost every issue with terrorism because the construction authorization proceeding involves “basic questions

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<sup>1</sup>In two related decisions the same day, we denied similar petitions to suspend, dismiss, or hold in abeyance other proceedings as a result of the September 11 terrorist attacks in the United States. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376 (2001), and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385 (2001).

<sup>2</sup>*See* “NRC Staff’s Response to GANE’s Motion for Reconsideration of CLI-01-28” (Jan. 22, 2002); “Duke Cogema Stone & Webster’s Answer Opposing Georgians Against Nuclear Energy’s Motion for Reconsideration of CLI-01-28” (Jan. 17, 2002).

<sup>3</sup>*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000) (affirming Licensing Board’s holding); *id.*, LBP-98-17, 48 NRC 69, 73-74 (1998). *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139-40 (1994).

<sup>4</sup>As discussed below, the NRC will not hesitate to require changes to the construction plan where necessary to protect public health and safety. Thus, there is no reason to conclude, as GANE asserts, that such changes, if necessary, would be foreclosed.

about the physical design of the proposed MOX facility” and it is “difficult to imagine how issues relating to the adequacy of the plant’s design for protection against a terrorist attack can be separated from issues relating to the overall safety of the design.” Motion at 3. As a result, according to GANE, it will be inefficient to go ahead with the litigation. *Id.* at 4. We do not agree with GANE’s expansive view of the position terrorism considerations hold in this proceeding.

The Licensing Board did admit one contention, GANE contention 12, that focuses on terrorism — specifically, that DCS has failed in its environmental report to analyze the impacts of malevolent acts of terrorism and insider sabotage causing a beyond-design-basis accident. However, the Board also admitted contentions regarding the material control and accounting and physical security systems, seismic design, designation of the controlled area, safety analysis of accidents with bounding consequences, cost comparison with other alternatives, and the waste stream from the aqueous polishing step.<sup>5</sup> *See* LBP-01-35, 54 NRC 403 (2001). Although terrorism considerations may bear peripherally on some of these contentions, the gravamen of each has little or nothing to do with the threat of terrorism at the MOX fuel fabrication facility. The parties can litigate these contentions efficiently now.<sup>6</sup>

Third, claiming that the Commission may have lost sight of the paramount consideration of safety and security of the proposed MOX facility, GANE discounts the Commission’s responsibility to license and regulate nuclear facilities and materials in a timely and efficient manner. Says GANE, “[t]o allow construction and licensing of a facility that does not provide effective protection against a terrorist threat would not meet the ultimate goals of the MOX disposition program.” Motion at 6. As we noted in CLI-01-28, the Commission has directed the NRC Staff to perform a comprehensive review of all aspects of our security requirements in light of the events of September 11, 2001. CLI-01-28, 54 NRC at 400. That review might lead to rules or policies affecting the proposed MOX facility. If it does, we have time enough to act. Under current NRC regulations, we have authority to require DCS to make any necessary modifications to the facility.<sup>7</sup> The Commission will not hesitate to require licensees and applicants to change construction plans or operations when the health and safety of workers or the public are at stake. Accordingly, the Commission does not agree that its

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<sup>5</sup> In a motion for reconsideration before the Board, DCS challenged the Board’s admission of contention 12, as well as the contentions dealing with the controlled area boundary and with material control and accounting and physical security as principal systems. The Board recently denied DCS’s motion. *See* unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002).

<sup>6</sup> As we stated in CLI-01-28, our hearing rules contain sufficient flexibility to deal with any new developments that occur during the pendency of this proceeding. *See* CLI-01-28, 54 NRC at 400.

<sup>7</sup> *See* Atomic Energy Act of 1954, § 161b, 42 U.S.C. § 2201(b), and 10 C.F.R. §§ 2.202, 70.32(b), 70.76, and 70.81(a).

consideration of the application in this proceeding fails to adequately consider its health and safety mission.

Lastly, GANE reiterates its objection to the bifurcated licensing review of the MOX facility. The Board recently denied GANE's August 13, 2001 "Motion To Dismiss Licensing Proceeding, or, in the Alternative, Hold It in Abeyance," which challenged the validity and legality of the two-part review of applications for the MOX facility that we outlined in a notice of opportunity for hearing. *See* unpublished Memorandum and Order (Ruling on Motion to Dismiss) (Dec. 20, 2001); 66 Fed. Reg. 19,994 (Apr. 18, 2001). Review of this issue here is not appropriate. The Commission currently is separately considering whether to accept GANE's petition for interlocutory review on the two-part review question.

In summary, GANE has offered nothing in its refined or restated arguments that the Commission had not already considered when we issued CLI-01-28. Further, GANE has not demonstrated any factual or legal error in CLI-01-28 that warrants our reconsideration of the order.

### III. CONCLUSION

For the foregoing reasons, the Commission *denies* GANE's Motion for Reconsideration of CLI-01-28.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 30th day of January 2002.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Michael C. Farrar, Chairman**  
**Dr. Jerry R. Kline**  
**Dr. Peter S. Lam**

**In the Matter of**

**Docket No. 72-22-ISFSI**  
**(ASLBP No. 97-732-02-ISFSI)**

**PRIVATE FUEL STORAGE, L.L.C.**  
**(Independent Spent Fuel Storage**  
**Installation)**

**January 9, 2002**

In this 10 C.F.R. Part 72 licensing proceeding to construct and operate an independent spent fuel storage installation (ISFSI), Applicant Private Fuel Storage, L.L.C. (PFS) filed a motion for summary disposition of contention Utah L, Part B, "Geotechnical." The motion asserts that, with respect to an exemption request granted to PFS by the NRC Staff from the Commission's requirement to prepare a deterministic seismic hazard analysis, the State of Utah had presented no genuine dispute of material fact. In its ruling, the Board denies the Applicant's motion based on a dispute among experts that warrants further inquiry through the process of an evidentiary hearing.

**RULES OF PRACTICE: SUMMARY DISPOSITION (EXPERT  
OPINION)**

In a motion for summary judgment, even when there is agreement on baseline facts between the parties, disagreements among competing experts about opinions based on those facts also constitute "factual disputes" precluding summary action. Therefore, in ruling on such a motion, it is not appropriate "to untangle

the expert affidavits and decide ‘which experts are more correct.’” LBP-01-39, 54 NRC 497, 509-10 (2001).

**RULES OF PRACTICE: SUMMARY DISPOSITION**

An action for summary judgment will rarely be appropriate on complex issues; ruling summarily on complex matters with “ever-lurking issues of fact” can prove to be a “treacherous shortcut” that avoids what is clearly needed, “a plenary trial where the proof can be fully developed, questions answered, issues clearly focused and facts definitively found.” *In re Bloomfield Steamship Co.*, 298 F. Supp. 1239, 1241-42 (S.D.N.Y. 1969).

**RULES OF PRACTICE: BURDEN OF PROOF (SAFETY ISSUES)**

In the event that a seismic safety contention is admitted to a proceeding, any applicant must carry the burden of demonstrating that its proposed approach and design provides an appropriate level of protection against earthquakes. *See* CLI-01-12, 53 NRC 459, 472, *aff’g* LBP-01-3, 54 NRC 84 (2001).

**RULES OF PRACTICE: CONSIDERATION OF ISSUES (STAFF REVIEW)**

In licensing board proceedings on safety matters, all that is usually before the board is the adequacy of an applicant’s proposal; indeed, there is ample Commission precedent that board proceedings are not to examine the suitability of the Staff’s action in reviewing an applicant’s proposal and measuring it against Commission rules and regulations. *See, for example, Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121-22, *reconsideration denied*, CLI-95-8, 41 NRC 386, 395-96 (1995) (cited in LBP-01-3, 53 NRC 84, 97 (2001)).

**RULES OF PRACTICE: CONSIDERATION OF ISSUES (STAFF REVIEW)**

When the merits of an exemption request are the subject of a hearing, the Staff’s justification for the exemption becomes part of the controversy, and thus is subject to review in the evidentiary hearing.

**RULES OF PRACTICE: SUMMARY DISPOSITION**

Summary disposition is reserved for those cases where there is no genuine dispute over the basic and ultimate material facts, including those dependent upon

expert opinion. When the Board is in no position to say which of the experts' opinions will prevail, then notwithstanding the sincerity of each party's belief that its view is correct, their genuine disagreements on serious matters can only be resolved at hearing. LBP-01-39, 54 NRC at 509-12, 516, 523.

**RULES OF PRACTICE: SUMMARY DISPOSITION**

Whatever supporting reasoning may be required when a board grants summary disposition, thereby issuing the last word on an issue, far less will usually be in order when a board declines to take such action, particularly when the contention involves "complex factual/opinion disputes that patently can be resolved only in a hearing." LBP-01-39, 54 NRC at 510-11.

**RULES OF PRACTICE: SUMMARY DISPOSITION (EXPERT OPINION)**

The grant of an exemption from the usual rules to a first-of-a-kind facility is naturally expected to trigger a dispute among experts of the parties, making unlikely a successful motion for summary disposition.

**RULES OF PRACTICE: SUMMARY DISPOSITION**

The test in a summary disposition ruling is not whether a Board believes that an intervenor will prevail at the hearing. It is, rather, whether "the [intervenor's] experts have presented a serious, documented, response to the Applicant's claims, sufficiently plausible to create doubt about the outcome" (LBP-01-39, 54 NRC at 516), doubt of the type that under the applicable summary judgment principles can be resolved only at a hearing (*id.* at 510, 523).

**MEMORANDUM AND ORDER  
(Ruling on Applicant's Motion for Summary Disposition  
of Part B of "Contention Utah L, Geotechnical")**

By recently denying the motion of the Applicant, Private Fuel Storage, L.L.C. (PFS), for summary disposition of "Part A" of Contention Utah L, we allowed the intervenor State of Utah to continue to pursue a number of geotechnical concerns about the spent nuclear fuel storage facility that PFS proposes to build in Skull Valley, Utah, 50 miles southwest of Salt Lake City. LBP-01-39, 54 NRC 497 (2001). We now address another aspect of the geotechnical controversy. It

comes to us via the Applicant's motion for summary disposition of Contention Utah L's "Part B," which has just become ready for decision. *See id.* at 524.

In view of (1) our desire to provide the parties early notice of what will be involved in the upcoming April hearing, (2) the extent to which we expressed ourselves in LBP-01-39, and (3) the result we reach, we do not think it necessary to provide the type of detailed discussion set forth in LBP-01-39. The abbreviated reasons given below suffice to show why we must *deny the Applicant's motion*, thus sending the Part B issues to hearing with those in Part A.

## I. THE SETTING

In LBP-01-39, we provided background information about a number of subjects — the proposed facility, the earlier stages of this proceeding, and the nature of Part A of Contention Utah L. We discussed as well the related Contention Utah QQ, and admitted it into the proceeding.

We need not repeat that background here. All that need be said now about the Part A contention is that, with Utah QQ, it reflected the State's position that, for a number of reasons, the Applicant had not demonstrated that its proposed facility was adequately designed to protect against the risk of ground motion resulting from possible earthquakes.

As we noted in LBP-01-39 (*id.* at 500 n.6), Part B presents a related issue, albeit in somewhat different form. It was triggered when, in the course of pursuing its application, PFS sought and obtained from the NRC Staff an exemption from one part of the applicable regulations. As specifically authorized by the Commission itself (CLI-01-12, 53 NRC 459, *aff'g* LBP-01-3, 54 NRC 84 (2001)), the State has presented to us for resolution its challenge to the grant of that exemption, in the form of Part B of its geotechnical contention.

Thus, the difference between the way Part A and Part B of Contention L are framed might be stated as follows. Part A challenges the Applicant's efforts to show that its facility design generally *meets the requirements* of the NRC's rules and regulations regarding seismic risk. Part B challenges the Applicant's efforts to rely upon an *exemption from meeting* one part of those rules and regulations and to substitute another method for demonstrating that the potential seismic risk is being properly addressed.

After the parties conducted most of their discovery on the issue, the Applicant moved on November 9, 2001, for summary disposition in its favor, urging that there remains for Part B no genuine dispute of material fact. The Staff responded on December 7, defending its grant of the exemption and urging that the matter can be summarily resolved in the Applicant's favor.

The State too filed a response to the Applicant's motion on December 7. It later filed two more documents: (1) on December 17, a reply to the Staff's

position, and (2) on December 21, a supplement we had authorized following our November 21 resolution (unpublished) of a lingering discovery-related dispute. As might be expected, in all these pleadings the State argues that, because of ample dispute over material facts, it is entitled to proceed to a hearing on its challenge to the exemption, rather than to have it rejected summarily.

## II. THE LAW

We set out at some length in LBP-01-39 the legal principles guiding action on summary disposition motions. Most of those principles are based on the analogous rules governing summary judgment in federal courts. 54 NRC at 509-12. We need repeat here only that even where there is agreement on baseline facts, disagreements among competing experts about opinions based on those facts also constitute “factual disputes” precluding summary action. In that regard, we pointed to federal court precedent to the effect that it is not appropriate, in ruling on summary judgment, “to untangle the expert affidavits and decide ‘which experts are more correct.’” *Id.* at 509-10.

We would add only that an oft-quoted federal district court opinion expands on what we touched on in LBP-01-39 (*id.* at 510-11). We indicated there that summary judgment will rarely be appropriate on complex issues; the court added that ruling summarily on complex matters with “ever-lurking issues of fact” can prove to be a “treacherous shortcut” that avoids what is clearly needed, “a plenary trial where the proof can be fully developed, questions answered, issues clearly focused and facts definitively found.” *In re Bloomfield Steamship Co.*, 298 F. Supp. 1239, 1241-42 (S.D.N.Y. 1969).

## III. THE ARGUMENTS

Until recently, the Commission’s rules on seismic design required applicants for all facilities to perform a “deterministic” analysis. *See* 10 C.F.R. Part 100, Appendix A, made applicable to the proposed PFS facility by 10 C.F.R. § 72.102(b); *see also* 10 C.F.R. § 72.102(f)(1). Since 1997, however, the Commission’s rules have allowed applicants for early site permits for new nuclear power plants, and certain others, to perform a “probabilistic seismic hazard analysis.” 10 C.F.R. § 100.23(a), (d)(1). That change has not yet been adopted, however, for facilities of the type proposed here, although the Staff has proposed, and the Commission is considering, doing so in rulemaking plans which are under active consideration. *See* SECY-98-126 (June 4, 1998) and SECY-01-178 (Sept. 26, 2001).

Part of a probabilistic approach involves selection of the recurrence interval of the ground motion to be taken into account, which under the initial rulemaking plan cited above would have focused on either a 10,000 year return period or a less rigorous 1000 year return period, depending on the safety circumstances. For present purposes, we need not detail each party's reasoning in support of its position on this subject or trace the course and status of the rulemaking plans. Instead, we note only that, in seeking an exemption that would allow it to incorporate a probabilistic analysis, the Applicant initially sought to use a 1000 year period; for its part, the State urged that the 10,000 year period be employed. In granting the exemption, the NRC Staff settled on a 2000 year period.

In the final analysis, any applicant must carry the burden of demonstrating that its proposed approach and design provides an appropriate level of earthquake protection. So too here. *See* CLI-01-12, 53 NRC at 472. In that effort, PFS has provided considerable support for its position in its motion for summary disposition and accompanying documentation. Not surprisingly, the Staff, having granted the exemption, supports summary action granting the Applicant's motion and rejecting the State's challenge.

Some of the Staff's documentation touches on its regulatory approach in granting the exemption. Of course, in most Board proceedings on safety matters, all that is before us is the adequacy of the applicant's proposal (see preceding paragraph); indeed, there is ample Commission precedent that our proceedings are *not* to examine the suitability of the Staff's action in reviewing an applicant's proposal and measuring it against Commission rules and regulations. *See, for example, Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121-22, *reconsideration denied*, CLI-95-8, 41 NRC 386, 395-96 (1995), cited when we admitted this issue into the proceeding a year ago (LBP-01-3, 53 NRC 84, 97 (2001)).

Here, however, we are faced with an atypical matter which — with the Commission's explicit permission (CLI-01-12, 53 NRC at 472-73) — focuses squarely not only on the reasons for the Applicant's request for the exemption from the Commission's usual rules, but also on the somewhat different Staff justification for granting the exemption. Accordingly, the merit of the Staff's action is part of the controversy and is to be duly reviewed here.

In that regard, the Staff refers to its Safety Evaluation Report in defending the grant of the exemption, and argues that its action has removed any material dispute about the issue. The Staff stops short, however, of endorsing everything the Applicant now puts forward, and in fact takes some pains to indicate where it differs from the Applicant's appraisal of its case.

For its part, the State has put forward contrary opinion, and has done so in the way a party opposing summary rejection of its position is supposed to. That is, it set out in great detail wherein it differed with the Applicant's assertedly undisputed facts, and pointed to other disputed facts; provided affidavits of its

experts to support its factual position and its scientific theories; and wove those supporting materials into a cohesive exegesis of its position.<sup>1</sup>

#### IV. THE RESULT

As occurred with Part A of the geotechnical contention, and as suggested by the foregoing, we are faced once again with a battle of the experts: the Applicant's and Staff's saying that sufficient conservatism has been built into the proposed approach, the State's saying not. Both sides have marshaled substantial support for their positions, not only in their lengthy briefs but in the statements of their experts and in their detailed construction of the scientific support for their case.

Having reviewed all the documentary materials, we are in no position at this time to say which of the expert viewpoints will prevail. And that is the point. Summary disposition is reserved for those cases where there is no genuine dispute over the basic and ultimate material facts, including those dependent upon expert opinion. Just recently, we were able to resolve part of a much simpler issue about this facility on that basis. LBP-01-40, 54 NRC 526 (2001). Here, the disputes are fundamental and extensive. Notwithstanding the sincerity of each party's belief that its view is correct, their genuine disagreements on serious matters can, for the reasons we discussed at length in LBP-01-39, be resolved only at hearing. 54 NRC at 509-12, 516, 523.<sup>2</sup>

This result should not be surprising. By its very nature, the grant of an exemption from the usual rules, to a first-of-its-kind facility, might be expected to trigger dispute among experts, even where, as here, some guidance can be taken from analogous Commission policy.

This leaves to address only the suggestion of the Applicant and Staff that the State should not be allowed, based on its initial pleading, to press any of its current assertions about the alleged inadequacies in the facility's proposed design.<sup>3</sup> As the parties recognize, at the time the papers now before us were filed, similar questions were pending about Contention Utah QQ. We have since

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<sup>1</sup>Put another way, in the face of initially compelling presentations by the other parties, the State did "not rest upon the mere allegations or denials" previously provided but submitted "specific facts," opinions and arguments to cast doubt on their positions. 10 C.F.R. § 2.749(b). For example, the State has, among other things, pointed to opinions of PFS witnesses that it urges are not based on personal knowledge or are outside their area of expertise; conducted its own analysis of cask stability; drawn upon actual earthquake experience; and challenged PFS's ground motion bounding conditions.

<sup>2</sup>In line with Commission thinking (*see* LBP-01-39, 54 NRC at 510-11), we choose not to devote any additional resources to the exposition here of the specific nature of the many factual/opinion disputes that emerge from and run through the Part B record. Whatever may be required when we *grant* summary disposition, thereby issuing our last word on an issue, far less will usually be in order when we *decline* to take such action, particularly when the contention involves "complex factual/opinion disputes that patently can be resolved only in a hearing." *Ibid*.

<sup>3</sup>As the Applicant and Staff seem to see it, the State's pleadings would embrace challenges to the adequacy of the standards against which the facility would be designed, but not to the adequacy of the proposed design to meet those standards. That issue may have been mooted by our rulings in LBP-01-39, but in any event we treat it again here.

resolved those questions in the State's favor in LBP-01-39, where we spoke about the modicum of flexibility that must be accorded both sides as a legitimate controversy progresses, more facts and insights are developed, and the Applicant adopts "new approaches to anti-seismic design and construction." *Id.* at 516-17, 519-20. The analogous questions now presented must be resolved the same way.

In that regard, the Applicant's initial deterministic approach fell short here, so it sought an exemption to proceed probabilistically. We think that this allowable mid-course substantive correction by the Applicant was more significant than the adjustment it challenges the State for adopting, i.e., making explicit what was at least implicit in the State's initial pleading. If more authorization for the State's approach is needed, we need point again only to the inherent interconnectedness of all these issues — made all the more apparent by the exemption request and its dependence on design features (*see* Applicant's Motion at 3-4) — to confirm our prior rulings. LBP-01-39, 54 NRC at 517.

## V. THE CONCLUSION

As we observed in LBP-01-39, the test now is *not* whether we think the State *will prevail* at the hearing. It is, rather, whether "the State's experts have presented a serious, documented, response to the Applicant's claims, sufficiently plausible to create doubt about the outcome" (*id.* at 516,<sup>4</sup> doubt of the type that under the applicable summary judgment principles *can be resolved* only at a hearing (*id.* at 510, 523). As the preceding section reveals, the State has met that test, and we — faced here again with genuine disputes about material facts — must again reject the Applicant's invitation to rule in its favor summarily.

Accordingly, Part B of Contention Utah L will be resolved, like the other pending seismic-related issues, not summarily on documents but after full exposition at a hearing. The parties should, therefore, include Part B matters in the "unified geotechnical contention" being jointly drafted to aid preparation for that hearing. *See* LBP-01-39, 54 NRC at 521.<sup>5</sup>

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For the foregoing reasons, it is, this 9th day of January 2002, ORDERED that:

1. The Applicant's motion for summary disposition of Part B of Contention Utah L is DENIED; and

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<sup>4</sup>One aspect of plausibility, of course, can involve the gatekeeping factors discussed in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael*, 526 U.S. 136 (1999). *See* LBP-01-39, 54 NRC at 510 n.19).

<sup>5</sup>Given the target of January 17th we had set for its submission, one of the parties may present that jointly prepared document at the prehearing conference to be held on that date if it is not possible to send it to us electronically the previous evening.

2. The parties are DIRECTED to include Part B issues in preparing the “unified geotechnical contention” document called for in LBP-01-39.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Michael C. Farrar, Chairman  
ADMINISTRATIVE JUDGE

Jerry R. Kline  
ADMINISTRATIVE JUDGE

Peter S. Lam  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 9, 2002

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State of Utah; and (3) the NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Michael C. Farrar, Chairman**  
**Dr. Jerry R. Kline**  
**Dr. Peter S. Lam**

**In the Matter of**

**Docket No. 72-22-ISFSI**  
**(ASLBP No. 97-732-02-ISFSI)**

**PRIVATE FUEL STORAGE, L.L.C.**  
**(Independent Spent Fuel Storage**  
**Installation)**

**January 14, 2002**

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board, acting pursuant to 10 C.F.R. § 2.749, grants a PFS request for summary disposition regarding Contention Utah W, "Other Impacts Not Considered." The Board finds that the contention may be summarily dismissed because (1) it has been rendered moot as presented due to the subsequent discussion of the PFS ER and the Staff DEIS that analyzes the possible environmental impacts of flooding at the intermodal transfer point and (2) PFS has demonstrated that there are no remaining factual disputes in the conclusions drawn from those discussions.

**REGULATIONS: INTERPRETATIONS (10 C.F.R. § 51.52)**

The analysis Table S-4 of 10 C.F.R. § 51.52 concerning transportation-related impacts does not preempt or preclude a discussion of site-specific environmental consequences of construction and operation of an intermodal transfer facility.

**RULES OF PRACTICE: CONTENTIONS (CHANGED CIRCUMSTANCES)**

The language of the disputed contention, “has not considered the impact of . . . ,” placed the contention in the “omission” rather than the “analysis” category as defined by LBP-01-23, 54 NRC 163, 171 (2001), requiring that the contention, if it is to remain active, be modified after the omission is corrected.

**SUMMARY DISPOSITION (BURDEN OF PROOF)**

Given the respondent’s burden to counter the movant’s assertions and statement of material facts, the Board may consider the respondent’s failure to directly contradict these proffered assertions if the Board believes it is well within the respondent’s power to do so, when judging the reliability of the movant’s assertions.

**MEMORANDUM AND ORDER**

**(Ruling on Applicant’s Motion for Summary Disposition of Contention Utah W, “Other Impacts Not Considered” [Flooding])**

We are presented here with questions concerning the analysis performed — under the National Environmental Policy Act of 1969 (NEPA) — of the impact of potential flooding of Utah’s Great Salt Lake on a facility that would support the operation of the independent spent fuel storage installation (ISFSI) that Applicant Private Fuel Storage, L.L.C. (PFS), proposes to build on the Skull Valley, Utah reservation of the Skull Valley Band of Goshute Indians. The ISFSI offsite support facility said to be subject to the potential flooding is the proposed intermodal transfer point (ITP) (or, as it has been referred to more recently, the intermodal transfer facility (ITF)), to be located just west of Rowley Junction, at a range of 3 ½ or more miles from the Lake’s varying shoreline. The NEPA issue comes to us by way of a challenge — Contention Utah W, “Other Impacts Not Considered” — presented by Intervenor State of Utah.

By motion dated July 27, 2001, PFS requested that summary disposition be entered in its favor rejecting the State’s view of the flooding issue. In responses filed August 16, 2001, the NRC Staff supported the PFS summary disposition request, while the State opposed it. For the reasons set forth below, we *grant PFS summary disposition regarding Contention Utah W.*

## I. BACKGROUND

Contention Utah W was originally framed to posit a number of different challenges to the adequacy of the PFS environmental report (ER) regarding its proposed Skull Valley ISFSI. As admitted, however, the contention has a very limited scope. *See* LBP-98-7, 47 NRC 142, 201-02, *reconsideration denied*, LBP-98-10, 47 NRC 288, 293-94, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). In this regard, the admitted contention asserts:

The [ER] does not adequately consider the adverse impacts of the proposed ISFSI and thus does not comply with NEPA or 10 C.F.R. § 51.45(b) in that the *Applicant has not considered the impact of flooding* on the [ITF].

47 NRC at 256 (emphasis added).

We described the ITF that is the focus of this contention in some detail previously in LBP-98-29, 48 NRC 286, 289 (1998). To recap briefly, it is planned to be a facility at which transportation casks containing spent nuclear fuel canisters would be transferred from rail cars arriving on the Union Pacific rail mainline to heavy haul trucks for transport to the PFS facility.

At the time Contention Utah W was being admitted, the ITF was to be located at Rowley Junction, Utah, the highway interchange at the intersection of Interstate 80 (I-80) and Skull Valley Road (which is the main improved roadway providing access to the Skull Valley Band reservation, and the proposed PFS facility, some 24 miles to the south). Although as originally proposed, use of the ITF seemingly was the preferred PFS transportation option, PFS amended its application in August 1998 to indicate that its preferred option for moving the transportation casks from the Union Pacific mainline was to build a rail line spur that would start near the I-80 Low Junction, Utah interchange, some 17 miles west of Rowley Junction. At the same time, it relocated the proposed ITF for its rail-to-truck transportation option to a site a little less than 2 miles to the west of the original Rowley Junction location.

The Board subsequently granted summary disposition in connection with a State issue statement, Contention Utah B, License Needed for Intermodal Transfer Point, thereby rejecting the State's view that the 10 C.F.R. Part 72 *licensing procedures* covering the ISFSI itself were also applicable to the ITF. Nonetheless, we declined to dismiss ITF-related Contention Utah W, finding that the ITF was subject to *NEPA consideration* because it was proposed to be constructed as part of the PFS license application. *See* LBP-99-39, 50 NRC 232, 236 (1999).

Thereafter, in April 2000, PFS again revised its application to address the potential for flooding at the relocated ITF.<sup>1</sup> That matter was also discussed in the Staff's June 2000 Draft Environmental Impact Statement [hereinafter DEIS].<sup>2</sup>

Following discovery among the interested parties, PFS filed its pending dispositive motion seeking summary disposition of Contention Utah W. That motion is accompanied by a statement of material facts not in dispute and is supported by four affidavits, from: (1) Donald W. Lewis, Stone & Webster, Inc. (S&W), PFS facility Lead Mechanical Engineer; (2) Kevin Coppersmith, former Geomatrix Consultants, Inc. principal, now Coppersmith Consulting, Inc. independent consultant; (3) George H.C. Liang, S&W Senior Principal Environmental Engineer; and (4) Dr. Krishna P. Singh, Holtec International President and Chief Executive Officer.<sup>3</sup>

In its August 16, 2001 response, the NRC Staff declared its support for the PFS motion and, with modifications, the accompanying statement of material facts not in dispute. *See* NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention W (Aug. 16, 2001) at 10 [hereinafter Staff Response]. In support of its response, the Staff provided the joint affidavit of seven individuals: (1) Terence J. Blasing, research staff member in the Oak Ridge National Laboratory (ORNL) Environmental Sciences Division; (2) Richard H. Ketelle, Bechtel-Jacobs Corporation subsurface contamination specialist; (3) Henry W. Lee, NRC Office of Nuclear Materials Safety and Safeguards Spent Fuel Project Office (NMSS/SFPO) Senior Structural Engineer; (4) Makuteswara Srinivasan, NMSS/SFPO Metallurgical Engineer/Scientist; (5) John Stamatakos, Southwest Research Institute Center for Nuclear Waste Regulatory Analysis Senior Research Scientist; (6) Michael D. Waters, NMSS/SFPO Project Engineer; and (7) Gregory P. Zimmerman, ORNL Center for Energy and Environmental Analysis Environmental Impact Analysis Program Leader. *See id.* unnumbered exh. (Joint Affidavit of NRC Staff Concerning Utah W) [hereinafter Staff Joint Affidavit].

For its part, the State opposed the PFS motion, providing in its mid-August response a statement of disputed material facts and two supporting affidavits, from Dr. Marvin Resnikoff, Radioactive Waste Management Associates Senior Associate, and Michael V. Lowe, Geologic Program Manager for the Utah

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<sup>1</sup> *See* PFS, Environmental Report [for Private Fuel Storage Facility] at 4.3.9 (rev. 7 Apr. 14, 2000).

<sup>2</sup> Draft Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714, at 3-11, 5-7, 5-10 (June 2000).

<sup>3</sup> *See* [PFS] Motion for Summary Disposition of Utah Contention W (July 27, 2001) [hereinafter PFS Motion]; *id.*, Statement of Material Facts on Which No Genuine Dispute Exists (July 27, 2001) [hereinafter PFS Undisputed Material Facts]; *id.*, Exh. A (Declaration of Donald Wayne Lewis) [hereinafter Lewis Declaration]; *id.*, Exh. B (Declaration of Kevin Coppersmith) [hereinafter Coppersmith Declaration]; *id.*, Exh. C (Declaration of George H.C. Liang) [hereinafter Liang Declaration]; *id.*, Exh. D, Declaration of Krishna P. Singh [hereinafter Singh Declaration].

Department of Natural Resources Utah Geological Survey Division.<sup>4</sup> Additionally, the State filed a late-August reply to the Staff's response, asserting that the response had failed to raise any novel arguments that would support the entry of summary disposition in favor of PFS. *See* [State] Reply to NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention W (Aug. 27, 2001) [hereinafter State Reply].

## II. ANALYSIS

### A. Standard for Summary Disposition

The standard governing motions for summary disposition is well established and has been used repeatedly by this Board in ruling on previous PFS dispositive motions:

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-99-23, 49 NRC 485, 491 (1999).

With this standard in mind, the Board addresses below the PFS summary disposition motion regarding Contention Utah W. We provide, first, the parties' positions on the matter, and then explain the reasoning that leads us to grant the motion.<sup>5</sup>

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<sup>4</sup> *See* [State] Response to [PFS] Motion for Summary Disposition of Utah Contention W (Aug. 16, 2001) [hereinafter State Response]; *id.*, [State] Statement of Disputed and Relevant Material Facts with Respect to Contention Utah W (Aug. 16, 2001) [hereinafter State Disputed Material Facts]; *id.*, Exh. 1 (Declaration of Dr. Marvin Resnikoff Regarding Material Facts in Dispute with Respect to Contention Utah W) [hereinafter Resnikoff Declaration]; *id.*, Exh. 2 (Declaration of Michael V. Lowe) [hereinafter Lowe Declaration].

<sup>5</sup> In LBP-02-1, issued last week, we pointed out that rulings *granting* summary disposition, representing "our last word on an issue," might be expected to provide more exposition of our reasoning than rulings *declining* to rule summarily, which do no more than send an issue to hearing for later resolution and explication. 55 NRC 11, 17 n.2 (2002).

## **B. Parties' Positions on Contention Utah W**

### ***1. PFS Position***

In support of its summary disposition request, PFS initially presents two essentially legal arguments that it declares are dispositive of Contention Utah W. PFS first declares that the effects of flooding on the spent fuel transportation casks that would be associated with transporting them through the ITF have already been considered in the Commission's generic evaluation of the environmental impacts of transporting spent fuel, which is found in Table S-4 of 10 C.F.R. § 51.52. In light of that generic consideration, PFS declares, the State is barred from litigating these impacts under this contention. *See* PFS Motion at 4. PFS's second legal argument is that the contention as framed is now moot, because the State was simply contesting the lack of *any* discussion of flooding in the ER, a purported deficiency that has been remedied by the amended ER and by Staff analysis of that issue in the DEIS. *See id.* at 4-5.

PFS goes on to urge that it should prevail not only on the strength of the foregoing legal arguments but also on the basis of the undisputed facts. In that regard, PFS proffers sixty-nine items that it asserts are material facts not in dispute regarding possible environmental impacts from potential flooding at the ITF; those undisputed facts, PFS says, warrant summary disposition in its favor relative to the State's Contention Utah W claims.

According to PFS, those facts establish the following. The ITF will be built at an elevation of 4221 feet, above the historic high water mark of 4212 feet by at least 9 feet, even before taking into account the additional 4-foot height of the railway cars or heavy haul trucks on which the transportation cask will always be situated and the 8-foot height of the cask in its horizontal shipping position. Moreover, PFS maintains, even putting aside this lack of a credible threat of flooding at the elevations involved, any threatened inundation could occur only slowly, over a period of years. That lead time, goes the argument, would provide ample opportunity for taking protective measures, such as redirecting shipments or moving shipments already onsite, building dikes, or restarting the existing Great Salt Lake pumping station to remove water. *See id.* at 6; *see also* PFS Undisputed Material Facts at 4, 5.

Nor, PFS asserts, is there any credible concern relative to cask submersion caused by wind-generated waves and seiches, which are vertical oscillatory lake water motions. In support of this claim, PFS cites what it describes as mid-1980s State-financed studies of the potential need for diking along the Lake's shores to protect against wind-induced seiches and waves. Those studies, it is said, establish a maximum water level of 4216 feet in unprotected areas near the shore, a figure that is still 5 feet below the elevation at which the ITF will be built. *See* PFS Motion at 6-7; *see also* PFS Undisputed Material Facts at 5-6.

The same is true with respect to potential seismically induced flooding or seiches, according to PFS. PFS discounts State reliance on a 1959 twenty-two foot seismic subsidence at Hebgen Lake in southwestern Montana, which it asserts fails to reflect any analysis of ITF area seismic conditions, declaring instead that a seismically induced subsidence at the ITF is unlikely to exceed 7 feet, thereby leaving the ITF above flood level even at the highest 4212-foot stage. Further, PFS declares that the State concern about inundation from a 12-foot seismically induced seiche is unfounded. According to PFS, this claim is deficient in two respects: (1) it is suspect for being based solely on unconfirmed reports about the level of a 1909 earthquake-induced seiche at another location; and (2) it fails to account both for the total height of the casks as they rest upon a railcar or truck trailer and for the fact that the elevation of a seiche decreases significantly as it moves onto land. *See* PFS Motion at 7-8; *see also* PFS Undisputed Material Facts at 6-7.

Finally, in support of its motion PFS seeks to establish that, even if any casks onsite at the ITF were to be inundated, there would be no adverse radiological or nonradiological consequences from such flooding. Relative to radiological consequences, PFS bases its conclusion on four hypothetical scenarios that might theoretically affect cask integrity in the event they became submerged: (1) casks falling to the ground and sustaining damage from an earthquake that also caused ITF flooding; (2) submerged cask failure due to confining floodwater external pressure; (3) cask overheating failure caused by a submersion-induced loss of heat dissipation capability; and (4) cask corrosion failure induced by chemical attack from prolonged submersion in the saline Lake waters.

Each concern, PFS asserts, is within the casks' design envelope. A cask breach would not result from an earthquake-induced drop off a railcar because such a drop, being no more than 4 feet, falls well within the 30-foot drop design basis required under 10 C.F.R. § 71.73(c)(1). So too, the casks are designed to withstand an external pressure of 300 pounds per square inch (psi), equivalent to being submerged at a depth of over 200 meters (656 feet). Further, PFS declares, negative thermal effects are of no moment because heat transfer in water would actually be improved by 200 times in relation to air. Saltwater corrosion would not be a concern either, in that centuries would be required to eat through the "carboline 890" protective coating on the transportation casks and the 6 inches of steel covering the separate storage canister that contains the spent fuel.

Finally, PFS asserts, there would be no nonradiological contamination concerns. Only bottled drinking water and portable toilets or a small sanitary waste disposal septic tank/leach field would be involved, and these could not cause any significant environmental impacts in the event of ITF flooding. *See* PFS Motion at 9-10; *see also* PFS Undisputed Material Facts at 7-10.

Thus, on the basis of these showings, PFS asserts that summary disposition in its favor is appropriate relative to Contention Utah W. As we discuss next, the NRC Staff agrees.

## **2. Staff Position**

In its response to the PFS dispositive motion, the Staff indicates that it agrees there are no disputed material facts at issue and that all issues pertaining to Contention Utah W should be resolved in favor of the Applicant. As to the two threshold legal issues asserted by PFS to be dispositive of the contention, the Staff notes that subsequent to the admission of Contention Utah W, the Applicant in its ER and the Staff in the DEIS specifically considered the potential for flooding at the revised site; the Staff concurs that these discussions have indeed rendered the PFS contention moot by addressing its central concern that such a discussion had not been provided in the original ER. Additionally, the Staff indicates that, although it does not rely upon generic Table S-4 as being dispositive of this contention, it nonetheless believes the PFS facility-specific transportation impacts analysis in the DEIS would compel the same result. *See* Staff Response at 7-9 & n.11.

On the facts relative to the PFS claims of summary disposition entitlement regarding the possible environmental impacts that might arise from State-postulated phenomena such as a rise in the Great Salt Lake's water level, wind-generated seiches and waves, and earthquake-generated seiches and subsidence, the Staff likewise agrees that there are no material facts in dispute preventing grant of the PFS request. In this regard, based on its review of the PFS statement of undisputed material facts, the Staff accepts those statements as generally correct, subject to certain modifications that the Staff asserts do not impact its overall conclusion that there are no material factual disputes extant.<sup>6</sup> *See id.* at 9-10.

## **3. State Position**

In its mid-August response and late-August reply, the State challenges the PFS and Staff positions regarding summary disposition for Contention Utah W. Initially, in addressing the two legal grounds proffered by PFS in support of its motion, the State declares that Table S-4 clearly is not applicable to this contention, citing the Board's earlier ruling in LBP-99-39, 50 NRC 232, 236 (1999). *See* State Response at 3-4. The State adds that potential ITF flooding-related environmental

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<sup>6</sup>For example, the Staff does not go so far as to agree with PFS that heat transfer in water is 200 times greater than in air, choosing instead to say simply that it is "substantially greater." Staff Joint Affidavit at 7. The difference is not material, since the question is only whether heat transfer would suffer because of flooding. Similarly, the Staff's willingness to agree only that corrosion would not occur for "decades," rather than PFS's "centuries" (*ibid.*), does not alter the result.

impacts are not within the bounds of cask testing performed under 10 C.F.R. § 71.73(c)(1) or covered by the existing ER/DEIS evaluations as they relate to earthquake-induced cask-drop accidents, derailments caused by track instability, septic tank/leach field contamination, and facility foundation/roadbed stability. *See id.* at 4-6; State Disputed Material Facts at 3-4, 6.

As to mootness, according to the State, the ER and DEIS discussions of flooding have not mooted Contention Utah W, which it asserts was not solely an “omission” contention, but has footing in the failure both to identify and to evaluate the environmental significance of potential flooding events for the proposed ITF. In that regard, the State further claims both the ER and “scant” DEIS flooding-related discussions are still deficient because those documents (1) ignore a State nuclear waste transfer facility siting law that would require a facility like the PFS ITF to be sited at least 2 miles farther from the Great Salt Lake, and (2) seek to establish the elevations of the ITF site and the Lake’s floodplain by relying on an inapplicable 1999 State draft planning document relating to recreational and extractive industries around the Lake’s edge. *See* State Response at 6-7.

With respect to PFS’s purported undisputed material facts regarding the State’s Contention Utah W claims about possible ITF flooding environmental impacts, the State declares that the motion lacks adequate support in three respects. First, according to the State, PFS has failed to provide any reliable evidence of the final grade elevation of the ITF. In this regard, the State asserts that PFS has attempted to establish its 4221-foot elevation figure based on the declarations of its witnesses Lewis and Liang, which seek to support that figure using either unreliable hearsay (i.e., an unauthenticated document that was not introduced into the proceeding) or opinions based on a lack of personal knowledge. *See* State Response at 7-9; *see also* State Disputed Material Facts at 2.

Also in dispute, the State asserts, is the PFS position that we need not consider for the ITF a seismically induced 12-foot seiche. The State says a “naked assertion” in PFS’s Liang declaration — namely, that the 1909 reports of a 12-foot seiche overtopping a railroad trestle in the Lake as a result of the Hansel Valley earthquake are unreliable — cannot stand, being foresworn by the scientific report of State witness Lowe, who was given this information by a long-time Southern Pacific Transportation Company employee, who had gathered it from company records. State Response at 9-10; *see also* State Disputed Material Facts at 5-6.

Finally, the State complains that the PFS motion is “replete” with unsupported assertions. State Response at 10. In addition to those relating to site elevation, cask testing, future studies on site foundation stability, and septic tank/leach field contamination referenced earlier, the State also identifies PFS declarations relating to its ability to prioritize Union Pacific shipments or to move shipments to another location, build dikes, or rely on the restart of the Great Salt Lake pumps.

See State Response at 10 & n.11; see also State Disputed Material Facts at 3, 4. Moreover, says the State, the PFS reference to the State-sponsored diking study to claim a maximum flooding elevation of 4216 feet ignores other evidence of higher Lake levels, including 1980s' studies showing storm-induced debris lines of between 4212 and 4218 feet on the Lake's Antelope Island, located about 26 miles from the proposed ITF site, and archeological studies putting Lake levels at 4217 feet within the past 400 years and 4221 feet within the past 2000 years. See State Response at 10; State Disputed Material Facts at 5.

## C. Licensing Board Determination

### 1. The Law

Relative to the two "legal" matters raised by the parties regarding PFS's motion, the first can be resolved in the State's favor in short order. As previous rulings relative to this contention suggest (see LBP-99-39, 50 NRC at 236), we do not consider the generic analysis in Table S-4 of transportation-related impacts as preempting or precluding a discussion of the relevant site-specific environmental impacts regarding the construction and operation of the ITF, which will be erected as a direct consequence of PFS's proposed Skull Valley ISFSI.<sup>7</sup>

The second matter, however, carries the day for PFS. Consistent with the Board's other contention rulings, see, e.g., LBP-01-26, 54 NRC 199, 207-08 (2001), the "has not considered" language of the contention as quoted above,<sup>8</sup> as well as the original basis statement that also declared PFS "has not considered the impact of flooding on the [ITF],"<sup>9</sup> put this issue statement at the outset into the "omission" rather than the "analysis" category, as we have previously defined them, see LBP-01-23, 54 NRC 163, 171 (2001). To be sure, there is a mention in the basis statement for the contention, as it incorporates by reference Contention Utah N, Flooding, that PFS has failed to "identify, document, and evaluate the significance of potential flooding events to the design of the intermodal transfer site," State Contentions at 98. And that same document makes specific mention of the PFS failure "to investigate information regarding floods and water waves along the lake shore that may have been generated by earthquake or landslide events," *id.* at 99. Nonetheless, it is clear that the central problem the State was bringing to the fore at the outset was the *lack of any discussion* of ITF-related flooding.

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<sup>7</sup> At the same time, we do not accept the State's attempt, see State Response at 3, to expand the scope of this contention regarding the impacts of flooding on the ITF to include the matter of track washout impacts, which is a generic, transportation-related subject.

<sup>8</sup> See *supra* p. 22 (quoting contention that the PFS ER "does not adequately consider the adverse impacts of the proposed ISFSI . . . in that the Applicant has not considered the impact of flooding").

<sup>9</sup> [State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] (Nov. 23, 1997) at 163 [hereinafter State Contentions].

That this “total omission” is the purported deficiency is borne out by a review of the original ER, which indeed had no discussion at all of ITF-related flooding, and the subsequent PFS attempt to address that criticism by adding a section to the ER discussing ITF-related flooding, a matter that then became the subject of analysis in the DEIS. As we noted previously, such “a significant change in the nature of the purported NEPA imperfection, from one focusing on a comprehensive information omission to one centered on a deficient analysis of subsequently supplied information,” *warrants issue modification by the complaining party*. LBP-01-26, 54 NRC at 208. Otherwise, absent any new pleading, the other parties would be left to speculate whether the concerns first expressed had been satisfied by the new information. Having failed to take the required step within the time frame established for interposing such matters into this proceeding, *see id.* at 209, the State’s arguments regarding the validity of the PFS (and Staff) analysis cannot now provide the basis for a material factual dispute that would preclude the entry of summary disposition in favor of PFS.

## 2. *The Facts*

Having said all this, we also observe that even if we were to find in favor of the State on its argument regarding this contention’s scope, we nonetheless would not reach a different result relative to the PFS motion. While the State seeks to rely upon a number of different factual disputes concerning ITF flooding, a close review of its main points is sufficient to establish that they do not establish genuine issues as to material facts and that summary disposition in favor of PFS in connection with Contention Utah W is therefore appropriate.

With regard to the central question of the ITF final grade elevation, we look to the general admonition that a party seeking to establish a material factual dispute must rely upon more than suspicions or bald assertions.<sup>10</sup> Notwithstanding that principle and the fact that the facility will be located physically within its borders, the State — in contesting the reliability of the 4221-foot elevation figure proffered by PFS and the Staff — demurred from taking the obvious step of advancing a materially different ITF elevation figure and asserting it to be correct, *a step that we think was well within its power to take (compare 10 C.F.R. § 2.749(c))*.

Instead, relying principally on the Licensing Board’s decision in *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 419 (1986), the State interposed concerns only about the derivation of the PFS/Staff elevation figure, noting in particular the “hearsay” nature of the information in the Lewis declaration. Given the State’s burden to counter the PFS showing, and the direct step it could have taken, we find the path it

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<sup>10</sup> *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), *aff’d*, *Advanced Medical Systems v. NRC*, 61 F.3d 903 (6th Cir. 1995) (table).

took unavailing, especially given “our authority as an administrative tribunal and under the Commission’s rules to consider hearsay as competent evidence, taking into account [the State’s] failure to contradict directly the assertions in judging their reliability.”<sup>11</sup> *Id.* at 419-20.

As was noted before, the State also seeks to interpose other flooding-related factual disputes concerning such matters as the ability of PFS to prioritize Union Pacific shipments, to move shipments to another location, to build dikes, or to rely on the restart of the Great Salt Lake pumps in the event of a multiyear water level rise resulting in a flood above the 4221-foot level. Yet, all these matters lack materiality in the face of a key series of uncontested PFS assertions, namely, that even if flooding were to occur and to cover any transportation casks at the ITF to a depth of some 600 feet, there will be no significant environmental impacts because there would be no radiological releases from the casks, which are already rated to withstand submersion at that depth and would be impervious to corrosion damage from the Lake waters for very long periods. *See* PFS Undisputed Material Facts at 7-9; *see also* note 6, *supra*.

Nor does the State fare any better in its attempts to interpose a NEPA deficiency relative to purported unanalyzed flooding-related radiological impacts in connection with the only cask breach event it proffers, an earthquake-induced rail car or transfer crane cask drop.<sup>12</sup> For that attempt even to move forward, we would first have to be willing (1) to assume such a cask drop/breach incident would be possible in connection with the transportation casks as they will be utilized at the ITF,<sup>13</sup> and (2) to put aside the serious question whether there is any need for a NEPA analysis of impacts that arise only from the contemporaneous

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<sup>11</sup> In this regard, the State raises particular concerns about the “unauthenticated” nature of the document referenced by Mr. Lewis as authority for his statements concerning ITF elevation in that it has not been provided to the Board in support of the PFS Motion. State Response at 8-9; *see also* State Disputed Material Facts at 2. Given Mr. Lewis’ sworn reliance on that document (*see* Lewis Decl. at 4), what is germane in connection with the PFS motion is that the State has not asserted that the document (1) is incorrect; or (2) was unavailable through the discovery process, thereby precluding the State from assessing its validity.

<sup>12</sup> PFS declarant Lewis described the arrangement whereby the spent fuel shipping casks are secured to a shipping cradle with heavy steel tie-down straps that are bolted to the shipping cradle that, in turn, is to be bolted to the rail or truck transport vehicle with heavy steel pins that allow the shipping assembly, i.e., the cask and the cradle, to be removed from the transport vehicle. *See* Lewis Declaration at 4. In doing so, Mr. Lewis notes that the straps and the pins will be designed to exceed the dynamic loads imposed by the vehicle during transport and that, considering the shipping assembly weight (142 tons) and the securing measures, rising lake water is not likely to dislodge the cask. *Ibid.* Although the State challenges this sworn statement regarding the dynamic load design of the securing measures as “unsupported,” State Disputed Material Facts 3, the State itself provides nothing to indicate it is incorrect, thereby relegating its claim to the sort of unsupported assertion that is inadequate to create a material factual dispute. In fact, the only cask drop scenario for which the State provides any supporting discussion is that involving an earthquake. *See* Resnikoff Declaration at 4.

<sup>13</sup> In his declaration, Dr. Resnikoff makes a number of assertions about the degree to which the cask drop accident testing requirements in 10 C.F.R. § 71.73(c) bound a cask drop that he declares could occur to a cask while awaiting transfer, or being transferred from rail to truck, at the ITF. *See* Resnikoff Declaration at 3-5. Although his claims are based essentially on the failure of PFS to demonstrate to his satisfaction that these regulatory testing requirements are bounding, rather than reflecting his own independent analysis that demonstrates they are not, for present purposes we will assume he is correct in this regard.

presence of two independent, low-probability events,<sup>14</sup> i.e., a flood at or near the 4212-foot level of the 1986 historic Great Salt Lake flood in conjunction with an earthquake of a magnitude sufficient to cause a cask drop/breach accident.<sup>15</sup>

Even if we put aside those two problems, we would still have to conclude, for each of the two State-posed scenarios that could involve flooding and an earthquake-induced cask drop/breach accident, that the State has failed to establish a material factual dispute regarding possible ITF inundation at its 4221-foot elevation. Relative to seiche-related flooding, although referencing historical data regarding a 12-foot, earthquake-induced seiche, the State fails to make any specific response controverting the PFS showing that the ITF's inland position would significantly decrease the size of such a seiche so that it would not exceed the 4220-foot level.<sup>16</sup> *Compare* PFS Undisputed Material Facts at 6 *with* State Disputed Material Facts at 6. By the same token, other than reiterating its opposition to the ITF 4221-foot elevation figure, the State does not dispute the PFS showing that an earthquake-induced subsidence at the ITF would not exceed 7 feet, so as not to cause ITF inundation even if the Lake were at its 4212-foot historic flood level. *Compare* PFS Undisputed Material Facts at 7 *with* State Disputed Material Facts at 5.

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In sum, the State's failure to interpose a material factual dispute relative to the PFS dispositive motion regarding Contention Utah W provides us reason,

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<sup>14</sup> In this regard, the State's proffer regarding other historic flood levels going back several centuries or more arguably reinforces the notion that the flooding levels about which it expresses concern relative to the ITF are very low probability events.

<sup>15</sup> See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333, 334-35 (1990) (events considered sufficiently unlikely that they are remote and speculative do not require NEPA consideration as a matter of law). *Cf. San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 38-42 (D.C. Cir.) (en banc) (NRC not required to consider simultaneous occurrence of earthquake and independently caused radiological emergency relative to nuclear facility emergency planning response), *cert. denied*, 479 U.S. 923 (1986); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 798-99 (1979) (plant need not be designed to reflect the remote possibility of a tornado coincident with an explosion of a fertilizer barge on a river adjacent to the facility).

<sup>16</sup> In this regard, although the State does not directly question PFS's reliance on a 1995 land-use planning document as establishing this floodplain figure (*compare* Liang Decl. at 7 *with* State Disputed Material Facts at 6), it does challenge the efficacy of PFS and Staff DEIS references to a 1999 draft State planning document that designates the floodplain at 4212 feet for planning purposes and 4217 feet as the extent of that floodplain. See State Response at 6-7; State Reply at 5. As we noted previously, the State asserts that this use of a report prepared to address recreational activities and extractive industries around the Lake, improperly ignores a specific Utah statute governing the siting of nuclear waste transfer facilities that would require the ITF to be at least 2 miles farther from the Lake than is planned. In the NEPA context, this argument seems to have at its heart, however, a matter that has already been resolved in the context of this litigation. See LBP-01-40, 54 NRC 526, 538 n.7 (2001).

independent of the legal grounds discussed in Section II.C.1 above, to grant summary disposition in favor of PFS.<sup>17</sup>

### III. CONCLUSION

Whether because (1) Contention Utah W, Other Impacts, as presented is moot as having been addressed by the discussion in the PFS ER and the Staff DEIS that analyzes the possible environmental impacts of flooding at the ITF, or (2) PFS has established there are no material factual disputes in connection with the sufficiency of those discussions' conclusions that there would be no significant environmental impacts from such flooding, PFS is entitled to summary disposition and a judgment in its favor regarding this State issue statement.<sup>18</sup>

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For the foregoing reasons, it is, this 14th day of January 2002, ORDERED that the July 27, 2001, PFS motion for summary disposition of Contention Utah W

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<sup>17</sup> Relative to this contention, the State also seeks to interpose several additional material factual disputes regarding impacts relating to site foundation stability, post-flood access, and septic tank/leach field contamination. Each, however, is unavailing. In the first instance, the State does not here address the PFS showing regarding the use of admixtures to prevent concrete from being susceptible to salty soil/water corrosion. *Compare* PFS Undisputed Material Facts at 9-10 *with* State Disputed Material Facts at 6. With regard to post-flood access, the State does not take issue with the PFS showing that the ability of the transportation casks to remain underwater for long intervals means that there would be no impacts as they remained in place for extended periods. *Compare* PFS Undisputed Material Facts at 10 *with* State Disputed Material Facts at 6. Finally, concerning septic tank/leach field contamination, the State's challenge is misdirected in that it questions the efficacy of the proposed use of a septic tank/leach field rather than the PFS conclusion that flood-related environmental impacts relative to that arrangement would be negligible. *Compare* PFS Undisputed Material Facts at 9 *with* State Disputed Material Facts at 6.

<sup>18</sup> We need add only what should be obvious, i.e., that as far as seismic events are concerned, our decision herein deals only with whether flooding would *add* any environmental impacts to the consequences of postulated earthquakes. In determining that there is no legitimate dispute in the Contention Utah W record that flooding would *not* have such an effect, we of course intimate no view on the entirely different issues involved in Contention Utah L, Geotechnical, about which we have recently written in LBP-01-39, 54 NRC 497 (2001), and LBP-02-1, *supra* note 5.

is GRANTED and, for the reasons set forth in Section II.C of this Memorandum and Order, a decision regarding Contention Utah W is rendered in favor of PFS.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Michael C. Farrar, Chairman  
ADMINISTRATIVE JUDGE

Jerry R. Kline  
ADMINISTRATIVE JUDGE

Peter S. Lam  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 14, 2002

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Alan S. Rosenthal**, Presiding Officer  
**Dr. Richard F. Cole**, Special Assistant

**In the Matter of**

**Docket No. 40-8681-MLA-10**  
**(ASLBP No. 02-793-01-MLA)**

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

**January 16, 2002**

In this Memorandum and Order denying three hearing requests in a Subpart L Material License Amendment proceeding, the Presiding Officer concluded that the hearing requestors failed to establish the existence of an actual or threatened incremental injury-in-fact and therefore lacked the necessary standing.

**RULES OF PRACTICE: STANDING TO INTERVENE**

In order to establish standing in a proceeding involving a facility with ongoing operations, “a petitioner’s challenge must show that the [proposed license] amendment will cause a ‘distinct new harm or threat apart from the activities already licensed.’” CLI-01-21, 54 NRC 247, 251 (2001) (citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27 (2001); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999)).

**MEMORANDUM AND ORDER**  
**(Denying Hearing Requests for Lack of Standing)**

At hand is the latest in what has turned out to be a continuing series of applications of the International Uranium (USA) Corporation (Licensee) for amendments to its source material license (SUA-1358). Under the aegis of that license, first issued in 1980 and renewed in 1985 and then again in 1997, the Licensee has been operating a uranium recovery facility (the White Mesa Uranium Mill) located near Blanding, Utah.

Because the basic license covers only the receipt and processing of natural ores, whenever the Licensee has desired authorization to receive and process alternate feed material at the Mill, it has been required to seek a license amendment. *See* November 20, 2001 explanatory memorandum supplied by the NRC Staff at my request.<sup>1</sup> In recent years, a substantial number of applications for such amendments have been filed in connection with the proposed receipt and processing of alternate feed materials having their origin in locations across the United States. Several of those applications have drawn requests for a hearing in response to *Federal Register* notices providing an opportunity to seek such relief. Just last Spring, for example, I had occasion to consider, and to reject for lack of standing, a hearing request addressed to the receipt and processing of materials of that stripe originating at a California location. *See* LBP-01-15, 53 NRC 344 (2001), *aff'd*, CLI-01-21, 54 NRC 247 (2001).<sup>2</sup>

The license amendment application now before me concerns the receipt and processing of material having a point of origin on the other side of the continent. It has prompted the submission of timely separate hearing requests by the City of Moab, Utah (Moab); the Utah Chapter of the Sierra Club (Sierra); and John Francis Darke. Each request is opposed by the Licensee as not meeting the requirements of the Commission's Rules of Practice.

Those requirements are to be found in Subpart L of the Rules, which sets out the informal hearing procedures that govern the adjudication of material license proceedings. 10 C.F.R. § 2.1201 *et seq.* Section 2.1205(e) spells out the requisite content of a hearing request submitted in a Subpart L proceeding. The request must describe "in detail" (1) the interest of the requestor in the proceeding; (2) how that interest might be affected by the results of the proceeding, with particular reference to the factors set out in paragraph (h) of that same section; and (3) the requestor's areas of concern about the licensing activity that is the subject matter of the proceeding.

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<sup>1</sup>The NRC Staff has elected not to participate otherwise in the proceeding. *See* 10 C.F.R. § 2.1213.

<sup>2</sup>For prior adjudicatory action taken on other amendment applications involving this license, *see, e.g.*, LBP-01-8, 53 NRC 204, *aff'd*, CLI-01-18, 54 NRC 27 (2001); LBP-99-24, 49 NRC 495 (1999); LBP-99-20, 49 NRC 429 (1999); LBP-99-8, 49 NRC 131 (1999); LBP-99-5, 49 NRC 107 (1999).

For its part, in the instance of a timely filed hearing request such as those here, section 2.1205(h) of Subpart L charges the Presiding Officer with the duty of determining both that the areas specified therein are germane to the subject matter of the proceeding and that the “judicial standards for standing” have been met by the hearing requestor. The question before me thus is whether, contrary to the insistence of the Licensee, the hearing requestors have satisfied both of those requirements.

For the reasons that follow, I am compelled to conclude that none of the hearing requestors has satisfied the standing test, as that test has been described in prior decisions involving proposed amendments to this license (most particularly, the very recent Commission decision in CLI-01-21). That being so, all three requests must be dismissed on that ground.

## I. BACKGROUND

A. The three hearing requests under present consideration were filed in response to a notice of opportunity for hearing that was published in the *Federal Register* on August 23, 2001. 66 Fed. Reg. 44,384. According to the notice, the Licensee desires to receive and process at the White Mesa Uranium Mill up to 600,000 cubic yards (840,000 tons) of alternate feed material from a site located in Maywood, New Jersey. That site is being remediated under the Formerly Utilized Sites Remedial Action Program (FUSRAP) by the United States Army Corps of Engineers.

The material in question consists of by-products from the processing of thorium and lanthanum from monazite sands. It is to be received and processed for its source material content. What remains after the extraction of the source material is to be stored in lined tailings cells with a groundwater detection monitoring program.

By way of supplementary information, the notice referred, *inter alia*, to the Licensee’s representations both that hazardous wastes regulated under the Resource Conservation and Recovery Act (RCRA) have not been identified in the material and that the verification sampling at the Maywood site will be implemented to ensure that, in fact, such hazardous wastes are not present. With regard to the matter of the movement of the material to the Mill, the notice observed that, while the exact transportation mode was yet to be determined, it might be similar to that employed in the shipment of other alternate feed materials to this facility. That would involve intermodal containers shipped from New Jersey by rail and then transferred to trucks for the last portion of the journey. On that score, if the maximum projected amount of 600,000 cubic yards were to be shipped to the Mill, forty-six to eighty-six truckloads per week would be involved. It was thought, however, that the more likely total volume would be

206,000 cubic yards, in which case the required number of truckloads per week would be forty-six. The Licensee disclaimed any significant impact from the transportation, given the intended employment of exclusive-use lined and covered containers and the small increase in truck traffic. *Id.* at 44,385.

B. Because of the then abundance of adjudicatory decisions in connection with applications to amend the license hereinvolved, at the time these hearing requests were filed in September 2001 there was little room for remaining doubt as to the ingredients of the required showing of the existence of judicial standing.<sup>3</sup> To the contrary, it would have been difficult for the Commission and its presiding officers to have provided a clearer road map in that regard. For present purposes, however, it does not seem necessary to canvass all of those decisions. Rather, a review of the teachings of LBP-01-15, rendered last April, and its subsequent November affirmance by the Commission in CLI-01-21, should suffice.

Those decisions concerned a challenge by the Glen Canyon Group of the Utah Sierra Club (Group) to the proposed receipt and processing at the White Mesa Mill of alternate feed material in the form of lead sulfide sludge. According to the *Federal Register* notice pertaining to the proposal, the material would be delivered to the Mill using exclusive-use trucks (60 to 70 per week over a period of 60 to 90 days) and in lined, covered, aluminum end-dump trailers.

In support of its challenge advanced in the form of a hearing request, the Group supplied two affidavits. The first, that of a member whose activities brought him into close proximity to the Mill site, expressed a strong personal interest in the application of all federal and state environmental and safety laws and regulations, including those governing the actions of administrative agencies. In addition, among other things, that affiant stated his concern with regard to the proposed transportation of the material to the Mill. In that connection, he (1) referred to eye, nose, and skin irritation that he assertedly experienced as a result of dust having as its source trucks hauling materials to the Mill; and (2) alluded to the possibility of accidents involving those trucks. The second affidavit, that of a hydrologist, set forth the opinion that the storage of the residue after processing in the Mill's tailings cells would give rise to a significant threat of an undetected seepage discharge to groundwater. Apart from relying on the averments in the two affidavits, the Group had sought to raise several other issues that related to such matters as whether the material might contain hazardous wastes and whether the approval of the proposal would be inconsistent with pertinent statutory and regulatory provisions.

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<sup>3</sup> Of all of the decisions referred to in the text above and accompanying note 2, only the November 14 Commission decision in CLI-01-21 was issued subsequent to July 2001. And that decision was called to the attention of the parties in a November 15 memorandum scheduling a telephone conference for the primary purpose of exploring further whether the content of the hearing requests met the judicial standing test. The disclosures during the conference pertaining to that issue will be discussed later in this opinion, pp. 41-43, *infra*.

Given the directions provided presiding officers in section 2.1205(h) of the Rules of Practice, however, none of those issues could be considered unless it were first determined that the Group had the standing to raise them. In that respect, LBP-01-15 pointed to the well-established principle, which the authors of section 2.1205(h) likely had in mind, that the existence of judicial standing hinges upon a demonstration of a present or future injury-in-fact that is arguably within the zone of interests protected by the governing statute. 53 NRC at 347 (citing *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983)). Thus, the initial, and necessarily pivotal, inquiry had to be into whether such injury-in-fact was established by the averments in the affidavits supporting the hearing request, taken in conjunction with the Group's stated organizational interest in both (1) the preservation of the environment in the vicinity of the Mill; and (2) compliance with the dictates of federal and state laws and regulations. *Id.* at 349.

The claimed organizational interests were summarily rejected as a basis for standing. For one thing, the Presiding Officer pointed (*id.* at 348) to the Supreme Court's landmark holding that injury-in-fact cannot be asserted on the footing of nothing more than a broad interest — shared with many others — in environmental preservation. *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). Likewise, the opinion took note (*ibid.*) of a Commission decision to the effect that assertions of a general (i.e., also widely possessed) interest in law observance cannot carry the day. *Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations*, CLI-77-24, 6 NRC 525, 531 (1997) (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

Turning then to the representations contained in the supporting affidavits, LBP-01-15 determined that they too fell short of establishing the required injury-in-fact. In that connection, it noted among other things that the alternate feed materials in question were not asserted to be significantly different in content from such materials previously processed at the Mill, and no leakage had apparently resulted from the storage of the residue in the tailings cells. Insofar as their transportation to the Mill was concerned, the opinion pointed to the lack of any showing that that transportation might pose “a threat not present with regard to the transportation of materials already authorized by the Commission.” Accordingly, “the claim that activities under the proposed license amendment might cause incremental harm must be deemed to rest on nothing more than unfounded conjecture.” 53 NRC at 351.

In affirming this outcome in CLI-01-21, the Commission essentially adopted the foregoing analysis. Of particular present significance, it stressed that, in circumstances where a facility with ongoing operations is involved, “a petitioner's challenge must show that the [proposed license] amendment will cause a ‘distinct

*new harm or threat apart from the activities already licensed.’* 54 NRC at 251 (citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27 (2001); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999) (emphasis supplied)). Still further, with respect to the truck accident concern that had been voiced by one of the affiants, the Commission referred (54 NRC at 253) once again to CLI-01-18, 54 NRC at 31-32, for the proposition that “speculation about accidents along feed material’s transport routes does not establish standing under our case law.”<sup>4</sup>

## II. DISCUSSION

As this background makes clear, the question to be decided is whether the hearing requestors have asserted a threat to them of concrete — as opposed to merely conjectural — *incremental* harm should the Licensee be permitted to receive and process the Maywood materials at its Mill. Before addressing the specific claims advanced in that regard, two preliminary observations are warranted.

First, as will shortly be seen, in their totality the cognizable assertions of potential harm relate exclusively to the impact of the transportation of the materials by truck between Moab and the Mill. That is to say, unlike the situation considered in LBP-01-15 and CLI-01-21, none of the hearing requests appears to raise issues pertaining to either the processing of the materials at the Mill or the storage of the residue in its tailings cells.

Secondly, all three hearing requests were filed by lay persons, and it was not clear from the submissions that their authors were acquainted with the prior decisions involving amendments to this license that were concerned with the standing issue. For this reason, the hearing requestors were accorded a further opportunity, at a stenographically recorded telephone conference, to persuade me that their filings met the Commission’s standing requirements as articulated in those decisions.

To this end, in a November 15 memorandum scheduling that conference for November 28 and expressly advising that the standing issue would be its principal focus, the parties were furnished with citations to each decision. In addition, the

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<sup>4</sup>The Commission also noted in CLI-01-21 that the Group “showed no discrete institutional injury to itself, other than general environmental and policy interests of the sort we repeatedly have found insufficient for organizational standing.” 54 NRC at 252.

It is worthy of passing note that the license amendment application considered in LBP-01-15 and CLI-01-21 is once again before me. Docket No. 40-8681-MLA-11. On December 11, 2001, the NRC Staff published a second *Federal Register* notice with regard to that application. 66 Fed. Reg. 64,064-66. It both recorded the Staff’s Finding of No Significant [Environmental] Impact and extended a new opportunity for a hearing on the license amendment. In response to that notice, separate hearing requests were filed by the Sierra Club and an individual. They remain pending before me.

hearing requestors were provided with the full text of three of the most recent issuances, LBP-01-8, LBP-01-15, and CLI-01-21.

What follows then is, first, a summary of the claims of injury-in-fact presented by each of the hearing requestors, as those claims were set forth in their written submissions and further developed during the conference. Thereafter, the sufficiency of those claims will be considered.

A.1. According to its October 18 submission, Moab is a municipality of 5000 inhabitants in east central Utah and is “nestled” between two national parks. Given its location, its economy is heavily dependent upon “destination recreational tourism,” which increases its population during peak seasons two- or threefold.

The Moab interest in the shipment of the Maywood materials to the Mill stems from the fact that U.S. Highway 191, an essentially north-south corridor, is the proposed route for use by the trucks transporting those materials. That highway bisects the town and its officials are concerned about the impact of the Maywood truck traffic upon its citizens and visitors. More specifically, Moab asserts that (1) because the majority of commercial establishments front on and are accessed off of Highway 191, its most important economic center would experience increased “traffic access problems”; (2) the crossing of the highway by vehicles and pedestrians would become more difficult and dangerous; and (3) the entrance and exit of parked vehicles along the highway would become more inconvenient and dangerous as a result of the restricted width of the highway through the municipality.

In addition, Moab maintained that the shipment of the material through its territory would pose a threat to its citizens and visitors in terms of increased low-level radiation exposure. In that connection, among other things, it pointed to its lack of a hazard mitigation plan or personnel trained to handle a spill of the material. And, finally, also in the context of the possibility of spills of the material, the city expressed concern that it would suffer economic harm from the perception of the highway as a “Radioactive Waste Transport Route.”

During the telephone conference, the Moab representative (its city manager) laid emphasis on the municipality’s inability to respond adequately should there be an accident involving radioactive substances (Tr. 36). She acknowledged that shipments to the Mill under prior license amendments had passed through the city without prompting the filing of a hearing request (Tr. 37-38). The city’s concern had been heightened, however, by an accident (not referred to in the hearing request) that had involved one of those shipments (Tr. 38-40). Assertedly, the local emergency management entities had not been informed of the accident and therefore had not been involved in dealing with it (*ibid.*). Accordingly, what Moab desired was a license amendment condition that would require the Licensee to enter into an emergency response agreement with the city (to which

the transportation provider would also be a party) that would provide for “a specific on-site emergency procedure” (Tr. 43-44).

2. Sierra’s initial filing, submitted on September 24, did not come close to satisfying the standing requirement of the Rules of Practice. Without seeking leave to do so, however, a lay member of its Environmental Health Committee subsequently filed on October 18 what was denominated “Petitioner’s Brief To Request Hearing To Intervene.” While clearly unauthorized, given that some latitude may appropriately be given to lay participants I decided to consider its content (to which, in a November 1 filing, the Licensee responded on the merits in addition to raising a procedural objection).<sup>5</sup>

In large measure, the October 18 filing rested on claims that were far removed from establishing a threat of injury-in-fact to the organization or members of it (e.g., the assertion that the proposed activity is inconsistent with governing statutory provisions). Sierra did append to the filing, however, the affidavits of John Weisheit and Karen Robinson, both of whom are members of the Glen Canyon Group of the organization.

Mr. Weisheit noted that he is also a member and employee of an organization located on Highway 191 in Moab and, accordingly, is concerned about possible truck accidents in that vicinity. Beyond that, he averred that his activities as a river guide brought him frequently to Cisco, the community to the north of Moab where the Maywood materials likely would be transferred from train to truck. Still further, he referred to time spent in the vicinity of the Mill and asserted that he had observed particulates from what he characterized as “radioactive piles” being cast into the atmosphere on windy days.

For her part, Ms. Robinson stated that she resides close to what she referred to as a location that was being used as a de facto “free port”/“safe haven” by trucks going to and from the Mill. She questioned whether this use, which she assumed would continue in the transportation of the Maywood materials, was proper and legal and also expressed doubt that her county would be able to remediate any incident arising during that transportation. As she saw it, the portions of her taxes that might go to emergency management portion of the county’s budget would not be put to good use.

During the telephone conference, at which Sierra was represented for the first time by counsel (*see supra* note 5), there was no specific reference to the

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<sup>5</sup> As will be later seen, at the telephone conference Sierra was represented by counsel who, pointing to the fact that the written submissions had been authored by a lay person, sought leave to supplement them with yet another filing. While my action on that endeavor can await my discussion of it, it might be noted at this juncture that this is not the first time that entities of the Sierra Club have followed the procedure of having a hearing request filed by a lay person and then having counsel represent it at the telephone conference held to consider the hearing request. Precisely the same procedure was followed by the Glen Canyon Group of the Sierra Club in connection with its hearing request ruled upon in LBP-01-15. Indeed, the same lawyer that represented Sierra at the conference in this case took part in the conference in that case. As should scarcely require emphasis, such a course of action does not serve well the interests of either the hearing requestor or the adjudicatory process.

concerns that had been articulated by the two affiants. Rather, at the outset of her presentation, counsel stressed the fact that, insofar as involved in the truck transportation of the Maywood shipments to the Mill, Highway 191 bisects three cities — Moab, then Monticello, and finally Blanding. According to counsel, between Monticello and Blanding, there is a steep grade that has produced accidents “and the concern is that increasing the traffic is only going to increase the possibility of an accident.” In this connection, counsel expressed doubt that the local authorities had the capability to respond adequately to such an occurrence. Tr. 9-10.

Recognizing that these assertions lacked support in the hearing request that had been prepared by a lay person, Sierra counsel asked leave to supplement the request with additional affidavits (Tr. 11). At that point, she apparently was unable to provide any detail respecting who might supply the affidavits and specifically what they might address in terms of threatened incremental harm (Tr. 19). Notwithstanding Licensee’s counsel’s objection to the receipt of any further Sierra submissions (Tr. 32), the matter was taken under advisement (Tr. 57). Subsequently, Sierra was informed that it might supply in writing within a week an offer of proof with regard to whose affidavits it desired to submit and specifically what they would contain. Sierra did not, however, avail itself of that opportunity.

3. Mr. Darke’s September 24 hearing request disclosed that he resides in Moab a short distance from Highway 191 and, in addition, finds himself frequently (as a pedestrian) at various points along the transportation corridor that that highway provides from points north of Moab to the Mill south of Blanding. He considers himself subjected to cumulative harmful “emissions and effluent” that he believes to be produced by the transportation of alternate feed materials destined for the Mill. He also is concerned regarding “a worst-case accident” and whether its effects could be mitigated.<sup>6</sup>

4. The November 15 scheduling memorandum called upon the Licensee to provide certain information at the telephone conference with regard to, *inter alia*, the volume of the truck traffic that would be associated with the transportation of the Maywood materials to the Mill taken in conjunction with the simultaneous movement of alternate feed materials under prior amendments to the materials license in question. In addition, during the conference, its counsel was asked by me to supply in writing further data on that score, and to include in that submission

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<sup>6</sup> Much of the Darke hearing request was devoted to his belief that, in numerous respects, the proposal is unlawful. For present purposes, it is not necessary to consider the merits of that belief. Moreover, insofar as the standing issue is concerned, nothing offered by Mr. Darke during the telephone conference added anything of substance to what was contained in the hearing request. It should be noted, however, that, in a filing received just 2 days before the date set for the conference, he had sought to have the November 15 scheduling memorandum either withdrawn or amended to limit the discussion at the conference to agenda and scheduling matters. For the reasons set forth in my November 26 memorandum (unpublished), that relief was denied and the conference was held in accordance with the terms of the November 15 memorandum.

an account of the traffic accident to which the Moab representative had alluded during her oral presentation.

For present purposes, only the disclosures in the Licensee's December 5 filing need receive illumination. It there appears (at 4-5) that, during the early stages of the shipment of Maywood materials to the Mill, there might also be shipments from two other sources (Linde and Cameco) that would produce a maximum aggregate of approximately 102 shipments per week. The Licensee went on to acknowledge, however, the possibility (which it deemed to be remote) that, for a very short period of time, there would also be shipments from the Molycorp project that could increase the weekly total number of shipments to 171.

The Licensee's post-conference submission goes on to provide (at 6) statistics supplied by the Utah Department of Transportation (UDOT) with respect to truck traffic at various points along the portion of Highway 191 that is used to transport materials to the Mill. Based upon a calculation methodology that is explained in detail and seems reasonable on its face, the Licensee concluded (at 7) that the average number of trucks passing through Moab per day would be approximately 915. Making an adjustment for the fact that the UDOT statistics are calculated over a 7-day week whereas most shipments to the Mill take place Monday to Friday, the Licensee reaches the following conclusions (*ibid.*): If the total weekly truck trips to and from the Mill is 102, they would represent approximately 1.6% of the total truck traffic through Moab. Were the projected total to be increased to 172 round trips per week to accommodate the possible inclusion of Molycorp shipments, the percentage would rise to 2.7.<sup>7</sup>

According to the Licensee's December 5 submission (at 12-13), the traffic accident referred to by Moab during the telephone conference occurred on September 29, 1999, at the Cisco railhead site, approximately 60 miles north of Moab along Highway 191. The truck driver overcorrected his truck to accommodate oncoming traffic, with the consequence that the tractor and trailer overturned with a spillage of approximately 7 to 10 yards of alternate feed material from the intermodal container.

The report goes on to state (at 13) that the transportation contractor was notified within 1 hour of the accident and that local, state, and federal authorities — including the county sheriff, the state highway patrol and local emergency response agencies — were promptly made aware of the spill. The area was cleaned up by the contractor's personnel and a hazardous materials cleanup specialist within 8½ hours of the spill. Radiological surveys conducted by the

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<sup>7</sup>In compiling its traffic volume statistics, the UDOT defines "truck" in such a way that an ordinary pickup vehicle is excluded from that classification, instead being deemed to be a "car." See [Licensee's] December 7 Record of Discussion.

specialist and again by the Licensee reflected that no residual contamination was present.<sup>8</sup>

B. As just seen, the claims of injury-in-fact advanced by the three hearing requestors focus almost exclusively upon the transportation route that truck shipments of alternate feed materials to the White Mesa Mill have followed in the past and, presumably, would follow in the instance of the Maywood materials. That route commences at the Cisco railhead where the materials are off-loaded from trains and then proceeds in an essentially southerly direction along U.S. Highway 191 to the Mill, which is located a short distance below Blanding. The route passes through both Moab and Monticello and appears to total in the neighborhood of 140 miles.<sup>9</sup>

What must be now examined is whether any of those claims, put forth either in written submissions or voiced at the telephone conference, amount to what the Commission referred to in its recent decision in CLI-01-21 as “a distinct new harm or threat apart from the activities already licensed.” See pp. 39-40, *supra*. Stated another way, given that this transportation corridor manifestly has been employed for many years in the truck movement of alternate feed materials from Cisco to the Mill under previously approved license amendments, have the hearing requestors pointed to any threat posed by the Maywood shipments that was not equally present with respect to the earlier ones?

1. Turning first to Moab, it appeared at the telephone conference that its principal concern relates to the possibility of a truck accident, a concern heightened by the alleged failure to have notified it of the 1999 truck accident in Cisco and the municipality’s perceived inability to deal effectively with emergency situations of that stripe. Quite apart from the Commission’s observation in CLI-01-21 (p. 40, *supra*) that “speculation about accidents along feed material’s transport routes does not establish standing under our case law,” for several reasons that concern cannot carry the day here.

For one thing, the uncontroverted account of the Cisco accident provided by the Licensee would certainly suggest that the Moab apprehension based upon it is not well founded. The accident occurred at an appreciable distance from the city and it therefore is neither surprising nor alarming that its officials were

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<sup>8</sup>Both Mr. Darke and Sierra, but not Moab, took advantage of the opportunity accorded the hearing requestors to respond to the disclosures in the Licensee’s December 5 submission. Contrary to Mr. Darke’s insistence in his December 19 filing, the Licensee’s submission addresses adequately the questions that Judge Cole and I posed during the telephone conference. Further, I found nothing else in the Darke filing that added anything of materiality on the standing question at hand or called for the further exploration that the filing requested.

While Sierra’s December 24 filing was labeled “SIERRA CLUB’S RESPONSE TO IUSA’S SUPPLEMENTAL FILING,” upon examination it became readily apparent that, in fact, it was far broader in scope and sought to address additional matters not covered by the Licensee’s submission. As such, it manifestly was unauthorized. Accordingly, in a January 2 order (unpublished), it was rejected *sua sponte* for that reason.”

<sup>9</sup>The distance between Cisco and Moab on Highway 191 was reported by the Licensee to be approximately 60 miles and consultation of a road map of the area has reflected that Blanding is about 75 miles from Moab on that highway.

not notified of the occurrence. On the other hand, federal, state, and county officials did receive notification (in that regard, Cisco and Moab are both located within Grand County). Moreover, the transportation contractor took prompt, and successful, measures to deal with the spillage resulting from the accident.<sup>10</sup>

Beyond that, Moab assigns no reason to believe that an accident involving trucks carrying the Maywood materials is any more likely than one involving other shipments to the Mill pursuant to prior license amendments. In this connection, it has not been explained why, in any given period, the presence of the Maywood truck movements on Highway 191 will likely provide an aggregate amount of Mill truck traffic in excess of the volume of such traffic in the past. To be sure, as the Licensee has acknowledged, the Maywood shipments will overlap some of those headed for the Mill from other locales. But the high probability is that the same overlap has prevailed over the course of the Mill's two decades of operation — at least there is no claim to the contrary.

This consideration also provides a total answer to Moab's concern with respect to increased traffic congestion in its business district. On that score, I need not pause to consider whether, especially before this agency, a municipality has standing in any circumstances to complain of possible traffic congestion within its boundaries that might be associated with a licensed activity being conducted some 80 miles distant. (At first blush, it is difficult to see what statute that governs NRC licensing activities might come into play.) Nor is it necessary to take into account the UDOT statistics provided by the Licensee that seem to indicate that the truck traffic associated with the Maywood shipments would add very little to what otherwise would exist. It is enough that Moab has not even endeavored to compare the volume of truck traffic including the Maywood shipments with the volume of such traffic associated with past shipments to the Mill under the aegis of this license and prior amendments thereto.

2. The Sierra assertion of standing rests on no better foundation. Plainly, it has not established any injury-in-fact to itself as an organization. Whatever broad interest it might have in environmental protection, the furtherance of public health and safety, or the observance of statutory and regulatory provisions is shared with many others and, as such, is of no assistance to it here.

Sierra is thus left with the two affidavits of members that accompanied its September 24 filing. Neither of them comes close, however, to providing Sierra with representational standing. This is because, as the above summary of their content reveals, neither provides any basis for a claim that the Maywood shipments would pose a threat to the affiant not present with regard to previously

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<sup>10</sup>It is true that, in Subpart L proceedings, if the allegations of a hearing requestor are sufficient to meet the standing and relevancy tests, further exploration of their merit is to take place following the grant of the request. Nonetheless, given that there was no mention of the accident at Cisco in Moab's written submissions (the first mention of it coming at the telephone conference), it is not amiss to take into account here the Licensee's response to it.

licensed activities at the Mill. Insofar as concerns Ms. Robinson's belief that the trucks possibly are violating established rules at Cisco, presumably there are local authorities to whom she might turn for a remedy. That is certainly not a matter within this Commission's area of governance.

Indeed, in seeking at the telephone conference leave to supplement the hearing request with further affidavits, Sierra counsel acknowledged the shortcomings of the papers that had been earlier filed by a lay person within the organization. Without, however, some indication as to who might supply those affidavits and what they might contain by way of a showing of an injury-in-fact above and beyond harm that might flow from already licensed activities, no good reason existed for granting such leave. No such information was supplied during the conference, and none was forthcoming in response to the opportunity accorded counsel to make an offer of proof on the matter following the conference.

3. Very little need be added with respect to the viability of the Darke hearing request. It suffices to note that, in common with those of Moab and Sierra, Mr. Darke points to no harm that he might sustain as a result of the proposed activity at issue here that was not equally a possibility with regard to the shipments to the Mill covered by prior license amendments. At the risk of undue repetition, that consideration is fatal to any claim of standing.<sup>11</sup>

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For the foregoing reasons, each of the three hearing requests must be, and hereby is, *denied* on the sole ground that it does not assert the existence of an actual or threatened injury-in-fact that is distinct from, and in addition to, such potential injury associated with previously authorized activities at the White Mesa Mill.<sup>12</sup>

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<sup>11</sup> In a December 7, 2001 filing, Mr. Darke asserted that certain portions of the license amendment application had not been made a part of the public record at the time the notice of opportunity for hearing on the application had been published in the *Federal Register* last August. Confirming the inadvertent omission of the documents in question, the NRC Staff further reported in a December 21 response that the omission had been cured. As suggested by the Staff, and not opposed by the Licensee in its December 21 response, I thereupon gave the hearing requestors an opportunity to file a supplemental memorandum confined to the bearing that the documents might have on the standing issue. See December 26 order (unpublished).

Of the hearing requestors, Mr. Darke alone took advantage of that opportunity. His January 9 memorandum does not, however, advance his cause. Leaving aside that it exceeded the page limit prescribed in the December 26 order, the memorandum fell far short of establishing that any document belatedly made part of the record has a material bearing upon whether Mr. Darke has standing to challenge the license amendment under consideration.

<sup>12</sup> It is instructive that the result reached here fully accords with that reached in recent years in connection with the hearing requests filed with regard to other amendment applications pertaining to the license in question. This strongly suggests that there has not been a significant difference between one alternate feed material and another insofar as concerns the risks associated with their shipment to, and processing and storage at, the White Mesa Mill. That being so, Judge Cole and I welcomed the observation in the NRC Staff's November 20 filing that it may prove possible to eliminate the necessity of a new license amendment application every time the Licensee desires to receive additional shipments of alternate feed materials at its Mill. Were that to come to pass, there would be a considerable saving of the time and effort that is necessarily expended in the preparation of, defense against, and adjudication of hearing requests that, given the settled principles respecting the ingredients of a showing of judicial standing, stand virtually no chance of being granted.

If so inclined, the hearing requestors may appeal this Order to the Commission within ten (10) days in the manner prescribed in 10 C.F.R. § 2.1205(o).

It is so ORDERED.

BY THE PRESIDING OFFICER<sup>13</sup>

Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 16, 2002

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<sup>13</sup>Copies of this Memorandum and Order were sent this date by e-mail transmission to the counsel or other representative of all of the parties. Mr. Darke's copy was also sent to him by express mail.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Ann Marshall Young, Chair**  
**Dr. Charles N. Kelber**  
**Lester S. Rubenstein**

**In the Matter of**

**Docket Nos. 50-369-LR**  
**50-370-LR**  
**50-413-LR**  
**50-414-LR**  
**(ASLBP No. 02-794-01-LR)**

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

**January 24, 2002**

In this license renewal proceeding under 10 C.F.R. Part 54, the Licensing Board finds that Petitioners Nuclear Information and Resource Service (NIRS) and Blue Ridge Environmental Defense League (BREDL) have each established interests sufficient to confer standing and submitted at least one admissible contention, therefore grants in part the hearing requests of both, and certifies one question regarding terrorism risks to the Commission for its consideration.

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

Judicial concepts of standing provide the following guidance in determining whether a petitioner has established the necessary “interest” under 10 C.F.R. § 2.714(d)(1): To qualify for standing a petitioner must allege (1) a concrete and

particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision, criteria commonly referred to, respectively, as “injury in fact,” causality, and redressability. The injury may be either actual or threatened, but must lie arguably within the “zone of interests” protected by the statutes governing the proceeding — here, either the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA).

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

Public interest group petitioners established “representational” standing to proceed as intervenor parties by providing affidavits of members who (1) reside in the immediate area of one or both of the nuclear stations at issue, (2) express concerns that plant aging and possible unsafe operation of the plants will pose risks to the environment as well as to their health and welfare, and (3) have authorized the organizations to represent them in this proceeding.

**RULES OF PRACTICE: CONTENTIONS**

To be admitted as litigable in a license renewal proceeding, a contention must meet the admissibility requirements of 10 C.F.R. § 2.714, and address a subject that falls within the scope of a license renewal proceeding as defined by the Commission in CLI-01-20, 54 NRC 211 (2001), and relevant regulatory provisions of 10 C.F.R. Parts 54 and 51. Some matters fall outside the Board’s jurisdiction and authority, including any challenge to an NRC rule, *see* 10 C.F.R. § 2.758, but there are other avenues through which Petitioners may seek relief, including filing an enforcement petition under 10 C.F.R. § 2.206, a rulemaking petition under 10 C.F.R. § 2.802, or a request to the Commission under section 2.758 to make an exception or waive a rule based upon “special circumstances with respect to the subject matter of the particular proceeding . . . such that . . . the rule . . . would not serve the purposes for which [it] was adopted.” 10 C.F.R. § 2.758(b).

**RULES OF PRACTICE: CONTENTIONS**

The failure of a contention to comply with any of the requirements of 10 C.F.R. § 2.714(b)(2), (d)(2), which are strict by design to avoid the delay that can be occasioned by admitting and then sifting through poorly defined or supported contentions, is grounds for dismissing the contention.

**RULES OF PRACTICE: CONTENTIONS**

A petitioner need not make its case at the contention stage of the proceeding, nor is the contention rule a “fortress” to deny intervention, but a petitioner must indicate what facts or expert opinions, be it one or many, of which it is aware at the time, provide the basis for its contention. The basis must be reasonably specific, open-ended or ill-defined contentions lacking in specificity or basis may not be admitted, and petitioners must articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties.

**RULES OF PRACTICE: CONTENTIONS**

Although the Board may view a petitioner’s support in a light favorable to the petitioner, the requirements of section 2.714 must be met, and a contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement of the rule. More than “bald or conclusory allegations” must be submitted, and a contention will be dismissed if a petitioner sets forth no facts or expert opinion on which it intends to rely to prove the contention.

**RULES OF PRACTICE: CONTENTIONS**

A contention must contain a fact-based argument that directly controverts and actually and specifically challenges the application in order to be admitted; and additional information corroborating the existence of an actual safety problem, in the form of documents, expert opinion, or at least a fact-based argument, is necessary, as is specific reference to specific portion(s) of a licensee’s application.

**RULES OF PRACTICE: CONTENTIONS**

A petitioner must, under 10 C.F.R. § 2.714(b)(2), specifically state the issue it wishes to raise in a contention, and, in addition to providing support in the form of expert opinion, document(s), and/or a fact-based argument as required under section 2.714(b)(2)(ii), must, under section 2.714(b)(2)(i), provide reasonably specific and understandable explanation and reasons to support its contentions, which go beyond mere allegation and speculation, are not open-ended, ill-defined, vague, or unparticularized, and are stated with reasonable specificity.

**RULES OF PRACTICE: CONTENTIONS**

A petitioner must, under section 2.714(b)(2)(ii), refer to documents and other sources of which the petitioner is aware, and has an obligation to examine the

publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.

**RULES OF PRACTICE: CONTENTIONS**

The support for a contention need not be in affidavit or formal evidentiary form, nor is a petitioner required to proffer facts sufficient to withstand a summary disposition motion, but a petitioner must, pursuant to section 2.714(b)(2)(ii), make a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate.

**RULES OF PRACTICE: CONTENTIONS**

Although the contention rule does not require a specific allegation or citation of a regulatory violation, a petitioner must, under section 2.714(b)(2)(iii), provide sufficient information to show a genuine dispute with the applicant on a material issue of law or fact, i.e., a dispute that actually, specifically, and directly challenges and controverts the application, with regard to a legal or factual issue, the resolution of which would make a difference in the outcome of the licensing proceeding. This information must include either: (1) references to the portions of the application that are disputed in a contention, together with reasons for the dispute, or (2) if a contention alleges that an application is deficient by virtue of failing to contain relevant information as required by law, identification of each failure and the supporting reasons for the petitioner's belief.

**RULES OF PRACTICE: CONTENTIONS**

A petitioner must, under section 2.714(d)(2)(ii), demonstrate that the contention, if proven, would be of consequence in the proceeding because it would entitle the petitioner to specific relief.

**RULES OF PRACTICE: CONTENTIONS**

Pursuant to section 2.714(b)(2)(iii), for issues arising under the National Environmental Policy Act (NEPA), contentions must be based on the applicant's environmental report, and the petitioner can amend such 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."

## **RULES OF PRACTICE: CONTENTIONS**

In addition to the requirements of 10 C.F.R. § 2.714, contentions are necessarily limited to issues that are germane to the application pending before the Board, and are not cognizable unless they are material to matters that fall within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission's notice of opportunity for hearing.

## **SCOPE OF LICENSE RENEWAL PROCEEDING**

The scope of a license renewal proceeding is limited to discrete safety and environmental issues, based upon two sets of regulatory requirements: 10 C.F.R. Part 54, which addresses public health and safety requirements, and 10 C.F.R. Part 51, which addresses the potential environmental impacts of an additional 20 years of nuclear power plant operation. This encompasses, under Part 54, sections 54.21(a)(c) and 54.4, "a review of the plant's structures and components that will require an aging management review for the period of extended operation," as well as of the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; and under Part 51, a review of environmental issues as limited in accordance with sections 51.71(d) and 51.95(c). CLI-01-20, 54 NRC at 212-13.

## **SCOPE OF LICENSE RENEWAL PROCEEDING**

The process defined in 10 C.F.R. Part 54 is intended to be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term. A full reassessment of safety issues reviewed when a facility was first licensed and continuously and routinely monitored and assessed by ongoing agency oversight and agency-mandated licensee programs is not required, as this would be both unnecessary and wasteful. Nor is the full gamut of provisions in a plant's current licensing basis open to reanalysis during license renewal.

## **SCOPE OF LICENSE RENEWAL PROCEEDING**

The full range of current safety requirements for a plant is not subject to review in license renewal because this would not add significantly to safety and is not needed to ensure that continued operation during the period of extended operation is not inimical to public health and safety. Emergency planning is one example of a safety issue that falls outside the scope of license renewal review, because

provisions for such planning during a plant's initial license term will continue to apply during the renewal term.

#### **SCOPE OF LICENSE RENEWAL PROCEEDING**

The focus of NRC license renewal review and of adjudicatory proceedings on license renewal applications (the scope of which are the same) is upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs, which are the most significant overall safety concerns posed by extended reactor operation. The focus is on plant systems, structures, and components for which current regulatory activities and requirements may not be sufficient to manage the effects of aging in the period of extended operation. Section 54.21(a)(1)(i) lists structures and components in which age-related degradation can occur as the result of metal fatigue, erosion, corrosion, thermal and radiation embrittlement, microbiologically induced effects, creep, and shrinkage. Applicants must identify actions in addition to inspection and testing programs that will need to be taken to manage adequately the detrimental effects of aging, including maintenance, replacement of parts, etc. But if an aging-related issue is adequately dealt with by regulatory processes on an ongoing basis, through such things as mandated, specified periods for replacement of parts, it would fall outside the scope of licensing renewal review.

#### **SCOPE OF LICENSE RENEWAL PROCEEDING**

With regard to "time-limited aging analyses" that are made during the original license term based upon a particular time period, an applicant must (1) show that the earlier analysis will remain valid for the extended operation period; or (2) modify and extend the analysis to apply to a longer term; or (3) otherwise demonstrate that the effects of aging will be adequately managed in the renewal term.

#### **SCOPE OF LICENSE RENEWAL PROCEEDING**

On a case-by-case basis, if warranted by special circumstances, the Commission may waive application of one or more of the license renewal rules or otherwise make an exception in a particular proceeding.

#### **SCOPE OF LICENSE RENEWAL PROCEEDING**

Part 51 is grounded on an extensive, systematic study of the potential environmental consequences of operating a nuclear power plant for an additional

20 years, resulting in a Generic Environmental Impact Statement (GEIS), which divides the license renewal environmental requirements into generic, or “Category 1,” components, and plant-specific, or “Category 2,” components. Category 1 issues are those in which generic conclusions may be drawn that are applicable to all plants or a specific subgroup of plants, and which therefore need not be addressed in a license renewal application. Category 2 issues are those not subject to generic environmental findings, and must be addressed and analyzed in the plant’s environmental report (ER).

#### **SCOPE OF LICENSE RENEWAL PROCEEDING**

The NRC Staff’s environmental review includes an independent assessment of the adequacy of the plant’s ER and results in a site-specific supplement to the GEIS, the Supplemental Environmental Impact Statement (SEIS), which must weigh all of the expected environmental impacts of license renewal, both those for which there are generic findings and those described in plant-specific analyses. Prior to finalizing the SEIS, the Staff produces a draft SEIS and seeks public comment on it.

#### **SCOPE OF LICENSE RENEWAL PROCEEDING**

With regard to any information a petitioner contends is “new and significant” such that a generic finding needs revisiting, the petitioner may in the hearing process seek a waiver of a generic rule under section 2.758, or, with regard to generic findings asserted to be incorrect for all plants, petition the Commission to initiate a fresh rulemaking under section 2.802. A petitioner may also use the SEIS notice and comment process to ask the NRC to forgo use of a suspect generic finding and suspend license renewal proceedings, pending a rulemaking or updating of the GEIS.

#### **SCOPE OF LICENSE RENEWAL**

Generic issues such as initiating mechanisms of cracking and other aging effects are not part of the focus of license renewal, absent a connection with specific issues relating to the plants at issue in a license renewal proceeding and the management of aging effects in those plants.

#### **CONTENTIONS: ADMISSIBILITY**

Contentions relating to the anticipated use of plutonium/mixed oxide (MOX) fuel in the plants at issue are consolidated and ruled admissible under 10 C.F.R.

§ 2.714(b)(2) and within the scope of a license renewal proceeding. Under section 2.714(b)(2), the contentions present specific statements of the issues the petitioner wishes to raise; provide brief explanations of the contentions' bases; provide fact-based argument sufficient to show a genuine dispute on the material issue of combined fact and law of whether future anticipated use of MOX fuel in the Duke plants is, under relevant case law, sufficiently definite and foreseeable to constitute a "proposal," or sufficiently "connected," with a "cumulative impact," "interdependence," or similar relationship to matters at issue in this license renewal proceeding to warrant being addressed in the SEIS; identify the failure of the LRA to contain information on the use of MOX fuel in the plants; and provide supporting reasons why the petitioner believes the information should be included in the application. The contentions also provide sufficient indication that the use of MOX fuel in the Duke plants could affect the management of aging effects in a number of structures and components, some time-limited aging analyses, as well as the environment with regard to thermal discharges, to place it within the scope of a license renewal proceeding. To avoid holding a hearing on whether the SEIS should include MOX issues, after the SEIS is completed, early hearing will be held on the question of whether anticipated MOX fuel use in the plants is sufficiently definite and related to license renewal issues under various tests in case law to warrant being addressed in the SEIS and the LRA. Ultimate resolution of whether and with what, if any, conditions the LRA should be granted will be determined at a later date in the proceeding.

#### **CONTENTIONS: ADMISSIBILITY**

#### **CERTIFICATION OF QUESTION TO COMMISSION**

A contention relating to security concerns in light of the terrorist events of September 11, 2001, would not be admissible under Part 54 because security concerns are outside the scope of license renewal safety issues. Contentions also relate primarily to generic environmental issues applicable to all nuclear plants under Part 51 and, under 10 C.F.R. § 50.13, a plant is not required to be protected against the effects of attacks and destructive acts of an enemy of the United States. MOX fuel issues, on which a contention has been admitted, might, depending upon evidence elicited, constitute plant-specific "new information" and "special circumstances with respect to the subject matter of the particular proceeding" under section 2.758, but whether such "special circumstances" are such that the application of section 50.13 and relevant security and license renewal rules "would not serve the purposes for which [they were] adopted" is a "novel . . . policy question" of the sort the Commission has directed be certified to it on an interlocutory basis. Therefore, ruling on this is particularly suited for early review by the Commission, and the issue is accordingly certified to the Commission for its consideration.

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**MEMORANDUM AND ORDER**  
**(Ruling on Standing and Contentions)**

This proceeding concerns the license renewal application (LRA) of Duke Energy Corporation (Duke), seeking approval under 10 C.F.R. Part 54 to renew the operating licenses for its McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2. Petitioners Nuclear Information and Resource Service (NIRS) and Blue Ridge Environmental Defense League (BREDL) have filed petitions to intervene and requests for hearing with regard to the renewal application.

For the reasons set forth below, we conclude that both Petitioners have standing and have proffered at least one admissible contention, and we therefore grant, in part, the hearing requests of both, admitting contentions relating to the anticipated use of plutonium mixed oxide (MOX) fuel in the Duke plants and to ice condensers and station blackout risks, and certifying one question relating to terrorism risks to the Commission for its consideration.

**I. BACKGROUND**

In its June 13, 2001, application, Duke seeks to renew the licenses for its McGuire Nuclear Station, Units 1 and 2, located some 17 miles north-northwest of Charlotte, North Carolina, for additional 20-year periods commencing in 2021 and 2023, respectively, and to renew the licenses for its Catawba Nuclear Station, Units 1 and 2, located in South Carolina some 18 miles southwest of Charlotte, North Carolina, for additional 20-year periods commencing in 2024 and 2026, respectively.

After noting receipt of the application, *see* 66 Fed. Reg. 37,072 (July 16, 2001), the NRC Staff determined it to be complete and acceptable for docketing and on August 15, 2001, provided a notice of opportunity for hearing with regard

to the application. *See* 66 Fed. Reg. 42,893 (Aug. 15, 2001). In response to this notice, Petitioners NIRS and BREDL, both appearing through nonattorney representatives, timely filed their petitions to intervene and requests for hearing on September 14, 2001; Duke and the NRC Staff filed responses to these on October 1, 2001. On October 4, 2001, the Commission issued an order referring the hearing requests and intervention petitions to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, for assignment of a Licensing Board to rule on the petitions and conduct any proceeding should a hearing be granted; in its order the Commission also provided the Licensing Board with guidance for the conduct and scheduling of the proceeding, with specific milestones set for various steps of the proceeding. *See* CLI-01-20, 54 NRC 211 (2001) (hereinafter Referral Order). On October 5, 2001, this Licensing Board was established to preside over the proceeding. *See* 66 Fed. Reg. 52,158 (Oct. 12, 2001).

In its initial prehearing order of October 16, 2001, the Board set deadlines for the filing of amended and supplemented petitions and responses thereto, and dates for oral argument on these. Order (Setting Deadlines, Schedule, and Guidance for Proceedings) (Oct. 16, 2001) (unpublished). These deadlines were subsequently extended at NIRS's request, based upon the Board's finding that the grounds for NIRS's request, i.e., the unavailability of various documents NIRS wished to utilize in drafting its contentions because of their removal from the NRC Web site for security reasons following the terrorist events of September 11, 2001, constituted "unavoidable and extreme circumstances" sufficient to meet the Commission's guideline to such effect as stated in its Referral Order, 54 NRC at 216, and its earlier *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998). Memorandum and Order (Granting Motion To Extend Time and Resetting Deadlines and Schedule for Proceedings), LBP-01-31, 54 NRC 242, 244-46 (2001).

Ultimately, after further proceedings concerning NIRS's access to documents, and an additional minimal extension to address this issue, both Petitioners timely filed their supplemented and amended petitions on November 29, 2001, and in addition on the same date NIRS filed a motion to suspend this proceeding pending the public release of the final safety analysis reports (FSARs) for the Duke plants, which was supported by BREDL.<sup>1</sup> Both Duke and the Staff filed responses to

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<sup>1</sup> "Contentions of Nuclear Information and Resource Service" (hereinafter NIRS Contentions); "[NIRS] Amended Petition To Intervene — Reply to Arguments with Respect to Standing"; "[NIRS] Motion To Suspend License Renewal Proceeding Pending Public Release of [FSARs]"; "Blue Ridge Environmental Defense League Submittal of Contentions . . ." (hereinafter BREDL Contentions) and "Support for Motion To Suspend Proceeding Filed by NIRS 11/29/01" (all dated Nov. 29, 2001).

NIRS's motion regarding the FSARs on December 10, 2001, and on December 13 timely filed their responses to the Petitioners' contentions.<sup>2</sup>

The Board denied NIRS's motion to suspend, finding it to be untimely and lacking a showing of good cause to reschedule oral argument on contentions that had already been filed. Memorandum and Order (Denying Motion To Suspend Proceeding Pending Public Release of FSARs) (Dec. 11, 2001) (unpublished). The Board noted, as was argued by Duke and the Staff, that Petitioners may move to submit late-filed contentions pursuant to the provisions of 10 C.F.R. § 2.714 when the FSARs become available again, *id.* at 2, and left the matter open for further argument as necessary at the close of oral argument on December 19. *Id.* at 2-3.

On December 18 and 19, 2001, the Board heard oral argument of the participants on the admissibility of the Petitioners' contentions. At the beginning of the conference, held in Charlotte, North Carolina, NIRS announced that it was withdrawing its contentions 1.1.4, 1.1.6, 1.2.1, 1.2.2, and 1.2.3, Tr. 194-96, as well as contentions 1.1.7, 4.1, 5.1, Tr. 548, and 1.1.8, Tr. 581-82. NIRS subsequently indicated it still wished to have the basis for contention 1.1.4 considered in support of its contention 1.1.5, or alternatively to be considered on its own without oral argument being offered, Tr. 549-51, and that it wished to have its contention 1.1.7 ruled on without oral argument, which was permitted, without objection. Tr. 548-49. At the conclusion of oral argument on December 19, the matter of the Staff's offer to provide the FSARs to the Petitioners subject to a temporary nondisclosure agreement was touched upon, and the participants were encouraged to make additional effort to reach agreement on how to handle this issue prior to seeking the Board's assistance on it. Tr. 641-44.

On December 28, 2001, the Commission issued CLI-01-27, 54 NRC 385 (2001), denying BREDL's "Petition To Dismiss Licensing Proceeding or, in the Alternative, Hold It in Abeyance," which had been filed with the Commission on October 23, 2001. The Commission found no basis for terminating or postponing the proceeding in the grounds argued by BREDL, including "major anticipated changes in the current licensing basis, i.e., the use of plutonium/mixed oxide ("MOX") fuel . . . increased security threats . . . relating to the risk of terrorist attacks [in the aftermath of September 11]," and "the NRC's purportedly improper grant to Duke of an exemption from a filing requirement" related to the timing of LRAs. CLI-01-27, 54 NRC at 388-89 (footnotes omitted). The Commission cited a number of different grounds for its action, noting that the "license renewals [at issue], if granted, will not take effect for at least another 20

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<sup>2</sup> "NRC Staff's Response to NIRS Motion To Suspend License Renewal Proceeding Pending Public Release of [FSARs]" (Dec. 10, 2001); "Response of Duke Energy Corporation to [NIRS] Motion To Suspend License Renewal Proceeding Pending Public Release of [FSARs]" (Dec. 10, 2001); "NRC Staff's Response to Contentions Filed by [NIRS] and [BREDL]" (Dec. 13, 2001) (hereinafter Staff Response); "Response of Duke Energy Corporation to Amended Petitions To Intervene filed by [NIRS] and [BREDL]" (Dec. 13, 2001) (hereinafter Duke Response).

years,” *id.* at 390, so that there is “no risk here of any immediate threat to the public health and safety.” *Id.* The Commission also noted its historic “reluctan[ce] to suspend pending adjudications to await developments in other . . . proceedings.” *Id.* Moreover, reemphasizing that “[l]icense renewal focuses on *aging* issues, not on everyday operating issues,” on the matter of terrorist attacks the Commission expressed that “it is far from clear that upcoming terrorism-related changes in our rules, if any, will bear on license renewal review[ ],” but pointed out that, to the extent agency safety, environmental, or safeguards rules are revised “in a manner that affects issues material to this adjudication, our procedural rules allow for the possibility of late-filed contentions to address such new developments.” *Id.* at 391. Finally, with regard to BREDL’s “contention-like arguments . . . regarding plutonium/MOX fuel,” which raises the much-litigated environmental law “cumulative impact” issue, the Commission stated that it is “generally preferable for the Licensing Board to address such questions in the first instance, allowing [the Commission] ultimately to consider them after development of a full record.” *Id.* at 391-92.<sup>3</sup>

## II. ANALYSIS

### A. Standing

A petitioner’s standing, or right to participate in a Commission licensing proceeding, is grounded in section 189a of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a)(1)(A), which requires the NRC to provide a hearing “upon the request of any person whose interest may be affected by the proceeding.” The Commission has implemented this requirement in its regulations at 10 C.F.R. § 2.714. Under section 2.714(a)(2), an intervention petition must set forth with particularity “the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1),” along with “the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.” 10 C.F.R. § 2.714(a)(2). Subsection (d)(1) provides in relevant part that the Board shall consider the following three factors when deciding whether to grant standing to a petitioner:

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<sup>3</sup> We note that the Commission also refers to BREDL’s argument (before the Commission) concerning “the NRC Staff’s purportedly improper grant to Duke of an exemption from a filing requirement,” CLI-01-27, 54 NRC at 389, 391-92, but we do not discuss this issue in this Memorandum and Order, because no contention has been filed with the Board based on the exemption, other than as part of the basis in support of BREDL contention 4, *see* discussion of BREDL contention 4, *infra*, which we do not find to be determinative in our ruling on that contention.

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

When determining whether a petitioner has established the necessary "interest" under subsection (d)(1), licensing boards are directed by Commission precedent to look for guidance to judicial concepts of standing. *See, e.g., Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). According to these concepts, to qualify for standing a petitioner must allege (1) a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995). These three criteria are commonly referred to, respectively, as "injury in fact," causality, and redressability. The requisite injury may be either actual or threatened, *Yankee*, CLI-98-21, 48 NRC at 195 (citing, e.g., *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)), but must arguably lie within the "zone of interests" protected by the statutes governing the proceeding — here, either the AEA or the National Environmental Policy Act (NEPA). *See Yankee*, CLI-98-21, 48 NRC at 195-96; *Ambrosia Lake*, CLI-98-11, 48 NRC at 6.

Neither Duke nor the Staff opposes a conclusion that both NIRS and BREDL have established standing to proceed as intervenor parties in this matter, and we likewise conclude that both Petitioners have established standing under AEA § 189a and the Commission's rules, by virtue of providing the affidavits of members who (1) reside in the immediate area of one or both of the McGuire and Catawba nuclear stations, (2) express concerns that plant aging and possible unsafe operation of the plants will pose risks to the environment as well as to their health and welfare, and (3) have either explicitly or implicitly authorized the organization to represent them in this proceeding. As a consequence, both Petitioners have established their "representational standing" to participate in this proceeding. *See Yankee*, CLI-98-21, 48 NRC at 195; *Georgia Tech*, CLI-95-12, 42 NRC at 115; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146-50 (2001), *aff'd*, CLI-01-17, 54 NRC 3 (2001).

## B. Contentions

Both Petitioners have submitted a number of contentions. To be admitted as litigable in this proceeding, each must meet the admissibility requirements of 10 C.F.R. § 2.714, and address a subject that falls within the scope of a license renewal proceeding as defined by the Commission in its Referral Order and the relevant regulatory provisions of 10 C.F.R. Parts 54 and 51. In addition, as noted at the beginning of oral argument on the Petitioners' contentions, *see* Tr. 197-98, there are some matters that fall outside the Board's jurisdiction and authority, including any challenge to a Commission rule, *see* 10 C.F.R. § 2.758, but for which there are other avenues through which Petitioners may seek relief, including filing an enforcement petition under 10 C.F.R. § 2.206, a rulemaking petition under 10 C.F.R. § 2.802, or a request to the Commission under 10 C.F.R. § 2.758 to make an exception or waive a rule based upon "special circumstances with respect to the subject matter of the particular proceeding . . . such that . . . the rule . . . would not serve the purposes for which [it] was adopted." 10 C.F.R. § 2.758(b).

Because both the contention requirements and the law on the scope of a license renewal proceeding involve complex issues not easily susceptible to immediately clear and precise definition, and because both Petitioners in this proceeding have appeared *pro se*,<sup>4</sup> we address these legal principles at some length, in an attempt to clarify for the Petitioners what these principles encompass, and how we apply them herein.

### 1. Contention Admissibility Requirements

The standards that licensing boards must apply in ruling on the admissibility of contentions, and that we shall therefore apply in ruling on those contentions proffered by the Petitioners in this proceeding, are defined in 10 C.F.R. § 2.714. This rule provides in relevant part as follows:

(b)(1) . . . . A petitioner who fails to file a supplement that satisfies the requirements of paragraph (b)(2) of this section with respect to at least one contention will not be permitted to participate as a party.

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

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

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<sup>4</sup>We note that, inasmuch as the Petitioners appear without legal counsel, they would not necessarily be held strictly to the high standards to which the Commission holds entities represented by lawyers. *See Yankee*, CLI-98-21, 48 NRC at 201. We hasten to add, however, that, even though *pro se* petitioners will not always be expected to meet the same standards to which entities with legal counsel are held, the Commission also emphasized in *Yankee* that such petitioners are still expected to comply with the Commission's basic procedural rules, especially simple ones such as those establishing filing deadlines. *Id.*

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

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

....

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

....

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

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

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

The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). And, pursuant to section 2.714(b)(1), the failure of a petitioner to submit at least one admissible contention is grounds for dismissing the petition.<sup>5</sup>

The Commission has recently noted that the “contention rule is strict by design,” having been “toughened . . . in 1989 because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)). The Commission observed in *Millstone* that “[s]erious hearing delays — of months or years — occurred, as licensing boards admitted and then sifted through poorly defined or supported contentions,” which resulted in Congress “call[ing] upon the Commission to make ‘fundamental changes’

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<sup>5</sup>Of course, if a petitioner should at a later date discover facts that might provide grounds for a contention, a petition containing such a contention could be submitted pursuant to 10 C.F.R. § 2.714(a)(1), and may be considered if the late-filed petition establishes that it is timely and appropriate under the factors listed in subsections (i)-(v) of section 2.714(a)(1). See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999); *Turkey Point*, CLI-01-17, 54 NRC at 24 n.18.

in the public hearing process.” *Millstone*, CLI-01-24, 54 NRC at 358 (citing *Oconee*, CLI-99-11, 49 NRC at 334; Proposed Rule, Contentions, 51 Fed. Reg. 24,365, 24,366 (July 3, 1986); H.R. Rep. No. 97-177, at 151 (1981)). The rule provisions quoted above incorporate the changes the Commission made in 1989 with regard to the admission of contentions.

There are various sources that provide some elucidation in interpreting and applying these provisions. The Statement of Considerations (SOC) for the final 1989 rule amendments, 54 Fed. Reg. 33,168 (Aug. 11, 1989), provides guidance that is entitled to “special weight” under the authority of *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988). In the SOC, the Commission noted that the requirement in section 2.714(b)(2)(ii) “does not call upon the intervenor to make its case at this stage of the proceeding,” but does require a petitioner “to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention,” 54 Fed. Reg. at 33,170.

Similarly, in *Oconee* the Commission observed that the “contention rule should [not] be turned into a ‘fortress to deny intervention,’” and that contentions “that are material and supported by reasonably specific factual and legal allegations” will be admitted. *Oconee*, CLI-99-11, 49 NRC at 335 (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974)). The Commission in *Millstone* also notes that the 1989 contention rule revisions “insist upon some ‘reasonably specific factual and legal’ basis for [a] contention,” emphasizing as well that “presiding officers may not admit open-ended or ill-defined contentions lacking in specificity or basis,” and that petitioners “must articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties.” *Millstone*, CLI-01-24, 54 NRC at 359 (citing 54 Fed. Reg. at 33,168, 33,171).

Moreover, a contention “should refer to those specific documents or other sources of which the petitioner is aware and upon which he intends to rely in establishing the validity of the contention.” *Millstone*, CLI-01-24, 54 NRC at 358 (citing *Oconee*, CLI-99-11, 49 NRC at 333). Although the Commission’s use of the word “should,” as well as the language in subsection 2.714(b)(2)(ii) referring to specific sources and documents “of which the petitioner is aware,” indicates that provision of documents and sources under subsection 2.714(b)(2)(ii) is not an absolute requirement, the Commission in the SOC interprets the subsection as placing on a petitioner an “ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.” 54 Fed. Reg. at 33,170 (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983)).

Mere reference to documents does not, however, provide an adequate basis for a contention. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998).

Although the Board “may appropriately view a petitioner’s support for its contention in a light that is favorable to the petitioner, [it] cannot do so by ignoring the requirements [of] section 2.714(b)(2),” and a “contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement” of the rule. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). A “contention will be dismissed if [a petitioner] sets forth no facts or expert opinion on which it intends to rely to prove its contention, or if the contention fails to establish that a genuine dispute exists between the intervenor and the applicant.” 54 Fed. Reg. at 33,171. Petitioners must do more than submit “bald or conclusory allegation[s]” of a dispute with the applicant. *Id.* They must “read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant’s position and the petitioner’s opposing view,” *Millstone*, CLI-01-24, 54 NRC at 358 (citing 54 Fed. Reg. at 33,170), and “explain[] why they have a disagreement with [the applicant].” 54 Fed. Reg. at 33,171.

The factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion, *see id.* at 33,170-71, but a petitioner “must make a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate,” *id.* at 33,171 (citing *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980)). Petitioners must develop a “fact-based argument that actually and specifically challenges the application,” and a contention “that fails directly to controvert the license application . . . is subject to dismissal.” *Oconee*, CLI-99-11, 49 NRC at 341-42 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998)). As the Commission stated in *Oconee*, “it is not unreasonable to expect a petitioner to provide additional information corroborating the existence of an actual safety problem. Documents, expert opinion, or at least a fact-based argument are necessary.” *Oconee*, CLI-99-11, 49 NRC at 342.

“It is surely legitimate,” the Commission further observed,

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

*Id.* As emphasized in *Catawba*, “[n]either Section 189a of the [Atomic Energy] Act nor Section 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.” *Catawba*, ALAB-687, 16 NRC at 468.

Thus, petitioners must do more than merely make unsupported allegations. Their contentions must *specifically* state the issue they wish to raise and, in addition to providing support in the form of expert opinion, document(s), and/or a fact-based argument, they must provide reasonably specific and understandable *explanation* and *reasons* to support their contentions. If petitioners in their contentions “fail to offer any specific explanation, factual or legal, for why the consequences [the petitioners] fear will occur,” they do not satisfy the requirements of the contention rule. *Millstone*, CLI-01-24, 54 NRC at 359. “An admissible contention must *explain*, with specificity, particular safety or legal reasons requiring rejection of the contested [licensing action].” *Id.* at 359-60 (emphasis added). The contention rule does not require “a specific allegation or citation of a regulatory violation,” but petitioners are obliged, under 10 C.F.R. § 2.714(b)(2)(iii), either “to include references to the specific portion of the application . . . that the petitioner disputes and the supporting *reasons* for each dispute,” or, if a contention alleges that an application is deficient, to identify “each failure and the supporting *reasons* for the petitioner’s belief.” *Id.* at 361-62 (emphasis added).

To summarize the above principles in the context of the language and structure of the contention rule provisions that are quoted above, an admissible contention must:

(A) under section 2.714(b)(2), consist of a *specific* statement of the issue of law or fact the petitioner wishes to raise or controvert; and

(B) under subsection 2.714(b)(2)(i), be supported by a brief *explanation* of the factual and/or legal basis or bases of the contention, which goes beyond mere allegation and speculation, is *not* open-ended, ill-defined, vague, or unparticularized, and *is* stated with reasonable specificity; and

(C) under subsection 2.714(b)(2)(ii), include a statement of the alleged facts or expert opinion (or both) that support the contention and on which the petitioner intends to rely to prove its case at a hearing, which must also be stated with reasonable specificity; and

(D) also under subsection 2.714(b)(2)(ii), include references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish the facts it alleges and/or the expert opinion it offers, which must also be stated with reasonable specificity and, at a minimum, consist of a fact-based argument sufficient to demonstrate that an inquiry in depth is appropriate, and illustrate that the petitioner has examined

the publicly available documentary material pertaining to the facility(ies) in question with sufficient care to uncover any information that could serve as a foundation for a specific contention; and

(E) under subsection 2.714(b)(2)(iii), provide sufficient information to show that a *genuine dispute* exists with the applicant on a *material* issue of law or fact (i.e., a dispute that actually, specifically, and directly challenges and controverts the application, with regard to a legal or factual issue, the resolution of which “would make a difference in the outcome of the licensing proceeding,” 54 Fed. Reg. at 33,172, which includes either:

(1) *references to the specific portions of the application* (including the applicant’s environmental report and safety report) that the petitioner disputes *and the supporting reasons for each dispute*, or

(2) 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*; and

(F) under subsection 2.714(d)(2)(ii), demonstrate that the contention, if proven, would be of consequence in the proceeding because it would entitle the petitioner to specific relief.

Also, as indicated in the text of subsection 2.714(b)(2)(iii), for issues arising under the National Environmental Policy Act (NEPA), contentions must be based on the applicant’s environmental report, and the petitioner can amend such 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.”

In addition to the requirements of 10 C.F.R. § 2.714, contentions are necessarily limited to issues that are germane to the application pending before the Board, *Yankee*, CLI-98-21, 48 NRC at 204 n.7, and are not cognizable unless they are material to matters that fall within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission’s notice of opportunity for hearing. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *see also Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426-27 (1980); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980). In the next section, we address the scope of this proceeding as directed by the Commission in its Referral Order and relevant rules.

## 2. *Scope of License Renewal Proceeding*

Initial NRC reactor operating licenses last 40 years, and may be renewed for terms of up to 20 years. *Turkey Point*, CLI-01-17, 54 NRC at 7 (citing 42 U.S.C. § 2133; 10 C.F.R. §§ 50.51, 54.31). As indicated above, Duke in this proceeding seeks to renew the operating licenses for its McGuire Nuclear Station Units 1 and 2 for additional 20-year periods commencing in 2021 and 2023, and to renew the licenses for its Catawba Nuclear Station Units 1 and 2 for additional 20-year periods commencing in 2024 and 2026, respectively.

In its Referral Order the Commission stated that “[t]he scope of this proceeding is limited to discrete safety and environmental issues.” CLI-01-20, 54 NRC at 212 (citing *Turkey Point*, CLI-01-17, 54 NRC at 6-13). As the Commission earlier explained in *Turkey Point*, two sets of regulatory requirements govern NRC review of LRAs for reactors, 10 C.F.R. Part 54, which addresses public health and safety requirements, and 10 C.F.R. Part 51, which addresses the potential environmental impacts of an additional 20 years of nuclear power plant operation. *Turkey Point*, CLI-01-17, 54 NRC at 6-7.

Thus, as the Commission noted in its Referral Order, the scope of this proceeding encompasses, under Part 54, “a review of the plant’s structures and components that will require an aging management review for the period of extended operation,” as well as of the plant’s “systems, structures, and components that are subject to an evaluation of time-limited aging analyses,” CLI-01-20, 54 NRC at 212-13 (citing 10 C.F.R. §§ 54.21(a) and (c), 54.4; Final Rule, “Nuclear Power Plant License Renewal, Revisions,” 60 Fed. Reg. 22,461 (May 8, 1995)); and, under Part 51, a review of environmental issues as limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). CLI-01-20, 54 NRC at 213 (citing NUREG-1437, “Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants”; Final Rule, “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 61 Fed. Reg. 28,467 (June 5, 1996), *amended by* 61 Fed. Reg. 66,537 (Dec. 18, 1996)). We are to guide ourselves by these regulations in determining whether proffered contentions meet the standard in 10 C.F.R. § 2.714(b)(2)(iii). CLI-01-20, 54 NRC at 212-13.

### *a. Safety Issues in License Renewal Proceedings*

In developing 10 C.F.R. Part 54 beginning in the 1980s, the Commission sought “to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term.” *Turkey Point*, CLI-01-17, 54 NRC at 7. Noting that the “issues and concerns involved in an extended 20 years of operation are not identical to issues reviewed when a reactor facility is first built and licensed,” the Commission found

that requiring a full reassessment of safety issues that were “thoroughly reviewed when the facility was first licensed” and continue to be “routinely monitored and assessed by ongoing agency oversight and agency-mandated licensee programs” would be “both unnecessary and wasteful.” *Id.* To highlight matters that are *within* the scope of license renewal review, we turn first to those things that the Commission has specifically discussed as being *outside* the scope of license renewal review.

The Commission did not “believe it necessary or appropriate to throw open the full gamut of provisions in a plant’s current licensing basis to re-analysis during the license renewal review.” *Id.* at 9. “Current licensing basis” is described by the Commission in *Turkey Point* as follows:

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

. . . . The current licensing basis represents an “evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.” 60 Fed. Reg. at 22,473. It is effectively addressed and maintained by ongoing agency oversight, review, and enforcement.

*Turkey Point*, CLI-01-17, 54 NRC at 9.

One specific example of a safety issue that falls outside the scope of license renewal review and was discussed by the Commission in *Turkey Point* is that of emergency planning. Noting that the provisions for emergency planning during a plant’s initial license term “will continue to apply during the renewal term,” the Commission noted that these provisions include “mandated periodic reviews and emergency drills,” as well as “performance criteria[] and independent evaluations [that] provide a process to ensure continued adequacy of emergency preparedness.” *Id.* Other similar safety-related issues will also fall outside the scope of license renewal review. The Commission explained how it reached this conclusion in the 1991 license renewal rulemaking, as follows:

The Commission cannot conclude that its regulation of operating reactors is “perfect” and cannot be improved, that all safety issues applicable to all plants have been resolved, or that all plants have been and at all times in the future will operate in perfect compliance with all NRC requirements. However, based upon its review of the regulatory programs in this rulemaking, the Commission does conclude that (a) its program of oversight is sufficiently

broad and rigorous to establish that the added discipline of a formal license renewal review against the full range of current safety requirements would not add significantly to safety, and (b) such a review is not needed to ensure that continued operation during the period of extended operation is not inimical to the public health and safety.

*Id.* at 10 (citing Final Rule, “Nuclear Power Plant License Renewal,” 56 Fed. Reg. 64,943, 64,945 (Dec. 13, 1991)).

In contrast to the preceding aspects of a plant’s components, structures, systems, current licensing basis, and operation that fall *outside* the scope of license renewal review, the Commission chose to focus the NRC license renewal review (the scope of which is the same as that of adjudicatory proceedings like this one) “upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs,” which are “the most significant overall safety concerns posed by extended reactor operation.” *Turkey Point*, CLI-01-17, 54 NRC at 7. The Commission has also framed the focus of license renewal review as being on “plant systems, structures, and components for which current [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in the period of extended operation.” *Id.* at 10 (citing 60 Fed. Reg. at 22,469) (emphasis in original). These effects become important during extended operation beyond the initial 40-year license term, “particularly since the design of some components may have been based explicitly upon an assumed service life of 40 years.” *Turkey Point*, CLI-01-17, 54 NRC at 7.

The Commission in *Turkey Point* described these effects as follows:

Adverse aging effects can result from metal fatigue, erosion, corrosion, thermal and radiation embrittlement, microbiologically induced effects, creep, and shrinkage. Such age-related degradation can affect a number of reactor and auxiliary systems, including the reactor vessel, the reactor coolant system pressure boundary, steam generators, electrical cables, the pressurizer, heat exchangers, and the spent fuel pool. Indeed, a host of individual components and structures are at issue. *See* 10 C.F.R. § 54.21(a)(1)(i). Left unmitigated, the effects of aging can overstress equipment, unacceptably reduce safety margins, and lead to the loss of required plant functions, including the capability to shut down the reactor and maintain it in a shutdown condition, and to otherwise prevent or mitigate the consequences of accidents with a potential for offsite exposures.

*Turkey Point*, CLI-01-17, 54 NRC at 7-8.

Applicants must demonstrate how their programs will be effective in managing the effects of aging during the proposed period of extended operation, at a “detailed . . . ‘component and structure level,’ rather than at a more generalized ‘system level.’” *Id.* at 8. Although adverse aging effects “generally are gradual and thus can be detected by programs that ensure sufficient inspections and testing,” applicants must “identify any additional actions, i.e., maintenance, replacement of parts, etc., that will need to be taken to manage adequately the detrimental effects of aging.” *Id.*

An issue can be related to plant aging, however, and still not warrant review at the time of a license renewal application, according to the Commission in *Turkey Point*. If an aging-related issue is “adequately dealt with by regulatory processes” on an ongoing basis — for example, a structure or component is already required to be replaced “at mandated, specified time periods” — it would fall outside the scope of licensing renewal review. *Id.* at 10 n.2.

In addition to those plant systems, structures, and components for which current regulatory activities and requirements may not be sufficient to *manage the effects of aging* in the period of extended operation, another category of safety issues that fall *within* the scope of license renewal review is described by the Commission in *Turkey Point* as follows:

[S]ome safety reviews or analyses made during the original term of the license may have been based upon a particular time period, such as, perhaps, an assumed service life of a specific number of years or some period of operation defined by the original license term, i.e., 40 years. Before the NRC will grant any license renewal application, an applicant must reassess these “time-limited aging analyses,” and (1) show that the earlier analysis will remain valid for the extended operation period; or (2) modify and extend the analysis to apply to a longer term, such as 60 years; or (3) otherwise demonstrate that the effects of aging will be adequately managed in the renewal term.

*Id.* at 8 (citing 60 Fed. Reg. at 22,480; 10 C.F.R. §§ 54.21(c), 54.29(a)(2)).

The Commission also points out, in its discussion of health and safety issues and license renewal in *Turkey Point*, that (as indicated above), “[o]n a case-by-case basis, if warranted by ‘special circumstances,’ the Commission may waive application of one or more of our license renewal rules or otherwise make an exception for the proceeding at issue.” *Turkey Point*, CLI-01-17, 54 NRC at 10 (citing 10 C.F.R. § 2.758; 56 Fed. Reg. at 64,961) (footnote omitted). The Commission also notes that “any change to a plant’s licensing basis that requires a license amendment — i.e., a change in the technical specifications — will itself offer an opportunity for hearing in accordance with section 189 of the Atomic Energy Act.” *Turkey Point*, CLI-01-17, 54 NRC at 10.

#### *b. Environmental Issues in License Renewal Proceedings*

In 1996 the Commission amended its environmental protection requirements in 10 C.F.R. Part 51 to establish environmental review requirements for license renewals, seeking in so doing to “develop . . . requirements . . . that were both efficient and more effectively focused.” *Id.* at 11. Grounded upon “an extensive, systematic study of the potential environmental consequences of operating a nuclear power plant for an additional 20 years,” Part 51 divides the license renewal environmental requirements into “generic,” or “Category 1,” components, and

“plant-specific,” or “Category 2,” components. *Id.* (citing NUREG-1437, the May 1996 “Generic Environmental Impact Statement” (hereinafter GEIS)).

The basis for these two separate categories is found in the study underlying Part 51, which included the Commission’s evaluation of environmental and safety data on the operating experience of all U.S. light-water nuclear power reactors that held operating licenses in 1991, and provided as well for the participation of numerous interest groups through public workshops and written public comments. *Turkey Point*, CLI-01-17, 54 NRC at 11 (citing GEIS at 1-4; 61 Fed. Reg. at 28,468). The resulting GEIS identified a number of possible environmental impacts, generic and plant-specific, that could result from an additional 20 years of nuclear power plant operation.

Issues on which the Commission found that it could draw generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants, were, as indicated above, identified as “Category 1” issues. *Id.* at 11 (citing GEIS at 1-4; 10 C.F.R. Part 51, Subpart A, App. B). This categorization was based on the Commission’s conclusion that these issues involve environmental effects that are essentially similar for all plants, and that they thus need not be assessed repeatedly on a site-specific basis, plant-by-plant. Accordingly, under Part 51, license renewal applicants need not submit in their site-specific Environmental Reports (ERs) an analysis of Category 1 issues, but instead may reference and adopt the generic environmental impact findings codified in Table B-1, Appendix B to Part 51. *Turkey Point*, CLI-01-17, 54 NRC at 11 (citing 10 C.F.R. § 51.53(c)(3)(i)). For example, under Part 51, the “noise impact from operation expected during the license renewal term” is a Category 1 issue not subject to plant-specific analysis, based on the Commission’s findings that noise impacts have generally been small at all plants, and that the principal sources for such impacts (cooling towers and transformers) will not change appreciably during extended operation. *Turkey Point*, CLI-01-17, 54 NRC at 12.

On other issues, however, the Commission was not able to make environmental findings on a generic basis, and applicants must provide a plant-specific review of all these “Category 2” environmental issues. *Turkey Point*, CLI-01-17, 54 NRC at 11 (citing 10 C.F.R. Part 51, Subpart A, Appendix B). These issues are characterized by the Commission as involving environmental impact severity levels that might differ significantly from one plant to another, or impacts for which additional plant-specific mitigation measures should be considered; for such issues applicants must provide plant-specific analyses of the environmental impacts. For example, the impact of extended operation on endangered or threatened species varies from one location to another and this fits within Category 2. In addition, even with generic Category 1 issues, an applicant must still provide additional analysis in its ER if new and significant information may bear on the applicability of the Category 1 finding at a particular plant. *Turkey Point*, CLI-01-17, 54 NRC at 11-12.

The NRC Staff's environmental review includes an independent assessment of the adequacy of the applicant's ER, resulting in conclusions set out in a draft Supplemental Environmental Impact Statement (SEIS), a site-specific supplement to the GEIS. Prior to finalizing the SEIS, the Staff seeks public comment. *Id.* (citing 10 C.F.R. §§ 51.70, 51.73-.74). The final SEIS adopts any applicable Category 1 environmental impact findings from the GEIS, and also takes account of public comments, including plant-specific claims and new information on generic findings. *Turkey Point*, CLI-01-17, 54 NRC at 12 (citing 10 C.F.R. §§ 51.71(d), 51.95(c); 61 Fed. Reg. at 28,470). Part 51 requires the final SEIS to weigh all of the expected environmental impacts of license renewal, both those for which there are generic findings and those described in plant-specific analyses. *Turkey Point*, CLI-01-17, 54 NRC at 12 (citing 10 C.F.R. § 51.95; GEIS at 1-9 to 1-10; 61 Fed. Reg. at 28,485; 61 Fed. Reg. at 66,541).

With regard to any information a petitioner contends is "new and significant" such that a generic finding needs revisiting, the petitioner may, in the hearing process, seek a waiver of a generic rule under the provisions of 10 C.F.R. § 2.758 or, with regard to generic findings asserted to be incorrect for all plants, may petition the Commission to initiate a fresh rulemaking under 10 C.F.R. § 2.802. *Turkey Point*, CLI-01-17, 54 NRC at 12. Moreover, in addition to providing public comment generally in the SEIS process, a petitioner may also "use the SEIS notice-and-comment process to ask the NRC to forgo use of the suspect generic finding and to suspend license renewal proceedings, pending a rulemaking or updating of the GEIS." *Id.* (citing 61 Fed. Reg. at 28,470; GEIS at 1-10 to 1-11).<sup>6</sup>

### 3. *Rulings on Contentions*

With the preceding general contention requirements and license renewal scope principles in mind, we turn now to our consideration of the Petitioners' contentions, which fall into several broad categories. In addition to (a) several contentions that NIRS has withdrawn, these categories are: (b) contentions that relate most appropriately to safety issues (even though they may also touch on environmental issues), (c) contentions that relate most appropriately to environmental issues (even though they may also concern safety issues), and also, (d) a separate subcategory of environmentally related contentions that have to do with severe

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<sup>6</sup> Another avenue for changing generic environmental findings is provided by the Commission in its own review, quite apart from individual license renewal proceedings, of the license renewal rules and GEIS environmental analyses, which is to be done every 10 years beginning approximately 7 years after completion of the last review. As part of this review the Commission will again provide opportunity for public comment, and if it finds that Part 51 or any of its underlying generic findings needs modification, the Commission will institute a new rulemaking. *Turkey Point*, CLI-01-17, 54 NRC at 12 (citing 61 Fed. Reg. at 28,468).

accident mitigation alternatives (SAMA), a Category 2 issue under the GEIS and 10 C.F.R. Part 51, Subpart A, Appendix B.

*a. Withdrawn Contentions*

During oral argument on contentions, NIRS announced, as indicated above, that it wished to withdraw several contentions. At this point we find it appropriate to consider contention 1.1.4 in combination with contention 1.1.5 and BREDL contention 4, which relate to the same issue of ice condensers and station blackout risks, and to consider contention 1.1.7 in combination with BREDL contention 1, which relates to the same issue of radiological impacts of license renewal, and to approve the withdrawal of NIRS's contentions 1.1.6, 1.1.8, 1.2.1, 1.2.2, 1.2.3, 4.1, and 5.1.

We find that the contentions remaining to be decided, some of which have aspects of both safety and environmental issues, fall most appropriately into the categories that follow, and will consider them under these categories, in some instances consolidated with contentions that relate to the same general subject matter, and in some instances in reframed formats.

*b. Contentions That Relate Most Appropriately to Safety Issues*

**(i) BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE (BREDL) CONTENTION 5; AND NIRS CONTENTIONS 2.1.1 AND 2.1.2 (RELATING TO REACTOR VESSEL INTEGRITY, STUD BOLTS, AND REACTOR LID PENETRATION NOZZLES)**

BREDL's contention 5 provides as follows:

The assessment of reactor vessel integrity with regard to embrittlement and metal fatigue is insufficient and incomplete.

NIRS states as follows in its contentions 2.1.1 and 2.1.2:

2.1 Reactor Aging Analysis Not Adequate.

2.1.1 Stud Bolt Contention: Applicant's ignoring of the essential role of stud bolts and stud bolt condition invalidates its Application.

2.1.2 Materials Contention: Duke has not adequately factored unforeseen aging.

*See* NIRS Contentions at 22-27.

BREDL offers as bases for its contention assertions including that Duke fails to include "important factors in their assessment including prolonged cycles of heating and cooling and stress fatigue in critical reactor parts not revealed by current methods"; that the coupon test used by the Applicant is insufficient in

not exposing the coupons to the weakening factor of stress fatigue and therefore providing no information on the fatigue effect of cycling between high-load and no-load conditions in the reactor vessel; and that the reactor stud bolts, which hold the closure head dome on the vessel, are exposed to greater stress than the vessel itself. BREDL Contentions, contention 5. In support of its contention, BREDL provides a statement of Jesse Riley, who also presented NIRS's argument on its contentions 2.1.1 and 2.1.2, on the subject of heating and cooling cycles and stress fatigue. BREDL also submitted evidence of a March 17, 2001, "NCV NonCited Violation," which is quoted by BREDL as follows:

**Initiating Events**

**Significance:** G Mar 17, 2001

Identified By: Licensee

Item Type: NCV NonCited Violation

**Inadequate Corrective Actions for Recurring Problems with Shutdown Operations Involving Loss of Letdown and/or Inadvertent Reactor Coolant System Cooldown Transients**

Inadequate corrective actions (10CFR50, Appendix B, Criterion XVI) for recurring problems with shutdown operations involving loss of letdown and/or inadvertent reactor coolant (NC) system cooldown transients. During a Unit 1 shutdown from Mode 2 to Mode 3 on March 9, 2001, NC system temperature went below minimum temperature for criticality due to overfeed of steam generators. This event occurred because of ineffective corrective actions to address procedural deficiencies and/or equipment problems complicating plant cooldown. This is captured in the licensee's corrective action program under PIP M-01-0986. This finding was determined to have very low safety significance and is being treated as a Non Cited Violation (Section 4OA7). Inspection Report#: 2000007(pdf)

*Id.* BREDL asserts that because "Duke Energy has not identified actions that have been or will be taken with respect to managing the effects of aging during the period of extended operation on the functionality of structures and components or time-limited aging analyses that have been identified under § 54.29," there is "no reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the Current Licensing basis." *Id.*

In support of contention 2.1.1, NIRS cites various parts of Duke's application, asserting that it contains "no reference . . . to the bolts that attach the closure head dome to the reactor vessel," and "no data . . . for stud bolts." NIRS Contentions at 22-23. Some calculations regarding the load on the stud bolts are provided, and NIRS contends that "this most heavily stressed part of the reactor vessel will be increasingly subject to failure with continued operation," that it was "designed for about 30 years of operation" (the original operating license later being extended to 40 years), and that "[t]he finding of unanticipated types of serious damage to reactor lid penetration nozzles at Oconee raises the question

of unanticipated types of damage to stud bolts.’’ *Id.* at 24. NIRS cites various documentation on the cracking of vessel head penetrations at Duke’s Oconee reactor. *Id.* at 24 n.16.

In support of contention 2.1.2, NIRS concentrates more on the issue of the reactor lid penetration nozzles, again citing the Oconee occurrences, and asserting that “[n]one of the parties to this proceeding knows what further adverse changes may take place in the subject reactors in the proposed 20 year period of extended operation.’’ *Id.* at 25-26. NIRS raises the “possible consequences of a major loss-of-coolant accident that would result from a simultaneous failure of the reactor vessel stud bolts,” and concludes its argument with reference again to the stud bolts, which, it avers, “bear about 3 times the stress of any other part of the reactor vessel” and are subject to “neutron radiation which . . . embrittles metal” and causes “metal ‘fatigue,’” and also refers to the “initial licensing [in recognition of] the fatigue factor[] restrict[ing] operation to 200 fuel cycles,” and to “questions about weakening the weld metal in the reactor vessel.’’ *Id.* at 26.

In oral argument, BREDL representative Louis Zeller and NIRS representative Jesse Riley expanded upon BREDL’s and NIRS’s written arguments and theories. Tr. 391-420, 471-510. With regard to Duke’s inservice inspection plan, which Mr. Riley agreed is of the type mandated by the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (Section III, Division 1, and Section XI, Division 1, according to Duke), Mr. Riley stated that the ASME code provisions were not sufficient. Use of the ASME code is mandated by 10 C.F.R. § 50.55a, cited by Duke in its response. *See* Duke Response at 59; Staff Response at 33.

#### **Duke and Staff Responses to BREDL Contention 5 and NIRS Contentions 2.1.1 and 2.1.2**

Duke and the Staff assert that, contrary to the arguments of BREDL and NIRS, Duke’s application does in fact address the issues raised in the contentions: it addresses embrittlement issues in section 4.2.2; aging management with regard to the issues raised in the contentions at issue in section 4.3, including thermal and stress fatigue at 4.3-1; pressure temperature operating limits in section 4.2.3; the Reactor Vessel Integrity Program in Appendix B to section B.3.26; a discussion of the Oconee experience in the “Operating Experience” portion of the description of the “Control Rod Drive Mechanism Nozzle and Other Vessel Closure Penetrations Inspection Program” at B.3.9-3 of Appendix B; and “Exterior Surfaces and Bolted Closures” in Table 3.1-1, at 3.1-5, which contains a section on “Reactor Vessel Closure Studs, nuts, and washers” — i.e., stud bolts (along with nuts and washers). The table indicates that the aging effects of “Cracking, Loss of Material, and Loss of Preload” on these parts are addressed in Duke’s “Inservice Inspection Plan” and its “Reactor Coolant System Operational

Leakage Monitoring Program,” part of its “Aging Management Programs and Activities.” Staff Response at 31-34, 54-55; Duke Response at 59-60, 63, 98-99. As noted by Duke in its response to NIRS contention 2.1.1,

In preparing the license renewal application, Duke first identified systems, structures, and components within the scope of the license renewal rule (10 C.F.R. § 54.4) and subject to an aging management review (10 C.F.R. § 54.21(a)(1)). The results of this review are presented in the tables in Chapter 3 of the license renewal application, specifically Columns 1, 2 and 3. The second step of the process required by the rule involved identifying the aging effects for the components subject to an aging management review. Aging effects manifest themselves when component materials are exposed to certain environmental conditions. The environments to which components are exposed are shown in Column 4 of the Chapter 3 tables and aging effects are documented in Column 5. The third step of the process was to identify programs to manage the aging effects (10 C.F.R. § 54.21(a)(3)). The programs are listed in Column 6 of the Chapter 3 table for each component type. The program attributes are captured in Appendix B of the application.

Duke Response at 58-59.

**Ruling on BREDL Contention 5 and NIRS Contentions 2.1.1 and 2.1.2**

We find that these contentions do not, as required by 10 C.F.R. § 2.714(b)(2)(iii), show a genuine dispute on a material issue of law or fact through appropriate reference to any of the specific parts of the application that address the subjects covered by the contentions. The only references to the application are found in NIRS contention 2.1.1, regarding stud bolts, but, as indicated above, there is a table that specifically addresses these bolts, contrary to the claim that these are “ignored.” Other references to the application are not sufficiently tied to other arguments of the Petitioners to show any genuine disputes on material issues of law or fact. Therefore, the contentions may not be admitted to be litigated in this proceeding. In addition, to the extent that they challenge NRC regulations relating to the ASME standards, they are inadmissible under 10 C.F.R. § 2.758, and no request for a waiver of the rule has been made, either explicitly or implicitly.

We note that, with regard to the merits of any “as yet unencountered failure mechanisms,” the Staff has stated that its regulatory process “ensures that [any] emerging issues are addressed by every affected licensee” as provided at Section 1.3.4 of NUREG-1412, “Foundations for the Adequacy of the Licensing Basis.” See Staff Response at 33. The Staff offers as an example of this, Bulletin 2001-01, “Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles,” which was issued by the Staff to address the associated aging effect revealed at Oconee. *Id.* at 33 n.17. In addition, as the Commission has indicated, to the extent the Petitioners wish to seek further consideration of their concerns,

another avenue of recourse would be through a rulemaking petition under 10 C.F.R. § 2.802. *Turkey Point*, CLI-01-17, 54 NRC at 12.

Under relevant requirements controlling in this proceeding, however, we rule BREDL contention 5 and NIRS contentions 2.1.1 and 2.1.2 to be inadmissible.<sup>7</sup>

(ii) **NIRS CONTENTION 3.1 (RELATING TO FIRE BARRIER PENETRATION SEALS)**

In this contention, NIRS states as follows:

3.1 Duke Energy Fire Barrier Penetration Seal Analysis and Qualification Testing Is Incomplete and Inadequate and Therefore Constitutes Degraded Fire Protection Defense-in-Depth for the Applicant Units.

*See* NIRS Contentions at 27. NIRS discusses this contention in four parts. In the first, NIRS asserts that the “as-built and originally installed fire penetration seals in all four applicant units have not been adequately analyzed and evaluated as qualified rated fire barrier penetration seals in [a] context of fire endurance age-related degradation for the requested license extension.” *Id.* It is further asserted that Duke originally installed a fire-barrier penetration sealant material called “Firewall 50,” but has not provided fire tests to qualify and demonstrate the 1-hour and 3-hour fire endurance capability of the seals. *Id.* at 28.

Next, NIRS contends that Duke has been replacing the “Firewall 50” penetration seals with a Dow-Corning RTV silicone foam fire penetration seal material, but has not provided an evaluation for the effective removal of the old “Firewall 50” material or analyzed how the silicone foam material performs after installation into the penetrations that previously used the “Firewall 50” material. *Id.* at 29. Third, NIRS argues that after Duke performed a 3-hour fire test it used an incorrect hose stream test that “does not provide an adequate test for standard fire fighting techniques likely to be utilized in the event of fire at the applicant units.” *Id.* at 30.

Finally, NIRS contends that the silicone foam is a combustible material that could burn through the penetration, particularly “[i]f just 1% of a jetliner’s fuel ignited after impact,” which would also produce an explosion. *Id.* at 30-31. Therefore, NIRS argues, the fire penetration seals used by Duke in the plants at issue “have not been rigorously tested and evaluated for the explosive environment and transient combustibles as delivered by [a] deliberate act of sabotage using an (*sic*) commercial jetliner aircraft” as identified in a report of the Argonne National Laboratory concerning the dangers presented by planes

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<sup>7</sup>In view of our ruling denying admission of BREDL contention 5, it is not necessary to rule on objections stated at oral argument by Duke and the Staff to various exhibits relating to this contention, Tr. 392, 420-21, based upon their not being provided until the date of oral argument.

hitting nuclear reactors.” *Id.* at 31. NIRS also challenges a June 2000 change in certain NRC fire protection regulations to provide that “combustible” materials can now be used in qualified fire barrier penetration seals. *Id.*

#### **Duke and Staff Responses to NIRS Contention 3.1**

Duke and the Staff respond that NIRS has not provided reference to specific sections of Duke’s application with which it takes issue, nor expert opinion to support its arguments, and that its concerns relate to present-day rather than aging issues. Duke Response at 64-66; Staff Response at 34-38. The Staff also points out that the rule that NIRS challenges, 10 C.F.R. Part 50, Appendix R, applies to reactors operating before January 1, 1979, prior to the initial operating dates of the Duke plants in the 1980s, and argues that NIRS’s contention, insofar as it relates to capacity to withstand a jetliner impact and explosion, constitutes a challenge to NRC rules. *Id.* at 34 n.18, 38. Duke also notes that fire penetration seals “have been evaluated for extended operation and are specifically addressed” in the application, citing Table 3.5.2 at 3.5-16, section B.3.12 of Appendix B at B.3.12-1. Duke Response at 67.

#### **Ruling on NIRS Contention 3.1**

Again, the Staff and Duke are correct that NIRS has not provided any reference to specific parts of the application that it contends are incorrect. Therefore, even were we to assume that NIRS had provided a sufficient fact-based argument showing that its concerns were related to aging, it has not specifically controverted the application and the contention must therefore be ruled to be inadmissible. In addition, the part of the contention that challenges the NRC rule change would be inadmissible under 10 C.F.R. § 2.758, whether or not it is related to the plants at issue, which it is not.

#### **(iii) BREDL CONTENTION 3 (RELATING TO STEAM GENERATOR AGING MANAGEMENT PROGRAM)**

BREDL Contention 3 states:

The aging management program for steam generators and associated components such as steam generator tubes is insufficient and incomplete, and does not assure safe operations that prevent design basis and severe catastrophic accidents. In addition the [design basis accident] frequency for steam generator tube rupture is grossly underestimated.

*See* BREDL Contentions at 24.

In this contention, BREDL identifies specific sections of the application it challenges, namely, Table 3.1.1, at 3.1-21 to -24 and 3.1-26, in which Duke describes twenty-two subcomponents of steam generators, which utilize the heat produced in reactor cores to convert water into the steam that turns the turbine blades to make electricity. *Id.* at 24, 26. BREDL asserts (a) that the description of the aging management program for steam generators found in Appendix B to Duke's application at Part B.3.31-3 "is simplistic, overly brief, and contains numerous discrepancies and omissions (*see* Part E)," *id.* at 25, and therefore does not comply with 10 C.F.R. § 54.13 or § 54.21(a), and also that the program is described merely as "equivalent" and not equal to that described in NUREG-1723 (Safety Evaluation Report Related to the License Renewal of Oconee Nuclear Station, Units 1, 2, and 3), *id.* at 34; (b) that Duke's "Alloy 600 Aging Management Review," which is a program to ensure adequate inspection of parts made of Alloy 600 and "rank susceptibility to primary water stress corrosion cracking," fails to provide the assurance required by section 54.21 by stating merely that the "review will be complete by the end of the initial 40-year license period"; and (c) that Duke's Chemistry Control Program, for managing "loss of material and/or cracking of components exposed to borated water, closed cooling water, fuel oil, and treated oil [*sic*] environments," is inadequate in that it fails to "identify past problems with chemistry control throughout the industry and the efforts required to prevent recurrence." *Id.* at 25-26. BREDL also alleges that Duke has "in practice sought and obtained 'relief' from meeting regulatory requirements and industry standards for pre-service inspection of numerous steam generator subcomponents," which has resulted in "the failure to develop a baseline for monitoring aging of these parts," issues that Duke allegedly failed to identify in violation of 10 C.F.R. § 54.17. *Id.* at 26.

To provide a basis for contention 2, BREDL relies heavily on the asserted inadequacy of the current state of steam generator performance and regulation, pointing to steam generator tube ruptures (SGTRs) in the Indian Point 2 and Palo Verde 2 reactors, and discussion in various scientific papers of stress corrosion cracking being the "principal degradation model leading to tube plugging in the U.S. and worldwide." BREDL Contentions at 27 (citing NRC Technical Issues Paper and Fact Sheets, TIP:27, *Steam Generator Tube Issues*; D.A. Powers, *Material Issues in Modern Reactor Safety*, Sandia National Laboratory, SAND 2000-1936C, at 6). BREDL also relies on the differing professional opinion (DPO) of now-retired NRC Staff member Dr. Joram Hopenfeld to the effect that "excessively degraded steam generator tubes" were permitted to remain in service, leading to "serious safety issues," BREDL Contentions at 28, and on statements from some meetings of the Advisory Committee for Reactor Safeguards (ACRS), concerning the understanding of the Staff of steam generator tube damage, the Hopenfeld DPO, and various problems with steam generator tubes. *Id.* at 28-33. BREDL refers to SGTRs at McGuire 1, a 1997 shutdown

at McGuire 2 “because of an increasing primary-to-secondary leak,” *id.* at 30, and an NRC-approved waiver of weld inspections of a Catawba 2 replacement steam generator’s primary system inlet and outlet nozzles in the preservice inspection, and contends that Duke’s license renewal application does not identify or address several generic issues including “deformation due to corrosion at tube support plate intersections” identified in NUREG-1800 (Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants (SRP)), *id.* at 35, various steam generator tube crack initiation mechanisms, and past problems in water chemistry control programs. *See id.* at 34-36. Finally, BREDL questions the time at which the effectiveness evaluation of the Alloy 600 aging management programs is to start, noting that Duke states that the Alloy 600 Aging Management Review will be complete “by” the end of the initial 40-year license period. *Id.* at 35 (citing LRA, Appendix B, at B.3.1-1).

### **Duke and Staff Responses to BREDL Contention 3**

Duke responds that much of the material BREDL argues is missing from the LRA is actually there or there in substance, and that the rest of it is either not required by regulation, or not relevant in that there is no nexus between the information (including the Indian Point and Palo Verde SGTRs, Dr. Hopenfeld’s DPO, and the information from the ACRS meetings) with any particular deficiencies in the LRA. Duke Response at 81 n.136, 82-84. With regard to NUREG-1800, Duke acknowledges that its application does not contain all that the SRP calls for, but notes that it filed its application prior to issuance of NUREG-1800 in July 2001, and states that failure to address all topics in the form specified in NUREG-1800 does not in and of itself indicate any deficiency in the application. *Id.* at 83-84.

With specific regard to the alleged steam generator surveillance program deficiencies relating to deformation due to corrosion of the tube support plate intersections, crack initiation mechanisms and alloy 600 performance, Duke states that the information cited as omitted is in Table 3.1.1 and in Appendix B at B.3.31; that the Catawba 2 information is not omitted, as the table applies to all plants, unless otherwise noted; that the tube support plate interaction corrosion issue is discussed under “cracking” in the LRA at 3.1-22; and that NRC requirements speak only to the management of aging effects and do not require licensees to anticipate as-yet-unidentified aging degradation mechanisms. *Id.* at 83-84.

With respect to the effectiveness review of the Alloy 600 Aging Management Review, Duke states that there is no requirement that the review must be done earlier than the end of the current license term, and that the review “is intended to evaluate those programs in a timely fashion to determine whether any enhancements are indicated prior to the period of extended operation,” and that this “meets the intent of the NRC requirement in 10 C.F.R. § 54.29(a)(1)

to manage the effects of aging *during the period of extended operation.*” *Id.* at 85-86. Duke says that it “does so by assessing current programmatic oversight and by assuring that enhancements are made prior to the extended period of operation, which begins at year 40.” *Id.* at 86 (citing LRA, Appendix B at B.3.1-1).

Regarding alleged deficiencies in the water chemistry control program, Duke argues that BREDL’s arguments are insufficiently specific to support contention 2, that the program is in compliance with relevant guidelines, and that BREDL does not challenge the substantive sufficiency of the program. *Id.* at 86-87.

The Staff agrees with Duke that BREDL fails to relate various problems having to do with steam generator tubes to any specific deficiencies in Duke’s aging management programs, argues that BREDL fails to provide support for many of its statements, and notes that the steam generators and associated tubing have been replaced in three of the four Duke plants at issue. Staff Response at 47. BREDL challenges these replacements, asserting that the “abbreviated life span of the first steam generators indicates an inability to implement a strong and durable aging management program.” BREDL Contentions at 36. According to the Staff, however, the replacement steam generator tubes at McGuire 1 and 2 and Catawba 1 are fabricated from thermally treated Alloy 690, and those at Catawba 2 are fabricated from thermally treated Alloy 600, and BREDL has not demonstrated that there have been any tube ruptures in plants that use these materials. *See* Staff Response at 47 (citing LRA at 3.1-22). Moreover, the Staff asserts, BREDL has failed to allege any defect in the steam generator aging management programs proposed by Duke in its LRA that would cause Duke to be unable to detect, monitor, and repair the tubes so as to ensure structural and leakage integrity. *See* Staff Response at 48.

The Staff argues further that BREDL does not demonstrate that the timing of the Alloy 600 Aging Management Review renders the program deficient or that it is inadequate to manage the effects of aging for the period of extended operation, and notes that, in addition to the review discussed by BREDL, there are other programs cited in the application that will be used to manage and monitor aging. *Id.* at 49 (citing LRA § B.3.1, at B.3.1-1). Regarding the chemistry control program, the Staff notes that the LRA does in fact contain a discussion of plant-specific and industry operating experience at B.3.6-4 to -5, which BREDL does not challenge. *See* Staff Response at 49-50.

Asserting that because the bases for contention 3 either relate to current operating issues, reflect an incorrect reading of the LRA, or are not adequately supported by facts and expert opinion, the Staff argues that BREDL has failed to demonstrate a genuine dispute as to a material issue of fact or law and is therefore inadmissible. *See id.* at 50.

### **Ruling on BREDL Contention 3**

We recognize the importance of steam generators as part of the primary systems of reactors, and the need to maintain their integrity through steady state, transient, and accident conditions. We are also cognizant of the long and checkered history of steam generator performance. In this licensing action, however, the focus and scope is on the aging management programs described in the LRA and their ability to detect, monitor, and repair tubes so as to ensure structural and leakage integrity in the Catawba and McGuire plants during the period of license extension.

BREDL in its contention alleges omissions and/or deficiencies in the steam generator surveillance program and the water chemistry program, and challenges the effectiveness of the Alloy 600 aging management review program. BREDL centers its arguments on issues relating to the general industry's past and current performance and the NRC's regulatory requirements, in addition to alleging that Duke's CLB and LRA do not adequately address current performance, and that continuation of the current practices in the license extension period will also be inadequate. Recounting in some detail past general industry problems with steam generator tubes, BREDL alleges that Duke fails to account for past problems or identify efforts to prevent recurrence. We find, however, that BREDL does not adequately explain how these problems relate specifically to the Duke plants. And with regard to problems BREDL asserts with regard to the Duke plants specifically, it fails to explain, for example, why the replacement of three of the plants' steam generators is problematic as opposed to indicating that past problems were addressed appropriately, or how or why the exemption from the preservice inspection requirements will impair the development of adequate "baseline" data. Mere assertions without appropriate explanation and support do not satisfy the requirements of the contention rule.

In short, BREDL fails specifically to relate the "old experience" with steam generators to deficiencies in the proposed aging management programs for the four Duke units at issue, or to specific materials discussed in the LRA. As noted by both Duke and the Staff, *see, e.g.*, Duke Response at 84, Staff Response at 49, the license renewal regulations focus on the *effects* of aging, and such generic issues as initiating mechanisms of cracking and other aging effects are not part of this focus in and of themselves, absent a connection with specific issues relating to the plants at issue and the management of aging effects in those plants.

As to the BREDL claim regarding the apparent potential for an inadequate evaluation of the Alloy 600 aging management review results, which could result in inadequate enhancements for the period of extended operation, BREDL's statement that "[a] 'review' is only a part of a 'program,'" BREDL Contentions at 35, fails to provide any specific explanation of why this is a problem in terms of any actual, specific impact relating to components made of Alloy 600. Nor has BREDL provided any specific examples of potential for harm arising

out of the “review” aspect, or controverted any specific aspect of the review as described in LRA § B.3.1, at B.3.1-1, including the “Inservice Inspection Plan,” the “Control Rod Drive Mechanism and Other Vessel Head Penetration Program,” the “Reactor Vessel Internals Inspection,” and the “Steam Generator Integrity Program.” Given that BREDL has failed specifically to address these matters or controvert them, we are unable to find a “genuine dispute” on a material issue of fact or law for litigation.

Similarly, with regard to alleged omissions and/or deficiencies in the steam generator surveillance program and the water chemistry program as contended by BREDL, we find that BREDL has shown no genuine dispute on any material issues of fact or law, in that its arguments lack reasonable specificity regarding the Duke plants and fail to address particular parts of the LRA that do address these programs.

In sum, although BREDL in contention 3 discusses significant issues with regard to steam generators *in general*, we find that it has failed to “directly controvert” the Duke license renewal application with reasonable specificity and explanation of how the various facts it offers relate to specific parts of Duke’s application, and thereby has failed to show any genuine disputes of material fact or law with regard to the application. Contention 3 is thus inadmissible in this proceeding.

*c. Contentions That Relate Most Appropriately to Environmental Issues*

**(i) BREDL CONTENTION 1; NIRS CONTENTION 1.1.7 (RELATING TO RADIOLOGICAL IMPACTS)**

In its contention 1, BREDL asserts that:

Offsite radiological impacts must [be] analyzed as a Category 2 issue in [the Applicant’s] Environmental Report.

*Id.* at 3. NIRS in its contention 1.1.7 asserts that Duke’s application is not complete with regard to “New Information on Impact of Radiation.” NIRS Contentions at 16.

BREDL acknowledges that 10 C.F.R. Part 51, Subpart A, Appendix B identifies radiological impacts of routine operations as a Category 1 environmental issue. *See* BREDL Contentions at 3. Both BREDL and NIRS assert that there is new information that warrants making such impacts a Category 2 issue, and NIRS asserts that the application is not complete by virtue of not including this new information. The nature of the new information provided by the Petitioners consists of:

(1) a study by Dr. Joseph Mangano “focusing on the effects from operational closure of the Rancho Seco nuclear power plant near Sacramento[,] California,” which found “significant decreases in mortality (all causes and from congenital anomalies) and cancer incidence . . . for fetuses, infants, and small children” following operational closure, *id.* at 3-4;

(2) a “recently published health study by KGA Associates in the Chernobyl Nuclear Power Plant area near Kiev, Ukraine and sponsored by the U.S. Department of Defense,” in which the authors conclude among other things that the research “suggests neurocognitive and physical decrements in performance 12 years AFTER a nuclear accident” and new information on the occurrence of hot particles following a major radionuclide release, *id.* at 4-5;

(3) “information submitted by the Radiation and Public Health Project for the Peach Bottom [Atomic Power Plant] relicensing proceeding,” *id.* at 6, raising concerns about nuclear reactor emissions and health risks, including from low-dose radioactive nuclides, *see id.* at 6-12; and

(4) a report published by Dr. David A. Scheinberg of Memorial Sloan-Kettering Cancer Center in which it is indicated that even a single atom of actinium-225 has the capacity to kill a cancer cell, from which it may be inferred that one atom also has the potential to harm or kill healthy cells as well, NIRS Contentions at 17.

#### **Duke and Staff Responses to BREDL Contention 1 and NIRS Contention 1.1.7**

Duke and the Staff oppose these contentions, asserting that they constitute a challenge to NRC rules, do not meet the requirements for a request for rule waiver under 10 C.F.R. § 2.758, and are generic rather than plant-specific issues. Duke Response at 45-47, 75-77; Staff Response at 27, 42-43.

#### **Ruling on BREDL Contention 1 and NIRS Contention 1.1.7**

Given, as acknowledged by BREDL, that under relevant NRC regulation in 10 C.F.R. Part 51, Subpart A, Appendix B, radiological impacts of nuclear plant operations is a Category 1, or generic, environmental issue, contentions 1 and 1.1.7 do constitute challenges to NRC rules, not permitted under 10 C.F.R. § 2.758. Section 2.758(b) permits a party to petition that the application of an NRC rule be waived or an exception made, but under this section the “sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation . . . would not serve the purposes for which the rule . . . was adopted.”

As argued by Duke and the Staff, neither Petitioner has shown any “special circumstances *with respect to the subject matter of [this] particular proceeding*” (emphasis supplied). The issue is manifestly a generic one, as applicable to all nuclear plants as to any one of the plant units at issue in this proceeding. Therefore, even were we to consider the documents submitted in support of the contentions to constitute affidavits as required by section 2.758(b), we do not

find a rule waiver to be appropriate in this proceeding. As the Commission has suggested, the Petitioners may wish to present their essentially generic concerns about radiological impacts through a petition for rulemaking under 10 C.F.R. § 2.802.

For the preceding reasons, we find BREDL contention 1 and NIRS contention 1.1.7 to be inadmissible.

(ii) **NIRS CONTENTION 1.1.3 (RELATING TO CLIMATE CHANGE)**

NIRS asserts in contention 1.1.3 that Duke's license renewal application is not complete in that it "fails to analyze the multiple impacts . . . accelerating [climate] changes will have on reactor operations, as well as the ways that it will change the type and magnitude of impact that the reactors have on their external surroundings." NIRS Contentions at 12-13. NIRS notes Duke's statement at page 8-32 of its Environmental Report for the McGuire units, to the effect that nuclear power may be a strategy to lower the impact of electrical energy generation in the context of such climate change,<sup>8</sup> and contends that "[a]nalysis of Climate Change must include an analysis of increased potential for Station Blackout by virtue of projected increased numbers and intensity of hurricanes and tornados and other severe weather." *Id.* NIRS asserts in a footnote that there are "abundant resources on climate change," and provides a Web site address where some of such resources may be found. *Id.* at 12 n.8.

**Duke and Staff Responses to NIRS Contention 1.1.3**

Duke faults this contention for being outside the scope of a license renewal proceeding and lacking in specificity, as well as raising a generic issue that is not included in any of the Category 2 environmental subject areas that are plant-specific. Duke Response at 23-27. The Staff also opposes the contention, asserting that NIRS has provided no facts or expert opinion to support its contention, and noting that nuclear power plants are designed to accommodate severe weather events as part of the spectrum of design-basis accidents considered in the design and licensing of the plant. *See* Staff Response at 21 (citing 10 C.F.R. Part 50, Appendix A, General Design Criterion 2; 10 C.F.R. § 100.10(c)).

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<sup>8</sup>Duke in the Environmental Report quotes the *Joint DOE-Electric Power Research Institute Strategic Research and Development Plan to Optimize US Nuclear Power Plants*, as follows: "[N]uclear energy was one of the prominent energy technologies that could contribute to alleviate global climate change and also help in other energy challenges . . . ."

### **Ruling on NIRS Contention 1.1.3**

We find this contention to be insufficiently specific in showing a relationship to plant aging or to any Category 2 environmental issue, supported by some expert opinion or specific facts or fact-based argument, and that it fails to provide sufficient information to show a genuine dispute on a material issue of law or fact, as required under 10 C.F.R. § 2.714(b)(2)(i)-(iii). Moreover, we note that NIRS representative Olson conceded at oral argument, Tr. 570, 575, that the climate change issue relates more generically to all nuclear plants than specifically to renewal of the operating licenses for the four Duke units at issue. With regard to the asserted tie-in with the station blackout issue, although we address station blackout below in our discussion of BREDL contention 4 and NIRS contentions 1.1.5 and 1.1.4, this does not change the generic nature of the climate change issue. Again, as the Commission suggests, if the Petitioner has specific information regarding license renewal or nuclear plant design issues, the most appropriate route for raising these would be through a rulemaking petition under 10 C.F.R. § 2.802 (which representative Olson also recognized at oral argument, *see id.* at 577-78). Contention 1.1.3 is not, however, admissible in this proceeding, for the reasons stated.

### **(iii) NIRS CONTENTIONS 1.1.1 AND 1.2.4 (RELATING TO PLUTONIUM/MOX FUEL)**

NIRS contention 1.1.1 states:

MOX Fuel Use Will Have a Significant Impact on the Safe Operation of Catawba and McGuire During the License Renewal Period and Must be Considered in the License Renewal Application.

NIRS Contentions at 2. Contention 1.2.4 states:

Environmental Reports Do Not Consider MOX Fuel Use.

*Id.* at 20.

These two contentions, which we consolidate for our consideration, relate to the nature of the connection between the four Duke plants and a project involving a contract between the Department of Energy (DOE) and Duke Cogema Stone & Webster (DCS), for DCS to construct a facility intended to convert surplus weapons-grade plutonium oxide into mixed oxide (MOX) fuel that is currently anticipated to be used in the four Duke units at issue herein. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 409-11, 419 (2001). More specifically, the contentions relate

to alleged aging and license renewal environmental issues associated with such use of MOX fuel.

Relying on the provisions of 10 C.F.R. §§ 54.21(a)(3) and (c)(1) for the requirements, respectively, that an applicant for license renewal must demonstrate “that the effects of aging will be adequately managed . . . for the period of extended operation,” and “evaluate all time-limited aging analyses (TLAAs) and demonstrate that they will apply for the period of extended operation,” *see* NIRS Contentions at 2, NIRS in contention 1.1.1 argues that Duke’s “plan to utilize . . . [MOX] fuel in Catawba and McGuire will have a significant impact on these assessments and may jeopardize the safe operation of these plants in the license renewal period.” *Id.* NIRS asserts that such use of MOX fuel will require “substantial modifications” to Duke’s aging management plans, which do not consider the use of MOX fuel or any “accelerated aging effects” associated with it. *Id.*

In its basis for contention 1.1.1, NIRS recounts that, according to the contract between DOE and DCS, which is a “consortium including Duke Energy,” the use of the MOX fuel in the Duke plants is to “commenc[e] in 2008 and continu[e] for approximately fifteen years.” *Id.* at 3. Noting DCS’s currently pending application for an NRC license to construct and operate the MOX fuel fabrication facility (MFFF) (contentions in relation to which, filed by BREDL and others not including NIRS, were ruled on in LBP-01-35), NIRS states that DCS “also intends to apply for license amendments to load MOX lead test assemblies in at least one of the four reactors in early 2002, and to apply for license amendments for batch irradiation in all four reactors in 2005.” *Id.* NIRS states further that schedule slippage will likely cause many of these actions to be delayed, and that this, in combination with the possibility that additional quantities of weapons-grade plutonium (WG-Pu) may be made available to DCS by DOE by virtue of additional reductions in the U.S. nuclear weapons stockpile, may result in the use of MOX fuel “well into the license renewal period.” *Id.*

NIRS cites various studies relating to the neutron flux and spectrum of neutron energies involved with the use of MOX fuel, and the impact of this on the aging of “many reactor structures and components within the scope of license renewal.” NIRS Contentions at 3. Citing an Oak Ridge National Laboratory report by G.T. Yahr, *Impact of Conversion to Mixed-Oxide Fuels on Reactor Structural Components*, ORNL/TM-13423, at 1 (April 1997), NIRS states that the fast neutron flux ( $E > 1.0$  MeV) in a full core of WG-MOX would be some 20% higher at the beginning of operation than that in a core consisting only of conventional low-enriched uranium (LEU) fuel. *Id.* at 3 n.1. NIRS also refers to a Westinghouse study for the statement that the  $E > 1.0$  MeV neutron flux is about 6% higher in a full WG-MOX core than in an LEU core, and to a paper presented at the American Nuclear Society/Canadian Nuclear Association Joint Meeting in Toronto, Canada, in June 1976, for the statement

that gamma-ray sources are about 20% higher in full MOX cores. *Id.* at 3 n.2 & 4 n.3 (citing Westinghouse Electric Corporation, *Plutonium Disposition in Existing Pressurized Water Reactors*, DOE/SF/19683-6, at 2.1-24 (June 1, 1994); A.J. Frankel, P.C. Rohr, and N.L. Shapiro, *PWR Plutonium Burners for Nuclear Energy Centers*, at 12 (1976)). NIRS asserts that, as currently planned by DCS, at equilibrium, about 40% of the Catawba and McGuire cores would consist of MOX fuel, resulting in a proportionately smaller but still significant increase in fast neutron flux and heating rates. *Id.* at 3-4.

As to the specific aging-related degradation effects of the increased fast neutron flux and gamma heating associated with MOX fuel on metallic core structures (including the reactor pressure vessel, reactor internals, and piping), NIRS asserts that these include embrittlement, irradiation-assisted stress corrosion cracking (IASCC), creep, and thermal fatigue. *Id.* at 4 & n.4 (citing Yahr, ORNL/TM-13423, at 7). Thus, argues NIRS, reevaluation of TLAAAs in the license renewal application, including section 4.2 on “Reactor Vessel Neutron Embrittlement” and 4.3 on “Metal Fatigue,” is necessary, using the parameters appropriate for the planned MOX core. *Id.* at 4. NIRS stresses that it intends these as illustrations of how MOX fuel use intersects with other license renewal issues, and that it would bring additional contentions in another proceeding concentrating solely on the use of MOX fuel in the reactors (presumably referring to the future license amendment proceedings mentioned above). *Id.*

With regard to its contention 1.2.4, on the omission of consideration of MOX fuel use in Duke’s ER, NIRS asserts that the use of MOX fuel “would result in a core that has a significantly greater fraction of plutonium throughout the fueling cycle,” producing a higher percentage of actinides, which will “translate into increased plutonium and actinides in all forms of discharge from the reactor.” *Id.* at 21-22. NIRS also calls for an analysis of MOX fuel on thermal discharges. *Id.* at 22.

#### **Duke and Staff Responses to NIRS Contentions 1.1.1 and 1.2.4, and Oral Argument of Parties**

Duke argues that NIRS’s contentions relating to MOX fuel use in the Duke plants are inappropriate for consideration in this proceeding because any use of MOX in the Duke plants “as part of an international program to reduce stockpiles of surplus weapons plutonium in the United States and Russia” is merely “possible” and outside the scope of this proceeding because Duke is not currently “authorized to use MOX fuel at McGuire or Catawba and the present [LRA] does not request such approval.” Duke Response at 13. Indeed, Duke states, the LRA “assumes throughout that licensed activities are now, and will continue to be, conducted in accordance with the facilities’ current licensing bases (i.e., use of low-enriched uranium fuel only). *Id.* Duke also seeks to incorporate

by reference into its response to BREDL's and NIRS's contentions its arguments on the MOX issue that it made to the Commission in its response to BREDL's petition to the Commission to dismiss or hold in abeyance this license renewal proceeding.<sup>9</sup> See Duke Response at 13. Emphasizing that future use of MOX fuel in its plants is merely possible and not certain, Duke states that all MOX issues, including impacts of aging during the period of extended operation, and safety and environmental analyses, should be addressed in license amendment proceedings arising out of amendment applications it intends to file in 2002 through 2005,<sup>10</sup> with an "opportunity for hearing like that offered in the instant proceeding." *Id.* at 58; see also *id.* at 13-16.

In oral argument on contention 1.2.4, however, NIRS representative Olson questioned whether in a license amendment proceeding on MOX use there would be an Environmental Impact Statement (EIS). Tr. 587.

The Staff addresses the EIS issue in its Response to NIRS's MOX contentions, noting that the National Environmental Policy Act (NEPA) "mandates the preparation of an [EIS] for all major federal actions significantly affecting the quality of the human environment." Staff Response at 13 (citing 42 U.S.C. § 4332). Noting further that NRC regulations at 10 C.F.R. § 51.20(b)(2) require an EIS in a license renewal proceeding (taking the form of a supplement to the GEIS), the Staff concedes that it is the NRC's duty to "consider the reasonably foreseeable environmental impacts arising from the proposed action," and defines the issue here as "whether the Staff is required to address the plausible impacts of using MOX in the supplement to the GEIS." Staff Response at 12-13. According to the Staff, under NEPA, "only the impacts arising from proposed actions or their alternatives have to be analyzed," and thus it is not required to address the impacts of MOX fuel in this proceeding, because it is not a "proposal." *Id.* Citing *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976), which addressed the NEPA requirement for a proposal, the Staff identifies the most problematic issue relating

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<sup>9</sup> Although Duke's filing in response to BREDL's motion to the Commission was not directed to this Board, and although Duke did not supply the Board with a copy of its response filed with the Commission with its response to the contentions before the Board, we will allow Duke the benefit of our consideration of its arguments to the Commission, in the interest of the development of a full record, as called for by the Commission in CLI-01-27, 54 NRC at 392. We also note that, despite Duke's request that the Commission rule on the MOX issue, the Commission found such a ruling premature, stating that the Commission "believe[s] it is generally preferable for the Licensing Board to address such questions in the first instance, allowing us ultimately to consider them after development of a full record." *Id.* Based on this directive from the Commission, we address the MOX issue in some depth in this Memorandum and Order.

<sup>10</sup> In its argument, Duke states in one place that it "intends to file for license amendments to load MOX fuel in at least one of the McGuire and Catawba units in 2002, and to apply for such license amendments for all four units in 2005," Duke Response at 13, and in another that the "current schedule calls for submittal in late 2003 or early 2004 of license amendment requests to the NRC to allow the use of MOX fuel in batch quantities, with such use to begin no earlier than late 2007." *Id.* at 14-15. At another place, Duke states, "If and when Duke requests NRC license amendments to permit MOX fuel use in its reactors . . ." *Id.* at 57.

We note Duke's reference to contentions seeking to have the use of MOX fuel in the Duke plants considered in the *Savannah River* proceeding. In that case, however, there were no aging issues associated with the primary subject matter of the proceeding, the MFFF.

to the MOX contentions, stating, “The difficulty . . . in applying the holding in *Kleppe* is that the court never defined what constitutes a proposal.” *Id.*

Observing that since *Kleppe* there has been a great deal of litigation on the “proposal” requirement, the Staff discusses some of the case law arising out of this litigation, including *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990), in which the Court stated:

*Kleppe* . . . clearly establishes that an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue.

*Id.* at 1478, cited by the Staff in its Response at 14. The Staff cautions that the Court in *National Wildlife* called into question an earlier decision in which it had held that “future, yet unproposed projects should be considered in the EIS analyzing a proposal if the envisioned future projects would impact the relevant environment,” the Court in 1990 opining that it “seriously [doubted] that the relevant reasoning in [*Scientists’ Institute for Public Information, Inc. v. AEC (SIPI)* survived] the Supreme Court’s *Kleppe* decision.” Staff Response at 14-15 n.11 (citing *Scientists’ Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *National Wildlife*, 912 F.2d at 1478)).

In other cases relied upon by the Staff, the Fifth Circuit has held that the government is not required to address projects that are “merely contemplated” (citing *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1015-16 (5th Cir. 1980)); and the Third Circuit has also applied a “proposed” versus “contemplated” test (citing *Society Hill Towers Owners Association v. Rendell*, 210 F.3d 168, 182 (3d Cir. 2000)). Staff Response at 13-15 & n.10.

The Staff argues, as does Duke, that there is no proposal before the Commission to irradiate MOX at Catawba and McGuire, and that, because of this, as well as because “irradiation of MOX fuel is not part of the plant’s CLB, its consideration is beyond the scope of this proceeding.” Staff Response at 12, 15 (citing 10 C.F.R. §§ 54.29(a), 54.3). Noting that it is uncertain whether the applicant in *Savannah River* will be allowed to build the MFFF, the Staff also emphasizes that Duke has not applied to amend its operating license to use MOX fuel, which the Staff argues also indicates that there is no “proposal” to use MOX fuel in the plants. *Id.* at 16.

Duke in its response to BREDL’s earlier “Petition to Dismiss” filed with the Commission argues that this license renewal proceeding and the “possible future use of MOX fuel” at the McGuire and Catawba plants are “not part of the same licensing action,” but are “separate and distinct licensing actions.” Response of Duke Energy Corporation to Blue Ridge Environmental Defense League Petition to Dismiss Licensing Proceeding or, in the Alternative, Hold It In Abeyance at 11

(Nov. 5, 2001) (hereinafter Duke Response to BREDL Motion). Citing case law including the *Society Hill* case discussed above, Duke argues that the LRA and possible future submission of a license amendment application to approve the use of MOX in the McGuire and Catawba plants are not “interdependent,” stressing that all four units currently operate without MOX fuel and can continue to do so throughout their current license terms and the proposed renewal periods. *Id.* at 11-12.

Duke also asserts that this license renewal application has “independent utility” under the standard applied by the Court in *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985), and by the Licensing Board in *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 157 (1988), and that future use of MOX fuel at McGuire and Catawba is “far from a certainty.” Duke Response to BREDL Motion at 12; Duke Response at 15.

During oral argument on contention 1.1.1, NIRS representative Olson agreed with Duke and the Staff that the use of plutonium/MOX fuel is “not certain,” but did not agree that it was “speculative.” Tr. 429. Ms. Olson also indicated that NIRS agrees with Duke’s statement that the use of MOX fuel would change its licensing bases for the plants at issue, *id.* at 430, but, observing that the license renewal GEIS assumes the use of low-enriched uranium (LEU) fuel in the reactors, stated that NIRS is concerned that, if the MOX fuel issue is not considered in this license renewal proceeding, an array of issues including source term, severe accident analysis, and time-limited aging analysis might be foreclosed from consideration in any later license amendment proceeding. *Id.* at 431-32. Other substantive issues raised by NIRS include time-limited aging analysis specifically with regard to the reactor vessel, placement of MOX assemblies in the vessel, and leakage issues. *Id.* at 436.

NIRS wishes to be sure that Duke “makes a clear determination about plutonium fuel use during the renewal period,” which, it notes, “begins immediately after granting the renewal [license] because it supplants the old license,” and argues that “if there is going to be any significant time period in the next 40 years that [MOX] fuel might be in use, . . . it should be considered [in this license renewal proceeding].” *Id.* at 434. Stating that taxpayer resources were at issue, NIRS indicated that it agreed, however, that if no issues concerning MOX fuel use as it relates to aging and license renewal would be foreclosed in a later license amendment proceeding, there is no need to consider the same issues twice. *Id.* at 435-36.

Duke indicated agreement, in oral argument, that in any future license amendment proceeding on the use of MOX fuel in the Duke reactors, no issue, including aging, backfit, and related issues, would be foreclosed, in that Duke would not object to the litigation of any aging-related issues, such as might be litigated in this license renewal proceeding, on the basis that they were “not in

scope,” assuming they meet the contention requirements of section 2.714. *Id.* at 438-39. Duke also agreed, however, that in contrast to a license renewal proceeding in which an EIS is done by virtue of the nature of the proceeding, in a license amendment proceeding an EIS is not automatically triggered. *Id.* at 604; *see also id.* at 592-96. Rather, in a license amendment proceeding, the Staff determines whether to do an EIS based on whether a “major federal action” is involved, and the Staff stated through counsel that it could not say whether it would do an EIS in a license amendment proceeding on the use of MOX fuel in the McGuire and Catawba plants — that this would “depend[] on the environmental review and the information provided at that time.” Tr. 596. Therefore, although there appears to be no dispute that the Staff’s determination in any future license amendment proceeding whether to perform an EIS can be challenged by Petitioners, *see* January 7, 2002, Letter from Staff Counsel Antonio Fernandez to Licensing Board, and that the same general issues would be addressed, *see* Tr. 590, the Petitioners could not expect that an EIS would automatically be done merely by the nature of the proceeding, as in this license renewal proceeding.

With regard to whether it is possible that the MOX issue could ever become a part of this license renewal proceeding if we deny the NIRS MOX contentions at this time, we observe what appears to be a concession on Duke’s part that, under 10 C.F.R. § 54.21(b), “with regard to current licensing basis changes that occur during the NRC Staff’s review of the application,” it would have to “submit ‘an amendment to the renewal application . . . that identifies any change to the CLB of the facility that materially affects the contents of the license renewal application, including the FSAR supplement.’” Duke Response at 13 n.35. In the text accompanying this footnote, Duke states, in the context of its discussion of “possible future use of MOX fuel at McGuire and Catawba,” that “[a]ny changes made to the current licensing bases of McGuire or Catawba during the NRC Staff’s review of the renewal application will be made in accordance with Commission regulations,” followed by its reference to footnote 35, quoted above. *Id.* at 13. “Similarly,” Duke continues, “following issuance of the renewed operating licenses, Duke will address any future changes in the current licensing bases at the time of those changes and in accordance with governing NRC regulations.” *Id.* at 14 (citing, *e.g.*, 10 C.F.R. § 54.37(b)). Section 54.37(b) provides as follows:

After the renewed license is issued, the FSAR update required by 10 CFR 50.71(e) must include any systems, structures, and components newly identified that would have been subject to an aging management review or evaluation of time-limited aging analyses in accordance with § 54.21. This FSAR update must describe how the effects of aging will be managed such that the intended function(s) in § 54.4(b) will be effectively maintained during the period of extended operation.

Duke argues, however, that it intends to go forward with license renewal whether or not it uses MOX fuel in any of the plants. Duke Response at 15; Duke Response to BREDL Motion at 10-11. Duke argues that “the mere possibility of future use of MOX fuel has in no way changed the *current* licensing basis of either the McGuire or Catawba plants, and therefore need not be addressed in Duke’s license renewal application now before the NRC Staff for review.” Duke Response at 14.

With regard to the current licensing basis and how this concept plays into the issue before us, we note the Staff’s argument that Part 54 precludes consideration of issues related to use of MOX at Catawba and McGuire, citing 10 C.F.R. § 54.29 for the proposition that “the Commission explicitly limits the scope of the Staff’s analysis to matters covered by the CLB.” Staff Response at 16. Section 54.29 provides as follows:

**§ 54.29 Standards for issuance of a renewed license.**

A renewed license may be issued by the Commission up to the full term authorized by § 54.31 if the Commission finds that:

(a) Actions have been identified and have been or will be taken with respect to the matters identified in paragraphs (a)(1) and (a)(2) of this section, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB, and that any changes made to the plant’s CLB in order to comply with this paragraph are in accord with the Act and the Commission’s regulations. These matters are:

(1) managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review under § 54.21(a)(1); and

(2) time-limited aging analyses that have been identified to require review under § 54.21(c).

(b) Any applicable requirements of subpart A of 10 C.F.R. Part 51 have been satisfied.

(c) Any matters raised under § 2.758 have been addressed.

Given that section 54.29 specifically includes a reference to “changes made to the plant’s CLB,” the Staff’s interpretation of it as “explicitly limiting the scope . . . to matters covered by the CLB,” implying that no changes can be made to the CLB, is not supported by the actual language of the rule. As the Staff notes, the CLB is defined in 10 C.F.R. § 54.3 as:

*Current licensing basis (CLB)* is the set of NRC requirements applicable to a specific plant and a licensee’s written commitments for ensuring compliance with and operation within applicable NRC requirements and the plant-specific design basis (including all modifications and additions to such commitments over the life of the license) that are docketed and in effect. The CLB includes the NRC regulations contained in 10 CFR parts 2, 19, 20, 21, 26, 30, 40, 50, 51, 54, 55, 70, 72, 73, 100 and appendices thereto; orders; license conditions; exemptions; and technical specifications. It also includes the plant-specific design-basis information defined in 10 CFR 50.2 as documented in the most recent final safety analysis report (FSAR) as required by 10 CFR 50.71 and the licensee’s commitments remaining in effect that were made in docketed licensing correspondence such as licensee responses to NRC bulletins, generic

letters, and enforcement actions, as well as licensee commitments documented in NRC safety evaluations or licensee event reports.

From this definition, the CLB would arguably appear to include any “license conditions” that might be added as a result of any “changes” resulting from, for example, a license renewal proceeding. *See also* the Commission’s definition of the CLB in *Turkey Point*, quoted above in Section II.B.2.a of this Memorandum and Order (on the scope of safety issues in license renewal proceedings), in which the Commission notes that the CLB “represents an ‘*evolving* set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.’” *Turkey Point*, CLI-01-17, 54 NRC at 9 (emphasis added). In any event, in its response to BREDL’s motion to dismiss, Duke specifically refers to “changes [that might be made] in the current licensing basis,” and to a “*potential* future change to the current licensing basis involv[ing] the use of MOX fuel at McGuire and Catawba” that “Duke is currently evaluating and planning.” Duke Response to BREDL Motion at 8 — language that would seem, indeed, to take us right back to the “proposal” analysis of *Kleppe* and its progeny.

#### **Ruling on NIRS Contentions 1.1.1 and 1.2.4**

Since both Duke and the Staff have centered their arguments on the admissibility of NIRS’s MOX contentions to a large degree on case law they argue is relevant to whether an EIS — in this case the license renewal SEIS — should consider and address MOX fuel use in the Duke plants, we turn first, in our analysis on contentions 1.1.1 and 1.2.4, to a review of some of the case law relied on by Duke and the Staff that has arisen out of the Supreme Court’s seminal *Kleppe* decision, which is cited by both Duke and the Staff, as well as the Commission in CLI-01-27. *See* 54 NRC at 392 n.17.

*Kleppe* itself involved an action against the Department of the Interior and other federal agencies responsible for issuing coal leases, approving mining plans, granting rights-of-way, and taking other actions to enable private companies and public utilities to develop coal reserves on federally owned or controlled land. *Kleppe*, 427 U.S. at 395. In 1976, the Supreme Court ruled against the environmental groups seeking the preparation of one comprehensive environmental impact statement covering all projects in the Northern Great Plains Region, because there was no “proposal” for nationwide action. *Id.* at 414-15. The Court noted that when “several proposals . . . that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together,” *id.* at 410, but that agencies are not required to consider “the possible environmental impacts of less imminent actions when preparing the impact statement on proposed

actions.” *Id.* at 410 n.20. The Court stated further, “Should contemplated actions later reach the state of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment; and the condition of the environment presumably will reflect earlier proposed actions and their effects.” *Id.* As indicated above, the difference between “proposed and less imminent actions” has been the topic of many subsequent lower court decisions.

In 1983, the Fourth Circuit Court of Appeals ruled, in another case involving coal mines, and a challenge to the validity of permits allowing underground mine operators to discharge water from the mines, that the EPA had in fact considered the “cumulative impacts” of the five mines at issue in the case, and was not required to consider the impact of future planned projects when the opening of the five mines “did not represent a practical commitment to the others.” *Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983). The Court stated that, when developing an EIS, agencies must consider the impact of other proposed projects “only if the projects are so interdependent that it would be unwise or irrational to complete one without the other.” *Id.*

The Tenth Circuit has applied this interdependency standard in ruling on a challenge to an oil and gas lease and drilling permit, brought by plaintiffs contending that a comprehensive EIS had to be prepared prior to issuance of the lease and permit, *Park County Resource Council, Inc. v. USDA*, 817 F.2d 609 (10th Cir. 1987), and in ruling on a challenge to a proposed upgrade to an airport runway based on a contention that the Federal Aviation Administration should have considered the cumulative impacts of other parts of a larger contemplated expansion of the Albuquerque International Airport. *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426 (10th Cir. 1996). The Court in *Park County* concluded that no comprehensive EIS was required, based upon its finding that plans for future possible full field development “were not concrete enough at the leasing stage to require such an inquiry.” 817 F.2d at 623. Noting that “the steps from leasing to full field development [were] not ‘so interdependent that it would be unwise or irrational to complete one without the others,’” the Court opined that requiring a “cumulative EIS contemplating full field development at the leasing stage” would result in “a gross misallocation of resources” and “trivialize NEPA.” *Id.* at 623 (citations omitted). The Court found that there was a “rational basis to defer preparation of an EIS until a more concrete proposal was submitted.” *Id.* at 624.

The Court in *Airport Neighbors*, citing *Park County*, concluded that additional components of the airport expansion Master Plan were “not so interdependent that it would be unwise or irrational to complete the runway . . . upgrade without them,” because there was no “inextricable nexus” between the runway upgrade and the other parts of the plan, such that the rest of the plan could not be abandoned “without destroying the [runway upgrade’s] functionality.” *Airport Neighbors*, 90 F.3d at 431.

Courts have applied the “proposal”/“cumulative impact”/interdependency/ etc. collection of standards arising out of *Kleppe* in various other fact situations as well, including several involving the Army Corps of Engineers. In one of these, involving the navigation project at issue in the *South Louisiana* case discussed above, the “contemplated” levee extension that was asserted to require consideration in the EIS for the navigation project had previously been a proposal but was later consolidated into a study of various alternative flood control measures, the choice of which would be used was “quite uncertain” at the time. *South Louisiana*, 629 F.2d at 1015. This led the Fifth Circuit to its conclusion that the levee extension did not have to be discussed in the navigation project EIS. *Id.*

In another case involving the Corps, *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983), the Fifth Circuit reversed the District Court’s decision that a Corps issuance of permits authorizing private construction of a multipurpose deepwater port and crude oil distribution system did not require consideration of the impact of increased bulk cargo activities expected to result from more carriers using the port, which the District Court had found to be “speculative possibilities, not actual proposals.” *Id.* at 979. The Court did not use the *Kleppe* “cumulative impact” analysis, *see id.* at 979 n.21, but based its holding on the fact that the Corps had discussed the benefits of such bulk cargo activities in the EIS, thereby “render[ing] a decision that these activities were imminent,” and thus could not ignore the costs of the activities and had to address them in the EIS. *Id.* at 979.

Two years later, the Fifth Circuit, in a case involving a Corps of Engineers permit authorizing a housing developer to construct a canal system, found the Corps’ environmental assessment insufficient in its analysis of cumulative effects. *Fritiofson v. Alexander*, 772 F.2d 1225, 1247 (5th Cir. 1985). Although the Court’s analysis might not apply on all points in an NRC case, to the extent that the analysis may be based upon Council on Environmental Quality (CEQ) rules that may not have been adopted by the NRC, *see id.* at 1242; *Limerick Ecology Action v. NRC*, 869 F.2d 719, 725 (3d Cir. 1989), the Court’s analysis of case law on the “independent utility” test cited by Duke herein, as it relates to the *Kleppe* “cumulative impact” test, is instructive. In a footnote, the Court notes that “issues of economic and functional dependence” (which address whether, because of such dependence, proceeding with one project will “foreclose options or irretrievably commit resources to future projects”) are “distinct from questions of environmental synergy,” and that “there may be circumstances in which proposals that are not functionally or economically interdependent may, because of cumulative impacts, trigger the requirement to prepare a comprehensive EIS.” *Fritiofson*, 772 F.2d at 1241 n.10 (citing *Kleppe*, 427 U.S. at 410).

The First Circuit has discussed another, “reasonably foreseeable” test to apply in determining whether an EIS addresses appropriate environmental impacts, in a case in which the Court upheld the District Court’s summary judgment in favor

of the defendant against the Sierra Club's challenge to an EIS on a marine port project in Maine. *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). The Court described this test as follows:

[A] likelihood of occurrence, which gives rise to the duty, is determined from the perspective of the person of ordinary prudence in the position of the decisionmaker at the time the decision is made about what to include in the EIS. . . . [E]ven as to those effects sufficiently likely to occur to merit inclusion, the EIS need only "furnish such information as appears to be reasonably necessary under the circumstances for the evaluation of the project." . . . [t]he issue is whether the "EIS can be said to constitute a statement which enable[s] those who did not have a part in its compilation to understand and consider meaningfully the factors involved."

*Id.* (citations omitted). Although the Court in *Sierra Club* also refers to the CEQ rules, it cites *Kleppe* as well, for the proposition that agencies need not consider potential effects that are highly speculative or indefinite, and provides the following guidance on resolving what is "reasonably foreseeable":

Whether a particular set of impacts is definite enough to take into account, or too speculative to warrant consideration, reflects several different factors. With what confidence can one say that the impacts are likely to occur? Can one describe them "now" with sufficient specificity to make their consideration useful? If the decisionmaker does not take them into account "now," will the decisionmaker be able to take account of them before the agency is so firmly committed to the project that further environmental knowledge, as a practical matter, will prove irrelevant to the government's decision?

*Id.* at 768 (citations omitted).

In another case cited by the Staff in its response, *see* Staff Response at 13 n.10, which involved a federally financed highway connector in Massachusetts, the First Circuit concluded that an EIS, which treated future secondary development that might be brought on by the development of the highway as "too remote and speculative to discuss in any detail," *Concerned Citizens on I-190 v. Secretary of Transportation*, 641 F.2d 1, 5 (1st Cir. 1981), did provide enough of a statement to "enable[] those who did not have a part in its compilation to understand and consider meaningfully the factors involved." *Id.* (quoting *Cumington Preservation Committee v. Federal Aviation Administration*, 524 F.2d 241, 244 (1st Cir. 1975). Agreeing that "the highly speculative nature of the (projected) growth" and "the existence of continuing opportunities to limit its adverse effects" rendered the EIS "at least minimally acceptable," the Court upheld the

EIS against a challenge that it failed to take sufficient account of the impact of such future development on Boston's drinking water supply. *Id.* at 6.<sup>11</sup>

The Ninth Circuit, in another case involving a highway connector, denied a challenge that the highway project improperly segmented different portions of the highway in violation of NEPA, concluding that "no evidence was presented of any synergistic or cumulative environmental impact which may result from the completion of the remaining segments of I-82 other than an increase in traffic," and that the *Kleppe* requirement to consider actions that have such impact together therefore did not apply. *Lange v. Brinegar*, 625 F.2d 812, 817 (9th Cir. 1980).

Later, in the *Thomas v. Peterson* case cited by Duke for the "independent utility" test, the Ninth Circuit addressed the complaints of certain landowners and others that a U.S. Forest Service approval of a timber road in an area of the Nez Perce National Forest in Idaho required combined treatment of the road and timber sales that the road was designed to facilitate in a single EIS under NEPA. 753 F.2d at 757-58. In reaching its ruling that a single combined EIS was required, the Court discusses various tests for when an agency must "consider several related actions in a single EIS," including the "connected actions" test, under which actions are, for example, interdependent with each other; the "cumulative actions" test, under which actions "when viewed with other proposed actions have cumulatively significant impacts"; and the "independent utility" test, under which the first action has utility independent of the other action(s). *Id.* at 758-60. The Court found that the actions at issue were both "connected" and "cumulative," and held that the Forest Service was required to prepare an EIS that analyzed the combined impacts of the road and the timber sales. *Id.* at 760-61.

In another case cited by Duke, the Ninth Circuit upheld the Army Corps of Engineers' argument that three phases of a development project were "not connected actions because each ha[d] independent utility and that it therefore was not required to consider the environmental impacts attributable to the three different phases in a single NEPA analysis." *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 41 (2001).

The Sixth Circuit upheld the Interstate Commerce Commission's approval of the acquisition by CSX Corporation, the nation's second largest railroad, of American Commercial Lines, Inc., owner of the nation's largest bargeline, against a challenge that there should have been an EIS that considered the impacts of

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<sup>11</sup> In *Concerned Citizens*, the Court quoted from an earlier decision on the purposes of an EIS:

First, it permits the court to ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard . . . . Second, it serves as an environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project . . . . Finally, and perhaps most substantively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.

*Id.* at 3 (quoting *Silva v. Lynn*, 482 F.2d 1284-85 (1st Cir. 1973)).

future market extensions and capital improvement projects. *Crouse Corp. v. Interstate Commerce Commission*, 781 F.2d 1176, 1193-96 (6th Cir. 1986). The Court in reaching its conclusion noted that the Commission had justified the limited scope of its analysis on the grounds that “the lack of final design and engineering plans made it impossible to conduct an in-depth analysis,” and that when construction of the new facilities was proposed, the Commission would not be the authority to decide on the project or prepare any environmental analysis. *Id.* at 1194. Further, relying on *Kleppe*, the Court found the future projects were not proposed but merely contemplated, and that the future projects were not an “inherent component” of the proposed merger. *Id.* at 1194-95.

In *Neighbors Organizing To Insure a Sound Environment v. McArtor*, 878 F.2d 174 (6th Cir. 1989), the Sixth Circuit again used *Kleppe* to evaluate a Federal Aviation Administration decision not to include a potential new runway in the agency’s EIS for a new airport terminal at the Metropolitan Nashville Davidson County Airport. The Court decided that because the runway was “not reasonably foreseeable” and because a separate EIS would be prepared in the future if the runway were ever constructed, the FAA’s environmental review was sufficient. *Id.* at 178.

In a similar case, the D.C. Circuit Court upheld a decision of the Federal Aviation Administration (FAA) to exclude certain elements deemed to be “independent or speculative” from its evaluation of a plan to expand Dallas/Fort Worth International Airport. *See City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1504 (D.C. Cir 1994). The court declared, however, that “if the FAA determined that review of an element of the [airport project] would have been premature when it was considering the cumulative impact of the project in the FEIS, then such review must be done when the matter is no longer too speculative to warrant it.” *Id.* at 1506.

In the *National Wildlife* case, as noted by the Staff, Staff Response at 14 n.11, the D.C. Circuit upheld a FERC EIS relating to a proposed dam along which a small hydroelectric powerhouse was to be built, finding that the second phase of the dam project — the proposal for which had been withdrawn and the reintroduction of which was “merely speculative and hypothetical” — did not require consideration in the EIS, even though the EIS considered benefits that might ensue from the potential for expansion of the dam as planned for in Phase II of the project. 912 F.2d at 1478. The Court noted that the Commission did not have before it a proposal for a license as to Phase II, nor in any way approved Phase II. *Id.* at 1478-79.

We also note in passing the D.C. Circuit’s much earlier observation, in discussing whether a “program EIS” had to be prepared for the Navy’s Trident Program, that “it would be a highly artificial and superficial rule which would

look merely to the label attached to a project, program, etc. for its application.’’ *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 825 (D.C. Cir. 1977).<sup>12</sup>

In the most recent case cited by the Staff, the Third Circuit Court of Appeals quotes the same language quoted above from *National Wildlife*, *supra* p. 92, as well as the following standard, which had been adopted by the Fourth and Tenth Circuits:

Generally, an administrative agency need consider the impact of other proposed projects when developing an EIS for a pending project only if the projects are so interdependent that it would be unwise or irrational to complete one without the others.

*Society Hill*, 210 F.3d at 181 (quoting *Webb*, 699 F.2d at 161). The Court, in addressing the requirements of an environmental assessment (EA), held that projects that were proposed in the city of Philadelphia’s planning documents, including a proposed “mega” entertainment complex for the Penn’s Landing area, were “not sufficiently concrete” to warrant inclusion in the EA for a hotel/parking garage under the “segmentation” or “cumulative impact” analysis. *Id.* Finding that the District Court’s focus on the likelihood that the other projects would be completed as well as the interdependence of them was correct, the Court noted that there was no evidence that “realization of the future plans was, indeed, expected to materialize”; that “[w]here future development is unlikely or difficult to anticipate there is no need to study cumulative impacts”; and that, “[m]oreover, plans for the Penn’s Landing area appear to change regularly.” *Id.* at 182.

With regard to cases specifically involving the NRC, the D.C. Circuit’s decision in *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *reh’g en banc granted on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985), *aff’d on reh’g en banc*, 789 F.2d 26 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 923 (1986), was cited by the Staff in oral argument for the proposition that “just engaging in . . . research [is not] good enough to trigger a ‘proposal,’” Tr. 620. In *San Luis Obispo*, the Court, after providing an overview and summary of the Supreme Court’s view of the limited role courts were to play in reviewing NRC orders in view of Congress’s “historic commitment to the development of a viable nuclear power industry,” 751 F.2d at 1294-96, applied a “rule of reason” in deciding whether the EIS for the licensing of the Diablo Canyon nuclear power plant had to be supplemented to include discussion of possible environmental consequences of a core-melt accident. *Id.* at 1300. The Court concluded that this “rule of reason,” under which agencies “need not discuss in detail events whose probabilities

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<sup>12</sup> Although the Court’s reliance on, and comparison with, the *SUPI* case in *Concerned About Trident* may render it less useful as precedent, given the Court’s later indication of doubt about the *SUPI* reasoning, see *National Wildlife*, 912 F.2d at 1478, and discussion of Staff response to MOX contention at p. 92 of this Memorandum, the principle that actuality matters more than labels in considering cumulative impact issues would seem still to be a valid principle.

they believe to be inconsequentially small,” did not require such a discussion on a subject that the Commission had viewed as being of so low probability as to be scientifically and legally insignificant, notwithstanding that it was at the time further researching the issue following the Three Mile Island accident (which, the Court noted, “entailed no breach of the reactor containment vessel and no substantial release of radiation into the atmosphere” and had “negligible environmental consequences”), “if the Commission reasonably believed that such accidents were highly unlikely to occur.” *Id.* at 1298-1301. The Court did not consider unreasonable the Commission’s conclusion to the effect that “until such time as its research yields a contrary result, the Commission [would] continue[] to regard [such] accidents as highly improbable events.” *Id.* at 1301.

In *United States Department of Energy (Clinch River Breeder Reactor Plant)*, CLI-82-23, 16 NRC 412 (1982), *rev’d and remanded per curiam on other grounds sub nom. Natural Resources Defense Council v. NRC*, 695 F.2d 623 (D.C. Cir. 1982), cited by the Staff in its Response to [BREDL]’s Petition To Dismiss Licensing Proceeding or, in the Alternative, Hold It in Abeyance (Nov. 8, 2001) at 6, the Commission addressed DOE’s request for an exemption from certain 10 C.F.R. § 50.10 requirements prior to starting certain site and construction work in connection with the proposed Clinch River facility. The Commission found that the Staff was not required under *Kleppe* to do a separate EIS on site preparation activities that would “not result in any irreversible or irretrievable commitments to the remaining segments of the [Clinch River Breeder Reactor] project.” *Id.* at 424.

We note also *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982), in which the Commission, in denying petitions requesting a formal adjudicatory hearing on a materials license amendment permitting a licensee to demolish certain buildings on its West Chicago site and receive for temporary onsite storage a small quantity of thorium ore mill tailings, found among other things that under *Kleppe*, the Staff could issue the amendment without waiting for completion of a draft comprehensive EIS regarding the stabilization of wastes at the West Chicago facility. *Id.* at 263-65. Although there was an “obvious relationship between the demolition of the buildings and the final disposal of the waste,” the “activities and the environmental concerns involved [were] sufficiently distinct such that consideration of the demolition procedures need not await the preparation of [the] comprehensive impact statement.” *Id.* at 265. The receipt of the offsite materials was also found to be “minor in volume and radioactive content,” such that it was “not capable of adding in any significant way to the concerns that already exist with regard to decommissioning or of foreclosing any of the ultimate disposal options being considered.” *Id.*

The Commission in *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31 (2001), *cited in* CLI-01-27, 54 NRC at 392 n.17, addressed the “cumulative impacts” test more directly, in a case involving *in situ*

leach mining of uranium. *Id.* at 34. Observing that the term ‘synergistic’ relates ‘to the *joint* action of different parts — or sites — which, acting together, enhance the effects of one or more individual sites,’ *id.* at 57, the Commission noted that ‘NEPA analysis looks at both the severity of ‘impacts’ a project may have on different resources, and the possibility that these impacts may combine in such a fashion that will enhance the significance of their individual effects,’ and that ‘[o]nly the latter consideration is the NEPA ‘cumulative impacts’ concern.’ *Id.* Further, ‘[a] cumulative impacts review examines ‘the impact on the environment *which results from the incremental impact* of the action, when added to other past, present, and reasonably foreseeable future actions.’’ *Id.* at 60 (citing 40 C.F.R. § 1508.7).<sup>13</sup>

Finally, we note the *Vermont Yankee* case cited by Duke in its Response to BREDL’s Petition to Dismiss, at 12 n.20, in which the Licensing Board, in ruling on the merits of a license amendment application to expand the capacity of the station’s spent fuel pool, applied the ‘‘independent utility’’ test to determine whether reracking and related activities, standing alone, had any independent utility such that it could be segmented out for environmental review. LBP-88-19, 28 NRC at 157. The Board did this only, however, after posing the question to the parties and receiving responses from them on the issue, and based on the responses, the Board found the segmentation at issue to be improper. *Id.* at 159.

The preceding overview gives a fair sampling of the ways in which federal courts and the NRC have addressed the ‘‘cumulative impacts,’’ ‘‘proposal,’’ ‘‘interdependence,’’ ‘‘independent utility,’’ and ‘‘reasonably foreseeable’’ standards and related issues. Based on the perspective this provides, at this point we observe two things: First, that the courts’ rulings on these issues have been very much tied to facts of the individual cases; and second, that in making their rulings, the courts were ruling (albeit from an appellate perspective) on the actual merits of the issues before them, relating to whether particular potential or actual undertakings, projects and plans, etc., constituted ‘‘proposals,’’ with sufficient impacts that were ‘‘cumulative’’ to some other potential or actual undertaking(s), or were ‘‘connected to’’ or ‘‘interdependent with’’ other project(s) or plan(s), or met other definitions of tests for requiring them to be addressed in an EIS.<sup>14</sup>

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<sup>13</sup>Section 1508.7 of 40 C.F.R. states in full as follows:

‘‘Cumulative impact’’ is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

<sup>14</sup>We also note a concept that is very similar to the ‘‘proposal’’ issue considered by the courts, which the Commission defined in the *Turkey Point* license renewal case, i.e., the ‘‘tangible plan’’ idea discussed by the Commission with regard to plans for a possible commercial airport near the Turkey Point plant — plans that were at the time found to be speculative, but which the Commission stated might be the subject of a late-filed contention should a ‘‘tangible plan’’ for the airport ‘‘again emerge,’’ the potential safety impacts of which could be considered at such time. *Turkey Point*, CLI-01-17, 54 NRC at 24 n.18.

In contrast, at this point in this proceeding, we are ruling on standing and, more relevantly, the admissibility of contentions. Thus we must apply the standards for admission of contentions, which we have discussed and summarized above at some length in Section II.B.1 and B.2 of this Memorandum. The parties in this proceeding, however, seem to conflate the contentions admissibility issue into what is actually the merits question of whether the MOX fuel use issue should be addressed in the SEIS, and effectively urge us to rule on this merits issue.

If we follow the parties' implicit definition of the issue before us relating to possible MOX use in the Duke plants, *see, e.g.*, Staff Response at 12-13, and *deny* the MOX contentions, the issue would, of course, be resolved (absent reversal of our denial). But if we *admit* the MOX contentions under such a definition of the issue, MOX fuel use would have to be addressed in the SEIS (absent reversal of our admission of the contentions). In either case, if we proceed in the fashion the parties effectively urge on us, we will have essentially decided the MOX issue on the merits *prior to*, and *without*, the development of a record much, if any, fuller than that before the Commission when it issued its recent decision denying BREDL's motion to dismiss, when the Commission has explicitly directed us not only to address the question, but also to "develop[] a full record." CLI-01-27, 54 NRC at 7.

There is another way, though, of looking at our duty with regard to the MOX contentions: *in light of* the Commission's decision in CLI-01-27, as well as in light of the extremely fact-dependent nature of the case law relating to the "cumulative impact" issue, and, perhaps most importantly in view of our duty in issuing this decision on whether contentions are admissible, in light of authority to the effect that, in deciding whether to admit contentions, we are not to decide issues on the merits, but merely whether "further inquiry" is warranted on the matters put forth in the contentions in question, such that they should be admitted for litigation. *See Duke Power Co.* (Amendment to Materials License SNM-1773—Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979). *See also* 54 Fed. Reg. at 33,171, wherein the Commission noted that it had deleted wording from the originally proposed new section 2.714(d)(2)(ii) because it could have suggested "that the presiding officer is to prejudge the merits of a contention before an intervenor has an opportunity to present a full case."

We find, in considering these two approaches, that the "balance of the scales" tips toward finding that our duty lies in this second course. We say this in full recognition that, although this course is actually quite straightforward, in a sense we are charting somewhat new territory, and thus must not proceed lightly with regard to these serious issues — issues both posing arguably the very significant benefit, as noted by Duke, of reducing nuclear weapons stockpiles, as well as being of a nature to raise fears in the minds of some members of the public, especially after the events of September 11, when undertaking any action that could be

perceived to present an opportunity for terrorist attack, *see* discussion below of NIRS contention 1.1.2, warrants full, deliberate, and considered attention. In addition, since the issues have to do with nuclear power, they might be said to present to the general public a level of complexity that in itself is somewhat daunting.

In taking this course, what we decide herein is not the ultimate merits of whether MOX fuel use should be addressed in the SEIS based on what is at this point a relatively poorly developed record, but rather the (also significant) issue of whether the contention, that any future MOX use should be considered in this proceeding, is sufficiently arguable and supported under the contention admissibility standards of section 2.714 and the provisions of Parts 51 and 54 to warrant further inquiry and to admit *for litigation in this proceeding*. We emphasize these words for the purpose of highlighting that, as with any other contention, in deciding whether to admit a “MOX contention” to be litigated, we would *not* be deciding the issue determinatively on the merits *unless* the contention is properly admissible, and if so, *not until after* a “full record” is developed; our decision(s) would then ultimately be appealable, and would thus be subject to full and appropriate consideration by the Commission, “after development of a full record.” *See* CLI-01-27, 54 NRC at 7. At this point, we have been presented only with assertions from both parties, have not heard evidence, and are not in a position to do fact-finding. Before making a merits ruling on this issue, it is appropriate, as the Commission suggests, to develop a “full record” with regard to the facts relevant to the MOX contentions, especially given the wide array of fact situations involved in cases having to do with “cumulative impact,” “proposals,” and related issues, and the desirability of avoiding a possibly precipitous decision on an issue of great public interest and import, based on few if any developed facts but with arguably significant consequences.

Another very practical issue, however, presents itself in the approach we consider: If we admit the consolidated MOX contention and then wait to conduct a hearing on it until after the EIS is done, as would occur in the normal process, then any possible decision on the merits of whether MOX fuel use *should* be addressed in the EIS and thus in this license renewal proceeding would be both untimely and inefficient. If, on the other hand, we admit the contention and then in the near future conduct an evidentiary hearing for the purpose of developing a full record on the MOX fuel issue, so that at an appropriate time that would contribute to the efficiency of the hearing process we can make a decision on the merits *of this issue* (which would ultimately at one point or another go to the Commission for its attention on an appellate basis), then it seems to us that we will have both fulfilled the Commission’s directive in CLI-01-27, and also allowed all parties to “have their say” and “be heard.” This is not, of course, to say that the contention should be admitted if it does not meet the contention admissibility and license renewal scope standards, to which issue we now turn.

Looking at NIRS's MOX consolidated contention from the standpoint of the contention admissibility standards, we find that it meets the standards of 10 C.F.R. § 2.714(b)(2), in that it presents a specific statement of the issue NIRS wishes to raise; provides a brief explanation of the bases of the contention; provides a fact-based argument sufficient to show a genuine dispute on the material issue of combined fact and law, of whether future anticipated use of MOX fuel in the Duke plants is sufficiently definite to constitute a "proposal" under the law, with a connection, "cumulative impact," "interdependence," or similar relationship to matters at issue in this license renewal proceeding, to warrant being addressed in the SEIS for this proceeding. NIRS has also identified the failure of the LRA to contain information on the use of MOX fuel in the plants, and provided supporting reasons why it believes the information should be included in the application.

Looking at the contention from the standpoint of whether it falls within the scope of license renewal, we find that NIRS has presented sufficient indication that the use of MOX fuel in the Duke plants could affect the management of aging effects in a number of structures and components, some time-limited aging analyses, as well as the environment with regard to thermal discharges, that we find it to be within the scope of a license renewal proceeding.

We therefore, in light of the above analysis, rule NIRS's consolidated MOX contention to be admissible for litigation in this proceeding, renumbered as NIRS contention 1 and reframed as follows:

Anticipated MOX fuel use in the Duke plants will have a significant impact on aging and environmental license renewal issues during the extended period of operations in the Duke plants, through mechanisms including changes in the fission neutron spectrum and the abundances of fission products, and must therefore be considered in the license renewal application and addressed in the Supplemental EIS.

At the hearing on this contention, all parties may present evidence to establish whether or not this contention should be sustained on the merits, which will determine whether MOX fuel use must be addressed in the SEIS and the LRA. With regard to a ruling on the merits of this issue, the ultimate result of which we in no way suggest in making this or any other observation in our discussion of the MOX contention, we note again that the issue of whether, and with what if any conditions,<sup>15</sup> the license renewal application should be granted is not before us to determine at this point.

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<sup>15</sup> We note that there is precedent for placing conditions in licenses, which may rise or fall on the existence of differing sets of facts. *See, e.g., Curators of the University of Missouri*, LBP-91-12, 33 NRC 253, 258 (1991), *aff'd*, CLI-91-7, 33 NRC 295 (1991).

**(iv) NIRS CONTENTION 1.1.2 (RELATING TO SECURITY CONCERNS IN LIGHT OF TERRORIST EVENTS OF SEPTEMBER 11, 2001)**

NIRS in its contention 1.1.2 asserts that Duke's license renewal application is not complete with regard to security concerns, in that it "has not realistically or fully analyzed and evaluated all structures, systems and components required for the protection of the public health and safety from deliberate acts of radiological sabotage" in the wake of the terrorist events of September 11, 2001. NIRS Contentions at 5. NIRS goes on to state that the "unanalyzed systems, structures and components include but are not limited to the containment structure, fire protection systems and coolant water intake systems and electrical grid system as primary power supply to plant safety systems" for the plants. *Id.* Noting various press accounts of U.S. power plants being explicitly targeted by extremist groups "for acts of radiological sabotage and mass terrorism," and a November 1, 2001, statement of Director General Mohamed El Baradei of the International Atomic Energy Agency that an act of nuclear terrorism is "far more likely" than previously thought, NIRS argues that "[t]his change of conditions must be factored into this proceeding in a more direct manner than only withholding documents from the intervenors." *Id.* at 5-6.

NIRS asserts that its concerns regarding terrorism and security are age-related in that they were not considered in the original licensing of the plants and are exacerbated by the license extension "since the duration that a target exists impacts the probability that it will be hit," particularly given "ample evidence" of an increase and overall acceleration in terrorism, including the targeting of nuclear facilities. *Id.* at 6. In addition, NIRS cites 10 C.F.R. § 51[.53](c)(3)(iv),<sup>16</sup> for its requirement that "[t]he environmental report must contain any new and significant information regarding the impacts of license renewal of which the applicant is aware." NIRS argues, "Certainly a major direct attack on a nuclear reactor site would result in environmental impacts." *Id.*

NIRS contends that an adequate security analysis for extending operating licenses of the Duke reactors must, in order to address "increasing risks to [its] members," include consideration of:

- (a) the reality of the vulnerability of the units, especially given that the McGuire units are on the approach to the Charlotte airport;
- (b) the possibility of truck bombs like that used in the attack on the Federal Building in Oklahoma City, which involved a larger truck than that postulated under the design basis threat, or tractor trailer trucks;

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<sup>16</sup> NIRS's citation was actually to "10CFR51(c)(3)(iv)," but it is evident that the intent was to refer to 10 C.F.R. § 51.53(c)(3)(iv), a portion of which NIRS quotes. We thus consider NIRS's argument on the basis of reference to the correct rule.

(c) the possibility of attacks via water, including attacks on the dams on Lake Norman and Lake Wylie, near the plants in question, which could affect their coolant intake systems and thereby jeopardize the cooling system and reactor integrity;

(d) analysis of combustible fire penetration seals;

(e) impacts on outside containment structures and functions including the control room, off-site power service, emergency diesel generators, fuel pool, and emergency access;

(f) attack by multiple coordinated teams with multiple insiders assisting, since the current design basis threat “unrealistically limits the applicant units station force-on-force security response capability to a small single team partially aided by a single insider limited only to providing information and not involved in active act of sabotage”;

(g) the socio-economic impact of closure of Lake Norman and/or Lake Wylie for security purposes (referring for comparison purposes to a decision made by Exelon to close public access to Lake Clinton near the Clinton nuclear power station);

(h) the impact of future use of MOX fuel on the attractiveness of the site for attack “given that unused MOX fuel made from weapons grade plutonium is attractive to those seeking weapons usable material”;

(i) the impact of MOX fuel use on core breach accident scenarios whether directly from attack or as a result of station blackout, “factoring in the findings of Dr. Edwin Lyman of the Nuclear Control Institute that a major reactor accident with weapons grade MOX in use would result in a 25% increase in latent cancer fatalities compared to the same accident with LEU fuel”;

(j) the impact of the attractiveness of a site using MOX fuel “for purposes of an attack designed to maximize human suffering and property damage”;

(k) an upgrade in the assumptions used to assess the resources available to cope with such a disaster, noting how the events of September 11 in New York City resulted in the loss of “major infrastructure pieces such as ‘911,’ ” and proposing as an example possible impacts on Charlotte drinking water drawn from below Lake Norman in the event of an attack on the McGuire station;

(l) the potential vulnerability of the containment structure in the event of an attack, noting new reported information on such vulnerability, based on an Argonne National Laboratory report that includes a description of the “exact speed at which a jetliner would begin to transfer its force into the primary containment and interior structure of a nuclear reactor [and] how the concrete containment would spall, scab and eventually perforate depending on the aircraft velocity,” and on certain statements of Chairman Meserve in a letter to Congressman Edward Markey, indicating that nuclear plants are not required to be “designed to survive the crash of a Boeing 747”;

(m) the asserted need for a “revision of generic assumptions about license renewal and high-level nuclear waste generation (10 C.F.R. 51.23(a)) since the accretion of high-level nuclear waste in both pool and dry storage on these sites considerably impacts the potential source term from a major attack and radiological release; and

(n) the “vulnerability of the electrical grid systems and station switchyards to sabotage and the adverse impact on the public health and safety from terrorist attack on these primary power systems that lie outside the applicant units’ protected areas.”

*Id.* at 7-11.

#### **Duke and Staff Responses to NIRS Contention 1.1.2**

Duke argues that NIRS contention 1.1.2 constitutes an attack on NRC security regulations, and that it seeks relief this Licensing Board cannot grant, since the

security concerns raised involve generic issues currently under review by the Commission, and also relate to matters outside the scope of this proceeding. Duke argues that MOX-related terrorism issues are out of scope and inappropriate for the same reasons it argued with regard to NIRS's MOX contentions. Duke Response at 17-22. Duke also asserts that the station blackout issue is inadmissible for the same reasons argued with regard to NIRS contentions 1.1.4 and 1.1.5, *id.* at 22 n.59, which we address in our consideration of these contentions along with BREDL contention 4.

With regard to the generic nature of the terrorism issues, Duke notes Chairman Meserve's October 16, 2001, response to Congressman Edward Markey, quoting the Chairman as stating that he has directed the NRC Staff to "thoroughly reevaluate" in a "top-to-bottom analysis . . . all aspects of the Agency's safeguards and physical security programs," and notes as well recent legislative proposals dealing with the possible terrorist threat to U.S. nuclear power plants, "which could result in new mandated security requirements being placed on all nuclear facilities." *Id.* at 18.

On the issue of terrorism-related issues being outside the scope of this proceeding, Duke offers as an example that "socioeconomics" is a Category 1 issue under Appendix B to Subpart A of 10 C.F.R. Part 51, Table B-1, *id.* at 17 n.49, and argues that "re-visiting the list of Category 2 issues to be addressed in a license renewal application would require Commission action under either 10 C.F.R. § 2.758 or 2.802." *Id.* at 21. Duke contends that NIRS "has not attempted to make the showing required by 10 C.F.R. § 2.758." *Id.*

The Staff submits that this contention must be rejected based upon the Commission's statement in the SOC for the final revision to 10 C.F.R. Part 54, which provides in relevant part as follows:

When the design bases of systems, structures, and components can be confirmed either indirectly by inspection or directly by verification of functionality through test or operation, a reasonable conclusion can be drawn that the CLB is or will be maintained. This conclusion recognizes that the portion of the CLB that can be impacted by the detrimental effects of aging is limited to the design-bases aspects of the CLB. All other aspects of the CLB, e.g., quality assurance, physical protection (*security*), and radiation protection requirements, are not subject to physical aging processes that may cause noncompliance with those aspects of the CLB.

Staff Response at 18 (citing Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. at 22,475 (emphasis added)). The Staff also argues that NIRS offers no facts or expert opinion to support the bases for the contention or demonstrate that the security issues raised are age-related, *id.* at 18-20, and that the contention impermissibly challenges the Commission's rule at 10 C.F.R. § 50.13, entitled "Attacks and destructive acts by enemies of the United States; and defense activities," which provides as follows:

An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

The Staff asserts that such measures are therefore not in the CLB for McGuire or Catawba, and in turn not within the scope of this proceeding under 10 C.F.R. Part 54. *See* Staff Response at 18-19. Arguing that NIRS essentially contends that Duke should be required to provide more security analysis than is required under current NRC rules, the Staff states that this constitutes an additional impermissible challenge to Commission rules. *Id.* at 19-20 (citing 10 C.F.R. §§ 50.33(c), 73.1, 73.55, and Part 73, Appendix C). The Staff points out that the Commission has begun considering all of its regulations and requirements in light of the September 11 events, but that until then current regulations continue to govern. Finally, the Staff challenges NIRS's reliance on the 1982 Argonne report as being "new" information, and asserts that NIRS has provided no support for its view that the types of attacks enumerated in the contention constitute events that are required to be included in the license renewal application based either on aging issues under Part 54 or environmental issues under Part 51. *Id.*

#### **Ruling on NIRS Contention 1.1.2**

We begin by recognizing the seriousness and gravity of terrorism issues, especially since the shocking and tragic events of September 11. As noted by the Licensing Board in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476 (2001), "things are not — and may never be — the same in the wake of the catastrophic events of that day." *Id.* at 487. We also recognize that these issues carry special concerns as they relate specifically to nuclear plants, which has indeed, as indicated above, led the Commission to undertake a "top-to-bottom" analysis and reevaluation of all aspects of NRC safeguards and physical security requirements. With certain exceptions, however, relating to the anticipated use of MOX fuel at the Duke plants, and possibly also to the location of the McGuire plant in the approach to the Charlotte airport, the concerns expressed by NIRS in this contention would apply generically to U.S. nuclear plants. To this extent, as Duke and the Staff argue, NIRS contention 1.1.2 raises issues that, while obviously quite serious, would seem to lie outside the scope of this license renewal proceeding as defined herein, which concerns only the four Duke units at issue and not nuclear plants generally.

Specifically with regard to safety issues, the quotation from the 1995 SOC for Part 54 provided by the Staff also establishes that security concerns are outside the scope of safety-related aspects of license renewal proceedings. And

further, with regard to the argument of Duke and the Staff that NIRS fails to show any age-related issues, we find it to be largely correct. We note, however, NIRS's reliance on 10 C.F.R. § 51.53(c)(3)(iv) with regard to "new information" on environmental impacts. This might be said to leave a door open for any such "new information" with regard to plant-specific environmentally related concerns, but, as indicated in our discussion in Section II.B.2.b, above, of the scope of license renewal proceedings with regard to environmental issues, this would require a request for a rule waiver under section 2.758. *See Turkey Point*, CLI-01-17, 54 NRC at 12.

Any such request would, moreover, have to address not only any substantive rules relating to security and license renewal issues, but also 10 C.F.R. § 50.13, in which the Commission has specifically provided that "[a]n applicant for a license . . . is not required to provide for design features or other measures" to protect against the effects of "attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person." As noted in *Private Fuel Storage*, section 50.13 "reflects the Commission's determination in the late 1960s to exclude from licensing consideration the need for an applicant to provide special design features or other measures to protect against enemy attacks and destructive acts." *Private Fuel Storage*, LBP-01-37, 54 NRC at 486. The basis for this exclusion, according to the Commission, was that

the protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies of our Government having internal security functions. . . . One factor underlying our practice in this connection has been a recognition that reactor design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic "safeguards" as respects possible hostile acts by an enemy of the United States.

*Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), 4 AEC 9, 13 (1967), *aff'd sub nom. Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).

We are aware that another Licensing Board, in the *Savannah River* case, has admitted a contention relating to terrorism. *See Savannah River*, LBP-01-35, 54 NRC at 444-47. As that Board stated, "it can no longer be argued that terrorist attacks of heretofore unimagined scope and sophistication against previously unimaginable targets are not reasonably foreseeable." *Id.* at 446. The Board in *Savannah River*, however, found that section 50.13 does not apply to the MOX fuel fabrication facility. *Id.* at 445. This case presents a different situation, in that, although license renewal is not specifically listed in section 50.13 or defined in Part 50, 10 C.F.R. § 2.4 defines "license" as meaning "a license, including a renewed license . . . issued by the Commission." We find this an appropriate

definition to use with regard to section 50.13, which leads us to conclude that section 50.13 applies in this license renewal proceeding, absent a rule waiver, in that the terrorism concerns raised by NIRS clearly fall within the ambit of section 50.13.

We thus further conclude that, in order for us to admit any part of contention 1.1.2, NIRS's contention and bases must demonstrate that any such concerns are so unusual that they might be said to raise implicitly (since NIRS has not raised explicitly) "special circumstances with respect to the subject matter of [this] particular proceeding such that the application of [section 50.13, as well as relevant security and license renewal rules] . . . would not serve the purpose for which [they were] adopted," as required under 10 C.F.R. § 2.758(b). Considering this rule waiver issue in conjunction with the "door" we tentatively found to be open with regard to new information offered by NIRS on plant-specific environmentally related concerns, the question becomes: whether NIRS has demonstrated that the "new information" it recounts both (a) is adequately explained and supported and demonstrates a genuine dispute of material fact or law as required under section 2.714(b)(2) (which we would find), and (b) would constitute "special circumstances with respect to the subject matter of [this] particular proceeding . . . such that the application of . . . [section 50.13 and relevant security and license renewal rules] would not serve the purpose for which [they were] . . . adopted" and should therefore be waived so that NIRS contention should be admitted in part and litigated in this proceeding.

As to what might be litigated in the event that *both* these questions were resolved in the affirmative, we note that any information relating to the location of the McGuire units in the approach to the Charlotte airport would not be "new" and would therefore not satisfy this part of the query posed above. With regard to the MOX fuel issues put forth by NIRS, we have admitted the contention and, depending upon what evidence is elicited with regard to the issue, there would appear to be issues related to MOX fuel use that might constitute "new information" and "special circumstances with respect to the subject matter of [this] particular proceeding" that NIRS has at least implicitly raised, as required by section 2.758 and suggested by the Commission in *Turkey Point*, CLI-01-17, 54 NRC at 12. Whether such "special circumstances" are "such that the application of the [rules in question] would not serve the purpose for which [they] were adopted," however, is more of a "novel . . . policy question[]" of the sort the Commission has directed us to refer or certify to it on an interlocutory basis, *see* Commission Referral Order, CLI-01-20, 54 NRC at 213, especially given the Commission's current consideration and review of NRC security rules in light of the events of September 11.

Therefore, as in *Private Fuel Storage*, "this ruling seems to be one particularly suited for early review by the Commission," *Private Fuel Storage*, LBP-01-37, 54 NRC at 488, and we accordingly certify the question of the terrorism issues

raised in NIRS contention 1.1.2, as discussed above, to the Commission for its consideration. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 23; *Connecticut Yankee Atomic Power Co. (Haddam Neck Plant)*, CLI-01-25, 54 NRC 368, 374-75 (2001).

*d. Contentions That Relate to Severe Accident Mitigation Alternatives*

(i) **BREDL CONTENTION 2 (RELATING TO HUMAN RELIABILITY, WORKFORCE AGING, AND CRITICAL SKILLS RETENTION)**

BREDL contention 2 states:

The license renewal application fails to provide a human reliability analysis (HRA) that analyzes the impacts of workforce aging, critical skills retention and availability, the impacts of advanced technology on human reliability, and the ability of the future workforce to adequately implement aging programs, prevent severe accidents and economic accidents, and to mitigate the effect of accidents.

BREDL Contentions at 14.

BREDL “disputes the absence of a[n HRA]” in Duke’s license renewal application’s administrative control procedures “to ensure safety in a high consequence facility.” *Id.* BREDL argues that “[i]ntegrated safety management includes human resources as a safety system that should not be separated within an integrated safety analysis,” and states that present trends suggest that the nuclear industry is “presently characterized by an aging workforce with insufficient recruitment of replacement personnel,” despite efforts currently under way to reverse this “eroding of critical skills availability.” BREDL Contentions at 15. Stating that “[h]uman error is the direct or contributing and/or root cause of most nuclear accidents,” BREDL argues that “workforce capabilities and critical skills availability are the primary limiting factor in managing Catawba and McGuire Nuclear Power Plants,” and that essential aging management programs are “meaningless without the presence of a thorough HRA.” *Id.*

In support of its arguments, BREDL cites, with regard to safety-related issues, the requirement of 10 C.F.R. §§ 54.21 and (by reference) 54.4 for evaluation of safety-related systems in a licensee’s Integrated Plant Assessment (IPA), and various safety-related and other systems included in the scope of a license renewal proceeding under 10 C.F.R. §§ 54.4 and 54.21 that depend upon operator performance and human reliability. *Id.* With regard to environmental issues, BREDL cites the requirement of 10 C.F.R. § 51.53(c)(2) that license renewal applicants also submit an Environmental Report that contains “a description of the proposed action, including the applicant’s plans to modify the facility or its administrative control procedures as described in accordance with § 54.21.” *Id.* at 14-15. BREDL also cites 10 C.F.R. § 51.53(c)(3)(ii)(L), regarding severe

accident mitigation alternatives (SAMAs) in support of contention 2, stating that the SAMAs for both the Catawba and McGuire plants, various parts of which are cited, include human reliability as an integral part; specifically noted, from Table 2.1, are “Procedure Changes,” “PRA Based Simulator Training,” “Improv[ing] Plant Personnel’s Awareness of SS[C] Importance,” “Administrative Controls on SS[C] Unavailability,” and “Procedure Enhancements.” *Id.* at 16.

Noting an “abundance of expert documentation supporting the premise that human error is prevalent as a causal factor in accidents,” *id.* at 17, BREDL provides various such sources including reports from the Sandia and Brookhaven National Laboratories, and also provides references to authorities including the Argonne National Laboratory and Chairman Richard Meserve on the “human capital” issue. Chairman Meserve is quoted as stating that “the number of individuals with the technical skills critical to the achievement of our safety mission is rapidly declining in our Nation and our educational system is not replacing them,” *id.* at 20, and as seeking Congress’s help in addressing the problem. *See id.* at 17-22. Finally, BREDL provides examples of incidents at the Duke plants in which human error caused various problems. *See id.* at 22-23.

#### **Duke and Staff Responses to BREDL Contention 2**

Duke argues that BREDL contention 2 is outside the scope of license renewal, that it impermissibly challenges the current licensing basis of the Duke plants, and that it “ignores that ongoing operational issues are addressed by normal ongoing regulatory processes.” Duke Response at 77. Stating that there is no requirement in any of the Commission’s rules for an HRA, Duke asserts that contention 2 is inadmissible in that it fails to demonstrate a genuine dispute on a material issue of fact or law. *Id.* at 77-78. Duke finds in certain language in the 1995 SOC an indication that the Commission “deliberately chose to exclude issues of human reliability and performance from the scope of license renewal,” including the Commission’s statement that it did “not contend that all reactors are in compliance with their respective CLBs on a continuous basis,” *id.* at 78, and that

the portion of the CLB that can be impacted by the detrimental effects of aging is limited to the design-basis aspects of the CLB. All other aspects of the CLB, *e.g.*, quality assurance, physical protection (security), and radiation protection requirements, are not subject to physical aging processes that may cause noncompliance with those aspects of the CLB.

*Id.* at 78-79 (citing 60 Fed. Reg. at 22,474-75).<sup>17</sup> Also, citing *Turkey Point*, Duke quotes the Commission’s statement that “[i]ssues . . . which already are the focus of ongoing regulatory processes [ ] do not come within the NRC’s safety review at the license renewal stage[.]” Duke Response at 80 (citing CLI-01-17, 54 NRC at 10).

Duke uses this same argument, relating to the ongoing regulatory process, in addressing the SAMA issue, and concludes by asserting that the fact that many power reactor functions rely on successful performance by individuals is “merely a truism . . . [that] can be said with regard to all plants,” and that “[s]uch an expansive interpretation of the license renewal regulations cannot be squared with the limited scope of license renewal as explained in the Commission’s rulemaking and subsequent decisions.” Duke Response at 80.

The Staff agrees with Duke that BREDL contention 2 is outside the scope of this proceeding, and that it challenges the Commission’s regulations “by seeking to require HRAs when they are not required by the regulations.” Staff Response at 44. Interestingly, the Staff also argues that BREDL provides no expert opinion to support the statement that there is a trend “toward a less-qualified and less-experienced workforce.” *Id.* Asserting that there is no basis in Part 54 to include human operators “as integral parts of safety and non-safety related systems,” at least in part because human beings would be “active components” and thus not subject to aging review, the Staff notes that various existing regulations address human activity, including Part 55 on operator licensing, with 10 C.F.R. § 50.120 specifically addressing training and qualification. *Id.* at 45. The Staff concludes by arguing that BREDL has not demonstrated any genuine dispute on any material issue of fact or law. *Id.* at 46.

#### **Ruling on BREDL Contention 2**

We find that BREDL has raised a significant issue in contention 2, as perhaps best illustrated by the Chairman’s remarks on the aging workforce. Certainly, in order to minimize and avoid reactor accidents, there must clearly be not just sufficient numbers of, but also sufficiently trained, personnel at a plant. Although BREDL representative Moniak, a nonattorney, was not consistently articulate in oral argument, several of his statements describing what BREDL advocates with regard to contention 2 give a relatively cogent, straightforward summary of BREDL’s fundamental concern with regard to this contention:

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<sup>17</sup> In a footnote, Duke cites language that is more on point, to the effect that the operator licensing requirements of Part 55 “as well as normal NRC review of plant operations, are adequate to ensure that operators are aware of any license renewal development that may affect their duties.” Duke Response at 79 n.135 (citing 56 Fed. Reg. 64,943, 64,967 (Dec. 13, 1991)). This language comes from the SOC to the earlier rule that was revised in 1995, but which left “much . . . [of the old rule] valid.” *Id.*

[I]t's an assessment that would determine what critical skills are necessary to perform the task in the aging management program as well as the severe accident management assessment, what skills are necessary, how available are those skills today; and taking into account the present trends that say that those skills are not going to be as available during the license renewal period unless that trend is reversed, how is the licensee going to take efforts to reverse that trend and ensure that there's going to be enough highly qualified people . . . .

....

[T]he trend could manifest itself in a way that it would be much more difficult to detect, such as people working extra, working overtime, could cause increased fatigue.

....

[I]t would provide a discussion of how the next generation of reactor personnel are going to be recruited and how they are going to adequately staff the plant so that the risk of human error is kept very low. I guess maybe what I'm saying is there should be a human availability assessment more than a reliability assessment.

Tr. 256-57, 261, 266-67. The question is whether BREDL's concerns, including its arguments on the need for such a "human availability assessment," are appropriate to address in the context of a license renewal proceeding under NRC rules.

With regard to the safety aspects of license renewal, we find persuasive the arguments of Duke and the Staff that BREDL has raised no aging issues that fall within the scope of Part 54 license renewal issues. So too, notwithstanding some of BREDL's arguments relating to severe accident mitigation, the aging workforce is clearly a generic problem for the entire nuclear industry, as Duke essentially argues, and as Chairman Meserve's remarks illustrate.

We recognize BREDL's arguments countering the challenge-to-rules issue raised by the Staff, by pointing out that the regulations simply do not address human personnel availability issues related to the "war for talent" that has resulted from fewer people going into the nuclear field. *See* Tr. 252. We also recognize that Duke's own SAMA analysis in its license renewal application includes categories that relate to personnel issues and are in that sense comparable to the aging workforce/availability/"war for talent" issue that BREDL focused on in oral argument, and that the "war for talent" aspect of this issue arguably takes the issue out of the generic and into the plant-specific — i.e., it is reasonably likely that any given licensee will approach any "war for talent" arising out of the human capital issues addressed by Chairman Meserve in a manner at least somewhat specific to that licensee. Nonetheless, how any licensee approaches this issue, through what sorts of recruitment and other measures, will be largely

determined by whether, how, and the extent to which the *generic* issue of the aging workforce is addressed in the coming years.<sup>18</sup>

Thus, even though BREDL in its “war for talent” argument does raise some relatively narrow, but arguably plant-specific, issues that might fall within a SAMA analysis, we find that there is no relief that could reasonably be provided with regard to this issue at this point in time, pending resolution of the much broader and more significant *generic* issue of how the NRC, Congress, and the industry itself address the problem of an aging nuclear-trained workforce, and given the uncertainties as to the degree to which the trend BREDL and others describe is reversed and what the actual situation will be during the extended period of operation. Accordingly, we must deny BREDL contention 2, pursuant to 10 C.F.R. § 2.714(d)(2)(ii).<sup>19</sup>

We observe, as the Commission has suggested, that a petitioner may participate in the SEIS notice-and-comment process, which is yet to occur in this proceeding; that there will also be opportunity for public comment when the Commission reviews the GEIS for license renewal; and that Petitioners may always petition for a fresh rulemaking under section 2.802. *See* discussion at the end of Section II.B.2.b, above; *Turkey Point*, CLI-01-17, 54 NRC at 12. These options would seem to be more appropriate avenues for raising concerns with regard to aging workforce and associated issues, and they are all open to BREDL.

**(ii) BREDL CONTENTION 4; NIRS CONTENTIONS 1.1.5 AND 1.1.4 (RELATING TO ICE CONDENSERS AND STATION BLACKOUT RISKS)**

BREDL in contention 4 asserts:

The aging management programs associated with the Catawba and McGuire Ice Condenser systems are insufficient to assure safe operations and prevent design-basis and severe accidents.

*See* BREDL Contentions at 37. NIRS contention 1.1.5 states:

Alternative Mitigation of Station Blackout Caused Accidents Omitted,

and subsection 1.1.5(a) of this contention states:

Given the vulnerability of these reactors as documented in NUREG/CR-6427 and given the preponderance of new factors (terrorism and climate change) that increase the probability of

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<sup>18</sup> We note a recent article in which the problems raised by BREDL are discussed in some depth, including a sidebar on “Recommendations from [the Nuclear Energy Institute]’s First Industry–University Recruiting Workshop.” R. Michal, *Supply and Demand in the Workforce: An Update*, 44 Nuclear News, No. 13, at 22, 23 (Dec. 2001).

<sup>19</sup> In view of our ruling on BREDL contention 2, it is not necessary to rule on the Staff’s objection, made at oral argument, *see* Tr. 202-03, that it had not timely received a BREDL exhibit relating to contention 2.

station blackout, it is vital to consider [the alternative mitigation of a dedicated electrical line from the hydroelectric generating dams adjacent to each reactor site].

See NIRS Contentions at 15-17. NIRS contention 1.1.4 asserts that there is:

New Information on Risk of (and from) Station Blackout at Catawba and McGuire.

*Id.* at 12.

All of these contentions center around the issue of severe accident mitigation alternatives (SAMAs), in the context of the somewhat unique nature of the Duke reactors, which, as BREDL asserts, constitute “four of the ten existing Pressurized Water Reactors with ice condenser containment systems.” BREDL Contentions at 37. BREDL asserts that these ice-condenser containment systems are “the most vulnerable among all U.S. [nuclear power plants] to loss of containment accidents.” *Id.*

Citing regulations including 10 C.F.R. §§ 51.53(c)(3) and 51.45(c), BREDL contends that Duke’s aging management programs for ice condenser systems and components, as well as its SAMA analysis, are incomplete — the aging management program because it “fails to provide reasonable assurance that aging management will allow these systems to function as designed when necessary and prevent a catastrophic release of fission products to our environment,” and the SAMA analysis because it “fails to incorporate new and extensive information regarding ice condenser vulnerabilities,” or even to “identify potentially dominant failure modes for a severe accident” in its “analysis of potential containment-related SAMAs.” *Id.* at 38.

BREDL relies largely on a document that is not mentioned by Duke in its LRA, namely, NUREG/CR-6427, an April 2000 NRC-sponsored study by the Sandia National Laboratory. *Id.* at 38-40 (citing M.M. Pilch, K.D. Bergeron, and J.J. Gregory, “Assessment of the [Direct Containment Heating (DCH)] Issue for Plants with Ice Condenser Containments,” NUREG/CR-6427 (SAND99-2253) (Apr. 2000) (hereinafter NUREG/CR-6427)). From Chapter 6 of this document, on “Quantification of Containment Fragility,” BREDL quotes the following:

We note that the ice condenser plants are substantially less robust than other Westinghouse plants with large dry or subatmospheric containments. Table 6.1 shows that the mean of the containment failure pressure for all ice condenser plants is 62.8 psig [pounds per square inch gauge] at a failure frequency of 10%. The comparable value for all Westinghouse plants with large dry or subatmospheric containments is 113.1 psig. Ice condenser containments can afford to be less robust because of their reliance on ice beds as a pressure suppression feature for design basis accidents.

BREDL Contentions at 39 (citing NUREG/CR-6427 at 102).<sup>20</sup> BREDL also quotes the following from Chapter 8, on the report's Summary and Recommendation:

A plant-specific evaluation of the CET [Containment Event Trees] showed that all plants, except McGuire, had an early failure probability (given core damage) within the range of 0.35% to 5.8% for full power internal events. These integral estimates of early containment failure are qualitatively consistent with published IPE [Individual Plant Examination] results for these plants. The early containment failure probability, as computed here, was 13.9% for McGuire. This higher containment failure probability for McGuire is dominated by the relatively high SBO [station blackout] frequency and the relatively weak containment for McGuire. The IPE assessments of early containment failure at McGuire (2%) are significantly lower than our assessments; however, we have not investigated the reasons for the difference.

BREDL Contentions at 40 (citing NUREG/CR-6427 at 124).

BREDL also provides quoted material from a 2000 report by Dr. Edwin S. Lyman of the Nuclear Control Institute, including the following, on the subject of "Vulnerabilities of Ice Condenser Containments":

Nuclear power plants in the U.S. are required to have robust reactor containment buildings. The main purpose of these structures is to prevent the release of large quantities of radioactive materials in the event of a reactor core meltdown. . . .

. . . Most pressurized-water reactors (PWRs) in the U.S. have "large dry" containments, which are typically massive concrete structures with walls several feet thick. Catawba and McGuire, on the other hand, are among a handful of PWRs worldwide with "ice condenser" containments. These are typically thin steel shells that have only half the volume and failure pressure of large dry containments. To compensate for the reduced strength of their containment buildings, ice condenser plants are equipped with "ice beds." These consist of baskets filled with blocks of ice that are supposed to cool and condense steam flowing past them during a core-melt accident, reducing the threat that the containment will become overpressurized and rupture from the rapid generation of steam.

. . . [I]f the ice condensers . . . work as they are supposed to, . . . containment failure can still occur as a result of the combustion of hydrogen gas, which would be generated in large quantities during severe accidents when the metal cladding on fuel rods reacts with coolant water. During the Three Mile Island 2 (TMI-2) accident in 1979, a large amount of hydrogen was released to the containment and burned, although the pressure increase did not lead to rupture of TMI-2's large dry containment. The ice condensers not only cannot reduce the risk of hydrogen combustion but also can actually increase it, because they divide the containment volume into small compartments where hydrogen gas can more readily reach explosive concentrations.

. . . The pressure that can be generated in the containment from hydrogen combustion can typically reach a value of about 110 pounds per square inch (psi). The average failure pressure of U.S. large dry containments is around 113 psi, whereas for ice condenser containments it is around 63 psi. Therefore, hydrogen burns can easily overpressurize and rupture ice condenser containments.

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<sup>20</sup> BREDL reproduced Table 6.1 in its contentions, but we find it unnecessary to do so herein, as the quoted selection provides all relevant information from the table.

For this reason, after the TMI-2 accident, NRC required that ice condenser plants install hydrogen igniters, which are operator-initiated, AC-powered devices that are designed to burn hydrogen at a controlled rate before it reaches an explosive concentration.

However, the risk of hydrogen explosions in ice condensers has not been eliminated entirely by this requirement, since the hydrogen igniter systems now in use require AC power to operate. Therefore, in the event of a simultaneous loss of both off-site and on-site AC power supplies, known as a station blackout (SBO), hydrogen control is lost.

. . . . NUREG/CR-6427[] finds that “no ice condenser plant is inherently robust to all credible hydrogen combustion events in a (*sic*) SBO accident”[]; . . . that “ice condenser plants are at least two orders of magnitude [one hundred times] more vulnerable to early containment failure than other U.S. PWRs” as a result of hydrogen explosions during core melt accidents[]; . . . [and] that for accidents in which the hydrogen igniters were not available, such as SBOs, the probability that the containment would rupture as a result of hydrogen combustion is 34% for Catawba and 58% for McGuire. Using the same methodology, previous NRC studies found that the risk of containment failure at large dry containments is less than 0.1%.

[The authors of NUREG/CR-6427] found that [with regard to] certain SBO accidents — namely, those in which the reactor coolant system remains at high pressure at the time that the reactor vessel is breached by molten fuel — the probability of early containment failure as a result of detonation of pre-existing hydrogen is nearly 100% for both Catawba and McGuire.

*Id.* at 40-42.

BREDL also quotes Dr. Lyman on the likelihood of SBO, noting one that occurred at the Vogtle plant in Georgia in 1990, and an instance in 1996 in which Catawba “lost off-site power for more than a day with one of the two emergency diesel generators unavailable,” *id.* at 42, and on the possibility of SBO resulting from such things as earthquakes, tornadoes, and sabotage. *See id.* at 42-43. According to Dr. Lyman, data in Duke’s IPE submittals have been calculated by the NRC to provide an early containment failure probability (given core damage) of 13.9% for McGuire (which NRC has found consistent with the NRC’s guideline of 10%), whereas Duke calculated the rate to be 2.4%. *Id.* at 42. Dr. Lyman also notes that Duke has raised doubts about the validity of NUREG/CR-6427. *Id.* at 43. BREDL quotes Chairman Meserve as acknowledging the need to “evaluate the functionality of hydrogen igniters during station blackout at [ice condenser] plants through the generic safety issue program.” *Id.* at 44 (citing Nov. 14, 2001, Letter from NRC Chairman Richard Meserve to Dr. Edwin S. Lyman).

In support of contention 4, BREDL also refers to an October 8, 1999, exemption from the requirement of 10 C.F.R. § 54.17(c) that a license renewal application “may not be submitted to the Commission earlier than 20 years before the expiration of the operating license currently in effect,” based in part on Duke’s assertion of “regular and systematic exchanges of information on plant-specific operating experience among all three Duke nuclear stations.” *Id.* at 44 & n.1 (citing 64 Fed. Reg. 54,924-25 (Oct. 8, 1999)). BREDL cites a 1998 finding by the NRC Allegation Review Board that there were “problems with D.C. Cook Ice Condenser Containment such as configuration and testing, and Ice Basket Bay Doors and Components . . . known but not reported by D.C. Cook, Watts Bar,

McGuire, and Westinghouse” (which the board classified as of “low” concern), as evidence that “illustrate[s] a failure to exchange [such information].” *Id.* at 44-45 (citing a June 22, 1998, Memorandum from Oscar De Miranda, NRC Region II Senior Allegations Coordinator, to Jean Lea, Senior Allegations Coordinator of the Office of Nuclear Reactor Regulation).

NIRS in its contention 1.1.5 proposes as a severe accident mitigation alternative a “dedicated electrical line from [Duke’s] hydroelectric generating dams adjacent to each reactor site.” NIRS Contentions at 15. Asserting that “diesel generators have many problems, . . . that the NRC’s stated 95% reliability rate is not good enough,” and that “in the last 10 years of the 20th century, diesel generator failure contributed to station blackout at 3 reactor sites and near blackout at several more,” NIRS states that in addition, “the compounding factors of terrorism and climate change may reduce [the safety] margin into the danger zone.” *Id.* (citing, at note 13, SBOs at the Vogtle and Davis-Besse plants in 1990 and 1999, and other situations involving the “brink of generator failure”). NIRS contends that the dedicated line “would not pose a great challenge, and should be analyzed,” especially in view of the possibility of the use of MOX fuel in the Duke plants. *Id.* at 15-16.

In support of these arguments, in contention 1.1.4, NIRS asserts that SBO “contributes the largest share of risk of severe reactor accidents,” *id.* at 12 (citing NUREG-1150, “Severe Accident Risks: An Assessment of Five U.S. Nuclear Power Plants” (Oct. 1990)); relies on NUREG/CR-6427 and Dr. Lyman’s report, *id.* at 13; contends that “[t]he risk factors of intentional acts of terror, inadvertent acts of war in the event of an armed conflict within the U.S. have not been analyzed with respect to station blackout,” *id.* at 14; and insists that the interaction of the use of MOX fuel and station blackout must be analyzed, “both from the perspective of increased chances of SBO due to sabotage, as well as increased likelihood of accidents and [the likelihood that] containment failure with MOX fuel in the core . . . would lead to a significant increase in latent cancer fatalities compared to a (*sic*) LEU core.” *Id.* at 15 (citing DOE Final Supplemental EIS on Surplus Plutonium Disposition, and Dr. Lyman’s article, “Public Health Consequences of MOX Fuel: NRC Reactor Licensing Issues (Jan. 1999), posted at <http://www.nci.org/i/ib12199.htm>, *id.* at 15 n.12).

#### **Duke and Staff Responses to BREDL Contention 4 and NIRS Contentions 1.1.5 and 1.1.4**

Duke responds to BREDL’s contention 4 by asserting that it lacks support and fails to identify any specific omission, inaccuracy, or other deficiency in Duke’s license renewal application, and that “relevant aging management programs are discussed in the license renewal application,” citing sections 2.4 and 3.5 and Table 3.5-1 of the LRA. Duke Response at 92. Duke argues that “[t]he details in the application provide the basis to conclude that implementation of the programs

will allow these systems to perform their intended function . . . fully consistent with the requirements of 10 C.F.R. § 54.21(a),” and that the application also includes a discussion of relevant experience, citing Appendix B, Section B.3.18 of the LRA. *Id.* at 92-93. Arguing that BREDL does not specify the “central point of dispute” arising out of NUREG/CR-6427, Duke asserts that the risk issues BREDL raises “are not in any way associated by Dr. Lyman or BREDL to an equipment aging issue or any other issue unique to the period of extended operation,” and are therefore outside the scope of this license renewal proceeding. *Id.* at 94.

Asserting further that there is no regulatory requirement that Duke specifically reference NUREG/CR-6427 or Dr. Lyman’s views in the SAMA analyses for the McGuire and Catawba plants, Duke also contends that its analyses “have already addressed the substantive issues of those reports,” that NUREG/CR-6427 does not identify any new severe accident scenario or specific SAMA to reduce any consequences, and that in any event the NRC is addressing combustible gas control systems and the issues of NUREG/CR-6427 as a generic matter. *Id.* at 94-95. Duke argues that BREDL has failed to identify any deficiency in Duke’s aging management program or SAMA analyses for the ice condenser system, to provide citations to specific portions of the LRA, and to define “failure modes” or explain why identification of failure modes in the SAMA is required. For these reasons, Duke argues, BREDL contention 4 “must be rejected for lack of nexus between the alleged ‘new and extensive information’ and a license renewal review.” *Id.* at 96.

While agreeing that direct containment heating phenomena in ice condenser plants are different in some important aspects from DCH phenomena in other pressurized water reactors, Duke argues that the vulnerability issues relating to early containment failure are related not to DCH but to “non-DCH hydrogen combustion events,” citing in support of this argument NUREG/CR-6427, as follows:

All plants, especially McGuire, would benefit from reducing the station blackout frequency or some means of hydrogen control that is effective in station blackouts. The risk reduction was greater than an order of magnitude for all plants; however, NRC goals are generally achieved without such actions. If the igniters and air return fans are not available (e.g., SBOs), uncertainties in containment loads are dominated by uncertainties in hydrogen combustion phenomena and the amount of clad oxidized during core degradation.

*Id.* at 29 (citing NUREG/CR-6427, Abstract, at iv). On the probability of early containment failure, Duke quotes Ashok Thadani, NRC Director of Nuclear Regulatory Research, commenting on the results of NUREG/CR-6427, as follows:

As a result of this research, we now know that the threat to containment integrity posed by DCH is vastly reduced and that DCH constitutes, for the overwhelming majority of plants, no

substantive risk. . . . Resolution of the DCH issue has been achieved by demonstrating that either the containment failure probability is highly unlikely based on the containment's strength alone (the case for virtually all PWRs with large dry and subatmospheric containments) or that the conditional probability of high pressure melt ejection leading to DCH, together with the containment strength, leads to acceptably small containment failure probabilities and a small probability of large early release. . . . Even though the ice condenser plants were determined to be vulnerable to blackout sequences, the weighted probability of early containment failure (i.e., averaged over all full power internal events), was generally within the goal for containment performance.

Duke Response at 29-30 (citing Memorandum from Ashok Thadani, Director of Nuclear Regulatory Research, to Samuel Collins, Director of the Office of Nuclear Reactor Regulation (June 22, 2000), at 1-2 (hereinafter Thadani Memorandum)). Duke notes Mr. Thadani's comment that the possible implications of higher conditional failure probabilities for ice condenser plants, as well as BWR Mark III plants, during SBO sequences will be considered as part of the NRC's initiative to risk-inform 10 C.F.R. § 50.44 on an accelerated schedule. Duke Response at 30 (citing Thadani Memorandum at 2).

Duke suggests that NUREG/CR-6427 addresses only issues relating to the CLB for ice condenser plants, which are not "uniquely related to the period of extended operation." Duke Response at 31. Thus, Duke argues, "the fact that [the LRA] does not explicitly address the findings of NUREG/CR-6427 has no regulatory implications related to license renewal under Part 54, and certainly does not indicate that the renewal application is in any way deficient." *Id.* Arguing again with regard to NIRS contention 1.1.4, Duke asserts with regard to SAMAs that NIRS has "failed to specify, with basis, how Duke's treatment of the SAMA issue in the application is in any way deficient or what relief might be appropriate," and contends that the LRA's SAMA analyses "address the primary substantive conclusions of NUREG/CR-6427." *Id.* at 31-32. Duke avers that "NUREG/CR-6427 does not take into account the current design, operation, and maintenance of McGuire and Catawba, given the age of the underlying studies and data used," and therefore provides no basis for a contention that the SAMA analyses are inadequate. *Id.* at 33. In addition, Duke asserts, it "has already taken actions to reduce the frequency of Station Blackout by taking actions to improve emergency diesel generator reliability." *Id.* at 32. Finally, Duke also argues that there is no requirement that risk factors such as terrorism or acts of war be considered with regard to station blackout, either under Part 54 or Part 51, and that all issues relating to security and safeguards, and to possible future use of MOX fuel, are beyond the scope of this proceeding. *Id.* at 34, 37-38.

With respect to NIRS's proposal that a dedicated line be provided to mitigate the alleged SBO risks, Duke asserts that this does not present an adequate contention because it "does not demonstrate . . . that Duke's SAMA analyses fail to meet NRC license renewal requirements." *Id.* at 39. Duke states that the

proposed alternative is “not a credible alternative” because it is “not permitted by the NRC’s Station Blackout rule in 10 C.F.R. § 50.63.” *Id.* at 40. Duke’s explanation of this statement is found in a footnote in which it states that the proposed alternative is “not relevant from a regulatory standpoint” because a “Station Blackout by definition assumes a loss of offsite power and therefore no credit is taken for the switchyard and transmission lines.” *Id.* at 40 n.89.

Based on the preceding arguments, Duke states that NIRS in contentions 1.1.5 and 1.1.4 fails to show that a genuine dispute exists on a material issue of law or fact, and fails to raise an issue for which relief could be granted, and therefore the contentions must be dismissed. *See id.* at 33-34, 38.

The Staff also disputes the contentions relating to SBO, asserting with regard to BREDL contention 4 that it “does not challenge the scoping of the passive ice condenser structures listed in Table 3.5-1 of the application,” and fails to demonstrate why “the aging management programs, ice basket inspection and ice condenser engineering inspection proposed by Duke are incomplete or inaccurate,” or how they “fail to provide ‘reasonable assurance that aging management will allow these systems to function as designed when necessary and prevent a catastrophic release of fission products.’” Staff Response at 51. Contending that the claim, that Duke’s SAMA analysis is incomplete because it fails to incorporate the information in NUREG/CR-6427, “has no merit,” the Staff argues that Duke has complied with relevant regulations in its application and that BREDL has not “identified a dispute with the applicant’s decision to exercise the option of crediting aging management programs to manage the effects of aging of ice condenser structures and components.” *Id.* at 52.

The basis for the Staff’s argument relating to SAMAs, which it makes with regard to NIRS contention 1.1.4 as well, is that the Petitioners fail to allege that the analysis contained in Duke’s application is incorrect, and that the absence of a reference in the application does not mean that Duke’s plant safety analysis (PSA), on which its SAMA analysis relies, is deficient in this regard. *Id.* at 21-22. According to the Staff, Duke’s SAMAs include installing backup power to igniters that would mitigate the major contributor to containment failure in NUREG/CR-6427. *Id.* at 22.

Asserting further that “BREDL’s statement that ice condenser containment systems are the most vulnerable among all U.S. nuclear power plants to loss of containment accidents is unsupported by fact or expert opinion,” and that BREDL “fails to establish that any such vulnerability is associated with aging,” *id.* at 52, the Staff argues that BREDL has not specified any deficiencies in the aging management program or license renewal application, that it has failed to demonstrate a genuine dispute on a material issue of fact or law, and that its contention 4 therefore does not comply with 10 C.F.R. § 2.714(b)(2) and is inadmissible. *See id.* at 52-53.

With regard to NIRS's contentions insofar as they relate to terrorism and MOX issues, the Staff relies on its arguments with regard to those contentions, to the effect that these issues are outside the scope of this proceeding. *Id.* at 22-23.

**Ruling on BREDL Contention 4 and NIRS Contentions 1.1.5 and 1.1.4**

These contentions, as indicated above, center around the issue of severe accident mitigation alternatives. The primary relief requested by both Petitioners is that information contained in NUREG/CR-6427 be included in Duke's SAMA analysis, an analysis required under 10 C.F.R. § 51.53(c)(3)(ii)(L). Although Duke argues that it addresses NUREG/CR-6427 in substance in its SAMA analysis, and that NUREG/CR-6427 does not take into account the current design, operation, and maintenance of the McGuire and Catawba plants and therefore provides no basis for a contention that the SAMA analyses are inadequate, it is apparent that Duke has not considered or applied the values for conditional containment failure probability discussed in NUREG/CR-6427 in its own calculations. Whether or not it *should* apply these values goes to the merits of the contentions at issue, as do many of the quite extensive and detailed arguments of Duke and the Staff. With regard to the (also extensive) argument of Duke and the Staff that Duke is under no regulatory requirement to include in its application and SAMA analysis information such as that in NUREG/CR-6427, 10 C.F.R. § 51.45(e) requires that a licensee should provide not only information supporting the proposed action "but should also include adverse information," as noted by BREDL Representative Moniak at oral argument, in response to this argument. Tr. 359-60.

With respect to NIRS's allegation in its contention 1.1.5 that Duke has omitted an alternative mitigation of Station Blackout Caused Accidents, to wit, a dedicated transmission line from hydroelectric plants near the McGuire and Catawba stations, Duke argues that this is not permitted under section 50.63, but in its response provides no explanation for this statement other than a footnote stating that the proposed alternative is "not relevant from a regulatory standpoint" because a "Station Blackout by definition assumes a loss of offsite power and therefore no credit is taken for the switchyard and transmission lines." Duke Response at 40 n.89. Duke does not, however, address the definition of "Alternate ac source" that is found in the same section in which "Station blackout" is defined, i.e., section 50.2, and moreover, Duke conceded in oral argument that there was such a line at Oconee, albeit an underground one. Tr. 561. Although Duke counsel argued that Oconee's underground line is "part of the accredited licensing basis" and therefore a different question, *id.*, we find that from a practical perspective, drawing a distinction regarding a dedicated power line based upon its being underground is not terribly persuasive with regard to the intended function of such a line, and, in any event, would go to the merits of the issue rather than the sufficiency of the contention itself.

With regard to the scope of this proceeding, it is undisputed that severe accident mitigation alternatives are within the scope of a license renewal proceeding as a Category 2 environmental issue, notwithstanding that, as Duke notes, the matters addressed in NUREG/CR-6427, and related issues, are also the subject of a separate, generic approach to risk-informing certain NRC rules. With regard to the scope of SAMA, we note that the Commission in its SOC for the 1996 amendments to Part 51 stated quite specifically that it did “not intend to prescribe by rule the scope of an acceptable consideration of severe accident mitigation alternatives for license renewal,” and that it would “review each severe accident mitigation consideration provided by a license renewal applicant on its merits and determine whether it constitutes a reasonable consideration of severe accident mitigation alternatives.” 61 Fed. Reg. at 28,481-82. Thus, the SAMA issue would appear to be less restrictive than argued by Duke and the Staff. And, as stated by the Commission in *Turkey Point*, “[a]djudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review.” CLI-01-17, 54 NRC at 10. We accordingly find that the arguments of BREDL and NIRS with regard to the omission in Duke’s SAMA analysis of information from NUREG/CR-6427, particularly on containment vulnerability and failure probabilities, and of any consideration of a dedicated line as described above, fall within the scope of appropriate license renewal environmental issues for hearing.

In addition, we find that BREDL and NIRS have satisfied the contention admissibility requirements of 10 C.F.R. § 2.714(b)(2), (d)(2), with regard to most of their arguments contained in their contentions. We find that their assertions that Duke’s application, specifically its SAMA analysis, contains no reference to NUREG/CR-6427 or to the alternative of a dedicated line from an alternative source of electricity, satisfy the requirement of section 2.714(b)(2) that a specific statement of the issue of law or fact a petitioner wishes to raise or controvert be provided. We also find that, with regard to these issues, BREDL and NIRS have provided a sufficient, reasonably specific explanation of the bases of their contentions to meet the requirement of section 2.714(b)(2)(i), as well as sufficient expert opinion, facts, and references to sources and documents to support the contentions under section 2.714(b)(2)(ii), and sufficient information as required under section 2.714(b)(2)(iii) to show that a genuine dispute exists with regard to the material facts of whether and to what extent Duke’s SAMA analysis should take into account the calculations and values referenced in NUREG/CR-6427 and include the alternative of a separate dedicated line as described above. The Petitioners have also provided, as required by section 2.714(b)(2)(iii) and summarized in paragraph (E)(2) of Section II.B.1 of this Memorandum, identification of the failures of the Duke SAMA to include information from NUREG/CR-6427 and to consider the dedicated line alternative, along with the supporting reasons for the Petitioners’ beliefs that the application fails to contain

relevant information, and why it should. Finally, if they prevail on this contention, they would be entitled to the relief they seek — consideration in Duke’s SAMA analysis of the NUREG/CR-6427 information and the dedicated line alternative — and thus their contentions in this regard do not warrant dismissal under section 2.714(d)(2)(ii).

For the preceding reasons, we admit BREDL contention 4 and NIRS contentions 1.1.5 and 1.1.4 in part, consolidated, renumbered as BREDL/NIRS contention 2, and reframed as follows:

The Duke SAMA analysis is incomplete, and insufficient to mitigate severe accidents, in that it

(a) fails to include information from NUREG/CR-6427, and

(b) fails to include a severe accident mitigation alternative relating to Station Blackout-Caused Accidents, namely, a dedicated electrical line from the hydroelectric generating dams adjacent to each reactor site.

We note that our ruling is limited to admitting only the issues reflected in our reframing of the contention, and not any that do not reasonably fall within it.

### **III. CONCLUSION**

#### **A. Admitted Contentions**

In conclusion, we admit the following contentions:

NIRS consolidated contention 1, relating to anticipated Plutonium/MOX fuel use in the Duke plants; and

BREDL/NIRS consolidated contention 2, relating to Ice Condensers and Station Blackout Risks.

As noted above with regard to our ruling on the second of these, our rulings in this case are limited to admitting only the issues reflected in our reframing of the contentions, and not any that do not reasonably fall within the contentions as reframed. With regard to particular bases that may be in dispute that we have not addressed specifically, these issues relate to what evidence will be permitted in the hearing in this proceeding (assuming that matter is not resolved otherwise), and will be considered at the appropriate time upon appropriate request from any party.

#### **B. Certified Question**

We also certify the question of the admissibility of the security and terrorism-related issues raised in NIRS contention 1.1.2, as discussed above, to the Commission for its consideration.

### **C. Efficient Conduct of Proceedings**

In the interest of the efficient conduct of the proceedings in this matter, we have consolidated some contentions, and encourage the consolidation of proof on the same or related subject areas to the extent possible. We will address any issues related to this, including the designation of a lead party on BREDL/NIRS contention 2, further in the context of prehearing conferences, including a conference scheduled for February 12, 2002, as indicated below. For such purposes and as necessary and appropriate, the Board retains the authority under 10 C.F.R. § 2.714(f)(3) to determine priorities and control the compass of the hearing through these and other measures, giving due consideration to circumstances including the possibility of the filing of additional, late-filed contentions after the issuance of the Staff's SER and SEIS. Further, should either Petitioner decide to retain counsel to represent it in this proceeding, we encourage the earliest possible retention of such counsel, so that he or she may participate more effectively in the proceeding.

### **D. Settlement**

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

## **IV. ORDER**

In light of the foregoing discussion, and based upon the entire record of this proceeding to date, it is, on this 24th day of January 2002, ORDERED:

1. NIRS contention 1 and BREDL/NIRS contention 2, as consolidated and reframed above, are hereby admitted as contentions in this proceeding, as set forth above in this Memorandum and Order. The requests of BREDL and NIRS for a hearing on these contentions are hereby granted, and BREDL and NIRS are hereby admitted as parties to this proceeding. The Licensing Board will issue a Notice of Hearing in the near future.

2. The question of the admissibility of the terrorism issues raised in NIRS contention 1.1.2, as discussed above, is certified to the Commission for its consideration.

3. The remaining BREDL and NIRS contentions are hereby rejected.

4. A telephone prehearing conference will be convened on *Tuesday, February 12, 2002, at 3:00 p.m. Eastern time*, to address administrative and other appropriate matters, including document availability issues; schedules for discovery and the filing of summary disposition and other motions; additional prehearing conferences; periodic status reports relating to the SEIS process, discovery, late-filed contentions, and other matters; the hearing of limited appearance statements; and the evidentiary hearing. Parties should be prepared at this conference to discuss these matters, as well as the possibility of settling some or all parts of this proceeding. An agenda and directions for connecting into the conference call will be issued prior to the conference.

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

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD<sup>21</sup>

Ann Marshall Young, Chair  
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber  
ADMINISTRATIVE JUDGE

Lester S. Rubenstein  
ADMINISTRATIVE JUDGE

Dated at Rockville, Maryland,  
this 24th day of January 2002.

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<sup>21</sup> Copies of this Memorandum and Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Charles Bechhoefer**, Chairman  
**Dr. Richard F. Cole**  
**Dr. Charles N. Kelber**

**In the Matter of**

**Docket No. 50-423-LA-3**  
**(ASLBP No. 00-771-01-LA-R)**  
**(Facility Operating**  
**License NPF-49)**

**DOMINION NUCLEAR CONNECTICUT, INC.**  
**(Millstone Nuclear Power Station,**  
**Unit 3)**

**January 24, 2002**

In a spent fuel pool license amendment proceeding subject to the hybrid hearing procedures of 10 C.F.R. Part 2, Subpart K, the Licensing Board denies a late-filed environmental contention by Intervenors Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone (CCAM/CAM), concerning potential terrorism attacks at the Millstone-3 facility in the wake of the terrorist events of September 11, 2001. Although the Licensing Board finds that the contention meets the various jurisdictional requirements, as well as the 10 C.F.R. § 2.714(b)(2) late-filing factors, it denies admission of the contention based on 10 C.F.R. § 50.13 (which provides that a licensee need not consider defense issues) and applicable case law applying the policy of that section to environmental contentions. Because similar contentions in other cases were before the Commission for decision, the Board referred its ruling to the Commission.

## **LICENSING BOARD: JURISDICTION**

### **RULES OF PRACTICE: MOTIONS TO REOPEN RECORD**

As long as some part of a licensing case remains before the Licensing Board, and no appeal to the Commission is presently pending, the Board retains jurisdiction to reopen the record on any properly presented issue for the proceeding, including matters on which it had already ruled and that had been affirmed by the Commission. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376, 377 (1972).

### **RULES OF PROCEDURE: MOTIONS TO REOPEN RECORD**

After exceptions or an appeal have been filed with respect to an initial decision, jurisdiction to rule on a motion to reopen the record to add a new contention rests with the Commission. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2 ), ALAB-726, 17 NRC 755, 757 n.4 (1983); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982).

### **RULES OF PRACTICE: CONTENTIONS (UNTIMELY FILING)**

The most significant of the late-filed contention criteria is the first — “[g]ood cause, if any, for failure to file on time.” 10 C.F.R. § 2.714(a)(1)(i). See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-20, 53 NRC 565, 570 (2001).

### **RULES OF PRACTICE: RIGHT TO PARTICIPATE**

With respect to the availability of other forums to consider a late-filed contention, a 10 C.F.R. § 2.206 petition is not an adequate substitute for participating in an adjudicatory proceeding concerned with the grant or denial of an operating license. *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-76 (1983). Similarly, a limited appearance statement is not an adequate substitute for participation as a party. See *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975); *Duke Power Co.* (Amendment to Materials License SNM-1773—Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 149-50 (1979).

## **RULES OF PRACTICE: EXPERT WITNESSES**

Where a party's designated expert witness possesses sufficient threshold qualifications to address at least some (if not all) of the questions raised by a proposed contention, a motion to add a new contention will not be rejected for lack of an adequate expert witness. However, the weight accorded to the testimony of an expert witness, vis-a-vis that of other expert testimony, is determined in the context of resolving the merits of the contention should it be admitted. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250-51 (2001).

## **NEPA: SCOPE OF REVIEW (TERRORISM CONCERNS)**

The provision 10 C.F.R. § 50.13, "Attacks and destructive acts by enemies of the United States; and defense activities," is part of the safety regulations of the NRC and bars litigation of contentions raising these concerns. Further, its substantive terms have also been applied to environmental concerns as well. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985), *review declined*, CLI-86-5, 23 NRC 125 (1986), *aff'd sub nom. Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973).

## **RULES OF PRACTICE: REFERRAL OF RULING TO COMMISSION**

In the case of novel questions of law or fact, the Commission prefers that the Presiding Officer not merely certify a question to the Commission but, rather, provide a ruling before referring the issue, because the Presiding Officer is in a better position to fully evaluate the issue. *See Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Unit 1), ALAB-297, 2 NRC 727, 729 (1975); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 391-92 (2001).

## **MEMORANDUM AND ORDER** **(Late-Filed Contention Concerning Acts of Terrorism** **Affecting Spent Fuel Pool)**

This proceeding concerns a proposed increase in capacity (through the addition of high-density storage racks) of the spent fuel pool (SFP) of the Millstone Nuclear

Power Station, Unit 3 (Millstone-3), a pressurized water reactor located in New London County, Connecticut. Pending before this Licensing Board is a motion, filed November 1, 2001, by the Intervenors, the Connecticut Coalition Against Millstone (CCAM) and the Long Island Coalition Against Millstone (CAM) (collectively referenced as CCAM/CAM), to reopen the record and accept a late-filed environmental contention dealing with the likelihood and consequences of potential acts of terrorism against the Millstone-3 SFP.<sup>1</sup> The contention, which is supported by the declaration of Dr. Gordon Thompson, CCAM/CAM's designated expert witness, is founded in large part upon the terrorist acts of September 11, 2001, against targets in New York City and the Washington, D.C. area, and the potential for comparable strikes directed against nuclear facilities.

The Licensee, Dominion Nuclear Connecticut, Inc. (DNC), and the NRC Staff each advance a number of procedural and substantive reasons why we should reject the proposed new contention. For reasons set forth below, we are rejecting the contention solely on the basis of the bar against considering contentions of this sort set forth in 10 C.F.R. § 50.13, together with decisions applying the policy of that section to environmental contentions such as this one, *e.g.*, *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985), *review declined*, CLI-86-5, 23 NRC 125 (1986), *aff'd sub nom. Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973).

These provisions reflect policy choices adopted by the Commission during an earlier time frame. Because the Commission currently has before it similar questions raised in other proceedings concerning the appropriate treatment for proposed contentions based on the recent terrorist activities, *see, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476 (2001),<sup>2</sup> we are referring this ruling to the Commission for its review and policy guidance.

## I. THE PROPOSED CONTENTION AND ITS BASES

The new proposed contention, denominated sequentially as CCAM/CAM Contention 12,<sup>3</sup> asserts, in substance, that

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<sup>1</sup> CCAM/CAM Motion To Reopen the Record and Request for Admission of Late-Filed Environmental Contention, dated November 1, 2001 (CCAM/CAM Motion).

<sup>2</sup> *But see Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 445-46 (2001).

<sup>3</sup> *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 29-46 (2000).

in two significant respects, circumstances have changed and new information has become available which warrant reconsideration of the NRC's previous determination that the proposed expansion of fuel storage capacity at the Millstone Unit 3 nuclear power plant poses no significant environmental risk and therefore does not warrant preparation of an Environmental Impact Statement (EIS).<sup>4</sup>

Both the existence and the significance of the two categories of changed circumstances are analyzed in the declaration of CCAM/CAM's designated expert, Dr. Gordon Thompson.

The contention goes on to specify the first of the changed circumstances, the terrorist acts of September 11, 2001, on the World Trade Center and the Pentagon, and "related information which has subsequently become public."<sup>5</sup> CCAM/CAM claim that these events demonstrate conclusively that the NRC's rationale for not preparing an EIS for the proposed SFP increase in capacity was incorrect and that NRC should "prepare an EIS that fully considers the environmental impacts of the proposed license amendment, including its effects on the probability and consequences of accidents at the Millstone plant."<sup>6</sup> CCAM/CAM emphasize that the terrorist events and related information upon which they rely affect both the probability of and the consequences to be expected from terrorist activities of various types, not limited to airplane crashes.

The second of the changed circumstances to which CCAM/CAM refer is, in their view, newly developed information concerning the proper analysis of accidents in spent fuel pools: namely, the Staff's "recent concessions" that<sup>7</sup>

(a) loss of water from a high-density [SFP] can lead to the onset of exothermic oxidation reactions for spent fuel of any age after discharge from a reactor; (b) the onset of exothermic oxidation reactions can be assumed if the water level in a pool declines to the level of the top of the spent fuel racks; and (c) the onset of exothermic oxidation reactions in one pool is likely to lead to the onset of similar reactions in nearby pools."

Based on this information, CCAM/CAM conclude that, in the event of an act of malice or insanity which causes uncovering of the fuel, a severe pool accident involving a "significant offsite release may be assumed as inevitable, and that the consequences of such an act could be significantly greater under the proposed license amendment."<sup>8</sup>

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<sup>4</sup> CCAM/CAM Motion at 1.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.* at 7-8. These claims are supported by the declaration of Dr. Thompson, who, in turn, relies on selected parts of the analysis appearing in "Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants," NUREG-1738 (Jan. 2001) [hereinafter NUREG-1738]. See Declaration of 31 October 2001 by Dr. Gordon Thompson in Support of a Motion by CCAM/CAM.

## II. RESPONSES OF DNC AND THE NRC STAFF

DNC, through its response dated November 13, 2001,<sup>9</sup> and the NRC Staff, through its filing dated November 16, 2001,<sup>10</sup> each take virtually identical positions in opposition to the CCAM/CAM motion. They each claim that (1) we lack jurisdiction to entertain the CCAM/CAM motion;<sup>11</sup> (2) the motion was untimely filed for purposes of both reopening the record and advancing a late-filed contention;<sup>12</sup> (3) the motion represents an improper attempt to have us reconsider our earlier rulings rejecting CCAM/CAM Contentions 7-11;<sup>13</sup> (4) the proposed contention does not satisfy the procedural requirements regarding contentions set forth in 10 C.F.R. § 2.714;<sup>14</sup> and, (5) on the merits, the contention is not one that can be considered in licensing proceedings of the type involved here.<sup>15</sup> They also each ask that we certify or refer the motion to the Commission.<sup>16</sup>

## III. LICENSING BOARD RULING

The Licensing Board will first treat the myriad of procedural issues raised by DNC and the Staff, and subsequently turn to the substantive merits of the CCAM/CAM motion.

### A. Procedural Issues

There are essentially four categories of procedural issues raised by both DNC and the Staff that, if we agreed with their position, would preclude us from treating the substantive merits of the issue attempted to be raised by CCAM/CAM. We treat them *seriatim*.

1. The first of these issues is our jurisdiction to entertain the motion at all. CCAM/CAM claim that if there is any matter pending before a licensing board, as there clearly is here, the board has jurisdiction to entertain a motion to reopen the record on any issue falling within the scope of a pending proceeding.<sup>17</sup> They cite an early Appeal Board decision, *Wisconsin Electric Power Co.* (Point Beach

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<sup>9</sup>[DNC] Response to [CCAM/CAM] Motion To Reopen the Record and Request for Admission of Late-Filed Environmental Contention and Motion for Directed Certification (Nov. 13, 2001) [hereinafter DNC Response].

<sup>10</sup>NRC Staff Response Opposing the Motion of [CCAM/CAM] To Reopen the Record to Admit a Late-Filed Environmental Contention (Nov. 16, 2001) [hereinafter NRC Staff Response].

<sup>11</sup>DNC Response at 5; Staff Response at 6-7.

<sup>12</sup>DNC Response at 12; Staff Response at 10.

<sup>13</sup>DNC Response at 12-13; Staff Response at 10-11.

<sup>14</sup>DNC Response at 16-22; NRC Staff Response at 19-24.

<sup>15</sup>DNC Response at 16-22; NRC Staff Response at 19-24.

<sup>16</sup>DNC Response at 4-5, 7-10, 23; NRC Staff Response at 1, 7 (supporting DNC motion to certify issue "without decision" to the Commission).

<sup>17</sup>CCAM/CAM Motion at 2-3.

Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376, 377 (1972), holding that as long as some part of a licensing case remains before the licensing board, that board retains jurisdiction to reopen the record on any properly presented issue for the proceeding, including matters on which it had already ruled and that had been affirmed by the Commission. (The substantive criteria for reopening the record would, of course, prevent a motion for reopening from becoming instead a motion for reconsideration.)

DNC and the Staff adopt a vastly contrary jurisdictional posture. They claim that, once exceptions to or an appeal with respect to an initial decision have been filed, a licensing board loses jurisdiction to entertain motions to reopen the record. They cite *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355, 357 n.3 (2000), a Commission ruling in this proceeding, remanding the Contention-4 issue now before us for our consideration; and *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 n.4 (1983).<sup>18</sup>

The precedent that at least the Staff would regard as most controlling and, indeed, the “law of the case,” is the Commission’s statement in this very proceeding that, with respect to the CCAM/CAM motion to reopen the record concerning Contention 4 (the matter currently pending before us), “[t]he Board lacks jurisdiction to consider a motion to reopen after a petition to review a final order has been filed.” *Millstone*, CLI-00-25, 52 NRC at 357 n.3. In context, that observation would certainly have been governing, inasmuch as, at that time, no matters in this proceeding were pending before us. As matters now stand, however, as of November 1, 2001, when the current CCAM/CAM motion was filed, that was not the case: a portion of CCAM/CAM Contention 4 was then and is currently pending before us.

The precedent that is less clear in its applicability or nonapplicability is *Limerick*, ALAB-726, *supra*. There, the Licensing Board issued a partial initial decision (PID) and, on the same day, the intervenor (not having yet been served with the PID) filed a motion to reopen the record. No exceptions to the PID had been filed, and certain matters remained before the Licensing Board for decision. The Licensing Board denied the motion for lack of jurisdiction, but the Appeal Board reversed, holding that the Licensing Board should have entertained the motion to reopen the record. *Id.* at 757. By way of dictum, however, the Appeal Board commented that this result would follow whether or not the Licensing Board had issued a PID (with some issues remaining before it) or an Initial Decision disposing of all matters before it. *Id.* at 757 n.4. Beyond that, the Appeal Board sanctioned its earlier holding that, after exceptions have been filed, jurisdiction

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<sup>18</sup> DNC Response at 5-6; NRC Staff Response at 6-7.

to rule on a motion to reopen the record to add a new contention rests with the Appeal Board. *Id.* at 757 n.3 (citing *Three Mile Island*, ALAB-699, 16 NRC at 1327 n.6). That proceeding, like this one last December (when CCAM/CAM sought to reopen the record on Contention 4) involved the situation in which no matters remained before the Licensing Board for decision and exceptions (or an appeal) had been filed to a Board's final initial decision.

Here, one matter — the resolution of Contention 4 — remains before this Board for decision. Further, no appeals are currently pending before the Commission. In that situation, the precedent cited by CCAM/CAM suggests we have jurisdiction to entertain CCAM/CAM's latest motion to reopen the record, and we will do so here. (Because we are electing to refer our ruling here to the Commission, albeit on policy grounds unrelated to the jurisdictional matters discussed here, that body may elect to comment further on the jurisdictional questions we have just treated.)

2. The second procedural issue raised by DNC and the Staff is whether proposed Contention CCAM/CAM 12 is no more than an untimely request for reconsideration of our rejection of several CCAM/CAM contentions early in this proceeding. DNC equates the current proposed contention to previous CCAM/CAM contentions (which we rejected) concerning

(a) the probability and consequences of accidents involving the "partial or total uncovering of fuel assemblies and exothermic reaction of fuel cladding" in the spent fuel pool [CCAM/CAM Contention 8]; (b) the analysis under NEPA of alternatives to wet storage [CCAM/CAM Contention 9]; (c) the need to consider "severe accident implications of alternative options" [CCAM/CAM Contention 10]; and (d) the need for a Full Environmental Impact Statement based upon the same considerations [CCAM/CAM Contention 11].<sup>19</sup>

DNC observes that all of those contentions were "supported" by the declaration of Dr. Thompson.<sup>20</sup> For its part, the Staff adds CCAM/CAM Contention 7, concerning an alleged "significant increase in probability and consequences of overheating accidents," leading to an accident potentially involving exothermic reaction of cladding, to those it deems the Intervenors are improperly seeking reconsideration.

We agree that there are some common elements of CCAM/CAM's earlier contentions (particularly Contention 11) and the proposed new contention. But there is one supervening development that belies the claims of DNC and the Staff that CCAM/CAM are only seeking reconsideration of our rejection of their earlier contentions (be it four or five). That development is the actual terrorist incidents that occurred on September 11, 2001, together with the Commission's subsequent acknowledgments (relied on by CCAM/CAM) that terrorist threats to nuclear plants must be taken seriously.

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<sup>19</sup>DNC Response at 12; see *Millstone*, LBP-00-2, 51 NRC at 43-46.

<sup>20</sup>DNC Response at 12.

None of the earlier four (or five) proposed contentions refers explicitly to terrorist activity, although Dr. Thompson, in his declaration, does peripherally mention terrorist incidents as a potential cause of a beyond-design-basis accident that could result in extensive radioactive injury. *See* Thompson Report, dated February 1999, attached as Exhibit 1 to CCAM/CAM Supplemental Petition to Intervene, dated November 17, 1999, at 7-8. In contrast, CCAM/CAM's proposed Contention 12 explicitly refers to "[t]he terrorist attacks of 11 September 2001 on the World Trade Center and the Pentagon," and related information, which has subsequently become public that tends to associate terrorist activities with nuclear plants. It appears to us that, in the basis for the contention, CCAM/CAM are substituting an active event for what was previously only a hypothetical scenario. We would be ignoring reality if we were to treat CCAM/CAM's Contention 12 as merely an improper attempt to have us reconsider our rejection of its earlier contentions. Hence, we decline to do so.

3. The third procedural issue raised by DNC and the Staff is the timeliness of CCAM/CAM's filing of their proposed contention on November 1, 2001, approximately 50 days after the terrorism events of September 11, 2001. For their part, CCAM/CAM also rely, regarding the timeliness of their submission, on NRC press releases, dated September 21, 2001 (CCAM/CAM Motion, Exhibit 2) and October 18, 2001 (CCAM/CAM Motion, Exhibit 6), together with other press accounts of potential terrorist attacks on nuclear facilities, as relevant to the issue when they had sufficient information to submit a late-filed contention.

DNC and the Staff would each have us reject the admittedly late-filed contention on grounds of timeliness, claiming that CCAM/CAM have not satisfied the late-filed contention criteria set forth in 10 C.F.R. § 2.714(a)(1) and (b)(1) or the timeliness criterion for motions to reopen the record set forth in 10 C.F.R. § 2.734(a)(1) — most specifically the criterion of good cause for failure to file on time (10 C.F.R. § 2.714(a)(1)(i)). DNC and the Staff each reference other pending licensing proceedings, namely the MOX fuel proceeding (proposed contention filed October 10, 2001) and the Private Fuel Storage ISFSI proceeding (proposed contention also filed on October 10, 2001), in which similar terrorist-based contentions were filed, each within 30 days of the September 11, 2001 terrorist attacks.

The most significant of the late-filed contention criteria is the first — "[g]ood cause, if any, for failure to file on time." 10 C.F.R. § 2.714(a)(1)(i). *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-20, 53 NRC 565, 570 (2001). For the purpose of timeliness, we construe proposed

Contention 12 as stemming from the terrorist attacks of September 11, 2001.<sup>21</sup> But, in the context of CCAM/CAM's proposed contention, the Commission's releases dated September 21, 2001, and October 18, 2001, are also significant. The terrorist events themselves did not involve nuclear facilities. The Commission releases emphasized the significance of the terrorist events to nuclear facilities and were instrumental in the development of the material necessary to support late-filed Contention 12. Those releases occurred 41 days and 12 days, respectively, prior to submission of CCAM/CAM Contention 12, and they may be equated to an authoritative acknowledgment of the gravity of the issues presented by that contention. Taking into account that, at least with respect to motions to reopen the record, the timeliness criterion provides that "an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented," 10 C.F.R. § 2.734(a)(1), we view proposed Contention 12 as an exceptionally grave issue and the "good cause" timeliness criterion (whether under 10 C.F.R. § 2.714(a)(1)(i) or 10 C.F.R. § 2.734(a)(1)) as having been satisfied.

As for the other timeliness criteria, we do not believe that there are other means available whereby CCAM/CAM's interest will be protected. 10 C.F.R. § 2.714(a)(1)(ii). DNC suggests the Commission's ongoing generic and policy evaluation of the spent fuel accident risk at decommissioning plants causes this factor to weigh against admission. But this study has not been the focus of any proceeding (rulemaking or otherwise) in which CCAM/CAM could express their views. No formal rulemaking has yet been announced. Nor are the other, appropriate generic approaches to addressing terrorism that, according to DNC, other petitioners have elected to follow equivalent to the hearing rights afforded here, *cf. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-76 (1983) (section 2.206 petition not an adequate substitute for participating in an adjudicatory proceeding concerned with the grant or denial of an operating license)*.<sup>22</sup> As a result, the second of the timeliness criteria also must be balanced in favor of CCAM/CAM.

The third criterion, the extent to which a petitioner's participation may reasonably be expected to assist in developing a sound record, clearly balances in CCAM/CAM's favor. CCAM/CAM have provided significant assistance to the Board in resolving questions earlier in this proceeding, and we have no reason

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<sup>21</sup> We do not construe the issuance of NUREG-1738 in October 2000, or its availability to Intervenors in January 2001, as a basis for evaluating whether the new contention was timely submitted. Rather, CCAM/CAM appear to be using NUREG-1738 as a new methodology for evaluating the results of a terrorist act, not as a basis for calculating the timeliness of its contention. The terrorist attack itself plus the Commission's acknowledgment of its potential effect on nuclear facilities appear to be the bases for determining whether Contention 12 was timely submitted.

<sup>22</sup> See also *Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975)* (limited appearance statement not an adequate substitute for participation as a party, "with a party's attendant procedural rights"); *Duke Power Co. (Amendment to Materials License SNM-1773 —Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 149-50 (1979)* (limited appearance statement not an adequate substitute for party participation).

to doubt that they will do so again.<sup>23</sup> The fourth criterion, the extent to which a petitioner's interest will be represented by existing parties, also balances in CCAM/CAM's favor, inasmuch as there are no other parties that would adequately represent CCAM/CAM's interest. The final criterion, the extent to which the contention will broaden the issues or delay the proceeding, must perforce be balanced against CCAM/CAM, inasmuch as admission of a new contention would add an entirely disparate contention to the proceeding that would cause some delay in completing the proceeding, although not in litigating or deciding the single issue presently before us.

In short, four of the five late-filed criteria, including two of the most significant (the first and third), balance in favor of accepting the contention, and only one (the fifth) cautions against doing so. We balance the factors in favor of accepting CCAM/CAM Contention 12 from a timeliness standpoint.

4. The fourth procedural objection advanced by both DNC and the Staff claims that proposed CCAM/CAM Contention 12 fails to meet the technical requirements for a contention, as set forth in 10 C.F.R. § 2.714(b). DNC claims, correctly, that a contention must have a basis in fact or law and that it must entitle a petitioner to relief. It adds that the severe consequences of the extraordinary terrorist scenario are not something that must be evaluated under NEPA.<sup>24</sup> The Staff adds that CCAM/CAM's designated expert lacks qualifications to address the questions that proposed Contention 12 would engender.<sup>25</sup>

Whether the potential consequences of a terrorist act need be evaluated under NEPA is a question going to the merits of the proposed contention and hence will be discussed below. Suffice it to say that CCAM/CAM have provided at least one factual basis for Contention 12 and they have demonstrated meaningful relief that it could achieve — i.e., reevaluation of the Staff's decision (made in its Environmental Assessment) not to prepare an Environmental Impact Statement for this facility modification. Further, Dr. Thompson, CCAM/CAM's expert, seems to possess sufficient threshold qualifications to address at least some (if not all) of the questions raised by CCAM/CAM, although the weight to be accorded his testimony (*vis-a-vis* that of other experts) would be determined in

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<sup>23</sup> In that connection, we express no view at this time on the merits of the case presented by CCAM/CAM. We note, however, that the stated purpose of NUREG-1738, upon which CCAM/CAM rely to a significant extent, is "to provide a technical basis for decommissioning Rulemaking for permanently shutdown nuclear power plants." NUREG-1738 at iii. Thus, there may be real questions as to whether NUREG-1738 sheds much light on the risk arising from the operation of spent fuel pools at operating nuclear reactors, or from terrorist attacks on such pools, or the extent to which NUREG-1738 may provide a surrogate (an earthquake well beyond the design basis) for the consequences of "destructive acts of malice." These matters are involved in the merits of the contention before us and thus will not be addressed at this time.

<sup>24</sup> DNC Response at 17.

<sup>25</sup> NRC Staff Response at 15-16; NRC Staff's Reply to [CCAM/CAM] Response to [ASLB] Questions in Memorandum and Order of December 10, 2001 (Jan. 10, 2002) at 4 n.7; DNC does not challenge the qualifications of CCAM/CAM's expert. See [DNC] Response to [CCAM/CAM] Reply to Oppositions to [CCAM/CAM Motion] (Jan. 3, 2002) at 5 [hereinafter DNC Reply].

the context of resolving the merits, should it be admitted. *See* CCAM/CAM Reply at 12-13, citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250-51 (2001). Accordingly, we believe that CCAM/CAM have satisfactorily met the contention requirement with respect to proposed Contention 12.

## **B. Admissibility of Proposed Contention 12**

Having rejected the numerous procedural objections to our admitting, as a new contention, proposed CCAM/CAM Contention 12, we must now turn to deciding whether it is an admissible contention. And, as we pointed out in permitting CCAM/CAM to reply to DNC and the Staff's oppositions to their contention, and requesting all parties to address certain questions posed in that Order,<sup>26</sup> there is currently a provision in NRC regulations that provides:

**§ 50.13 Attacks and destructive acts by enemies of the United States; and defense activities.**

An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

This provision is part of the safety regulations of the NRC, but its substantive terms appear to have been applied as well to environmental issues, such as are presented by CCAM/CAM Contention 12. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985), *review declined*, CLI-86-5, 23 NRC 125 (1986), *aff'd sub nom. Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973).

Because of the apparent applicability of this provision to our acceptance of CCAM/CAM Contention 12, we asked all parties to address its significance in view of the two cases cited above. Memorandum and Order (CCAM/CAM Motion for Leave To Reply to Responses of Licensee and Staff), dated December 10, 2001, at 3-4. CCAM/CAM observe that at the time section 50.13 was first issued (1967), NEPA had not yet been passed. CCAM/CAM correctly characterize

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<sup>26</sup> *See* Memorandum and Order (CCAM/CAM Motion for Leave To Reply to Responses of Licensee and Staff), dated December 10, 2001, at 3.

section 50.13 as a safety requirement and add that satisfying safety requirements “is not necessarily equivalent to compliance with the requirements of NEPA.”<sup>27</sup>

As for the carryover of section 50.13 to environmental contentions, CCAM/CAM cite *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 729 (3d Cir. 1989) [*LEA*], for the proposition that issues excluded from consideration as safety issues need not necessarily also be excluded under NEPA. CCAM/CAM recognize that *LEA* upheld NRC’s exclusion of a sabotage issue from NEPA consideration but interpret *LEA* as holding in this respect that: (a) regulations of the CEQ [Council on Environmental Quality] did not bind the NRC to consider worst-case accidents; (b) the NRC’s refusal to consider the impacts of sabotage was not based solely on policy statements, but on scientific judgment that then-current risk assessment techniques “could not provide a meaningful basis upon which to measure such risks”;<sup>28</sup> and (c) that the petitioner in *LEA* had failed to undermine or rebut the NRC’s conclusion.<sup>29</sup> CCAM/CAM observe that none of the grounds relied on by the *LEA* court relate to the question of whether the exclusion of safety issues required by section 50.13 also extends to environmental issues.

CCAM/CAM recognize also that NRC did address the applicability of section 50.13 to NEPA questions in *Shoreham*, ALAB-156, 6 AEC at 851. CCAM/CAM claim that ALAB-156 did not conclude that 10 C.F.R. § 50.13 governs NEPA considerations as a matter of law. Rather, according to CCAM/CAM, the Appeal Board in ALAB-156 examined the applicability of the rule’s rationale under NEPA’s “Rule of Reason.” Quoting from ALAB-156, CCAM/CAM claim that the rule’s underlying considerations regarding the feasibility and reasonableness of protection against “wartime sabotage” included:

- (1) the impracticability, particularly in the case of civilian industry, of anticipating accurately the nature of enemy attack and of designing defenses against it, (2) the settled tradition of looking to the military to deal with this problem and the consequent sharing of its burdens by all citizens, and (3) the unavailability, through security classification and otherwise, of relevant information and the undesirability of ventilating what is available in public proceedings.<sup>30</sup>

According to CCAM/CAM, the Appeal Board then concluded that this rationale was as applicable to the Commission’s NEPA responsibilities as to its health and safety responsibilities. But further, CCAM/CAM assert that, 28 years after ALAB-156, after such events as the destruction of the federal building in Oklahoma City, the near destruction of a U.S. destroyer by a boat bomb, and

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<sup>27</sup> [CCAM/CAM] Reply to Oppositions to Motion To Reopen the Record and Request for Admission of Late-Filed Environmental Contention (Dec. 21, 2001) at 16.

<sup>28</sup> *Id.* at 17 (quoting *LEA*, 869 F.2d at 742).

<sup>29</sup> *Id.*

<sup>30</sup> CCAM/CAM Reply at 18, citing *Shoreham*, ALAB-156, 6 AEC at 851, which in turn cites *Siegel v. AEC*, 400 F.2d 778 (1978).

the destruction of the World Trade Center by a commercial airliner bomb, these considerations no longer govern the NEPA “rule of reason.”<sup>31</sup>

Relying on the declaration of their designated expert, CCAM/CAM discount the impracticability of reasonably anticipating the nature of a serious attack on a nuclear power plant as well as the claimed lack of information concerning such attacks. “Enough is known about the methods typically used by terrorists, and the vulnerabilities in the designs of nuclear facilities, to evaluate measures that could increase the effectiveness of protection against such an attack.”<sup>32</sup> CCAM/CAM also claim that the military is generally ineffective in preventing such attacks “because [it] does not stand in constant readiness to counter serious domestic threats.”<sup>33</sup> CCAM/CAM conclude that the exclusion of issues in section 50.13 thus cannot be applied as a matter of law and that consideration of the consequences of “acts of malice or insanity” may only be excluded *ab initio* if it would be inconsistent with NEPA’s “rule of reason” (which, according to CCAM/CAM, is not the case here).<sup>34</sup>

DNC and the Staff each take a directly contrary view of the applicability of 10 C.F.R. § 50.13 and its environmental progeny to CCAM/CAM proposed Contention 12. According to DNC, “there can be no doubt that acts of terrorists fall into this provision, at least to the extent that those acts exceed the design basis security threat defined in 10 C.F.R. § 73.1(a)(1).”<sup>35</sup> Although acknowledging that section 50.13 may be a safety regulation not technically applicable to proposed Contention 12, DNC asserts that there is no principled or logical basis to ignore the regulation in the context of NEPA. It adds that the Appeal Board in *Shoreham*, ALAB-156, 6 AEC at 851, and more recently a Licensing Board in *Private Fuel Storage*, LBP-01-37, 54 NRC at 487, have explicitly found the regulation applicable to assessing NRC’s NEPA responsibilities and accordingly have rejected proposed environmental contentions similar to proposed Contention 12.

For its part, the Staff cites a recent Commission decision in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 379 (2001), to the effect that the Commission recently reaffirmed the basis for 10 C.F.R. § 50.13, concluding that the events of September 11, 2001, are precisely the kind of threats excluded from consideration in licensing decisions by 10 C.F.R. § 50.13. The Staff notes that this rationale was recently relied on by the Licensing Board in LBP-01-37, *supra*, rejecting the admission of a contention to litigate both safety and environmental concerns related to the September 11, 2001

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<sup>31</sup> *Id.* at 19.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 20.

<sup>35</sup> DNC Reply at 7.

attacks. The Staff also notes that CCAM/CAM's argument concerning *Shoreham* is not clear, inasmuch as, although the Commission took the rule of reason into account, the holding does not rest on that rule (as claimed by CCAM/CAM) but instead on the rationale for section 50.13.

DNC also advances a slightly different argument, to the extent that the Appeal Board decision in *Limerick*, together with the Third Circuit's subsequent decision in *LEA*, held that the NEPA review is limited by a "rule of reason" and that the NRC was not required by NEPA to entertain a contention on sabotage risk. DNC adds that the petitioner there, like CCAM/CAM here, had offered no meaningful method by which the NRC could either assess or predict sabotage risk. According to DNC, the Third Circuit cited (and relied on) the NRC's conclusion that "sabotage risk analysis is beyond current probabilistic risk assessment methods."<sup>36</sup>

Although calculating the risk of sabotage or terrorism may, as CCAM/CAM claim, fall within the purview of current analytical methodologies, a matter that would be litigated in resolving proposed Contention 12 if it were admitted, we conclude that the Commission's current policy is to apply 10 C.F.R. § 50.13 to environmental contentions. That being so, we perforce must reject proposed CCAM/CAM Contention 12.<sup>37</sup>

### C. Referral to Commission

DNC and the Staff urge that we certify, pursuant to 10 C.F.R. § 2.718(i), the question of the applicability of 10 C.F.R. § 50.13 to CCAM/CAM proposed Contention 12 to the Commission for its decision, without deciding the question ourselves. Such course is not preferred, however, in the absence of emergency or similar circumstances. See *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Unit 1), ALAB-297, 2 NRC 727, 729 (1975); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 391-92 (2001), because a ruling by the Presiding Officer puts the Commission in a better position to evaluate a question, based on the views not only of the parties but of the proposed reconciliation of those views by the Board itself. For that reason, we will refer our ruling to the Commission pursuant to 10 C.F.R. § 2.730(f). Certainly, prompt referral to the Commission here is desirable given the number of other proceedings in which terrorism contentions have been raised.

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<sup>36</sup>DNC Reply at 8 (citing *LEA*, 869 F.2d at 743-44).

<sup>37</sup>As DNC points out, a Licensing Board recently accepted an environmental-terrorist contention comparable to that proffered by CCAM/CAM here, but that was in a proceeding that did not involve a Part 50 facility, so that 10 C.F.R. § 50.13 did not apply.

**D. Order**

For the reasons set forth above, it is, this twenty-fourth day of January 2002,  
ORDERED:

1. CCAM/CAM's November 1, 2001 Motion To Reopen the Record To Admit Late-Filed CCAM/CAM Contention 12 is hereby *denied*.
2. This ruling is *referred* to the Commission pursuant to 10 C.F.R. § 2.730(f).

THE ATOMIC SAFETY AND  
LICENSING BOARD

Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 24, 2002

[Copies of this Memorandum and Order have been e-mailed today to counsel for each of the parties.]

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Alan S. Rosenthal**, Presiding Officer  
**Dr. Richard F. Cole**, Special Assistant

**In the Matter of**

**Docket No. 40-8681-MLA-11**  
**(ASLBP No. 02-795-02-MLA)**

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

**January 30, 2002**

In this Memorandum and Order in a Subpart L materials license amendment proceeding, the Presiding Officer grants the hearing requests of William Love and the Sierra Club and denies the request of the Nevada Nuclear Waste Task Force because of its lack of standing.

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

In order to establish judicial standing in a Subpart L informal proceeding, the hearing requestor must allege an actual or threatened incremental injury-in-fact that is arguably within the zone of interest established by the relevant statute.

**RULES OF PRACTICE: INFORMAL HEARINGS (AREAS OF CONCERN)**

A request for hearing in a Subpart L proceeding need not establish that the advanced areas of concern are meritorious. Instead, the hearing requestor merely

must set forth with particularity one or more germane areas of concern that provide standing to challenge the proposed license amendment.

**RULES OF PRACTICE: INFORMAL HEARINGS (AREAS OF CONCERN)**

Although, at this preliminary stage in the hearing process, the hearing requester need not demonstrate that an advanced concern will ultimately be found meritorious, the concern must appear at least worthy of further exploration.

**MEMORANDUM AND ORDER**

**(Granting Two Hearing Requests and Denying a Third Such Request)**

International Uranium (USA) Corporation (Licensee) possesses a source material license (SUA-1358) that was issued to it in 1980 and then renewed in 1985 and again in 1997. Under the aegis of that license, the Licensee has been operating a uranium recovery facility (the White Mesa Uranium Mill (Mill)) located near Blanding, Utah.

As was noted in a recent decision by this Presiding Officer, because the basic license covers only the receipt and processing of natural ores, whenever the Licensee has desired authority to receive and process alternate feed materials it has been required to apply for a license amendment. *See* LBP-02-3, 55 NRC 35 (2002). As also observed in that decision, in recent years a substantial number of license amendment applications have been filed in connection with the proposed receipt and processing of alternate feed materials having their origin in locations across the country. Several of those applications have drawn requests for a hearing in response to *Federal Register* notices providing an opportunity to seek such relief.

One such application came before me early last year. It involved shipments to the Mill of alternate feed material originating at the Molycorp site in Mountain Pass, California. As described in a January 9, 2001 *Federal Register* hearing opportunity notice, 66 Fed. Reg. 1702, the Molycorp material is the result of the extraction of lanthanides and other rare earth metals from bastnasite ores and, at that time, was stored in ponds as lead sulfide sludge, with an estimated uranium content of approximately 0.15% or better. According to the application, the Licensee proposed to process the material for its uranium content by the utilization of an acid leach that would serve to dissolve the uranium. The byproduct material would then be stored in the Mill's tailings cells.

The Glen Canyon Group of the Utah Chapter of the Sierra Club (Group) filed a request for a hearing in response to the opportunity to do so that had

been extended in the January 2001 *Federal Register* notice. Upon receiving the Licensee's response and conducting a telephone conference with the parties to obtain further exposition of their positions on the matter, I issued a decision denying the hearing request on the ground that the Group lacked standing to challenge the proposed amendment. LBP-01-15, 53 NRC 344 (2001). On the Group's appeal, the Commission affirmed that decision. CLI-01-21, 54 NRC 247 (2001).

One might well have thought that that would be the end of the matter insofar as possible adjudicatory consideration of this particular license amendment application was concerned. When, however, the NRC Staff completed its appraisal of the environmental impacts associated with the proposed activity and concluded that there were no significant impacts, it elected to put yet another notice in the *Federal Register*. That notice was published on December 11, 2001. 66 Fed. Reg. 64,064. In addition to recording the Staff's determination (denominated a Finding of No Significant Impact (FONSI)), it extended a new "opportunity for a hearing on the license amendment."<sup>1</sup>

In response to this second opportunity to seek a hearing, separate timely requests were filed by William E. Love on December 15, 2001, and by the Sierra Club (Sierra) and the Nevada Nuclear Waste Task Force (Task Force) on January 10, 2002.<sup>2</sup> The Licensee has submitted oppositions to all three requests and the matter is now ripe for decision.

For the reasons that follow, I conclude that, contrary to the insistence of the Licensee, the Love and Sierra hearing requests, unlike the one rejected last year in LBP-01-15, satisfy the conditions precedent to their grant. The Task Force hearing request, however, does not meet those conditions and, therefore, cannot be granted.

A. As detailed in several other recent decisions concerned with hearing requests directed to proposed amendments to the IUSA license here in issue, the Commission's Rules of Practice are most specific with regard to what the requestor must establish at the threshold. *See, e.g.*, CLI-01-21, LBP-01-15, and LBP-02-3 cited above. In a word, materials licensing proceedings such as this one are subject to the provisions of Subpart L of those Rules, which sets out the informal hearing procedures governing their adjudication. 10 C.F.R. § 2.1201 *et seq.*

Section 2.1205(e) spells out the required content of a hearing request submitted in a Subpart L proceeding. The request must describe "in detail" (1) the interest of the requestor in the proceeding; (2) how that interest might be affected by

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<sup>1</sup>The significance of a FONSI is that it relieves the Staff of the obligation to prepare an environmental impact statement. *See* 10 C.F.R. § 51.32(a)(2).

<sup>2</sup>Although filed in the name of the Sierra Club without further organizational identification, the hearing request was signed by an official of the Glen Canyon Group of the Utah Chapter of that entity and one of the supporting affidavits was supplied by the Chair of the Group.

the results of the proceeding, with particular reference to the factors set out in paragraph (h) of the section; and (3) the requestor's areas of concern about the licensing activity that is the subject matter of the proceeding. For his or her part, in accordance with the dictates of section 2.1205(h), the Presiding Officer must determine that the request is timely; that the area(s) of concern set forth therein are "germane to the subject matter of the proceeding"; and that the "judicial standards for standing" have been met by the requestor.

As the earlier decisions further make clear, in determining whether judicial standing has been established the crucial inquiry is into whether the hearing requestor has adequately alleged a present injury-in-fact that is arguably within the zone of interests protected by the governing statute(s). In that connection, the claimed harm must be incremental. That is to say, in the words of the Commission in CLI-01-21, "a petitioner's challenge must show that the [proposed license] amendment will cause 'a distinct new harm or threat' apart from the activities already licensed," 54 NRC at 251 (citing, *inter alia*, *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27 (2001)).

It was this requirement of an assertion of incremental harm that caused the rejection of last year's hearing request of the Glen Canyon Group. As concluded in LBP-01-15, as well as by the Commission in its affirmance of that decision in CLI-01-21, the Group did not allege any harm that was not equally present or threatened by the receipt and processing at the Mill of alternate feed materials under the authority of earlier granted amendments to the license. More specifically, there was no claim on the part of the Group that there were such differences between the Molycorp material and the other materials as to pose a threat of harm that had not previously been present in the conduct of the Mill's licensed activities. To the contrary, both of the affidavits submitted in support of the hearing request advanced concerns that did not apply uniquely to either the receipt or the processing of the Molycorp material.<sup>3</sup>

B. The question now before me is whether the hearing requests currently in hand suffer from the same infirmities that led to the result reached in LBP-01-15. They will be considered in turn.

1. Mr. Love, a resident of Moab, Utah (some 75 miles north of Blanding), represents that he has "hunted, hiked, drunk surface water below the Mill and visited the area around [it] every year that [he has] resided in Utah," adding that

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<sup>3</sup>One of the affiants was a member of the Group whose activities brought him into close proximity to the site. His specific concerns related to the transportation of the materials to the Mill and the possibility that drinking water might be adversely affected by the processed material. There was no averment that the Molycorp materials posed a greater risk in these respects than had the materials previously processed at the Mill.

The second affidavit, that of a hydrogeologist in the employ of the State of Utah, addressed what he deemed to be the possibility of undetected seepage discharge from the Mill's tailings cells into groundwater. The affidavit had been prepared and furnished some years earlier in connection with another license amendment application concerned with this Mill. Thus, it did not relate specifically to a distinct new harm or threat apart from the activities already licensed.

it is his intention to continue such activity in future years.<sup>4</sup> His stated concern is that his “health, recreation activity, economic and psychological welfare will be affected by the shipment, storage, and processing of” the Molycorp material.

On that score, his hearing request asserts, among other things, that Environmental Protection Agency data acquired in an analysis of the Molycorp material will reflect that that material contains a “high level lead (12%) concentrate,” the discharge of which into the environment through ground and surface water would adversely affect his health. Those data, the request goes on to maintain, will also show “that [the] material in the [Molycorp] waste is completely different from prior material processed by the plant.”

The hearing request additionally asserts that the Licensee’s own data, as well as data acquired by the State of Utah, establish the inadequacy of the company’s monitoring of groundwater, air, and vegetation. Further, in alleging that the Licensee’s data also reflect the company’s inability to protect its own workers and the surrounding area from lead contamination, Mr. Love once again insists that the Molycorp material is “completely different” from that “normally processed by the mill.”

As is readily apparent, there thus is a marked, and most significant, difference between the concerns articulated by this hearing requestor and those advanced by the Glen Canyon Group in its hearing request that was found wanting last year. In contrast to the Group’s filing, Mr. Love asserts a threatened injury-in-fact that cannot be dismissed as being equally associated with Mill activities under previous amendments to the material license under consideration. If he is correct, because of its lead content the Molycorp material is not to be equated with material previously received at and processed by the Mill. According to his thesis, because of asserted deficiencies in the Licensee’s protective and monitoring capabilities, the difference in material composition translates itself into a significant difference in the risk to his health and well-being.

In its December 31 opposition to the hearing request, the Licensee vigorously insists that Mr. Love’s concerns are not well founded. That position may well ultimately be upheld. Further exploration of the matter may indeed produce the necessary conclusion that, in point of fact and contrary to his claim, the lead composition of the Molycorp material does not pose a real threat to Mr. Love’s health and well-being, let alone one significantly greater than that posed by Mill activities authorized under prior license amendments. That consideration is, however, of no present moment. As the terms of section 2.105(e) and (h) make clear, at this seminal stage of an informal Subpart L proceeding, it is enough that the hearing requestor has set forth with sufficient particularity one or more

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<sup>4</sup>Mr. Love might have been more precise with regard to how far from the Mill the specified activities take place. Nonetheless, the representation appears sufficient to satisfy, if but barely, the geographic distance aspect of the standing requirement.

germane areas of concern that provide standing to challenge the proposal that is on the table. Manifestly, Mr. Love has met that burden. Whether the concern(s) advanced are also meritorious is for later determination. *See* 10 C.F.R. § 2.1233.<sup>5</sup>

2. Turning now to the Sierra hearing request, it advances several concerns. At this preliminary stage, however, it is not necessary to consider all of them if any one of them carries the day. Once again, the sole question now before me is whether the allegations of the hearing request establish that Sierra has presented at least one germane concern that it has the standing to raise.

On that score, the hearing request is supported by, *inter alia*, the affidavit of John Weisheit, the Chair of the Glen Canyon Group. In common with Mr. Love, Mr. Weisheit is a resident of Moab. According to the affidavit, both his professional and his personal recreational activities bring him in close proximity to the facility. As has Mr. Love, Mr. Weisheit focuses on the high concentration of lead in the Molycorp material, which he asserts is both “very toxic to humans” and “a change from waste that has already been approved to be hauled through Moab.”

The short of the matter thus is that, contrary to the assertions of the Licensee in its January 25 filing, the Sierra hearing request passes preliminary muster for the same reason that the Love request has been determined to meet the requirements of section 2.205(e) and (h) of the Rules of Practice. This does not mean, of course, that Sierra necessarily will ultimately prevail. To repeat the observation above with regard to the Love request, it does not perforce follow from the grant of the hearing request that there is merit to Mr. Weisheit’s concern directed to the lead concentration to be found in the Molycorp material. That remains to be seen. Nor is there cause to consider at this juncture whether there is possible substance to the other claims advanced by Sierra, including those set forth in an 11-page January 9, 2002 letter from Victoria Woodard of the Glen Canyon Group to Michael Lesar of the NRC Staff (appended to the hearing request as Appendix C). Although that letter assigned numerous reasons why the Group believes that the Staff’s FONSI is fatally flawed and that, as a consequence, the preparation of a full Environmental Impact Statement is required, exploration of the validity of those reasons has to await another day.

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<sup>5</sup>In the event that a hearing request is granted on the strength of one such concern, the Presiding Officer must determine whether the other concerns advanced in the request are equally germane to the subject matter of the proceeding. Any articulated concern that does not so qualify is not to be considered. *See* Section II.B.3.c and 3.d of the Statement of Considerations accompanying the adoption of the rules of procedure for the conduct of informal adjudicatory hearings in material licensing proceedings, 54 Fed. Reg. 8269 (Feb. 28, 1989).

It should be added that, although the issuance of the *Federal Register* notice to which Mr. Love responded was apparently triggered by the NRC Staff’s Finding of No Significant [Environmental] Impact, the opportunity for hearing provided in the notice was not restricted to that Finding. *See supra* p. 149. Given the absence of such a restriction, or any other limitation in the notice on the issues that might be raised, he was free to base his hearing request on either safety or environmental aspects of the activity to which the license amendment was addressed.

3. In the form of a one-page letter signed by the Executive Director of the organization, the Task Force hearing request notes that, if transported by truck, the Molycorp material will pass through several Nevada communities, including the City of Las Vegas in highly populated Clark County (where the Task Force seemingly is based). Asserting that Interstate Highway 15, along which the shipments would move, is already heavily congested from the California border to Las Vegas, the Task Force expresses concern regarding increased congestion and accompanying additional risk to persons traveling on that highway. The relief it seeks is the preparation by the NRC of a “complete” Environmental Impact Statement followed by a hearing in Las Vegas.

In contrast to the Love and Sierra hearing requests, this one falls well short of the mark in a number of respects. For one thing, despite the fact that it implicitly is founded on an assertion of representational standing, the request fails to specify a single member of the organization who deems himself or herself threatened personally with an injury-in-fact attributable to the transportation of the Molycorp shipments through Clark County. In that connection, there also is no averment that one of the established and understood undertakings of the Task Force is to combat, on behalf of its members, increased traffic congestion on highways within that county.

Leaving aside that consideration, there is at least reason to question whether traffic congestion in a Nevada county that is at a considerable distance from the Mill (located in eastern Utah) is a factor that this Commission must or should consider in deciding whether to grant the sought license amendment. But even were that matter to be resolved in the Task Force’s favor, there is a total and crucial lack in the hearing request of any particularization with respect to the claim on which the entire request is based. Absolutely nothing has been furnished to suggest the existence of even a remote possibility that the addition of these shipments to the assertedly already very substantial traffic volume on Highway I-15 would pose a significant risk of harm to other users of the highway. Although, as above noted, it need not be demonstrated at this early stage of the proceeding that a concern will ultimately be found to be meritorious, it must appear that the concern is at least worthy of further exploration. No such conclusion can be drawn from what has been supplied by the Task Force here.<sup>6</sup>

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<sup>6</sup>In its January 25 response to the Sierra and Task Force hearing requests, the Licensee took note also of a letter sent to the Commission by the Executive Director of the Shundahai Network (Network). A Salt Lake City, Utah-based organization, the Network is said to be concerned with “environmental justice issues” and encouraging “public participation in creating and implementing nuclear policies.”

Undated, but apparently mailed on January 10, 2002, the Network’s letter calls upon the Commission (1) to withdraw the FONSI issued in connection with the license amendment application; (2) to prepare an environmental impact statement to address certain concerns set forth in the letter; and (3) to hold public hearings in Moab and Las Vegas to receive comments on the proposal in issue. The letter does not, however, explicitly or by necessary implication seek a Subpart L adjudicatory hearing in which the Network would be a participant. Accordingly, it is not being treated as a hearing request.

*(Continued)*

C. For the foregoing reasons, the Love and Sierra hearing requests must be, and hereby are, *granted*. For its part, the Task Force hearing request is *denied* for lack of standing. If so inclined, and to the extent adverse to it, both the Task Force and the Licensee may appeal this action to the Commission in accordance with the provisions of 10 C.F.R. § 2.1205(o). Any such appeal must be filed within ten (10) days of the service of this Order. Within fifteen (15) days of the service of the appeal brief(s), oppositions thereto may be filed in the manner prescribed in section 2.1205(o).<sup>7</sup>

D. In light of the grant of the Love and Sierra hearing requests and the provisions of 10 C.F.R. § 2.1231(a), it now becomes incumbent on the NRC Staff to prepare and to file the hearing file *no later than March 1, 2002*. That file shall contain a chronologically numbered index of each item contained in it. Moreover, each file item shall be separately tabbed in accordance with the index and be separated from the other file items by a substantial colored sheet of paper that contains the tab(s) for the immediately following item. Additionally, the items shall be housed in hole-punched three ring binders of no more than 4 inches of thickness.

It is so ORDERED.<sup>8</sup>

BY THE PRESIDING OFFICER<sup>9</sup>

Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 30, 2002

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It need be added only that, were the letter to be deemed a hearing request, denial of such relief would be mandated. In common with the Task Force submission, the letter does not come close to establishing the requisite judicial standing.

<sup>7</sup>At the time of the filing of the Love hearing request, the NRC Staff elected not to participate in the proceeding. See 10 C.F.R. § 2.1213. To this point at least, the Staff has not changed its mind in that regard notwithstanding that, in its subsequently filed hearing request, Sierra raises questions pertaining to the validity of the FONSI. If the Staff should adhere to its current election, Judge Cole and I will later determine whether, particularly given the FONSI issue, Staff participation on one or more of the presented issues nonetheless might be of assistance in the disposition of this matter.

<sup>8</sup>I will enter another order at a subsequent date calling for a telephone conference with the parties to discuss the content and scheduling of further proceedings in this matter once the hearing file is in hand. In that regard, note has been taken of the fact that Mr. Love will be out of the country until February 5, 2002.

<sup>9</sup>Copies of this Memorandum and Order were sent this date by e-mail transmission to the counsel or other representative of all of the parties and the NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 72-22-ISFSI**

**PRIVATE FUEL STORAGE, L.L.C.**  
**(Independent Spent Fuel Storage**  
**Installation)**

**February 6, 2002**

**MEMORANDUM AND ORDER**

In a December 13, 2001 order, the Atomic Safety and Licensing Board referred to the Commission its decision denying admission of a late-filed contention relating to the threat of a terrorist attack on Private Fuel Storage, L.L.C.'s proposed independent spent fuel storage installation (ISFSI).<sup>1</sup> Consistent with our policy to accept Board certifications and referrals where "early resolution" of issues is desirable,<sup>2</sup> we grant review and set the case for briefing.

The Applicant, Private Fuel Storage, L.L.C., seeks a license to operate an ISFSI on the Skull Valley Goshute Indian Reservation in Utah. In response to the terrorist attacks of September 11, 2001, Intervenor Utah asked the Board to admit its late-filed contention Utah RR, Suicide Mission Terrorism and Sabotage. Utah contends that the events of September 11 show that a terrorist attack is both more likely and potentially more dangerous than previously contemplated, and that PFS has not shown that its physical protection plan is capable of coping with

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<sup>1</sup> LBP-01-37, 54 NRC 476 (2001).

<sup>2</sup> See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998); see also *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-00-13, 52 NRC 23, 28-29 (2000).

this credible threat. In addition, Utah argues that PFS's Environmental Report and the NRC Staff's Draft Environmental Impact Statement<sup>3</sup> fail to comply with the National Environmental Policy Act (NEPA) because these studies do not evaluate possible environmental effects of such an attack. The Board rejected admission of this proposed contention as a safety issue and as a NEPA issue.<sup>4</sup>

In rejecting the contention as a safety issue, the Board relied on the statement of consideration for 10 C.F.R. § 73.51. The Board stated that the "Commission seems clearly to have excluded malevolent use of an airborne vehicle as part of any sabotage/terrorist threat that must be evaluated for these facilities [SNF and high-level radioactive waste storage sites]."<sup>5</sup> Thus, the Board rejected the contention as an impermissible challenge to Commission regulations that delineate the physical protection requirements at such facilities. The Board found this "an appropriate result under the agency's current regulatory regime" of excluding acts by an enemy or enemies of the United States, citing 10 C.F.R. § 50.13 and *Florida Power & Light Co.*<sup>6</sup>

The Board also rejected admission of the contention as a NEPA issue, stating that, "at this juncture we [the Board members] are persuaded, as the Appeal Board observed a number of years ago, that 'the rationale for 10 C.F.R. § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities.'" But, in view of the Commission's ongoing "top-to-bottom" review of terrorism-related policies and rules, the Board found its rulings "particularly suited for early review by the Commission," and hence referred them to us.<sup>8</sup>

We accept the referral of the matters discussed above.<sup>9</sup> The parties to this proceeding shall file briefs that address all issues that the parties determine are relevant, and shall address in particular the following question:

What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001? The parties should cite all relevant cases, legislative history, or regulatory analysis.

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<sup>3</sup>The Final Environmental Impact Statement, dated December 2001, was not yet available at the time Utah submitted its contention and the Board made its ruling.

<sup>4</sup>LBP-01-37, 54 NRC at 484-87.

<sup>5</sup>*Id.* at 486.

<sup>6</sup>(Turkey Point Nuclear Generating Plant, Units 3 and 4), 4 AEC 9, 13 (1967), *aff'd sub nom. Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).

<sup>7</sup>*Long Island Lighting Co. (Shoreham Nuclear Power Station)*, ALAB-156, 6 AEC 831, 851 (1973); *see also Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989) (sabotage risk need not be considered in environmental impact statements because uncertainty in current risk assessment techniques would not allow meaningful risk assessment). LBP-01-37, 54 NRC at 487.

<sup>8</sup>*See* 10 C.F.R. § 2.730(f).

<sup>9</sup>Specifically, we accept review of the rulings in section II.B of the Board's December 13, 2001 Order. We decline referral of the rulings in section II.A of that Order (section 2.714(a)(1) late-filing factors).

Pursuant to 10 C.F.R. § 2.786(d), the Commission sets the following briefing schedule:

1. The parties shall file their briefs on or before February 27, 2002. Each brief shall be no longer than forty pages.
2. Reply briefs should be submitted no later than March 12, 2002, and shall not exceed twenty pages in length.
3. The parties shall submit briefs electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow.

Briefs in excess of ten pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, etc.

Finally, the Commission is aware that its decisions on the matters raised in the Private Fuel Storage case may decide similar issues raised in other proceedings.<sup>10</sup> In separate orders issued today, we accept review of those rulings and grant interlocutory review of the Duke Cogema Board's decision relating to NEPA. The Commission is taking this extraordinary step to ensure that all interested parties are afforded an opportunity to provide their views to the Commission before the Commission finally decides these important and substantial matters.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 6th day of February 2002.

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<sup>10</sup> As the Board in this proceeding noted, in the context of the agency's NEPA responsibilities, another Licensing Board recently reached a somewhat different conclusion, *see Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 444-47 (2001), *reconsideration denied*, Memorandum and Order (Ruling on Motion To Reconsider) (Jan. 16, 2002). Subsequently, a party to that proceeding petitioned for interlocutory Commission review of that Board's decision. Several other Boards have asked the Commission's guidance on similar issues. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131 (2002).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 70-03098-ML**

**DUKE COGEMA STONE &  
WEBSTER  
(Savannah River Mixed Oxide Fuel  
Fabrication Facility)**

**February 6, 2002**

**MEMORANDUM AND ORDER**

The Licensing Board in this construction authorization proceeding for a mixed oxide (“MOX”) fuel fabrication facility recently denied Duke Cogema Stone & Webster’s (“DCS’s”) request to reconsider its decision admitting four contentions. *See* LBP-01-35, 54 NRC 403 (2001); unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002). DCS asserts that the four contentions raise novel legal and policy issues which require the Commission’s early review. Accordingly, DCS has petitioned for interlocutory review on the ground that the Commission should exercise its inherent supervisory authority to review the matters.

Today, we consider only the Board’s ruling accepting a contention based on the terrorist acts of September 11, 2001.<sup>1</sup> Intervenor, Georgians Against Nuclear Energy (“GANE”), asserts that under the National Environmental Policy Act DCS and the NRC must evaluate the impacts of terrorist acts against the proposed

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<sup>1</sup>The other contentions deal with the controlled area boundary and with material control and accounting and physical security as principal systems.

MOX fuel facility. The Board found GANE's contention admissible because the September 11 terrorist attacks "close[] the door, at least for the immediate future, on qualitative arguments that such terrorist attacks are always remote and speculative and not reasonably foreseeable." LBP-01-35, 54 NRC at 446. The Board rejected arguments that a Commission rule barred GANE's contention (*id.* at 445)<sup>2</sup> and that terrorist-caused accidents require no fresh NEPA analysis because their effects would be "similar to other types of accidents" already addressed (*id.* at 446). According to DCS's petition for interlocutory Commission review, the Board's admission of GANE's terrorism contention departs from both NRC and court cases and is inconsistent with three recent decisions by licensing boards in other proceedings.

In view of our decisions today to consider terrorism issues in three other cases,<sup>3</sup> the Commission grants DCS's petition for review of the Board's terrorism ruling and directs the Board to proceed no further on GANE's terrorism contention, pending our merits decision on DCS's petition for review.<sup>4</sup>

The parties to this proceeding shall file briefs that address all issues that the parties determine are relevant to the matters discussed above, and in addition shall address in particular the following question:

What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001? The parties should cite all relevant cases, legislative history, or regulatory analysis.

Pursuant to 10 C.F.R. § 2.786(d), the Commission sets the following briefing schedule:

1. The parties shall file their briefs on or before February 27, 2002. Each brief shall be no longer than forty pages.
2. Reply briefs should be submitted no later than March 12, 2002, and shall not exceed twenty pages in length.

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<sup>2</sup>The Commission rule at issue was 10 C.F.R. § 50.13, which states that NRC reactor licensees are "not required to provide for design features or other measures for the specific purpose of protection against the effects of . . . attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States." The Board found this rule inapplicable to a MOX facility, which is licensed under Part 70 of our rules. According to the Board, "to apply the rationale for 10 C.F.R. § 50.13 to the agency's responsibilities under NEPA requires a leap that is tantamount to writing a comparable regulation for Part 70 facilities and then applying the rationale for that new regulation to the agency's NEPA responsibilities for the [MOX facility]." *Id.* at 445.

<sup>3</sup>See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476 (2001) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-3, 55 NRC 155 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131 (2002) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-5, 55 NRC 161 (2002); and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49 (2002) (certifying terrorism issue to the Commission), *certification accepted*, CLI-02-6, 55 NRC 164 (2002).

<sup>4</sup>The Commission at this time makes no decision regarding the remainder of DCS's petition for interlocutory review. We will address DCS's other claims in a subsequent order.

3. The parties shall submit briefs electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow.

Briefs in excess of ten pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, etc.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 6th day of February 2002.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 50-423-LA-3**  
**(Facility Operating**  
**License NPF-49)**

**DOMINION NUCLEAR CONNECTICUT, INC.**  
**(Millstone Nuclear Power Station,**  
**Unit 3)**

**February 6, 2002**

**MEMORANDUM AND ORDER**

This is a proceeding for a license amendment to expand the spent fuel pool at the Millstone Nuclear Power Station, Unit 3. On November 1, 2001, the Intervenor filed a proposed new contention, Contention 12, that pointed to the September 11 terrorist attacks and, in essence, maintained that the NRC now needed to prepare an environmental impact statement discussing the risks and consequences of terrorism affecting the Millstone spent fuel pool. On January 24, 2002, the Licensing Board found the contention procedurally valid, but found it inadmissible under a Commission substantive rule, 10 C.F.R. § 50.13. *See* LBP-02-5, 55 NRC 131 (2002). The Board referred the question of section 50.13's applicability to the Commission. *Id.* at 145.

Section 50.13 provides that reactor licensees are "not required to provide for design features or other measures for the specific purpose of protection against the effects of . . . attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States." The Board stated that "[t]his provision is part of the safety regulations of the NRC, but its substantive terms appear to

have been applied as well to environmental issues, such as are presented by . . . Contention 12.” *Id.* at 142. The Board indicated that “[although calculating the risk of sabotage or terrorism may . . . fall within the purview of current analytical methodologies, a matter that would be litigated in resolving proposed Contention 12 if it were admitted, we conclude that the Commission’s current policy is to apply 10 C.F.R. § 50.13 to environmental contentions.” *Id.* at 145. Hence, the Board “perforce” rejected proposed Contention 12, but referred its ruling to the Commission. *Id.*

As is our customary practice, the Commission accepts the Board’s referral pursuant to 10 C.F.R. § 2.730(f).<sup>1</sup> The parties to this proceeding shall file briefs that address all issues that the parties determine are relevant to the matters discussed above,<sup>2</sup> and in addition shall address in particular the following question:

What is an agency’s responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001? The parties should cite all relevant cases, legislative history, or regulatory analysis.

Pursuant to 10 C.F.R. § 2.786(d), the Commission sets the following briefing schedule:

1. The parties shall file their briefs on or before February 27, 2002. Each brief shall be no longer than forty pages.
2. Reply briefs should be submitted no later than March 12, 2002, and shall not exceed twenty pages in length.
3. The parties shall submit briefs electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow.

Briefs in excess of ten pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, etc.

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<sup>1</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000).

<sup>2</sup> The briefs shall not address the “procedural” issues discussed by the Board. See LBP-02-5, 55 NRC at 136-42.

IT IS SO ORDERED.<sup>3</sup>

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 6th day of February 2002.

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<sup>3</sup>Today the Commission also agrees to review terrorism contentions in three other cases. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476 (2001) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-3, 55 NRC 155 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49 (2002) (certifying terrorism issue to the Commission), *certification accepted*, CLI-02-6, 55 NRC 164 (2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001), *reconsideration denied*, unpublished Memorandum and Order (Jan. 16, 2002), *petition for Commission review granted in part*, CLI-02-4, 55 NRC 158 (2002).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve, Chairman**  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket Nos. 50-369-LR**  
**50-370-LR**  
**50-413-LR**  
**50-414-LR**  
**(consolidated)**

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

**February 6, 2002**

**MEMORANDUM AND ORDER**

On January 24, 2002, the Licensing Board issued LBP-02-4, 55 NRC 49, ruling that the Blue Ridge Environmental Defense League and the Nuclear Information and Resource Service had each demonstrated standing and that each had filed at least one admissible contention regarding whether the Commission should grant Duke's application to renew its operating licenses for Units 1 and 2 of the McGuire Nuclear Station and Units 1 and 2 of the Catawba Nuclear Station. More specifically, the Board admitted two contentions regarding the anticipated use of MOX fuel in the four subject facilities and the risks associated with ice condensers and station blackouts.

Finally, in LBP-02-4, the Board certified to the Commission the Petitioners' issues related to risks from acts of terrorism. Specifically, the Board certified to the Commission the question whether Duke Energy Corporation's ("Duke")

license renewal application for the four captioned facilities ‘has . . . realistically or fully analyzed and evaluated all structures, systems and components required for the protection of the public health and safety from deliberate acts of radiological sabotage.’ 55 NRC at 108, quoting petitioner Nuclear Information and Resource Service’s (“NIRS”) Contentions, dated Nov. 29, 2001, at 5.

As is our customary practice, the Commission accepts the Board’s certification.<sup>1</sup> The parties to this proceeding shall file briefs that address all issues that the parties determine are relevant to the matters discussed above, and in addition shall address in particular the following question:

What is an agency’s responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001? The parties should cite all relevant cases, legislative history, or regulatory analysis.

Pursuant to 10 C.F.R. § 2.786(d), the Commission sets the following briefing schedule:

1. The parties shall file their briefs on or before February 27, 2002. Each brief shall be no longer than forty pages.
2. Reply briefs should be submitted no later than March 12, 2002, and shall not exceed twenty pages in length.
3. The parties shall submit briefs electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow.

Briefs in excess of ten pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, etc.

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<sup>1</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000).

IT IS SO ORDERED.<sup>2</sup>

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 6th day of February 2002.

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<sup>2</sup>Today the Commission also agrees to examine terrorism contentions in three other cases. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476 (2001) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-3, 55 NRC 155 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131 (2002) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-5, 55 NRC 161 (2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001), *reconsideration denied*, unpublished Memorandum and Order (Ruling on Motion To Reconsider) (Jan. 16, 2002) (denying reconsideration of admission of terrorism contention), *petition for interlocutory review accepted in part*, CLI-02-4, 55 NRC 158 (2002).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**G. Paul Bollwerk, III, Chairman**  
**Dr. Jerry R. Kline**  
**Dr. Peter S. Lam**

**In the Matter of**

**Docket No. 72-22-ISFSI**  
**(ASLBP No. 97-732-02-ISFSI)**

**PRIVATE FUEL STORAGE, L.L.C.**  
**(Independent Spent Fuel Storage**  
**Installation)**

**February 22, 2002**

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board grants the request of Intervenor State of Utah to admit previously deferred late-filed contention Security-J, Law Enforcement.

**MEMORANDUM AND ORDER**  
**(Admitting Contention Security-J)**

Previously, in a June 14, 2001 memorandum and order, LBP-01-20, 53 NRC 565 (2001), this Licensing Board indicated it was deferring ruling on the admission of late-filed contention Security-J, Law Enforcement.<sup>1</sup> With

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<sup>1</sup> As has been noted elsewhere, this Board chaired by Judge Bollwerk retains jurisdiction over contention Security-J (as well as matters concerning contentions Utah E/Confederated Tribes F, Financial Assurance, and contention Utah S, Decommissioning) while the residuum of the case rests with a separately designated Licensing Board chaired by Judge Farrar. See LBP-01-39, 54 NRC 497, 499 n.3 (2001).

this contention, Intervenor State of Utah (State) asserts that recently adopted Utah legislation prohibiting any local government entity from entering into an arrangement to provide municipal services (including law enforcement assistance) to an independent spent fuel storage installation (ISFSI) renders Applicant Private Fuel Storage, L.L.C. (PFS), unable to comply with various NRC regulatory provisions, including 10 C.F.R. § 73.51(d)(6) that mandates a “[d]ocumented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities” relative to the proposed PFS 10 C.F.R. Part 72 Skull Valley, Utah ISFSI.<sup>2</sup> Although the Board indicated in that decision that the contention appears to meet the standards for late-filed admission under 10 C.F.R. § 2.714(a), (b), we nonetheless decided that deferring a ruling on admissibility was a more judicious use of Board and party resources. The basis for this deferral was a pending federal district court case filed by PFS and Intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) contesting the constitutional validity of this and other Utah legislation that PFS indicated would have the impact of foreclosing operation of its proposed ISFSI. In so doing, however, we directed that the parties to the federal court litigation — PFS, the Skull Valley Band, and the State — provide us with joint litigation status reports at 45-day intervals. *See id.* at 570-71.

Since June, we have received a series of six status reports, the most recent dated February 11, 2002. In the February 11 report, the parties indicate that the current schedule calls for an April 11, 2002 oral argument in federal district court on a variety of pending motions, including a State motion for judgment on the pleadings and PFS and Skull Valley Band motions for summary judgment. And relative to this pending matter, the joint report indicates that the State believes that the Board should continue to defer acting on contention Security-J, while PFS requests that the Board rule on the contention’s admissibility. *See Sixth Joint Report on the Status of Federal Lawsuit Skull Valley Band v. Leavitt* (Feb. 11, 2001) at 5. Additionally, during a January 17, 2002 prehearing conference, PFS counsel declared that, if admitted, PFS intended to seek summary disposition regarding contention Security-J. *See Tr.* at 2842.

In this instance, the Board continues to believe that, as a matter of comity and efficiency, it is preferable to allow the issue of the constitutional validity of the Utah statute in question in connection with contention Security-J to be addressed initially in the superior judicial forum of the federal district court. Nonetheless,

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<sup>2</sup>Contention Security-J provides:

The Applicant’s Physical Security Plan does not comply with 10 CFR Part 73 because the Applicant does not have valid documented liaison with a designated local law enforcement authority (LLEA), and redundant communications between onsite security force members and the LLEA, to provide timely response to unauthorized penetrations at the PFS facility. *See* 10 CFR §§ 72.180; 73.51(d)(6), (8) and (12); and Part 73, Appendix C.

LBP-01-20, 53 NRC at 568.

while oral argument on a variety of potentially dispositive motions is scheduled for early April, the federal court's schedule for addressing the matters pending before it obviously is its own (and unknown at this point). On the other hand, the schedule for this proceeding (which was originally established by this Board and is being carried forward by the Licensing Board chaired by Judge Farrar) looks toward the resolution of all currently admitted issues by September 2002.<sup>3</sup> Under the circumstances, we now find the best course is to admit contention Security-J, for the reasons previously outlined in LBP-02-20, 53 NRC at 570 & n.3,<sup>4</sup> and establish a schedule for any PFS dispositive motion and responses.

In this regard, we are aware that the parties currently are preparing for evidentiary hearings that begin in early April 2002 and potentially could last through mid-May 2002. Given the PFS representations at the January status conference and in the most recent status report that it is ready to move forward on this contention, we anticipate PFS may well be able to lodge its dispositive motion before the hearings begin; however, with the present schedule the State and the NRC Staff may require more than the 20 days generally provided by agency rules for their responses. As a consequence, we will afford the parties the opportunity in the first instance to arrive at a mutual agreement on a briefing schedule for the PFS motion. The only constraint we place upon their discussions is that all filings, including any State reply to a Staff response supporting a PFS dispositive motion, must be filed no later than 15 days after the filing of the parties' final responsive findings of fact and conclusions of law relative to the matters being heard in the upcoming evidentiary hearings.<sup>5</sup> Further, absent permission of the Board, the PFS dispositive motion and any responsive pleadings (exclusive of any supporting statements of undisputed/disputed material facts and exhibits) shall not exceed twenty pages in length.

The interested parties should provide us with a joint report outlining their agreement regarding a dispositive motion briefing schedule for contention Security-J on or before *Friday, March 1, 2002*. Additionally, the interested parties should continue to provide joint status reports regarding the district court litigation, the next of which is due on or before *Thursday, March 28, 2002*.

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<sup>3</sup>In addition to contention Security-J, the only other issue on which the question of admissibility is pending is the very recently submitted State request to admit late-filed contention Utah SS, Revised Cost-Benefit Analysis, which challenges purported new cost-benefit assumptions used in the Staff's December 2001 final environmental impact statement. This Board, of course, expresses no opinion on the admissibility of that late-filed issue statement, which is before the Licensing Board chaired by Judge Farrar.

<sup>4</sup>Although the reasons why contention Security-J is admissible relative to both the five late-filing factors in section 2.714(a)(1) and the substantive contention admission criteria of section 2.714(b) are clear from the discussion referenced above, we note that the contention clearly is sufficient to establish a genuine material dispute that warrants further inquiry in that, as the Staff observed, *see* NRC Staff Response to [State] Request for Admission of Late-Filed Contention Utah Security-J (Apr. 27, 2001) at 9, unless declared pre-empted by federal law or otherwise unconstitutional, it would call into serious question the degree to which the existing PFS security plan complies with section 73.51 and 10 C.F.R. Part 73, App. C.

<sup>5</sup>If, in response to the PFS dispositive motion, the State intends to lodge a cross-motion for summary disposition as well, the timing for PFS and Staff responses to that motion likewise should be factored into this time frame.

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD<sup>6</sup>

G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE

Dr. Jerry Kline  
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
February 22, 2002

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<sup>6</sup>Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Michael C. Farrar, Chairman**  
**Dr. Jerry R. Kline**  
**Dr. Peter S. Lam**

**In the Matter of**

**Docket No. 72-22-ISFSI**  
**(ASLBP No. 97-732-02-ISFSI)**

**PRIVATE FUEL STORAGE, L.L.C.**  
**(Independent Spent Fuel Storage**  
**Installation)**

**February 22, 2002**

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board, acting pursuant to 10 C.F.R. § 2.749, grants in part and denies in part a PFS request for summary disposition regarding Contention OGD O, Environmental Justice. The Board finds that there does not exist a dispute of material fact regarding the matters raised either by Basis 5, which addresses the cumulative impact of the proposed facility coupled with the impacts from other nearby hazardous waste facilities, or by Basis 6, which addresses the facility's adverse effects upon property values; the Board thus grants summary disposition with regard to these matters. With regard to the matters raised by Basis 1, which addresses the disparate sociological and economic impacts of the project on minority and low-income populations, the Board finds that there does exist a material factual dispute and denies summary disposition.

### **LICENSING BOARD: SCOPE OF REVIEW**

The federal courts have long recognized and deferred to tribal sovereignty in resolving tribal conflicts; this deference is not, however, absolute and courts have allowed agency intervention in exceptional situations where other factors prevail over the desire for allowing Tribal self-governance.

### **RULES OF PROCEDURE: JURISDICTION (LICENSING BOARDS)**

The Licensing Board has a right to examine the facts presented at least sufficiently to determine its own jurisdiction to proceed, taking a “peek at the merits,” as necessary to determine the jurisdictional boundary between (1) a legitimate look at matters of environmental justice and (2) a forbidden foray into matters of Tribal governance.

### **NEPA: ENVIRONMENTAL JUSTICE**

Executive Order 12898, addressing Environmental Justice, does not create new enforceable rights for individuals but, instead, is intended to focus agencies on ensuring that their actions do not have a disparate environmental impact on minority or impoverished populations.

### **RULES OF PRACTICE: CONTENTIONS (SCOPE)**

The fact that some allegations provided a basis for contentions or bases that were previously excluded from consideration does not limit their ability to be included as well within the scope of admitted contentions, particularly as subsequent events demonstrate that these allegations have a greater significance to admitted contentions than originally anticipated.

### **RULES OF PRACTICE: CONTENTIONS (SCOPE)**

A licensing board can allow further consideration of a matter that was also included in rejected assertions if the board provides the opposing parties with advance notice and an adequate explanation for the board’s decision.

### **NEPA: ENVIRONMENTAL JUSTICE (POPULATIONS)**

When defining the population subject to environmental injustice, the inquiry is not necessarily limited to the community at large, but when the crucial net disparate impact is felt by only a portion of the community, the inquiry may end up focusing on that particular subgroup.

**NEPA: ENVIRONMENTAL JUSTICE**

A disparate impact can stem from either (1) a disparity in how the environmental burdens of a project are felt by different populations, or (2) a disparity in how the net impact of the project — as measured by the balance of environmental burdens and economic benefits — is felt by different populations.

**NEPA: GENERIC ISSUES**

Under a simplified view of the National Environmental Policy Act (NEPA), an agency has several options if a project it proposes to license has potential adverse impacts. The agency may (1) disapprove the project entirely; (2) alter or reduce all or part of the project to render its adverse impacts, and the project, acceptable; or (3) license the project if it determines that the project's overall benefits exceed its environmental and other costs and that no obviously superior alternatives are in sight.

**NEPA: ENVIRONMENTAL JUSTICE**

A net disparate impact within the scope of the environmental justice concept may arise when some members of a community obtain an economic benefit from a proposed agency action to offset its anticipated burdens, while others do not and experience only the burdens.

**NEPA: ENVIRONMENTAL JUSTICE**

A community that consents to agency action within its borders may not then attempt to argue that the action will have a disparate impact upon its citizens compared to the less disadvantaged who live in other, more distant locations.

**RULES OF PRACTICE: SUMMARY DISPOSITION  
(BURDEN OF PROOF)**

If the nonmoving party introduces undisputed facts that are both relevant and material, the moving party cannot prevail on a motion for summary disposition.

**MEMORANDUM AND ORDER**  
**(Ruling on Applicant’s Motion for Summary Disposition of**  
**“Contention OGD O” — Environmental Justice)**

**INTRODUCTION AND SUMMARY**

Presented with serious disputes among members of the Skull Valley Band of the Goshute Indians over this proposed NRC licensing action and over certain landlease income, we are called upon here to apply two important federal doctrines that, at first glance, threaten to conflict with each other. On the one hand, the United States Supreme Court has long made it clear that matters of *Tribal governance* are largely beyond inquiry by federal (and State) instrumentalities, which must defer to a Tribal government’s creation of its own substantive laws to assist in Tribal governance and its enforcement of those laws in Tribal forums. On the other hand, an Executive Order issued by President Clinton in 1994, and endorsed by the Nuclear Regulatory Commission, reminds each federal agency to ensure that its actions — including awarding licenses for private projects — are consistent with norms of “*environmental justice*” that protect disadvantaged populations.

This matter had its genesis when the Skull Valley Band, acting through its identified leadership, entered into a business arrangement to lease its Reservation lands, located within the borders of the State of Utah, to a consortium of electric utility companies called Private Fuel Storage, L.L.C. (PFS, or the Applicant). That organization has applied for an NRC license to construct and operate a facility that — in a manner emanating from earlier federal policy — would provide for the temporary aboveground storage on the Skull Valley Reservation of spent fuel from nuclear reactors.

That project could eventually result in the presence on the Reservation of 4000 concrete-encased casks, each nearly 20 feet high and 11 feet in diameter. The Skull Valley Band, having invited the lease arrangement, intervened in this licensing proceeding to support the project, known formally as an “independent spent fuel storage installation” (ISFSI). On the other hand, a group known as Ohngo Gaudedah Devia (OGD), comprised primarily of Band members opposed to usage of the Tribal Reservation for that purpose, intervened to oppose that endeavor on a number of counts, only one of which remains pending.<sup>1</sup>

That OGD challenge to the proposed federal license, denominated “Contention OGD O,” raises environmental justice issues, pointing to the provisions of the

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<sup>1</sup>The State of Utah, the principal opponent of the PFS proposal, also intervened here to present various challenges to the project. For a recent rundown of the overall history and status of the proceeding, see LBP-01-39, 54 NRC 497 (2001). At this juncture, OGD’s environmental justice contention is the only one, of those that might be the subject of the hearing beginning in April, that has a dispositive motion still pending. *Compare id.* at 524 n.36.

Executive Order previously mentioned and the National Environmental Policy Act (NEPA). As OGD sees it, the proposed project is inconsistent with the Band's cultural heritage and the sacredness of its Reservation lands and, for those reasons and others involving more tangible sociological matters, thereby imposes environmental *injustice* upon OGD members in a manner not permitted by NEPA.

While our proceeding has been running its course, a controversy has been building among the various Band members on both sides, and their allies, concerning the legitimacy of the Tribal leadership and the control of Tribal finances. In that regard, and crucial to our decision today, allegations have been made that members opposing the project are being deprived, by the Tribal leadership overseeing the business arrangement, of any share in the lease payments coming to the Band from PFS. An OGD leader has filed an affidavit with us expressing his view of the facts related to those allegations.

Our current involvement was triggered when the Applicant asked us, under our rules of practice, to reject OGD's environmental justice claim summarily, as legally and factually deficient. Insofar as the crucial issue is concerned, the Applicant — essentially seeing this part of the controversy as involving an aspect of Tribal governance — requests that we therefore defer to, and base our action on, the formal position taken by the Tribal leadership in favor of the project, rather than set the matter for hearing.

The NRC Staff — whose role in the system is to review the PFS application from an internal regulatory standpoint before it comes to us to adjudicate any outside challenges<sup>2</sup> — supports the PFS motion for summary disposition. The motion has the Skull Valley Band's tacit approval. Of course, OGD opposes the motion, based in part on the above-mentioned affidavit.

Although we *grant the Applicant's motion in part*, we also, for reasons that do not ensnare us in the apparent controversy about Tribal governance, *deny the Applicant's motion in part*, thereby sending an aspect of the environmental justice claim to an April trial on the merits. We set out in *Section I* of this opinion our reasoning for that decision.

As we there explain, the Supreme Court's Tribal governance doctrines mentioned above do not preclude us from entertaining claims of deprivation of environmental justice that, in the situation here presented, may belong to a subgroup of the overall Tribal community. Under our rules, those claims here must go to hearing, for they cannot now be resolved on the competing assertions of Band members holding very different beliefs about the impact of the project on their individual situations, including the impact of the concomitant lease income

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<sup>2</sup>The Staff's work here began with PFS's filing its application in 1997 and has continued through PFS's submission of some 23 amendments. The Staff review led it recently to issue a Supplemental Safety Evaluation Report and the Final Environmental Impact Statement.

that was anticipated would be applied — but may not be being used — to relieve their poverty.

But the Supreme Court doctrines on Tribal governance, and similar lessons drawn from other sources, convince us that there are other, far better, ways than a hearing to resolve this controversy. To point the parties in that direction, we focus in *Section II* on why resolution of the matters underlying the environmental justice dispute may best be driven by those with a greater stake in, and understanding of, the conflict than we possess. We believe that a hearing before us should be a last resort. Accordingly, we *strongly encourage the protagonists to settle this matter* — achieving an outcome shaped by, and satisfactory to, themselves — rather than to turn it over to us for a trial, and an outcome, that may disappoint them all.<sup>3</sup>

## I. THE NEED FOR A HEARING

### A. The Setting of the Controversy

In early 1983, President Reagan signed the Nuclear Waste Policy Act of 1982 into law. As amended, that law acknowledges the potential for siting nuclear waste disposal facilities of one kind or another on Indian Reservations.<sup>4</sup> The response of Indian Nations to overtures from the Nuclear Waste Negotiator (established as a federal officer by Title IV of that Act) and from others was overwhelming. Although Indian Tribes control only some 3% of the Nation's land,

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<sup>3</sup>To guide the reader, we provide here a partial outline of our opinion:

- I. The Need for a Hearing
  - A. The Setting of the Controversy
    1. The Nature of the Facility, the Lease and the Disputes
    2. The Filings of the Parties
    3. The Concept of Environmental Justice
    4. The Standards for Summary Disposition
  - B. The Interpretation of the Law
    1. The Deference Owed to Tribal Governance
    2. The Definition of “Low-Income Populations”
      - a. Preliminary Matters
      - b. Environmental Justice Populations
    3. The Balancing of Environmental Impacts
  - C. The Facts in Dispute and the Facts Needed
    1. The Impacts on the Environment
      - a. Cumulative Impacts
      - b. Property Values
      - c. Adverse Impacts
    2. The Payments Under the Lease
    3. The Evidence for the Trial
- II. The Wisdom of a Settlement
  - A. The Policy of the Commission
  - B. The Path to a Settlement

<sup>4</sup> See 42 U.S.C. § 10242.

Tribes were responsible for some three-fourths of the twenty-odd initial nuclear waste disposal applications and all of the Phase II applications.<sup>5</sup> Eventually, the somewhat different proposal now before us emerged.

### *1. The Nature of the Facility, the Lease, and the Disputes*

As is well known, the absence of a repository for the permanent storage of spent nuclear fuel that has been and will be generated by the Nation's 100-odd power reactors<sup>6</sup> prompted a consortium of electric utility operators of nuclear power reactors to form the Private Fuel Storage, L.L.C., organization to seek an NRC license for an offsite facility for spent fuel storage, known in Commission argot as an ISFSI (*see* p. 174, above). In pursuing its goal, PFS entered into a business arrangement with the Skull Valley Band of the Goshute Indians (which acted through its ostensible leadership representatives) to construct and operate an ISFSI on the Band's Reservation some 50 miles southwest of Salt Lake City. The proposed ISFSI license would permit, among other things, the storage of 40,000 metric tons of spent nuclear reactor fuel in concrete-encased storage casks (*see* p. 174, above) to be arrayed on specially designed concrete pads.<sup>7</sup>

The storage of the casks is intended to be temporary (pending development of a permanent repository such as the one being considered for Yucca Mountain). To that end, PFS's contracts are to require its customers to retain title to the spent fuel they send to the facility, so that it could be sent back to them at the end of the facility's life if a permanent repository is not ready by then.<sup>8</sup>

Under the unique relationship that exists between the United States and sovereign Indian Nations, Tribal contracts are not valid without the approval of the Department of the Interior's Bureau of Indian Affairs (BIA). That agency gave the proposed lease between PFS and the Band preliminary approval in 1997. That lease had been negotiated and signed on behalf of the Band by Leon Bear, exercising the authority he claimed by virtue of having previously been elected the Band's President in a process that, while apparently controversial, earned BIA's approval. Joining him were the Band's Vice Chairperson and Secretary, at that time Mary Allen and Rex Allen, respectively.

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<sup>5</sup> These figures were reflected in various commentaries said to draw upon the records of the now-defunct Office of Nuclear Waste Negotiator.

<sup>6</sup> As of December 2000, a total of 104 power reactors remained licensed to operate. *See* NUREG-1350, Vol. 13, at 28 (June 2001). A number of others had earlier been decommissioned.

<sup>7</sup> The State has put forward various safety issues about the proposed facility, including the potential risks from (1) accidents caused by U.S. military operations to the West and (2) earthquakes and other geotechnical phenomena. We will be considering those issues, along with others, at the upcoming trial. *See* note 1, above.

<sup>8</sup> *See* FEIS (note 2, above) at xxxii. Although the initial license period would be for 20 years, the possibility of an extension exists. A controversy about how the expected facility life is treated in the FEIS has just given rise to a new, late-filed contention, submitted by the State on February 11, 2002, which we need not pause to detail here.

Not all Tribal members, however, shared these putative officers' view of the benefits to the Band of the lease arrangement, and a group of project opponents took issue with the leadership's actions. According to the documents before us (as also reflected in contemporary newspaper accounts),<sup>9</sup> the years since have been filled with challenges to the officers' authority, status, and actions; calls for, conduct of, and disputes over new elections; demands for information about the lease terms; battles for control of the Band's offices and bank accounts;<sup>10</sup> and even attempts to replace the Band's legal counsel involuntarily (*see* note 20, below).

We touch herein on a number of these disputes. As will be seen, however, our eventual focus (*see* pp. 193-99, below) primarily rests on only two of the opponents' claims (which turn out to be related), namely, that (1) the project's environmental impacts are unacceptable and that (2) the leadership has deprived them of any share of the significant benefits that should accrue to them from the project, namely, the income from the lease.

## 2. *The Filings of the Parties*

In response to the Commission's providing an opportunity for hearing on the PFS application, a number of the Skull Valley Band members, and other individuals, calling themselves Ohngo Gaudedah Devia, petitioned to intervene in this proceeding to oppose the project. (The Band itself is participating in support of the Applicant's position.) On November 24, 1997, OGD filed a number of specific challenges in the form of the "contentions" called for by NRC rules;<sup>11</sup> for a variety of reasons, this Board determined that, with one exception, those contentions could not go forward. LBP-98-7, 47 NRC 142, *reconsideration granted in part and denied in part*, LBP-98-10, 47 NRC 288, 298-99, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

The one remaining is "Contention OGD O," presenting an environmental justice claim. As framed, that contention invoked the Executive Order in urging that the community not be "made to suffer more environmental degradation at the hands of the NRC." After making reference to the Reservation's being surrounded by a "ring of environmentally harmful companies and facilities" that create or process hazardous waste, OGD presented six specific grounds that it said provided a basis for its claim.

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<sup>9</sup>Of course, we mention these accounts not to arrive at any factual determinations but only to highlight the intensity of the underlying controversy.

<sup>10</sup>*See Skull Valley Band Goshutes v. Zion's Bank*, No. 2:01CV00813C (D. Utah, filed Oct. 18, 2001); *see also* Brent Israelsen, "Nation" Inserts Itself into Tribal Fray, Salt Lake Tribune, Nov. 13, 2001 (referring to the Native American Tribal Organization, also known as the NATO Indian Nation).

<sup>11</sup>OGD presented 16 contentions, lettered A through P. The last of those (to which we refer later), dealt with the impacts of the facility's "routine operations" and "associated transportation activities," and complained of, among other things, "obvious impacts resulting from the physical presence of the facility," including "visual intrusion, noise, worker and visitor traffic." Contentions at 36.

This Board rejected three of those bases, leaving standing the three “disparate impact matters outlined in bases one, five and six.” See LBP-98-7, 47 NRC at 233. Basis #1 involves the disparate economic and sociological impacts on minority and low-income populations compared to the overall population. Basis #5 addresses the cumulative impacts of the PFS facility coupled with the impacts from other nearby hazardous waste facilities. And Basis #6 highlights the adverse effects on property values stemming from the proposed facility.<sup>12</sup>

After we admitted that contention into the proceeding, the Commission early on took the opportunity — afforded by its review of another aspect of this case — to provide further guidance on the environmental justice concept. CLI-98-13, 48 NRC 26, 35-36 (1998). The Commission there reminded us of its prior teachings, particularly those dealing with the limitations that inhere both in the Executive Order (whose “purpose was merely to underscore” certain already-existing provisions of NEPA) and in the “disparate impact” doctrine (which does not admit of a “broad NRC inquiry into questions of motivation and social equity in siting”). See *Louisiana Energy Services, L.P. [LES]* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998). As will be seen, our decision today observes those limitations.

In due course, in June 2000, the Staff issued its draft environmental impact statement (DEIS) for the PFS facility.<sup>13</sup> In there discussing environmental justice matters, the Staff based its conclusions (that the project passed muster) in large measure on information supplied by the Tribal leadership. See, e.g., DEIS at 4-38. In the DEIS, the Staff took the position that any negative environmental impacts attributable to the project’s presence on the Reservation — such as noise or visual impact (*id.* at 6-27) — would be more than offset by the environmental benefits that would flow to Band members from putting the lease payments to good use in improving their basic living conditions. See DEIS §§ 4.5.2.8 (at 4-36), 6.2.1.2 (at 6-31).

After the parties conducted discovery of each other’s evidence, the Applicant moved on May 25, 2001, for summary disposition of Contention OGD O, urging that the undisputed facts render a hearing unnecessary and justify a ruling in its favor. In thus filing the motion that is presently before us for resolution, PFS supplied, along with a supporting statement of material facts not

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<sup>12</sup> See OGD Contentions at 27-36. The rejected bases (numbered 2, 3, and 4) questioned the environmental, sociological, and psychological costs to Band members stemming from increased traffic, population, and impacted lifestyles; the lack of a cost-benefit analysis that considers the alternative of leaving spent fuel at reactor sites; and the need for the proposed PFS facility.

<sup>13</sup> See Draft Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June 2000) [hereinafter DEIS].

in dispute,<sup>14</sup> supporting information from three experts: George H.C. Liang, Senior Principal Environmental Engineer at Stone & Webster; Roger Bezdek, President of Management Information Services; and George Carruth, an independent consultant experienced in the area of radioactive waste.<sup>15</sup> Their declarations addressed whether the project would have impacts cumulative with other facilities in the area, and included analysis of potential groundwater contamination; the impact the proposed facility would have upon Tribal property values; and the cumulative air quality hazards to the Skull Valley Reservation posed by the proposed facility and surrounding hazardous facilities.

On June 28, 2001, OGD filed a response opposing the PFS dispositive motion. OGD's response included a statement of disputed and relevant material facts and the passionate 75-page sworn declaration of a leading OGD member, Sammy Blackbear. In that declaration, Mr. Blackbear identified himself as the Tribal Chairman, based on a disputed election that he claimed had unseated Leon Bear.<sup>16</sup>

Throughout the declaration were detailed allegations of a years-long course of conduct by Mr. Bear "and his cohorts" that Mr. Blackbear characterized (Decl. at 5) as a "systematic, longstanding, blatant pattern of corruption, oppression and abuse." Whatever the legitimacy of that characterization, or of Mr. Blackbear's claim to be the Tribe's legitimate leader, from our perspective *the key feature of the allegations is the claim that the Applicant's lease payments, intended for the Band, have been appropriated by Mr. Bear exclusively for his personal use and that of his allies, and withheld from any Tribal members who opposed the project.* Blackbear Decl. at 10-11. We discuss that claim at greater length below (pp. 198-99).

On the same date, the NRC Staff filed a response in support of the PFS motion, including various affidavits pertaining to several of the bases of OGD's contention.<sup>17</sup> That a portion of one affidavit was prepared by David L. Allison — BIA's Uintah and Ouray Superintendent, who is responsible for the federal government's relationship with the Skull Valley Band — is of particular interest

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<sup>14</sup> See [PFS] Motion for Summary Disposition of OGD Contention O — Environmental Justice (May 25, 2001) [hereinafter PFS Dispositive Motion]; *see also id.*, Statement of Material Facts on Which No Genuine Dispute Exists [hereinafter PFS Undisputed Facts].

<sup>15</sup> See Declaration of George H.C. Liang [hereinafter Liang Decl.]; Declaration of Roger Bezdek [hereinafter Bezdek Decl.]; Declaration of George Carruth [hereinafter Carruth Decl.].

<sup>16</sup> See [OGD]'s Response to [PFS]'s Motion for Summary Disposition of OGD Contention "O" (June 28, 2001) [hereinafter OGD Response]; *see also id.*, Statement of Material Facts at Issue in Support of [OGD]'s Response to [PFS]'s Motion for Summary Disposition of OGD Contention O [hereinafter OGD Disputed Facts]; *id.*, Declaration of Sammy Blackbear [hereinafter Blackbear Decl.].

<sup>17</sup> See NRC Staff's Response to Applicant's Motion for Summary Disposition of OGD Contention O — Environmental Justice [hereinafter Staff Response]; *see also id.*, Joint Affidavit of Sam A. Carnes, Paul R. Nickens and Michael J. Scott Concerning OGD Contention O, Basis 1 [hereinafter Basis One Affidavit]; *id.*, Joint Affidavit of Terence J. Blasing, Richard H. Kettle, and Michael J. Scott Concerning OGD Contention O, Basis 5 [hereinafter Basis Five Affidavit]; *id.*, Joint Affidavit of David L. Allison, Sam A. Carnes, and Michael J. Scott Concerning OGD Contention O, Basis 6 [hereinafter Basis Six Affidavit].

(see note 57, below). That Staff pleading engendered a July 9, 2001 OGD reply taking issue with a number of points the Staff had presented.<sup>18</sup>

Our rules of practice do not afford moving parties an automatic opportunity to reply to the filings of the other parties. 10 C.F.R. § 2.749(a). The Applicant, not having sought leave to reply, accordingly filed no rejoinder to the Blackbear declaration, which means that in most respects we have before us only one side of the story about the matters presented so forcefully in that declaration. The Band itself, going through a change of counsel around that time,<sup>19</sup> filed no papers in connection with the motion.<sup>20</sup>

### 3. *The Concept of Environmental Justice*

Executive Order 12898 (see p. 174, above) directed all agencies in the executive branch to examine, and if necessary to adjust, their activities to guard against inconsistency with norms of environmental justice.<sup>21</sup> Although that Order may not by its terms have been applicable to independent agencies, the Nuclear Regulatory Commission promptly endorsed its principles and agreed to abide by it.<sup>22</sup>

The Executive Order also indicated that it was not intended to add rights beyond those that already existed, but was simply intended to focus agency attention on protecting those rights. The Commission endorsed that limitation in adopting the Order's mandates. See *LES*, CLI-98-3, 47 NRC at 102.

The Executive Order has two key components. As already noted, one stresses that agencies should make achieving environmental justice part of their overall mission by "identifying and addressing . . . disproportionately high and adverse human health or environmental effects" of agency programs on minority and "low-income populations." § 1-101 (emphasis added). The other reminds an affected agency to conduct agency actions "that substantially affect human health or the environment" in a manner that does not deny benefits from, exclude

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<sup>18</sup> See [OGD]'s Response to NRC Staff's Response to [PFS]'s Motion for Summary Disposition of OGD Contention "O" (July 9, 2001) [hereinafter OGD Reply].

<sup>19</sup> See Notice of Appearance and Substitution of Counsel (Aug. 8, 2001).

<sup>20</sup> At a later point, certain assertedly "recently elected Tribal executive officers," including Mr. Blackbear, sought to have us "deal exclusively" with them as the Band's representatives. See Letter of Oct. 3, 2001. In response to that letter and our Oct. 11, 2001 Memorandum and Order (unpublished), the Band (as represented by its counsel who had newly appeared in August) filed affidavits of the Band's Mr. Bear and the BIA's Mr. Allison, which dealt primarily with the governance issues raised by the letter, not with the lease payment issues before us now. Report to the Board on the Status of Counsel (Oct. 24, 2001). The matter later ended without us having been presented any basis to allow involuntary replacement of counsel (see unpublished Memorandum and Order, Dec. 10, 2001).

<sup>21</sup> That Order, entitled "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations" and found at 3 C.F.R. Part 859 (1995), began by directing every agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations . . ." § 1-101.

<sup>22</sup> See March 31, 1994 Letter from the then-Chairman of the NRC to the President.

participation in, or discriminate under agency programs because of an individual's "race, color, or national origin." § 2-2.

As interpreted by the Commission in *LES*, the NRC's role is to identify and to weigh, or to mitigate, "disparate environmental impacts" upon disadvantaged groups but does not embrace the resolution of claims of "racial discrimination." CLI-98-3, 47 NRC at 100-10. In so denominating the Executive Order's reach, the Commission there pointed out that NRC expertise does not extend to such areas and that ordinarily the agency's resources — needed to protect the public health and safety and the environment and thus focused on those purposes — should not be misallocated to matters in which they were unlikely to make a difference.<sup>23</sup>

In the course of deciding the *LES* proceeding, the Commission devoted considerable attention to explaining how the environmental justice concept was to be applied to the work of the NRC. As noted above, the Commission there instructed licensing boards to focus on disparate environmental impacts that a proposed facility might create on disadvantaged groups, not on any purported racial discrimination, deliberate or coincidental, that might have been involved in the facility's siting. In doing so, the Commission noted that its purpose was not to diminish the agency's commitment to President Clinton's Executive Order. Because the NRC's environmental role was, however, limited to its authority under the National Environmental Policy Act of 1969 (42 U.S.C. § 4321), which the Commission pointed out is not a civil rights law, the agency was not to become involved in "full-scale racial discrimination litigation" in its licensing proceedings. *LES*, CLI-98-3, 47 NRC at 106. Instead, the focus was to be on an issue that "lies close to the heart of NEPA," namely, the disparate adverse environmental impacts of agency action on "minority and impoverished citizens." *Ibid.*

#### **4. The Standards for Summary Disposition**

The Commission's rules, like those of federal courts, allow judges to resolve summarily — that is, without an evidentiary hearing — matters that, although initially contested, turn out not to involve any material factual disputes. We have on many occasions in this proceeding recited and applied the general standards that govern the grant or denial of summary disposition:

In an NRC proceeding, a party is entitled to summary disposition if the presiding officer determines that there exists "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.749(d). When reviewing a motion for summary disposition, the Commission has used standards similar to those used by

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<sup>23</sup> *LES*, CLI-98-3, 47 NRC at 103. See also section 1-101 of the Executive Order, which provides that "[to] the greatest extent *practicable* and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission . . ." (emphasis added).

the federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

Consistent with Rule 56, the moving party bears the initial burden of showing that no genuine issue as to any material fact exists, which the party must do by a required statement of material facts and any supporting documentation submitted with the requisite motion. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-32, 50 NRC 155, 158 (1999). The opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation, or the facts will be deemed admitted. See CLI-93-22, 38 NRC at 102-03. When responding, the opposing party may not rely upon mere allegations or denials but must submit “specific facts showing that there is a genuine issue of fact.” [footnote omitted] 10 C.F.R. § 2.749(b).

LBP-01-30, 54 NRC 231, 235 (2001).

On some occasions, we have had to look also to more specific standards instructing us how to proceed when faced with opinions from competing experts.<sup>24</sup> Although some experts are involved here, the central dispute is not over experts’ technical opinions but about laypersons’ factual observations. In this situation, when what is at stake is whether a trial must be held to ascertain the truth, the specific standards are quite clear, and are easily understood and applied: “since the burden of proof is on the proponent of the motion, the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn.”<sup>25</sup>

In this instance, the Applicant (supported by the Staff) is the moving party, and OGD is the party opposing summary action. Therefore, we must — at this stage of the proceeding but for present purposes only — give credence to the fact-related material OGD has put forward,<sup>26</sup> including specifically the sworn declaration of Sammy Blackbear, and we do so in the next subsection of this opinion.<sup>27</sup>

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<sup>24</sup>For example, we referred earlier in this proceeding to “the corollary tenets that, among other things, instruct us at the summary disposition stage not to try to decide ‘which experts are more correct.’” LBP-01-39, 54 NRC 497, 509-10 (2001). See also LBP-02-1, 55 NRC 11, 15 (2002).

<sup>25</sup>*Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994) (citing 10A Charles A. Wright et al., *Federal Practice and Procedure* § 2727 (2d ed. 1983)).

<sup>26</sup>As we observed above, the Applicant did not seek to reply to the fact-based material submitted with OGD’s response. In two respects, then, we have no alternative but to accept OGD’s version as correct for purposes of ruling on the Applicant’s motion. The Applicant will, of course, have an opportunity at the trial to put forward its, and Mr. Bear’s, version of the facts.

<sup>27</sup>In contrast to the limited role allowed us at the summary disposition stage, where we simply determine whether factual issues exist, it is our task at a live evidentiary hearing to resolve those factual disputes. For example, for non-expert witnesses, we do so by such means as evaluating their credibility, which can be ascertained not only by detecting any inconsistencies in their testimony but also by observing their demeanor.

## **B. The Interpretation of the Law**

With the stage thus set, we need to consider — and, if necessary, to reconcile — a number of legal doctrines and the manner in which they apply to the situation presented. Specifically, we must first determine whether, and if so to what extent, we are permitted to look into (or are foreclosed from inquiring about) matters of Tribal governance. Second, we must ascertain what are the nature of the “low-income populations” or “impoverished citizens” (as described by the Executive Order and the Commission, respectively) that the environmental justice concept is intended to protect from disparate impact. Third, we must focus upon how a NEPA balance is struck between a project’s potential adverse environmental impacts and any offsetting economic or other benefits that may be anticipated.

Once those doctrines are clarified and their applicability here settled, we can turn to the task of evaluating the parties’ assertions about the facts. Once again, the principles that guide procedure at this stage call on us to determine whether there are material facts in dispute that preclude a summary resolution on the documentary record; if so, a trial, at which live testimony will be heard, is mandated.

### ***1. The Deference Owed to Tribal Governance***

When presented disputes involving Tribal members, the Supreme Court has long recognized and deferred to a Tribal government’s ability to create its own substantive laws to assist in Tribal governance and its ability to enforce those laws in Tribal forums. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Williams v. Lee*, 358 U.S. 217 (1959). This policy has led lower federal courts to encourage Tribal self-governance and to refrain from interfering in intratribal disputes. *Wheeler v. U.S. Department of the Interior*, 811 F.2d 549, 551 (10th Cir. 1987). In furtherance of this policy, the Supreme Court has recognized Tribal courts, if established,<sup>28</sup> as “appropriate forums for the *exclusive* adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.” *Santa Clara Pueblo*, 436 U.S. at 65 (emphasis added).

This policy of deferring to Tribal governance is, however, not absolute. The courts have also recognized that in some “special situations” the need for agency action may prevail over the desirability of allowing Tribal self-governance. *Wheeler*, 811 F.2d at 551-52. There is some suggestion in that regard that circumstances might permit intrusion into the realm of Tribal governance where no Tribal forum for interpreting Tribal law exists. *Nero v. Cherokee Nation of*

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<sup>28</sup>We are told that the Skull Valley Band has no established Tribal courts, although the Tribe is said to contract from time to time for judicial services, predominantly for tax issues. Blackbear Decl. at 3.

*Oklahoma*, 892 F.2d 1457, 1465 (10th Cir. 1989). And one court has directed the Bureau of Indian Affairs, on an interim basis, to choose between rival Tribal factions in order to allow the agency to interact successfully with the Tribe pending action by the Tribal court. *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983).<sup>29</sup>

The situation before us might be one of the special situations envisioned in *Wheeler* and *Nero*, for it differs in a material respect from many of the leading Tribal governance deference cases. Typically, those cases involved suits brought against the Tribe by disgruntled Tribal members complaining of Tribal action. In other words, there the Tribe did not initiate the process leading to the requested involvement of a non-Tribal government adjudicator.

In contrast, here the Tribe itself initiated the involvement with the non-Tribal adjudicator, first by entering into a business relationship with an organization seeking an NRC license (albeit for a Reservation-centered facility), and then by intervening in this licensing proceeding. For purposes of applying the deference doctrine, these affirmative extra-Tribal steps may invoke an exception by placing the Band in a position distinct from that of a Tribe that is unwillingly forced to defend its purely intratribal action, or on-reservation activity, in an outside forum.

For reasons that shall appear, *we need not now resolve the “exception” question. Nor need we now determine the precise boundary* between (1) a legitimate look into the factual disputes surrounding the environmental justice issue (*see pp. 189-91, below*) and (2) a forbidden foray into matters of Tribal governance. *In the circumstances of this case, the location of that boundary is likely to prove very much fact-driven — and at this point we do not have the facts.*

What we do have — even if the Tribal governance deference doctrine admitted of *no* exceptions — is a right to examine the facts related to environmental justice at least sufficiently closely to determine our own jurisdiction to proceed, taking the proverbial “peek at the merits” to the extent necessary to resolve jurisdictional issues.<sup>30</sup> In the course of performing that exercise at trial, we are also likely to become more informed about whether any exceptions to the Tribal governance deference doctrine should come into play here. In short, it remains to be seen whether we are dealing with an issue of Tribal governance, or a matter of some other nature.

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<sup>29</sup> Recognizing the agency’s obligation to interact with the Tribal government, the Court insisted that BIA make this interim choice pending action by an existing Sioux court system that was capable of successfully resolving the dispute. 708 F.2d at 339. The Court stressed, however, that BIA’s decision was intended to be only an interim one, which would be supplanted by the Tribal court’s eventual ruling. *Ibid.*

<sup>30</sup> *See Hardy v. Wigginton*, 922 F.2d 294, 297 (6th Cir. 1990) (in the context of a habeas corpus issue, citing *International Association of Machinists v. Trans World Airlines*, 839 F.2d 809, 812 (D.C. Cir. 1988), to draw upon the time-honored “peek at the merits” practice that courts may follow when deciding jurisdictional issues). *See also Nestor v. Hershey*, 425 F.2d 504, 511 (D.C. Cir. 1969), explaining that courts always have jurisdiction to determine their own jurisdiction, so that when the “issue of jurisdiction is inextricably intertwined with the merits of the controversy,” courts may examine the merits to the extent necessary to determine if they have jurisdiction to hear the issue.

## 2. *The Definition of “Low-Income Populations”*

The environmental justice Executive Order is intended not to create new enforceable rights in individuals, but simply to focus agencies on their existing environmental responsibility to see to it that their actions — here the licensing of the proposed PFS project — do not have a disparate environmental impact on minority or impoverished populations.<sup>31</sup> OGD claims that the PFS project will have such an impact on its members, and details a number of such impacts.

### a. *Preliminary Matters*

The Applicant and Staff have a twofold initial response. The first is that some of the impacts OGD now cites are outside the scope of its admitted contention. The other is that the information provided by their experts and by the Band indicates that the OGD-averred adverse impacts simply do not exist. We address both of those preliminary arguments now.

(i) OGD must overcome the assertion that it has not properly pleaded the adverse impacts — the operational noise, the visual intrusion, and the cultural insult — which we recognize (*see* p. 197, below) as furnishing the underpinning for its environmental justice claim. As the Applicant and Staff would read Contention OGD O, these items were not embraced within the contention as first written and as later limited by our order admitting it.

As we said not so long ago on another question in this case, that argument has something to commend it, but not enough. LBP-01-39, 54 NRC at 519. Given the nature and location of this proposed facility, we read the reference in Basis 1 (of what is, after all, an “environmental justice” contention) to “negative . . . sociological impacts” as embracing a number of such impacts. What is important is that the Applicant and Staff had notice of the nature of those impacts as they prepared for trial (and, in the Staff’s case, as it conducted the environmental analysis leading to the preparation of the Environmental Impact Statements).

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<sup>31</sup>OGD’s papers go beyond the disparate impact issue to allege racially discriminatory siting. Even if OGD is correct that, notwithstanding its holding in *LES* (*see* p. 182, above), the Commission seemingly left some leeway for us to consider such a claim in another case if it were well pleaded, that leeway seems to have been removed by the Commission’s further teachings in this very proceeding. *See* CLI-98-13, 48 NRC at 36, indicating quite clearly that “the focus of the Board’s environmental justice inquiry” here is to be on “disparate impacts,” not “questions of motivation and social equity in siting.” Even if that limitation were not in place, we are not prepared to agree that targeting of a group as the possible beneficiary of current government-related action can, in a manner that is cognizable before us, have a racially discriminatory effect upon that group if it is currently free (despite the history that led to its situation) to choose to pass up the opportunity so provided.

Of course, OGD would argue that the Band was deprived of the freedom to make that choice because, in seizing the PFS opportunity, its purported “leadership” did not speak for the entire Tribe. That argument, however, simply presents in a different fashion the underlying issue on which this case turns, which receives our full consideration elsewhere herein.

For this contention, the nature of the various impacts is not difficult to comprehend, and to the extent specificity is needed, it was provided by the discovery process. That some of the impacts might also have provided a basis for other contentions, or other bases, that were excluded from consideration, does not limit their relevance here. Indeed, that they were mentioned elsewhere indicates the Applicant and Staff could hardly have been unaware of them; the Staff's discussion of them in the DEIS is further evidence that they were not hidden from view — to the contrary, they are fairly obvious.

We need add only this. We also said in LBP-01-39 that once a contention is deemed sufficiently serious to be admitted into the proceeding (by passing the very stringent threshold screening standards that keep many from being litigated at all), “any number of *later developments* will also guide and control just how that contention does or does not move into the actual hearing process.” *Id.* at 508 (emphasis added).

To be sure, we said that in the context of an extremely complicated technical issue, one that had led the Applicant to amend its application on more than one occasion. Those circumstances are not present here. But other telling circumstances are.

In the first place, the contentions were drafted, and the late January 1998 oral argument on them was held,<sup>32</sup> before the Commission issued its April 3, 1998 *LES* decision defining the contours of environmental justice claims. Second, we had not anticipated, before we ruled on the admissibility and scope of the various contentions, that there would arise a question as to the distribution — or lack thereof — of the lease income to OGD's members. In the circumstances of these “later developments” (*see above*), there is occasion to look at the admitted contention in the new light cast by those events.

We are told by the Staff that when the Applicant conducted discovery, OGD indicated clearly that certain material that had initially been presented as part of a rejected contention (*see note 11, above*) (as well as in a rejected basis for the pending contention (*see note 12, above*)) was at that later juncture being relied upon to support the accepted contention. Staff Response at 13-14. *In this fashion, the Applicant was put on greater notice of the nature of the allegations it might have to defend against.* The Staff as well learned which areas of its DEIS might therefore need to be upgraded in producing the FEIS.

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<sup>32</sup>When oral argument was held on admitting the contention, and until 2 months ago, this Board was under the chairmanship of Judge G. Paul Bollwerk, III. We pointed out in LBP-01-39, issued late last year, that Judge Bollwerk, acting on December 19, 2001, in his capacity as Chief Administrative Judge of the Licensing Board Panel, had appointed another Board, chaired by Judge Farrar, to take over many of the matters remaining in this proceeding, with the original Board retaining jurisdiction over specified matters. 54 NRC at 499 n.3. As we there noted, there is no lack of continuity in the work of the two Boards, and indeed references to “our” past actions, or those of “this Board,” are not intended, unless specifically noted, to distinguish between the Board chaired by Judge Bollwerk and the Board chaired by Judge Farrar (both of which have the same technical members).

In addition, it could not have come as a surprise that residents of the Reservation complaining of “negative sociological impact” would be objecting to the fundamental, obvious intrusions the project’s physical presence would impose on them and on their interaction with each other and with the land — the noise of operations, the visual blight on the landscape, and the invasion of Reservation sanctity. As we see it, the impacts now in question were contained in the original OGD papers,<sup>33</sup> referenced later during the discovery process, and always conceded to exist. We therefore think it permissible to consider them here.<sup>34</sup>

Taking this approach to the contention is, we think, consistent with an action the Commission took in dealing with an analogous situation in its *LES* decision on environmental justice. The Commission there commented unfavorably on the Licensing Board’s decision to require the submission of certain evidence at the hearing after earlier rejecting for consideration the subject about which the evidence was to deal. CLI-98-3, 47 NRC at 109. Even though the Commission also found that the Board there had left its action “unexplained,” the Commission allowed the Board’s action to stand, given the circumstances there presented. *Ibid.*

Here, in contrast to the *LES* situation, this Board is, prior to the hearing, giving advance notice of, and providing an explanation for, our decision to allow further consideration of a subject some of the parties may have thought to have been previously excluded from consideration because it was also included in rejected assertions. In light of the reasons that underlie our explanation, we do not see that

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<sup>33</sup>To repeat, those impacts were mentioned not only in a rejected contention (lettered “P”, *see* note 11, above) but also in a rejected basis for the admitted and pending environmental justice contention (*see* note 12, above).

<sup>34</sup>We focus here on the disturbance to OGD members caused by the direct, physical impact of the project on the Reservation. The Applicant and Staff rely, however, on the Supreme Court’s having upheld the Commission’s view that a matter too remote to be cognizable in our proceedings was the psychological fear (of radiation exposure and the like) induced by the presence of a *neighboring*, unwanted facility that met applicable licensing standards. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776-78 (1983), *aff’g Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-39, 12 NRC 607 (1980) and CLI-81-20, 14 NRC 593 (1981).

We think the concerns before us here to be of a different nature — less ephemeral and less speculative — than those raised by the *Three Mile Island* plaintiffs. As we see it, a facility put directly *on one’s homelands* — resulting in physical invasion and effects that are direct and palpable, not indirect and evanescent — will have cognizable adverse impacts (more substantive than those described in *Metropolitan Edison*) on the peaceable enjoyment of the benefits that otherwise would be derived from that property.

The Commission recognized as much in *LES*, when it distinguished noncognizable “psychological effects” stemming from such things as “a fear of nuclear power” from cognizable environmental impacts which “will flow directly” from the *physical presence* of a “heavy industrial facility nearby.” CLI-98-3, 47 NRC at 109 n.26. *Cf.* Restatement (Second) of Torts §§ 46, 312, 436, 436A (1965), indicating that to recover for emotional distress, a tort claim based on negligence must involve *some physical injury* (which a claim based on deliberate conduct need not show) and that recovery by plaintiff for emotional distress in a suit based on intentional or reckless conduct directed at a third party in the plaintiff’s presence requires a *showing of physical harm*.

In any event, the Staff included discussion of the matters at issue here in the DEIS, while discussion of “psychological fear” matters is off-limits. This action confirms the inherent difference between the two types of alleged impacts.

any ultimate rights of the parties have been invaded, even though their short-term expectations may not have been met.<sup>35</sup>

(ii) The Applicant's second threshold argument is that its experts have established, in line with the Band's view, that many other environmental impacts of which OGD complains do not exist, or at least are nowhere near the offensive level that OGD claims. In large measure, we agree with the Applicant, as will be seen from our analysis of the facts in subsections I.C.1.a-b, below. But as we have pointed out above, and as the Applicant and Staff have conceded, this facility brings with it some adverse impacts, and they are not trivial.

How those impacts can be offset in a NEPA balance remains, therefore, an issue to be addressed. Indeed, as will be seen in Section I.B.3 below, it is a key point in the case. But first, having resolved the Applicant's preliminary arguments, we turn to the definitional aspects of the environmental justice issue.

#### *b. Environmental Justice Populations*

The environmental justice doctrine is supposed to focus an agency on protecting minority or low-income populations or, as the Commission put it, impoverished citizens. But neither the Executive Order nor any other readily available authority tells us how we are to go about defining or circumscribing such "populations" when the answer is not obvious. On that score, the Commission indicated in *LES* (47 NRC at 100) and repeated here (49 NRC at 36) that some of the answers may "become apparent only by considering factors peculiar to those communities."<sup>36</sup>

Here, the Band — the large community that would have drawn attention as being impoverished when the project was first being considered (*see* p. 177, above) — has welcomed the project, and is not now complaining of any environmental injustice. The Applicant's and the Staff's approach, although not framed precisely in terms of our definitional question, would have that be the end the inquiry.

We think not. The Band as a whole may well be benefitting as a result of, and not be complaining about, the project. *That does not provide the answer; it only reframes the question.*

As reframed, our inquiry now focuses, at OGD's urging, on a subgroup of the larger community, a smaller but distinct and well-defined population: those who are suffering a *disparate burden, bearing the adverse environmental consequences of the PFS project while remaining impoverished as others have their situation*

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<sup>35</sup>This somewhat peculiar procedural setting may explain why the Applicant's motion did not deal factually with the lease payment and other grounds on which we now deny that motion (*compare* p. 181 & note 26, above, *with* p. 198, below). The Applicant will, however, have full opportunity to present all its relevant evidence on all decisive matters at the hearing.

<sup>36</sup>To be sure, the Commission was speaking there of defining the "effects," not the "populations." But we nonetheless are able to take guidance from its approach.

*improve*. Just as in the *LES* proceeding the crucial disparate impact was felt by only a portion of the community at large — and indeed eventually focused on a particularly disadvantaged subgroup, namely “pedestrians”<sup>37</sup> — here we perceive no necessary bar to considering the impact of the project on less than the full complement of Band membership.

As we discuss at greater length below (pp. 191-93), an aspect of NEPA involves balancing environmental costs against economic (or other) benefits. A project’s “disparate impact” can thus stem from either (1) a disparity in how the environmental burdens of the project are felt by different populations, or (2) a disparity in how the net impact of the project — as measured by the balance of environmental burdens and economic benefits — is felt by different populations.

In that context, and under the view of the facts we must take at this stage, OGD’s members are indeed “disadvantaged” in relation to Mr. Bear and his leadership allies — the OGD group is receiving little or nothing in benefits from the project to offset its adverse environmental impacts, while Mr. Bear and his favorites (while bearing no more of the burdens) are receiving most, if not all, of the offsetting economic benefits. If that is true, it may be that only the OGD group remains an impoverished population within the meaning of the environmental justice rubric; the Bear group may no longer fit that mold.

Our manner of inquiring into whether OGD enjoys protected “population” status, or is simply caught up in a Tribal governance matter, is reinforced by the line of pre-NEPA federal court cases invalidating the Department of Housing and Urban Development’s placement of low-income housing in a manner that had a disparate impact on a disadvantaged portion of a community. In those cases, it was not determinative that a city’s duly-chosen overall leadership had fully concurred in the placement of the housing. What was determinative was the impact of that housing on the disadvantaged portion of the population. That group, voiceless in the city’s deliberations, was entitled to be heard by the court and to be relieved of the undue burden upon it. *See Gautreaux v. Romney*, 448 F.2d 731, 737 (7th Cir. 1971) [Chicago]; *see also Shannon v. U.S. Department of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970) [Philadelphia]. Had *Gautreaux* been brought after NEPA had been implemented and the Executive Order issued, it could, we think, have fit quite well within the “environmental justice” rubric.<sup>38</sup>

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<sup>37</sup> See CLI-98-3, 47 NRC at 107.

<sup>38</sup> We perceive recognize that (1) the theory of these pre-NEPA cases, as presented by the plaintiffs at the time, was one of racially discriminatory siting, and that (2) no such theory is permissible before this Board. But what we see in the housing cases is the emergence of a different principle, one that is instructive here. That is, those cases teach that even though a governing body’s *overall leadership* has given its blessing to a project and welcomes its presence, the negative impact of that project on a *disparate subgroup* of the community at large may be considered by the tribunal before which a challenge to the project is brought. In those pre-NEPA housing cases, the court challenges happened to be based on racial discrimination; under current law, they could just as well, like the matter before this Board, have been based on a type of disparate impact.

So too here. If Mr. Blackbear’s allegations are true, it may be that the Band as a whole now holds a privileged status vis-a-vis OGD, and that only OGD’s members fit the description of “low-income populations” or “impoverished citizens.” But we find ourselves unable to decide as a matter of law how the term “population” should be defined. As we see it, *the nature of the problem defines the scope of the population*. Or, as the Commission put it (*see* p. 189, above), the answer may “become apparent only by considering factors peculiar to” the situation at hand.

In other words, just as we found with respect to the jurisdictional issue about the reach of “Tribal governance,” we have to “peek at the merits” to resolve this definitional matter about the application of the term “low-income population.” Here too, then, we come to no conclusion other than that we must go to hearing.

### **3. *The Balancing of Environmental Impacts***

As seen in the foregoing section, it may prove appropriate for OGD to challenge the project for its disparate impact on OGD’s members, even if the OGD view is not shared by the Tribal leadership. The next question concerns the nature and consequences of those impacts.

Under the practices that various agencies have developed under the National Environmental Policy Act (and at the risk of oversimplifying the subject), it is commonly understood that an agency has several basic options when, after the proverbial “hard look” is taken, a project it proposes to license is seen to have potential adverse environmental consequences.<sup>39</sup> At one extreme, a project might be disapproved entirely, on the grounds that its adverse impacts are too severe. More typically, aspects of all or part of a project might be altered to reduce the adverse impacts to the point at which they, and the project, are acceptable.<sup>40</sup> Once those adverse impacts have been reduced to the extent practicable, an agency is free to proceed to license the project, if it determines that the project’s overall benefits exceed its environmental and other costs and that no obviously superior alternatives are in sight.<sup>41</sup>

Here, it is a relatively simple matter to apply those precepts. Both the Applicant and the Staff concede there are some adverse environmental impacts associated with putting this project on the Skull Valley Reservation. Because the Applicant otherwise has no right to use those lands for its own purpose, the Applicant and

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<sup>39</sup> *See, generally*, the Council on Environmental Quality’s regulations guiding executive branch agencies, 40 C.F.R. Chapter V, §§ 1500 *et seq.*

<sup>40</sup> *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 82-83 (1977).

<sup>41</sup> We mean in the above analysis to describe generally the internal procedures an agency may go through when it wishes to incorporate environmental factors thoroughly into its decision-making process, not to imply that reviewing courts can to the same extent force an agency’s hand on the substance of its determinations. After all, as judicial review has confirmed, NEPA is only a procedural statute that “merely prohibits uninformed — rather than unwise — agency action.” *See, for example, Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

Staff both recognize that when the NEPA-mandated environmental balance is struck with an eye on the Executive Order, *the only justification for imposing those adverse impacts on an impoverished population is the offsetting benefits that will accrue to the Band's members from payments for use of Tribal lands.*<sup>42</sup>

We would expect that, more typically, a standard NEPA environmental justice contest (if there is such a thing) would feature as the disparate impact the environmental burden being felt by all the disadvantaged neighbors of a proposed project, in contrast to the lack of burden imposed on the further-away, more-privileged, classes. Here, the situation is different: the environmental burden on those most affected by the project — the Tribal members living on the Reservation — is, as far as we have been told, the same for all.

*The disparity comes about, then, not in the direct environmental burden, but from the net impact as measured by the NEPA-sanctioned balance of environmental burdens and economic benefits — some obtain an economic benefit from the project to offset its environmental burdens, while others do not, experiencing only the burdens. We hold that this type of net disparity can be as much a matter for environmental justice review under NEPA — a statute that sets up a process in which the classic burden/benefit balance has always been central — as is the more usual disparate environmental burden viewed alone.*

We do not mean to imply by the above analysis that the deeply held beliefs of OGD's members — about the overall objectionable nature of this project's invasion of lands they view as sacred — can be eradicated by a mere monetary payment. That is not how we perceive the purpose of the funds supposed to be provided under the lease — they do not represent a “payoff” and should not be seen as a “sellout.” To the contrary, those funds can represent, and create, something else entirely: *a significant, indeed life-altering, sociological improvement for a people that is described by Mr. Blackbear (Decl. ¶396) as “in abject poverty”<sup>43</sup> — better food, shelter, clothing, health care and education.* All of these beneficial changes, it was seemingly envisioned by policymakers and presumably intended by the Applicant, would flow their way from the lease income and would represent the offset for the “negative . . . sociological impacts” on which the environmental justice contention was founded.

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<sup>42</sup>As the Applicant puts it, “[the DEIS] clearly shows that the economic impact of the [facility] on the Band is positive, in large part because of PFS lease payments to the Band.” PFS Motion at 7. The Staff says the same thing in this fashion: “The proposed [facility] would provide substantial lease income to the Skull Valley band and would result in a large positive impact.” DEIS at 6-31.

<sup>43</sup>The declaration there indicates that “*Leon Bear and his cohorts have grown rich, while the majority of the Goshutes living on the Reservation remain in abject poverty.*” *That poverty is movingly described* as being “in inadequate housing, without working plumbing or adequate sewage facilities or weatherization, without reliable motor vehicles, with restricted education, and without meaningful employment opportunities.” In that same vein, we are told that “some of the families have little or no utilities, going without adequate heat or any electricity for years.”

To be sure, the underlying desire of OGD's members is that the project not invade their Reservation, but their strong objections have thus far not carried the day. So long as that remains so, it would seem vital — both to the advancement of their welfare and to the success of the project which others in the Band welcome — that the contemplated lease payments be distributed to all the affected Tribal members. For both the Applicant and Staff have in effect conceded that the project cannot go forward unless the NRC finds it provides some sort of benefits to overcome the environmental costs it imposes upon affected Tribal members.<sup>44</sup> *To further disadvantage some among that population does not provide the solution — it exacerbates the problem.*

For OGD's members, the requisite benefits are not flowing, according to their description of the facts (which at this juncture, for the reasons stated earlier, must be taken as true for purposes of ruling on the Applicant's pending motion). We address the significance of what OGD says is happening in the next section.

### **C. The Facts in Dispute and the Facts Needed**

Having reviewed the overarching legal principles that must come into play in resolving Contention OGD O, we now can turn to analysis of various fact-specific matters, so as to determine whether there are any genuine issues of material fact that require a hearing for their resolution. In making this determination, we find it useful to discuss the facts concerning environmental impacts in terms of the remaining three bases that fleshed out the environmental justice contention (*see* p. 179, above). That discussion is followed by consideration of the situation involving the lease payments.

#### ***1. The Impacts on the Environment***

As indicated below, we find that there are no factual disputes underlying Bases 5 and 6 that would require a hearing to resolve. That is because the types of environmental impacts there described have proven to be of themselves not material to an ultimate decision about the facility. But the same cannot be said about the matters covered by Basis 1, as we understand it.

##### ***a. Cumulative Impacts***

In its Basis 5, Contention OGD O addresses the disproportionate impact the proposed facility will have — alone and combined with the other hazardous

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<sup>44</sup>Of course, the future of the project is also subject to the State's safety challenges and to the environmental contentions also awaiting trial. In other words, nothing we say here is intended to indicate any view whatsoever on the merits of those safety and environmental issues.

waste facilities located within a 35-mile radius of the proposed site — upon the local Tribal population. OGD asserts that the environmental assessments of the proposed facility, initially conducted by the Applicant and supplemented in the Staff’s DEIS,<sup>45</sup> fail to address these important issues and therefore violate the environmental justice Executive Order’s embodiment of NEPA.

As explained below, however, due to the Band’s contracting with the Applicant for use of Reservation land, and the analysis conducted by the Applicant and Staff — unchallenged here by OGD — concerning the impacts this facility will have, the Board finds OGD’s arguments to be unpersuasive when applied to the Band as a whole. Thus, the Board concludes that there no longer exists a dispute of material fact regarding this point and grants summary disposition to that extent.

OGD contends that the Executive Order requires the agency to identify and to address the “disproportionately high and adverse health or environmental effects” of the facility upon the surrounding minority, low-income community. OGD Contentions at 32. Locating the facility on the Reservation, OGD argues, will limit the exposure of the facility’s adverse impacts exclusively to Indian Tribes and therefore they will be disproportionately subjected to increased risks of cancer and other related injuries. OGD Response at 15-16. Because, according to OGD, Tribal members will be the exclusive victims of these adversities, OGD urges that the Applicant, and subsequently the Staff, must address this disparate impact as part of their environmental assessment. *Id.*

OGD’s argument fails to address a key component of this scenario — namely, that the Skull Valley Band, as representative of those living on the Reservation, was a full partner in the Applicant’s plan to construct the facility. Because it is being allowed to put the proposed facility upon the Reservation in return for the lease payments, the Applicant is insulated from accusations by the intended recipients that its facility will disproportionately affect their community at large, compared to those less disadvantaged who live in other, more distant, locations.<sup>46</sup>

OGD also uses Basis 5 to contend that the Applicant (and, by implication, the Staff in its subsequent DEIS) failed to analyze adequately the cumulative impacts created by adding this facility to an area that is already home to numerous other hazardous waste facilities. According to Contention OGD O:

[w]ithin a radius of thirty-five (35) miles the members of OGD and the Goshute Reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training

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<sup>45</sup>The DEIS has recently been duly transformed into the FEIS (*see note 2, above*). Because the pending motion papers naturally refer only to the DEIS and no party has called our attention to anything in the FEIS that changes the nature of the matters we must address here, we limit our consideration to the DEIS except for one background matter (*see p. 177, above*).

<sup>46</sup>The Applicant’s reliance upon the Band’s agreement to counter the assertion about the facility’s disparate impact, carries with it the implication that the entire host community affected by the facility will receive the “benefits” of the arrangement. This foretells our concern about the distribution of the rental income from the agreement and the net burden/benefit balance.

Range South, Desert Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, Aptus Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

OGD Contentions at 28. Because these facilities are located within such proximity to the proposed facility, OGD contends that there must be a full analysis of the cumulative impacts of all these facilities.

That the area in question is home to numerous hazardous waste facilities is a given; but OGD's assertion that the Staff and the Applicant have failed to address the cumulative impacts of siting the facility in this area is unfounded. To the contrary, the Staff devotes an entire DEIS section — Section 6.3, entitled "Cumulative Impacts" — to the discussion of the potential cumulative impacts that will arise due to the construction and operation of the proposed facility. *See* DEIS at 6-32 to 6-38.

Going beyond the Staff's discussion in the DEIS, the Applicant, in support of its Motion for Summary Disposition, supplied two expert witnesses' lengthy declarations that discussed the potential cumulative impacts of siting the project on the Reservation. *See* Liang Decl.; Carruth Decl. In his discussion, Dr. Liang determined that the distance between the other hazardous sites and the Reservation, the geography of the area, and the arid climate makes cumulative impacts from surface or groundwater transmission "not feasible." Liang Decl. at 5. As to hazardous materials, after studying the other facilities, PFS expert Carruth determined that the only conceivable threat would be from air pathways, and the cumulative air quality analysis for each of those facilities indicated air pollutants would be "well below" any level of significance. *Ibid.*; Carruth Decl. at 11, 33. Therefore, Dr. Carruth concluded that combining this low level of pollutants with the minimal emissions anticipated from the proposed facility would result in insignificant cumulative impacts upon the Reservation. *Id.* at 33.

In contrast to this detailed analysis presented by the Applicant, OGD did not supply any supporting documents to substantiate its claim that there will be adverse cumulative impacts. As has been stated in previous opinions here and elsewhere, the responding party cannot rely upon mere denials and unsupported allegations to answer a motion for summary disposition, but must demonstrate in some positive fashion the existence of a genuine issue of material fact in dispute.<sup>47</sup> In other words, however sincere its beliefs, OGD cannot simply rely upon its own presumption that there will be such effects; without providing supporting evidence of possible cumulative effects from the surrounding hazardous facilities, OGD's position cannot withstand the contrary declarations offered by PFS and the Staff.

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<sup>47</sup> *See, e.g.,* LBP-02-2, 55 NRC 20, 30 (2002); *see also* *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981).

Rather than present supporting documents that disputed PFS's analysis, OGD argued that it was premature for us to rule in light of the number of outstanding contentions that remained to be resolved before the full effects of the proposed facility could be determined. OGD asserts that the outcome of any one of these other contentions may affect the cumulative impact analysis. Since the filing of OGD's brief in June 2001, however, the Board has addressed, at least preliminarily, all outstanding contentions relevant to this issue.<sup>48</sup>

In terms of the contentions that survived the preliminary stages and whose merits will thus be addressed at the April hearing, only Utah O, which involves the impacts of the proposed facility upon the underlying groundwater, can be considered relevant to this cumulative impacts discussion. Even if we were to assume that the proposed facility would have an adverse groundwater impact,<sup>49</sup> it remains that OGD has — in the face of the Applicant's presentation — come forward with no showing that the surrounding hazardous waste facilities are contaminating the groundwater and that these contaminants are traveling to and causing contamination of the aquifer underlying the Reservation.<sup>50</sup> Because OGD has not presented any supporting documentation to substantiate its claims about the effects of other facilities, the Applicant is entitled to summary disposition of this matter.

*b. Property Values*

Basis 6 of Contention OGD O states that the Applicant's environmental report fails to address the impact of the proposed facility upon property values of surrounding Reservation lands. OGD believes construction of the facility on Tribal land will significantly decrease the value of its members' property. In particular, OGD's brief contends, the environmental analysis fails to address the unique cultural and spiritual values that members of all Indian Tribes assign to land. We note that all the Reservation land is held by the United States in trust for the Band as a whole; Tribe members own individually (in contrast to their

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<sup>48</sup>The Board has until today deferred ruling upon the admissibility of Contention Utah Security J (*see* LBP-01-39, 54 NRC at 524 n.35), but the issues involved in that contention would not in any way be expected to affect the cumulative impact analysis.

<sup>49</sup>The outcome of that particular dispute seems more likely to be either a finding that no material impact is expected, or a determination that the Applicant must take steps to avoid any such impact, neither of which results would benefit OGD's position. (We make that general observation about Utah O without intending to prejudge the specific evidence that may be provided us at the hearing. But in light of our general view on that score and the Commission's admonition that we urge the parties to settle issues susceptible to such resolution (*see* Section II of this opinion), we suggested at the last prehearing conference call (Tr. 2913, Feb. 6, 2002) that the parties attempt to settle that issue.)

<sup>50</sup>The only evidence offered concerning groundwater contamination was contained in the Liang Declaration. In there analyzing the hazardous waste facilities that surround the Skull Valley Reservation (Decl. at 5-7), Dr. Liang determined that contaminants released into the groundwater would be minimal even if they were able to reach the aquifer below the Reservation, but it is highly unlikely that could occur.

common interest in the land) only the structures placed on the land. Allison Decl. at 3.

We fully acknowledge the special relationship of Tribe members to their land. But we find that this issue has been adequately addressed by the DEIS. The DEIS discusses (at 6-30 to 6-31) the Reservation's procedures for alienating land and the impact that the construction and operation of the facility will have upon housing demand. In addition, the DEIS specifically recognizes the Tribe's use of the land for cultural and spiritual activities and discusses the impacts that the facility will have upon this use of the land.

Again, an initial answer to OGD's argument is provided by the voluntary nature of the agreement into which the Band entered to bring the facility to the Reservation. In light of that agreement, the main issue underlying this dispute becomes the distribution of the lease payments agreed to by PFS, which will allow the Band to improve its Tribal infrastructure by improving its educational and social service systems. Thus, as the Applicant's brief would have it, any decrease in land value should be offset by the lease and tax payments and the improvements generated by both.<sup>51</sup>

As indicated by the previous discussion, the Board concludes that there no longer remains any dispute of material facts regarding this matter. Thus, the Applicant is entitled to summary disposition on this point as well.

*c. Adverse Impacts*

What the Applicant is not entitled to, however, is a ruling that there are *no* adverse environmental impacts associated with the physical presence of the proposed facility; indeed, we do not understand either its or the Staff's arguments to embody such a claim. And, as we have seen above, there are a number of direct and simple — but significant and potentially extremely burdensome — adverse impacts that fit within the ambit of the sociological impacts referred to in the contention's Basis 1.

To repeat, these are the operational noise, the visual impact, and the cultural insult that the presence of the facility will bring to the Skull Valley Reservation, all now of relevance here (*see* pp. 186-89, above). We have seen that principles of environmental justice would preclude making OGD's members — if they do in fact prove to be a protected "population" — bear disproportionately (from a NEPA balancing standpoint) the net effect of these adverse impacts, whose degree might be contested but whose existence is unchallenged. That brings us to another part of the case that requires a hearing to resolve.

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<sup>51</sup> PFS Dispositive Motion at 19-20. This assumes the appropriate distribution of the lease payments, the need for which we turn to shortly. *See* Section I.C.2, below.

## 2. *The Payments Under the Lease*

The matter of the allocation of the lease payments presents itself in unusual fashion. In most summary disposition proceedings, the moving party presents asserted undisputed facts which it claims warrant a ruling in its favor. As we have seen (pp. 193-97, above), the Applicant was successful to the extent it employed that approach. But that success carried it only so far, for OGD's countering argument introduced a whole new set of asserted undisputed facts in the Blackbear declaration. Because, once again, those stand uncontroverted at this point, the moving party cannot hope to prevail at this stage if the asserted facts presented are relevant and material.<sup>52</sup>

We explained in Section I.B.3 why those facts are material to the issues we must decide. And even a cursory examination of them, as reflected in the Blackbear declaration, reveals their relevance to establishing the propositions for which they are presented. Thus, we need devote little discussion to them. We note merely that Mr. Blackbear claims — and, again, those claims are not refuted at this point and must be taken as true for present purposes — that the lease payments, said to amount already to “millions of dollars” (Decl. ¶ 53.d at 10, ¶ 258 at 54), have been misappropriated by Mr. Bear and converted to his own use and that of his allies and favorites (Decl. ¶ 283.c at 58, ¶ 300 at 61, ¶ 327 at 64, ¶ 334 at 65, ¶¶ 354-355 at 67-68).<sup>53</sup>

Going on, the Blackbear declaration cites examples of OGD members who sought the benefits of and an allocation from the lease payments and other funding sources to meet their most basic needs but who, having opposed the project, were turned down (Decl. ¶ 53.g at 12, ¶¶ 275-276 at 57, ¶¶ 340-347 at 66-67, ¶¶ 375-376 at 70). On the other hand, Mr. Bear is said to be making extraordinary purchases for his own use (¶ 53.d at 11, ¶ 277 at 57). At the risk of repetition, we point out again that we are not saying these allegations are true,<sup>54</sup> only that, uncontested as they are, the Applicant's motion cannot result in them being summarily denied — they can be resolved only at a hearing.

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<sup>52</sup> OGD did not cross-file for summary disposition. Thus, even to the extent the facts it has presented are as yet “undisputed,” it is not entitled to any relief at this point, for in the procedural posture then presented, the opposition was under no obligation to respond to those “facts.” The opportunity to do so will be presented at the hearing.

<sup>53</sup> The Blackbear declaration recounts throughout the numerous efforts he and other Band members have made to obtain an accounting of the PFS funds (and other income streams) flowing to the Tribe. It also recounts (*e.g.*, at 7, 33) the repeated unsuccessful efforts made to get BIA to intervene in an active capacity (which included filing suit against it: *Blackbear v. Norton*, Case No. 2:01CV00317C (D. Utah, filed May 2, 2001)), and the approaches made to other U.S. officials — the local U.S. Attorney, the FBI, and the Inspector General and the Solicitor of the Department of the Interior — that are said to have yielded promises but no results (Decl. ¶ 26 at 3-4; *id.* at 35). A reading of the full declaration makes it appear that OGD's members have explored every potential avenue of relief.

<sup>54</sup> Although these and other allegations are not yet proven, the Blackbear declaration says they point to a pattern of corruption (*see* p. 180, above). It remains to be seen whether, instead of demonstrating human frailty, they portray a matter of Tribal governance legitimized by Goshute culture (for example, the maintenance of Tribal discipline). On the other hand, it may be relevant that the PFS funds come from the leasing of Reservation land held for all Tribe members in common (*see* pp. 196-97, above).

The Blackbear declaration covers many other subjects, including the disputes over elections, the violation of Tribal norms, the relative standing of the protagonists,<sup>55</sup> the perception of threats, and other matters. Having found that a hearing is required, we need not delineate all these matters. As the parties see fit and to the extent we concur, some of them *may* be suitable for consideration at the hearing, but (unless shown otherwise) we do not expect to entertain matters that clearly involve only “Tribal governance,” especially given BIA’s primacy and action thereon. Some subjects do, however, seem clearly suitable for consideration there, and we list them briefly in the next subsection.

### **3. *The Evidence for the Trial***

At a minimum, and for obvious reasons, it seems certain evidence will be relevant to our determination. For instance, assuming Mr. Blackbear puts forth the same testimony about the flow of funds that is in his affidavit, of likely relevance would be a PFS (1) tabulation of all the payments it made at any point thus far to the Skull Valley Band or to any of its members, showing at a minimum the amount, form, timing, and recipient of each payment; and (2) schedule of future payments to be made if the facility is approved. Similarly relevant would be a Band accounting showing, at a minimum, (1) the amount of the payments received from the Applicant by the Band (or by any member thereof); (2) the manner in which those funds were distributed to individuals in the Band, expended on goods or services, or deposited to the Band’s accounts; and (3) to the extent the funds went into those accounts, the manner in which those funds were later distributed or put to other uses.<sup>56</sup>

These documents and any other evidentiary materials shall be made available to the other affected parties and to the Board by Friday, March 22, 2002. If Mr. Bear intends to testify at the hearing to contest the Blackbear allegations, his written testimony shall be prefiled at the same time by the Applicant and/or the Band, depending on which will be sponsoring him.

By the same token, the Staff or Band should consider providing the parties and the Board with prefiled testimony from the BIA’s Mr. Allison,<sup>57</sup> detailing his response to the relevant allegations in the Blackbear affidavit and setting out his understanding of the BIA’s authority and responsibility to bring about change in

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<sup>55</sup> According to the OGD brief (at 10), Mr. Bear is Goshute only by adoption, not by blood, and has not taken interest in Goshute social and cultural traditions. According to ¶ 8 of his declaration, Mr. Blackbear and his three children have lived on the Reservation since 1996.

<sup>56</sup> The Board is issuing today, covering proprietary information previously submitted, the protective order whose terms the parties had previously agreed upon and have been informally observing. We are not now making any determination as to whether those terms, or similar ones, should apply to the evidence now to be adduced.

<sup>57</sup> As observed above (pp. 180-81 & note 20), the Staff earlier presented an affidavit from Mr. Allison, albeit on a topic different from that now at issue, while the Band presented his affidavit on a related subject.

the situation. Or a party may wish instead to invite the direct participation of the BIA — the Staff’s partner in the preparation of the DEIS, and now the FEIS — in this proceeding, so that BIA could present these matters on its own behalf. Barring some objection of a nature we do not now envision, we would expect to approve BIA’s participation for that purpose. *Cf.* 10 C.F.R. § 2.715(c).

For its part, OGD will be expected to produce Mr. Blackbear as a witness. While his prefiled testimony may draw from his declaration, it should focus on the matters now in issue.

Of course, all affected parties may prefile other written testimony upon which they intend to rely, such as might be related to the reach of Tribal governance (*see, e.g.*, note 54, above). Any such prefilings or exhibits (such as photographs of dwelling structures) are likewise due by March 22, as are their briefs on any legal principles or theories bearing on the matters covered in this opinion which they would like to bring to our attention.

The matter will be heard during the week of April 22, assuming the other pending issues do not occupy all of that week. If no time is available then, and if to protect proprietary information the hearing is closed to the public (so that smaller facilities would suffice), then the Board will seek to obtain suitable space during the previous week, during which no hearings are otherwise contemplated. Otherwise, it will be heard after all the other issues. In the interim, the Board will be available, at the request of the affected parties, for prehearing conference calls to set any additional procedural guidelines or to resolve any anticipated procedural disputes.<sup>58</sup>

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One of the purposes of independent adjudicators in any society or culture is to assure that disputes are decided according to applicable law, not by wielding of unfettered power. The powerless or the frustrated who come before a tribunal are not entitled to demand victory, but they are entitled to receive justice.

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<sup>58</sup>*No Referral.* In light of the potential importance of some of the issues with which this opinion deals — namely, (1) the potential “Tribal governance” jurisdictional ban and (2) the “protected population” definitional aspects of the environmental justice question — we have considered whether to refer this matter to the Commission for its early review, as permitted by 10 C.F.R. § 2.730(f). We have decided against that course for several reasons.

Our first thought is that *the time for hearing is fast approaching* and we think it far better that the parties spend the intervening time preparing for that hearing, rather than preparing briefs for the Commission. Moreover, as it turned out, *we have made no final rulings* on either of the key points listed above; rather, we have merely said that the key questions — of (1) our jurisdiction to proceed without intruding into matters of Tribal governance and (2) the proper definition of the protected populations — are both inextricably bound up with the merits of the underlying disputes. To repeat, we have ruled only that we must go to hearing to obtain enough facts to resolve those threshold, fact-dependent matters; we have made no substantive or precedential rulings on either count.

Finally, we would expect that *either the matter will be settled or the hearing on this contention will be a short one*. Once it is concluded and we have made rulings on the points at issue, any review the Commission later deems warranted would thereby benefit from the presence of a full evidentiary record and properly developed legal arguments, as well as (if OGD prevails) our decision on a remedy.

Here, OGD is seeking environmental justice, as our laws entitle it to do. It may be that some of OGD's complaints will prove beyond our reach, involving matters of Tribal governance that would be reviewable only by Tribal courts, if any existed in the Skull Valley Band (or were imported for particular purposes).<sup>59</sup> But those complaints that prove within our reach will be addressed.

Because at this juncture we have heard essentially from only one side, it is important that we bear in mind the ancient axiom "*audi alteram partem*" — "hear the other side."<sup>60</sup> That venerable principle has particular application to the matter before us, where the Blackbear declaration puts forward a stinging indictment of the Bear regime that is as yet unanswered. We can assure the Applicant and the Band that we will come to no conclusions before we hear from Mr. Bear.

There is an alternative course, and a far preferable one. We discuss it in Section II, to which we commend the parties' most serious attention.

## II. THE WISDOM OF A SETTLEMENT

### A. The Policy of the Commission

In promulgating the Rules of Practice that govern our proceedings, the Commission included a separate section promoting the value of settling disputes. Given the importance of that policy to the matter before us, it is worth reciting here much of the text of that provision:

The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, . . . the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

10 C.F.R. § 2.759. *See also* 10 C.F.R. § 2.718(h) (authorizing the presiding officer to hold settlement conferences).

The Commission did not leave it at that, but reemphasized the point in a decision in another type of licensing proceeding. Specifically, in *Rockwell International Corp.* (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340 (1990), the Commission noted that "Commission policy strongly favors settlement of

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<sup>59</sup> *See* note 28, above.

<sup>60</sup> *See United States v. Steel Tank Barge H 1651*, 272 F. Supp. 658, 659 n.1 (E.D. La. 1967), *citing* John M. Kelley, *Audi Alteram Partem*, 9 Natural Law Forum 103 (1964). Together, those authorities trace the principle's flow from ancient Greek and Roman literature, through the common law, and into modern Supreme Court opinions on Constitutional law, and point out that the principle embodies elements of both providing due process to litigants and avoiding mistaken decision by judges.

adjudicatory proceedings.’’ See also *Policy Statement on Alternative Means of Dispute Resolution* (57 Fed. Reg. 36,678 (Aug. 14, 1992)).<sup>61</sup>

Certainly, this Commission viewpoint is consistent with the universal notion that reaching consensus is a valuable endeavor. In this regard, we think there has rarely been an issue so amenable to settlement as that presented here. The interests of the parties would seemingly be well served by resolving their disputes — which seem to be depriving both sides of peace of mind — in a fashion which, if not exactly amicable, would free them to pursue more productive activities.

## **B. The Path to a Settlement**

Our opinion today points out that the doctrines that require deference to Tribal governance do not necessarily preclude us from examining the environmental justice dispute before us. But those doctrines certainly instruct us that otherwise it is far better that solutions to disputes among Tribal members come from those who understand their customs and practices — so that any resolution incorporates conditions within which all can function well as time goes forward.

Accordingly, it is entirely clear to us that it would be a far wiser course for the affected litigants — the Applicant Private Fuel Storage, the Skull Valley Band of the Goshute Indians, and Ohngo Gaudedah Devia — and the apparent individual protagonists, Leon Bear and Sammy Blackbear, to settle this dispute rather than go to the hearing that we have ruled is otherwise required.

Moreover, as we see it, there are at least three organizations that might be able to help settle this dispute if the Band is unable to do so on its own. In the first place, we offer the services of a settlement judge from our own *Licensing Board Panel*. The Commission has encouraged the appointment of settlement judges, noting that to avoid any possible prejudgment problems, the Licensing Board presiding over the merits of the case can play only a limited role in looking at the merits in the course of promoting settlements.<sup>62</sup> In contrast, a settlement judge — not being involved in a decision-making role, not able to impose a solution, and thus not being bound by the *ex parte* rule — can employ a wide variety of potentially beneficial techniques, without compromising any rights of the parties.

Any such appointment would be made by the Licensing Board Panel’s Chief, Judge Bollwerk, who is prepared to start the process.<sup>63</sup> Because he is still involved with some aspects of the case and was involved in prior Board rulings involving

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<sup>61</sup> The Commission’s two major policy statements on the conduct of hearings, although directed primarily to other subjects, both encourage attempts to reach settlements. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 456 (1981), and *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998).

<sup>62</sup> See *Rockwell International*, CLI-90-5, 31 NRC at 340-41.

<sup>63</sup> This process was implemented recently in the *Hydro Resources* case (Docket No. 40-8968-ML), in which Judge Farrar was appointed to act as a settlement judge.

the parties affected by the possible settlement, he would not appoint himself, but rather another full-time or part-time legal member of the Panel to serve as settlement judge.

An NRC settlement judge would not necessarily bring to the table any particular knowledge of Tribal culture. If that quality were deemed helpful or desirable, it would seem there would be a larger role for the *Bureau of Indian Affairs* to play than it appears to have been able or willing to play thus far. We do not pretend to understand the nuances of the relationship between BIA and Indian Nations generally, or with the Skull Valley Band in particular. But it still may be that the BIA's Mr. Allison could better serve the public interest, and fulfill his agency role, as a mediator charged to help settle the dispute, rather than as a witness expected to help explain it (*see* pp. 199-200, above). He might do so on his own or, if the parties desired or the settlement judge wished, he might also participate in aid of the NRC settlement judge (if the parties seek that one be appointed), assuming that would not conflict with his role as a witness if settlement were not accomplished.

If NRC or BIA assistance is not desired, perhaps the Applicant, *Private Fuel Storage*, is in a good position to guide a settlement. After all, it is the PFS funding that is the source of the dispute, and it is the PFS project that is potentially at risk from Tribal instability. The Applicant needs no approval from us, or invitation from the parties, to press for an amicable settlement on its own. But its apparent inability to calm the controversy thus far hints that it might benefit from NRC and/or BIA involvement in a settlement process.

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We will be contacting the affected parties next week to obtain their thoughts about invoking a formal settlement process. As the two parts of our opinion lay out for them, the parties have a clear choice to make: reach a settlement or go to hearing. We are prepared to help with the former, or to conduct the latter.

Accordingly, for the reasons and to the extent set forth in Section I of this opinion, it is this 22d day of February 2002, ORDERED that:

- (1) the Applicant's motion for summary disposition of Contention OGD O is GRANTED IN PART and DENIED IN PART; and
- (2) the matter is SET FOR HEARING in Salt Lake City during the week beginning Monday, April 22, 2002 (unless otherwise ordered at the suggestion of the parties) under the SCHEDULE ESTABLISHED herein for prehearing filings.

The affected parties are ENCOURAGED to consider the suggestions regarding settlement set forth in Section II of this opinion, and to prepare to respond next week to the inquiry we will be making in that regard.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Michael C. Farrar, Chairman  
ADMINISTRATIVE JUDGE

Jerry R. Kline  
ADMINISTRATIVE JUDGE

Peter S. Lam  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
February 22, 2002

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State of Utah; and (3) the NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 70-03098-ML**

**DUKE COGEMA STONE &  
WEBSTER  
(Savannah River Mixed Oxide Fuel  
Fabrication Facility)**

**March 7, 2002**

In this proceeding to authorize construction of a mixed oxide (“MOX”) fuel fabrication facility, the Commission grants Georgians Against Nuclear Energy’s petition for interlocutory review of the Licensing Board’s denial of its motion to dismiss the proceeding on the ground that the two-step proceeding, divided between initial construction authorization and later licensing to operate the facility, is incompatible with 10 C.F.R. Part 70.

**RULES OF PROCEDURE: APPELLATE REVIEW; COMMISSION  
REVIEW OF LICENSING BOARD DECISIONS; INTERLOCUTORY  
REVIEW**

Ordinarily, we avoid piecemeal interference in ongoing licensing board proceedings. We typically turn down petitions to review interlocutory board orders summarily, without engaging in extensive merits discussion. *See, e.g., Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368 (2001); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297 (2000); *Dr. James E. Bauer* (Order Prohibiting Involvement in NRC-Licensed Activities), CLI-95-3, 41 NRC 245 (1995).

**RULES OF PROCEDURE: APPELLATE REVIEW;  
DISCRETIONARY INTERLOCUTORY REVIEW**

GANE's petition questions the very structure of our announced two-step licensing process. We find this question suitable for our consideration. *See* 10 C.F.R. § 2.786(g)(2). The Commission will consider a petition for interlocutory review under 10 C.F.R. § 2.786(g) in a Subpart L case. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998). This provision states that one of the standards for review of a presiding officer's referral or certification is that the issue "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner."

**RULES OF PROCEDURE: APPELLATE REVIEW;  
DISCRETIONARY INTERLOCUTORY REVIEW**

Even in the absence of a presiding officer's referral or certification, the Commission will consider a party's petition for review of an interlocutory order if one of the standards in 10 C.F.R. § 2.786(g) is met. *See Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 421-22 (1993).

**LICENSE FOR MIXED OXIDE FUEL FABRICATION FACILITY**

**RULES OF PROCEDURE: HEARING PROCEDURES FOR MOX  
FUEL FABRICATION FACILITY**

The Commission upholds the lawfulness of the two-step approach for licensing the MOX fuel fabrication facility.

**AEA: POSSESSION OF SPECIAL NUCLEAR MATERIAL**

**RULES OF PROCEDURE: HEARING PROCEDURES FOR MOX  
FUEL FABRICATION FACILITY**

Section 57 of the AEA requires a license to *possess* the "special nuclear material" required for production of MOX fuel, but requires no license to *construct* a fuel fabrication facility. *See* 42 U.S.C. § 2077. Indeed, the Act specifies no particular hearing or review requirements at all for MOX facilities. Congress has not said whether the NRC is to consider construction and operation together (a one-step process) or separately (a two-step process).

**RULES OF PROCEDURE: HEARING PROCEDURES FOR MOX FUEL FABRICATION FACILITY**

**AEA: COMMISSION AUTHORITY**

**RULES OF PROCEDURE: SCOPE AND TYPE OF PROCEDURE**

The absence of statutory procedural requirements leaves the Commission free to establish its own process to consider construction and operation of MOX facilities. This is consistent with the general approach of the AEA, which established “a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). *Accord Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995), *cert. denied*, 515 U.S. 1159 (1995).

**NRC: AUTHORITY**

**RULES OF PROCEDURE: SCOPE AND TYPE OF PROCEEDING**

The NRC has exceptionally wide latitude in designing its own proceedings. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978).

**NRC: AUTHORITY**

The agency even has authority “to change its procedures on a case-by-case basis with timely notice to the parties involved.” *City of West Chicago v. NRC*, 701 F.2d 632, 647 (7th Cir. 1983). *Accord National Whistleblower Center v. NRC*, 208 F.3d 256, 262 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 758 (2001).

**RULES OF PROCEDURE: HEARING PROCEDURES FOR MOX FUEL FABRICATION FACILITY**

**AEA: COMMISSION AUTHORITY**

**RULES OF PROCEDURE: SCOPE AND TYPE OF PROCEEDING**

The AEA does not speak to the “two-step” issue as such, but does grant the NRC broad power to organize its licensing process efficiently. The Commission has ample statutory authority to establish separate construction authorization and operating license reviews (and hearings) for licensing a MOX facility.

**RULES OF PROCEDURE: HEARING PROCEDURES FOR  
MOX FUEL FABRICATION FACILITY; SCOPE AND TYPE OF  
PROCEEDING**

Part 70 does not require a single application or a single licensing review except for the special case of uranium enrichment facilities. For uranium enrichment facilities, we added sections 70.23a and 70.31(e) to our regulations specifically to implement the one-step licensing process mandated by 42 U.S.C. § 2243. *See* Final Rule — “Uranium Enrichment Regulations,” 57 Fed. Reg. 18,388 (Apr. 30, 1992).

**LICENSE FOR MIXED OXIDE FUEL FABRICATION FACILITY**

**REGULATIONS: INTERPRETATION (10 C.F.R. §§ 70.23(a)(7),  
70.23(a)(8), 70.23(b))**

The key regulations for licensing a plutonium processing and fuel fabrication facility are 10 C.F.R. §§ 70.23(a)(7), 70.23(a)(8), and 70.23(b). These regulations contemplate two approvals, construction and operation. A license to *operate* requires prior Commission approval of construction under section 70.23(b). In addition, the Commission will make a separate determination that the license applicant has completed construction in accordance with its application.

**CONSTRUCTION AUTHORIZATION: MOX FUEL FABRICATION  
FACILITY**

Authorization to *construct* a MOX fuel fabrication facility requires prior Commission findings on specific environmental, design, and quality assurance issues pursuant to 10 C.F.R. §§ 70.23(a)(7) and 70.23(b).

**CONSTRUCTION AUTHORIZATION: MOX FUEL FABRICATION  
FACILITY**

**REGULATIONS: INTERPRETATION (10 C.F.R. § 70.23(b))**

**RULES OF PROCEDURE: SCOPE AND TYPE OF PROCEEDING;  
SCOPE OF INFORMATION REQUIRED FOR LICENSING**

The “information filed pursuant to § 70.22(f)” considered for construction authorization pursuant to 10 C.F.R. § 70.23(b) is a subset of the full-scale information required for a license application. At the construction authorization stage the NRC is considering construction issues alone and the review is aimed at the findings required for construction approval in 10 C.F.R. § 70.23(b). While 10

C.F.R. § 70.23(b) indicates that a construction permit approval will be made on the “basis of information” submitted under section 70.22(f), that does not mean the Commission need concern itself with information not relevant to the decision before it. Thus, the agency need only review documents and information related to those findings for construction approval, and can forego (until later) obtaining the complete license application required to operate the facility. The NRC can, therefore, confine its initial adjudicatory hearing to only the construction issues that are the subject of a Commission decision at this stage.

#### **LICENSE FOR MIXED OXIDE FUEL FABRICATION FACILITY**

##### **CONSTRUCTION AUTHORIZATION: MOX FUEL FABRICATION FACILITY**

##### **RULES OF PROCEDURE: HEARING PROCEDURES FOR MOX FUEL FABRICATION FACILITY; SCOPE AND TYPE OF PROCEEDING; SCOPE OF INFORMATION REQUIRED FOR LICENSING**

##### **COMMISSION AUTHORITY**

##### **REGULATIONS: INTERPRETATION (10 C.F.R. §§ 70.23(a)(7), 70.23(b), 70.23(a)(8))**

The regulations contemplate two approvals — approval of construction (10 C.F.R. § 70.23(a)(7), (b)) and approval for operation (10 C.F.R. § 70.23(a)(8)). It is reasonable, and well within the Commission’s discretion, therefore, to allow an applicant to submit the required materials to the NRC in increments corresponding to those two stages, and to set up a two-step hearing process corresponding to the two stages. Nothing in our regulations provides otherwise.

#### **LICENSE FOR MIXED OXIDE FUEL FABRICATION FACILITY**

##### **RULES OF PROCEDURE: SCOPE OF INFORMATION REQUIRED FOR LICENSING**

Our regulations do not preclude an applicant from making a single comprehensive application for a MOX fuel fabrication facility. But the NRC Staff’s review in the event of a single submission would nonetheless proceed in two phases — the preliminary environmental and technical review necessary to authorize construction and the final review necessary to issue an operating license.

**CONSTRUCTION AUTHORIZATION: MOX FUEL FABRICATION FACILITY**

**REGULATIONS: INTERPRETATION (10 C.F.R. § 70.21(f))**

The point of the 9-month provision of 10 C.F.R. § 70.21(f) is simply to provide enough time for the Commission and its Staff to complete their environmental review before commencement of construction. This is made clear by the regulation's history. *See* Final Rule, "Prohibition of Site Preparation and Related Activities," 37 Fed. Reg. 5745, 5746 (Mar. 21, 1972).

**LICENSE FOR MIXED OXIDE FUEL FABRICATION FACILITY**

**CONSTRUCTION AUTHORIZATION: MOX FUEL FABRICATION FACILITY**

**REGULATIONS: INTERPRETATION (10 C.F.R. § 70.21(f))**

We decline to read the 9-month provision to require the applicant to file additional (operation-related) materials not yet needed by the NRC, and we also decline to read the provision to require a one-step licensing process.

**NRC: AUTHORITY**

**CONSTRUCTION AUTHORIZATION: MOX FUEL FABRICATION FACILITY**

Even if our case-specific notice and order could not be reconciled with our general procedural rules, our case-specific requirements would prevail. In *National Whistleblower Center v. NRC* and *City of West Chicago v. NRC*, the courts of appeals recognized the NRC's authority "to change its procedures on a case-by-case basis with timely notice to the parties involved." *City of West Chicago*, 701 F.2d at 647; *accord National Whistleblower Center*, 208 F.3d at 262.

**NEPA: EIS (MOX FUEL FABRICATION FACILITY); NRC RESPONSIBILITIES**

**REGULATIONS: INTERPRETATION (10 C.F.R. § 51.70(a))**

The Commission's NEPA regulations appear in 10 C.F.R. Part 51. They do not call for delaying the NRC's NEPA review until completion of the agency's operational safety review. On the contrary, Part 51 requires the NRC Staff to "prepare a draft environmental impact statement as soon as practicable after

publication of the notice of intent to prepare an environmental impact statement and completion of the scoping process.” 10 C.F.R. § 51.70(a). That means, in effect, that the NRC must begin its environmental review under NEPA early enough to allow completion before the agency needs to take action that would have a significant effect on the environment. In this case, the environmental effects begin with construction, and are not confined to operation. Thus, the NRC reasonably performs its environmental review in connection with construction.

**NEPA: REQUIREMENT FOR ENVIRONMENTAL IMPACT STATEMENT; NRC RESPONSIBILITIES**

**NEPA AND AEA: JURISDICTION**

The NRC must meet its responsibilities under both NEPA and the AEA. But nothing in our regulations joins together the NRC’s NEPA and AEA obligations. The two inquiries are not coextensive. There is no reason to conclude that the NRC cannot complete a full environmental review, based on the applicant’s already-filed environmental report, prior to completion of its operating license safety review.

**NEPA: EIS (SUPPLEMENT); NRC RESPONSIBILITIES**

**RULES OF PROCEDURE: LATE-FILED CONTENTIONS**

If genuinely new environmental information emerges during subsequent phases of the proceeding, our rules provide for the possibility of supplements to the EIS and for late-filed hearing contentions. *See* CLI-01-13, 53 NRC at 481 (adopting late-filed contention rule, 10 C.F.R. § 2.714(a)(1), for this proceeding); 10 C.F.R. § 51.92 (providing for supplements to an EIS).

**NEPA: NRC RESPONSIBILITIES; EIS (TIMING)**

We see no need or requirement to make the NRC Staff’s safety review of the MOX facility operation a condition precedent to preparation of an EIS.

**MEMORANDUM AND ORDER**

This case involves the application of Duke Cogema Stone & Webster (“DCS”) for authorization to construct a mixed oxide (“MOX”) fuel fabrication facility. Intervenor Georgians Against Nuclear Energy (“GANE”) requested that the proceeding be dismissed or held in abeyance on the ground that the

NRC's contemplated two-step proceeding, divided between initial construction authorization and later licensing to operate the facility (i.e., to possess and use special nuclear material), is incompatible with 10 C.F.R. Part 70. The Licensing Board denied GANE's motion, and GANE petitions for interlocutory Commission review. We grant GANE's petition and affirm the Board's decision.

## I. BACKGROUND

On February 28, 2001, the DCS consortium submitted an application for authorization to construct a MOX fuel fabrication facility at the Department of Energy's Savannah River, South Carolina site. The MOX fuel fabrication facility, if approved and constructed, will convert surplus weapons-grade plutonium to MOX fuel, a blend of uranium and plutonium oxides, which commercial nuclear power stations can use to generate electricity.

In March 2001, the NRC Staff announced receipt of DCS's construction authorization request and its environmental report.<sup>1</sup> Later, the Commission published a Notice of Opportunity for a Hearing.<sup>2</sup> The hearing notice set out two requirements for NRC approval of the construction authorization request: (1) a safety finding "that the design bases of the proposed MOX fuel fabrication facility's principal structures, systems, and components, together with the DCS quality assurance plan, 'provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents.' 10 CFR 70.23(b)"; and (2) an environmental finding, after a review under the National Environmental Policy Act ("NEPA"),<sup>3</sup> that "the action called for is the issuance of the proposed license." 10 CFR 70.23(a)(7).<sup>4</sup>

The hearing notice also specified that the NRC would consider *operation* of the MOX facility later, when the agency would decide whether "construction of the facility has been properly completed (see 10 CFR 70.23(a)(8)), and . . . all other applicable 10 CFR Part 70 requirements have been met."<sup>5</sup> The question of operation, the NRC said, would be subject to a separate hearing notice.<sup>6</sup> The NRC limited the current hearing process to contentions pertinent to DCS's construction authorization request, environmental report, and quality assurance plan.<sup>7</sup>

Subsequently, GANE and several other Petitioners submitted timely hearing requests. In June 2001, we referred the hearing requests to the Chief Administrative

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<sup>1</sup> See 66 Fed. Reg. 13,794 (Mar. 7, 2001).

<sup>2</sup> See 66 Fed. Reg. 19,994 (Apr. 18, 2001).

<sup>3</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>4</sup> 66 Fed. Reg. at 19,994.

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

Judge of the Atomic Safety and Licensing Board Panel, and instructed him to appoint either a three-judge Licensing Board or a single presiding officer to consider the case.<sup>8</sup> Our referral order reiterated that only DCS's construction authorization request, and its attendant safety and environmental questions, was at issue.<sup>9</sup> Our order also stated that an enhanced Subpart L process governs the case, and set out a proposed schedule.<sup>10</sup> Shortly after our referral order, the Chief Judge appointed a three-judge Licensing Board to handle the case.

In August 2001, GANE filed a set of contentions and also a "Motion to Dismiss Licensing Proceeding, or, in the Alternative, Hold It in Abeyance" ("Motion"). GANE's motion argued that the Commission lacked authority, under Part 70, to split the MOX hearing process into two parts, one focused on the construction authorization request and the other on operation of the facility. GANE maintained that NRC rules contemplate a single, unified process for licensing a MOX production facility. Over the opposition of DCS, the Board found that GANE had standing to intervene and had advanced several admissible contentions.<sup>11</sup> But, in a separate decision, the Board summarily denied GANE's motion to dismiss the proceeding or to hold it in abeyance.<sup>12</sup> The Board reasoned that in both the initial hearing notice and the referral order, the Commission had already approved the two-step MOX licensing process challenged by GANE.

GANE then filed the petition for interlocutory review that we consider today. GANE also sought a stay of proceedings pending our review. Both DCS and the NRC Staff oppose GANE's petition and its stay motion.<sup>13</sup>

## II. DISCUSSION

Ordinarily, we avoid piecemeal interference in ongoing Licensing Board proceedings. We typically turn down petitions to review interlocutory board orders summarily, without engaging in extensive merits discussion.<sup>14</sup> Here,

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<sup>8</sup> See CLI-01-13, 53 NRC 478, 479 (2001).

<sup>9</sup> See *id.* at 483.

<sup>10</sup> See *id.* at 480-82, 484-86.

<sup>11</sup> See LBP-01-35, 54 NRC 403 (2001). DCS filed with the Board a "Motion for Reconsideration or, in the Alternative, for Certification to the Commission" (Dec. 17, 2002), challenging the Board's admission of GANE contentions dealing with terrorism, the controlled area boundary, and inclusion of material control and accounting and physical security as principal systems of the MOX fuel fabrication facility. The Board denied the motion. See unpublished Memorandum and Order (Ruling on Motion To Reconsider) (Jan. 16, 2002). DCS then sought interlocutory Commission review. We have granted DCS's petition in part (insofar as it deals with terrorism). See CLI-02-4, 55 NRC 158 (2001). We have not yet acted on the remainder of DCS's petition.

<sup>12</sup> See unpublished Memorandum and Order (Ruling on Motion To Dismiss) (Dec. 20, 2001) ("Denial Order").

<sup>13</sup> DCS, however, requests that the Commission accept review of GANE's petition and affirm the Board's Denial Order.

<sup>14</sup> See, e.g., *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368 (2001); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297 (2000); *Dr. James E. Bauer* (Order Prohibiting Involvement in NRC-Licensed Activities), CLI-95-3, 41 NRC 245 (1995).

though, GANE's petition questions the very structure of our announced two-step licensing process. We find this question suitable for our consideration.<sup>15</sup> If GANE were correct that Part 70 renders a two-step MOX licensing process unlawful, there would be no basis for the Board to continue on its current course of considering the MOX facility in two separate steps: at the construction authorization stage and at the operating license stage. And, although (as the Board noted) the Commission's initial hearing notice and its referral order took as their premise the validity of the two-step process, the Commission did not explain the legal basis for that premise. Hence, we take the opportunity of GANE's petition, and the other parties' responses, to do so now.

The Board, in its denial order, determined that the Commission had effectively decided the issue raised by GANE. The Board simply denied GANE's motion as incompatible with our actions — the initial hearing notice and the referral order — setting up the two-step process in the first place and offered no analysis of its own on the “two-step” question.<sup>16</sup> GANE insisted in its motion, and again in its petition before us, that the construction authorization proceeding is being conducted “far outside the bounds of the law.”<sup>17</sup> GANE construes the Atomic Energy Act<sup>18</sup> (“AEA”) and our 10 C.F.R. Part 70 regulations to require but a single application, and but a single hearing process, for construction and operation of a MOX facility. GANE also maintains that the two-step process improperly leaves important operational safety questions out of the NEPA inquiry, which is conducted at the construction authorization stage.

For the reasons below, we find GANE's position unpersuasive, and uphold the lawfulness of the two-step approach.

#### **A. The Atomic Energy Act Does Not Specify a Single Application or Hearing**

Section 57 of the AEA requires a license to *possess* the “special nuclear material” required for production of MOX fuel, but requires no license to

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<sup>15</sup> See 10 C.F.R. § 2.786(g)(2). The Commission will consider a petition for interlocutory review under 10 C.F.R. § 2.786(g) in a Subpart L case. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998). This provision states that one of the standards for review of a presiding officer's referral or certification is that the issue “[a]ffects the basic structure of the proceeding in a pervasive or unusual manner.” Even in the absence of a presiding officer's referral or certification, the Commission will consider a party's petition for review of an interlocutory order if one of the standards in 10 C.F.R. § 2.786(g) is met. See *Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 421-22 (1993). In addition, “[s]ometimes . . . interlocutory review is appropriate as an exercise of our inherent and ongoing supervisory authority over adjudicatory proceedings.” See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000).

<sup>16</sup> See Denial Order at 2-3.

<sup>17</sup> See Petition at 6. As the paper copy of GANE's Petition is not yet available because of mail delays, all page citations are keyed to the electronic version of the document.

<sup>18</sup> 42 U.S.C. §§ 2011 *et seq.*

*construct* a fuel fabrication facility.<sup>19</sup> Indeed, the Act specifies no particular hearing or review requirements at all for MOX facilities. By contrast, when it comes to uranium enrichment facilities, the AEA (§ 193) prescribes a one-step process, including a single adjudicatory hearing, that considers both construction and operation.<sup>20</sup> Similarly, for nuclear power reactors, the AEA (§ 185) mandates particular construction permit and operating license processes (either one-step or two-step, depending on circumstances).<sup>21</sup> For MOX facilities, however, Congress has not said whether the NRC is to consider construction and operation together (a one-step process) or separately (a two-step process).

The absence of statutory procedural requirements leaves the Commission free to establish its own process to consider construction and operation of MOX facilities. This is consistent with the general approach of the AEA, which established “a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.”<sup>22</sup> The NRC has exceptionally wide latitude in designing its own proceedings.<sup>23</sup> The agency even has authority “to change its procedures on a case-by-case basis with timely notice to the parties involved.”<sup>24</sup>

In sum, the AEA does not speak to the “two-step” issue as such, but does grant the NRC broad power to organize its licensing process efficiently. The Commission has ample statutory authority to establish separate construction authorization and operating license reviews (and hearings) for licensing a MOX facility.

## **B. NRC Regulations Do Not Specify a Single Application**

GANE principally argues that NRC regulations in Part 70 contemplate that “an entity seeking to build and operate a plutonium processing plant will file a single application that is complete with respect to both construction and operation.”<sup>25</sup> GANE cites 10 C.F.R. §§ 70.21 and 70.22(f) — specifying the filing requirements for applications to possess and use special nuclear material — for this proposition.

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<sup>19</sup> 42 U.S.C. § 2077.

<sup>20</sup> 42 U.S.C. § 2243. This provision entered the AEA in 1990, upon enactment of the Solar, Wind, Waste, and Geothermal Power Production Incentives Act, Pub. L. No. 101-575, 104 Stat. 2835.

<sup>21</sup> 42 U.S.C. § 2235.

<sup>22</sup> *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). *Accord Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995), *cert. denied*, 515 U.S. 1159 (1995).

<sup>23</sup> *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* 435 U.S. 519, 524-25 (1978).

<sup>24</sup> *City of West Chicago v. NRC*, 701 F.2d 632, 647 (7th Cir. 1983). *Accord National Whistleblower Center v. NRC*, 208 F.3d 256, 262 (D.C. Cir. 2000), *cert denied*, 121 S. Ct. 758 (2001).

<sup>25</sup> *See* GANE Petition at 1.

We find, however, that Part 70 does not require a single application or a single licensing review except for the special case of uranium enrichment facilities.<sup>26</sup>

The key regulations for a plutonium processing and fuel fabrication facility are 10 C.F.R. §§ 70.23(a)(7), 70.23(a)(8), and 70.23(b). These regulations contemplate two approvals, construction and operation. A license to *operate* requires prior Commission approval of construction under section 70.23(b). In addition, the Commission will make a separate determination that the license applicant has completed construction in accordance with its application:

Where the proposed activity is the operation of a plutonium processing and fuel fabrication plant, [the NRC must determine that] construction of the principal structures, systems, and components approved pursuant to paragraph (b) of this section has been completed in accordance with the application.

10 C.F.R. § 70.23(a)(8). Authorization to *construct* requires prior Commission findings on specific environmental, design, and quality assurance issues:

[The NRC must determine] before commencement of construction . . . on the basis of information filed and evaluations made pursuant to subpart A of part 51 . . . after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is issuance of the proposed license, with any appropriate conditions to protect environmental values.

10 C.F.R. § 70.23(a)(7); and

The Commission will approve construction of the principal structures, systems, and components of a plutonium processing and fuel fabrication plant *on the basis of information filed pursuant to § 70.22(f)* when the Commission has determined that the design bases of the principal structures, systems, and components, and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents. . . .

10 C.F.R. § 70.23(b) (emphasis added).

GANE appears to construe the phrase “information filed pursuant to 70.22(f)” to require the Applicant, before construction approval, to submit *all* information referred to in 10 C.F.R. § 70.22(f), including “the other information required by this section [§ 70.22].” However, the “information filed pursuant to § 70.22(f)” considered for construction authorization is a subset of the full-scale information

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<sup>26</sup> For uranium enrichment facilities, we added sections 70.23a and 70.31(e) to our regulations specifically to implement the one-step licensing process mandated by 42 U.S.C. § 2243. See Final Rule — “Uranium Enrichment Regulations,” 57 Fed. Reg. 18,388 (Apr. 30, 1992). See also note 21, *supra*, and accompanying text.

required for a license application.<sup>27</sup> At the construction authorization stage the NRC is considering construction issues alone and the review is aimed at the findings required for construction approval in 10 C.F.R. § 70.23(b). While 10 C.F.R. § 70.23(b) indicates that a construction permit approval will be made on the “basis of information” submitted under section 70.22(f), that does not mean the Commission need concern itself with information not relevant to the decision before it. Thus, the agency need only review documents and information related to those findings for construction approval, and can forego (until later) obtaining the complete license application required to operate the facility. The NRC can, therefore, confine its initial adjudicatory hearing to only the construction issues that are the subject of a Commission decision at this stage.

That, in fact, is just what the Commission did in establishing a hearing process for DCS’s proposed MOX facility. The safety and environmental findings for construction authorization under 10 C.F.R. § 70.23(a)(7) and 70.23(b) are identical to those set out in the notice of opportunity for hearing.<sup>28</sup> As the process is set up, DCS’s application for an operating license will come later, and will generate a second hearing opportunity keyed to the operating license.<sup>29</sup> Thus, interested members of the public, like GANE, will have a full opportunity to raise and litigate all of their concerns at appropriate points in the process.

In short, the regulations contemplate two approvals — approval of construction (10 C.F.R. § 70.23(a)(7), (b)) and approval for operation (10 C.F.R. § 70.23(a)(8)). It is reasonable, and well within the Commission’s discretion, therefore, to allow an applicant to submit the required materials to the NRC in increments corresponding to those two stages, and to set up a two-step hearing process corresponding to the two stages. Contrary to GANE’s view, nothing in our regulations provides otherwise.<sup>30</sup>

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<sup>27</sup> Section 70.22(f) applies only to applications for a plutonium processing and fuel fabrication plant and its requirements are in addition to the other applicable provisions of § 70.22 Contents of applications. It states:

Each application for a license to possess and use special nuclear material in a plutonium processing and fuel fabrication plant shall contain, in addition to the other information required by this section, a description of the plantsite, a description and safety assessment of the design bases of the principal structure, systems, and components of the plant, including provisions for protection against natural phenomena, and a description of the quality assurance program to be applied to the design, fabrication, construction, testing and operation of the structures, systems, and components of the plant.

<sup>28</sup> See 66 Fed. Reg. at 19,994.

<sup>29</sup> See *id.*

<sup>30</sup> This is not to say that our regulations preclude an applicant from making a single comprehensive application. But the NRC Staff’s review in the event of a single submission would nonetheless proceed in two phases — the preliminary environmental and technical review necessary to authorize construction and the final review necessary to issue an operating license.

### C. The 9-Month Provision of Section 70.21(f) Does Not Require a One-Step Process

GANE calls special attention to one of our filing regulations, 10 C.F.R. § 70.21(f), which states that an application to possess and use special nuclear material “shall be filed at least 9 months prior to commencement of construction of the plant or facility,” and “shall be accompanied by an Environmental Report.”<sup>31</sup> According to the proposed schedule for the MOX facility review as of the date of the filing of GANE’s petition, DCS was to submit its license application for operation of the MOX facility on July 31, 2002. The NRC Staff was due to issue its final environmental impact statement and safety evaluation report on September 30, 2002.<sup>32</sup> Thus, GANE asserts, under the original schedule the NRC might have been in a position to allow construction to begin in as little as 2 months after DCS submits its full application for a license to possess and use special nuclear material.<sup>33</sup>

In GANE’s view, regulatory history supports its position that the 9-month provision is pivotal. The Part 70 regulations the Commission proposed and adopted in 1971, says GANE, “clearly contemplated that the review of the operating license application and design bases would take place simultaneously, not sequentially as proposed in this case.”<sup>34</sup> GANE notes that, before 1971, the NRC reviewed operation, but not design and construction, of plutonium processing plants. The stated purpose of the 1971 regulations was to “provide for Commission review of the site and design bases for plutonium processing and fuel fabrication plants for which a license is sought, prior to the beginning of plant construction.”<sup>35</sup> The original 1971 rule included a requirement that the application must be filed at least 6 months before beginning construction. GANE points out that a subsequent amendment *lengthened* the period to the current 9 months. Thus, GANE reasons, “the Commission’s purpose in providing for pre-licensing approval of plutonium plant designs was to strengthen the safety requirements for a particularly dangerous type of facility, not to provide a shortcut

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<sup>31</sup> See GANE Petition at 7-8. The pertinent provision states in full:

An application for a license to possess and use special nuclear material for processing and fuel fabrication . . . shall be filed at least 9 months prior to commencement of construction of the plant or facility . . . and shall be accompanied by an Environmental Report required under subpart A of part 51 of this chapter.

10 C.F.R. § 70.21(f).

<sup>32</sup> By letter of January 24, 2002, DCS’s counsel informed the Licensing Board that the Department of Energy has determined that some of the surplus plutonium material previously intended for immobilization will instead be processed by the MOX facility and converted to MOX fuel, thus requiring some revisions to the construction authorization request and the environmental report. Counsel for the NRC Staff subsequently informed the Board by letter of February 14, 2002, that DCS plans to submit a supplemental environmental report in August or October 2002, and a supplemental construction authorization request in October 2002.

<sup>33</sup> Contrary to GANE’s assertion, the earliest date the Staff could have authorized construction to begin is Oct. 31, not Sept. 30, 2002. See 10 C.F.R. § 51.100(a)(1)(ii). Now, of course, the schedule has changed. See note 31, *supra*.

<sup>34</sup> GANE Petition at 7.

<sup>35</sup> See Proposed Rule: “Plutonium Processing and Fuel Fabrication Plants,” 36 Fed. Reg. 9786 (May 28, 1971).

for early construction before completion of a license application.”<sup>36</sup> GANE sees the NRC’s two-step plan for the MOX proceeding as weakening the NRC Staff’s safety review because the Staff will not finish its review of operational issues until after construction is under way.

GANE, we believe, has missed the point of the 9-month requirement. The Commission inserted it into our rules not to enhance the agency’s safety review, as GANE maintains, but simply to provide enough time for the Commission and its Staff to complete their environmental review before commencement of construction. This is made clear by the regulation’s history:

In order to assure that an opportunity is provided for full consideration of environmental effects before site preparation is begun, these amendments require that applications for such materials licenses be filed at least nine months prior to commencement of construction of plants or facilities in which the licensed activities will be conducted. . . . [T]he Director of Regulation must reach a favorable conclusion with respect to environmental considerations after completion of the environmental review. . . .<sup>37</sup>

The Commission wanted to ensure enough time to perform an adequate environmental review before a proposed site is disturbed. The 9-month regulation simply does not speak to the question of separate construction-stage and operating-stage reviews.

Here, DCS submitted its construction authorization request and its environmental report nearly a year ago, approximately 18 months in advance of its proposed October 2002 startup of construction. This early filing satisfies the only stated purpose of the 9-month provision: adequate time for an NRC environmental review. GANE argues that DCS must file its full license application 9 months in advance of construction authorization. But DCS did timely file the portions of its license application pertinent to construction authorization and its environmental report. We decline to read the 9-month provision to require DCS to file additional (operation-related) materials not yet needed by the NRC, and we also decline to read the provision to require a one-step licensing process.

#### **D. The NRC’s Case-Specific Orders Override Its Procedural Rules**

For the reasons we give above, we are persuaded that the two-step licensing process contemplated by our initial hearing notice and by our referral order lies entirely within what Parts 51 and 70 of our rules authorize. But even if our case-specific notice and order could not be reconciled with our general procedural rules, our case-specific requirements would prevail. In *National Whistleblower Center v. NRC* and *City of West Chicago v. NRC*, the courts of appeals recognized

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<sup>36</sup> GANE Petition at 8.

<sup>37</sup> Final Rule, “Prohibition of Site Preparation and Related Activities,” 37 Fed. Reg. 5745, 5746 (Mar. 21, 1972).

the NRC's authority "to change its procedures on a case-by-case basis with timely notice to the parties involved."<sup>38</sup> Here, from the outset, we gave ample notice of our procedural intent. GANE and other parties entered into the proceeding fully aware of the contemplated two-step process, the timing of the construction authorization and operating license steps, and the applicable hearing requirements. In these circumstances GANE cannot complain of departures, if any, from our general procedural rules.

#### **E. NEPA Findings Do Not Require a Complete Operational Safety Review**

The crux of GANE's NEPA argument is that the NRC Staff must issue its environmental impact statement ("EIS") in conjunction with making its safety findings on operation of the MOX facility; i.e., the Staff must complete its environmental and safety review of the entire license application before allowing construction to begin.<sup>39</sup> GANE's objection to the original schedule was that if, as planned, the Staff issued the EIS on September 30, 2002, the Staff would not have completed its full safety review, but only its construction-related review. The target date for the Staff's Safety Evaluation Report for operation of the facility was July 31, 2004.

The Commission's NEPA regulations appear in 10 C.F.R. Part 51. They do not call for delaying the NRC's NEPA review until completion of the agency's operational safety review. On the contrary, Part 51 requires the NRC Staff to "prepare a draft environmental impact statement as soon as practicable after publication of the notice of intent to prepare an environmental impact statement and completion of the scoping process."<sup>40</sup> That means, in effect, that the NRC must begin its environmental review under NEPA early enough to allow completion before the agency needs to take action that would have a significant effect on the environment. In this case, the environmental effects begin with construction, and are not confined to operation. Thus, the NRC reasonably performs its environmental review in connection with construction.

GANE is correct, of course, that the NRC must meet its responsibilities under both NEPA and the AEA. But nothing in our regulations joins together the NRC's NEPA and AEA obligations. The two inquiries are not coextensive. The courts, in fact, have taken care to remind the Commission that its AEA safety reviews do not satisfy its obligations under NEPA, which has independent statutory force.<sup>41</sup> GANE offers no reason to conclude that the NRC cannot complete a

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<sup>38</sup> *City of West Chicago*, 701 F.2d at 647; accord *National Whistleblower Center*, 208 F.3d at 262.

<sup>39</sup> See GANE Petition at 9-10.

<sup>40</sup> 10 C.F.R. § 51.70(a).

<sup>41</sup> See *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 729-31 (3d Cir. 1989).

full environmental review, based on DCS's already-filed environmental report, prior to completion of its operating license safety review. DCS's environmental report addresses the environmental effects of operating the MOX facility, as will (presumably) the NRC Staff's upcoming EIS. These issues are ripe for NEPA consideration now.

GANE was free to contest the environmental report during the current hearing process on construction authorization. And, if genuinely new environmental information emerges during subsequent phases of the proceeding, our rules provide for the possibility of supplements to the EIS and for late-filed hearing contentions.<sup>42</sup> GANE, however, demands that we make the NRC Staff's safety review of the facility operation a condition precedent to preparation of an EIS. We see no need or requirement to do this.<sup>43</sup>

### III. CONCLUSION

For the foregoing reasons, the Commission (1) *reviews and affirms* the Licensing Board's December 20, 2001 Denial Order, and (2) *denies* as moot GANE's motion for a stay of proceedings pending review.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 7th day of March 2002.

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<sup>42</sup> See CLI-01-13, 53 NRC at 481 (adopting late-filed contention rule, 10 C.F.R. § 2.714(a)(1), for this proceeding); 10 C.F.R. § 51.92 (providing for supplements to an EIS).

<sup>43</sup> GANE's view of NEPA cannot be squared with established NRC practice under other subparts of our regulations that require an environmental impact statement (EIS) considering the effects of operation early in the process, sometimes before an application to operate is even submitted. For example, for early site permits issued, Part 52 provides that the Commission will prepare an EIS that will focus on, among other things, the effects of operation of "a reactor, or reactors, which have characteristics that fall within the postulated site parameters." 10 C.F.R. § 52.18. This review is performed "notwithstanding the fact that an application for a construction permit or a combined license has not been filed in connection with the site or sites for which a permit is sought." See 10 C.F.R. § 52.15(a).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 72-22-ISFSI**

**PRIVATE FUEL STORAGE, L.L.C.**  
**(Independent Spent Fuel Storage**  
**Installation)**

**March 7, 2002**

**INTERLOCUTORY REVIEW DISFAVORED**

The Commission does not ordinarily undertake interlocutory review of licensing board orders. *See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5-7 (2001); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000).*

**INTERLOCUTORY REVIEW**

**IMMEDIATE AND IRREPARABLE IMPACT**

Our regulations provide an exception to the general rule against interlocutory review where delaying review could cause “immediate and irreparable impact” on the party requesting review. 10 C.F.R. § 2.786(g)(1). *See also Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184-85 (1995).*

## **INTERLOCUTORY REVIEW**

### **IMMEDIATE AND IRREPARABLE IMPACT**

A licensing board decision calling for inquiry into tribal finances and governance at hearing would threaten “irreparable harm” to Indian tribe if inquiry itself is unlawful interference with tribal sovereignty. As a practical matter, review of the Licensing Board’s ruling after a hearing on the internal tribal matters would provide no relief from the type of harm that conceivably could be suffered as a result of such an inquiry. *See Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 421 (1993).

## **INTERLOCUTORY REVIEW**

### **STAY OF PROCEEDINGS**

Where licensing board proceedings are themselves the “immediate and irreparable impact,” of which the party seeking interlocutory review complains, a stay of proceedings pending review is appropriate.

## **INTERLOCUTORY REVIEW**

### **STAY OF PROCEEDINGS**

A stay of licensing board proceedings is appropriate where necessary to allow meaningful Commission review, where a party is threatened with immediate irreparable harm, and where no one will suffer significant harm by the stay.

## **MEMORANDUM AND ORDER**

On February 22, 2002, the Atomic Safety and Licensing Board issued a lengthy decision that set for hearing some aspects of an “environmental justice” contention filed by Intervenor Ohngo Gaudadeh Devia (OGD).<sup>1</sup> Another Intervenor, the Skull Valley Band of Goshute Indians, now has sought interlocutory Commission review of the Board ruling, and seeks a stay of Board proceedings on environmental justice pending that review. The NRC Staff, too, has filed a motion for a stay of Board proceedings. We grant review, set the matter for full briefing, and stay all Board proceedings on environmental justice, including the hearing itself and all upcoming filing deadlines related to it.

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<sup>1</sup>*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171 (2002) (summary disposition ruling on OGD Contention O).

In the ruling challenged by the Skull Valley Band and the NRC Staff, the Board found a hearing necessary to resolve the question whether OGD, which includes Band members who oppose the PFS project, might suffer the environmental impacts of the project without enjoying its financial benefits. Among other things, the Board directed the litigants to be ready for hearing on the payments made by PFS to date and on the manner in which the Band has handled, spent, and distributed the payments. Under the Board ruling, the hearing itself would likely take place sometime during the week of April 22, 2002, and prefiled testimony and evidence would be due a month earlier, on March 22.

Both the Band and the NRC Staff raise the serious question whether an NRC hearing board lawfully may inquire into the internal financial and governance matters of a federally recognized sovereign Indian tribe such as the Skull Valley Band.<sup>2</sup> The NRC Staff also represents that “Counsel for the U.S. Bureau of Indian Affairs has expressed serious concerns regarding the Board’s decision and its potential impact on BIA, and has expressed interest in the Commission’s undertaking immediate review of the Board’s decision.”<sup>3</sup>

In these circumstances, the Commission has decided to review the environmental justice ruling. We do not ordinarily undertake interlocutory review of Board orders.<sup>4</sup> Our regulations provide an exception to this general rule where delaying review could cause “immediate and irreparable impact” on the party requesting review.<sup>5</sup> We find that the Board decision creates an exceptional situation that warrants immediate Commission attention under this standard. If we defer review until the end of the case, as is our usual practice, the hearing itself and various evidentiary submissions required by the Board, not to mention the Board’s actual review, would go forward unimpeded and prior to any Commission consideration of the tribal sovereignty issues the Band and the NRC Staff raise. In other words, the allegedly unlawful Board interference in tribal affairs would take place before the Commission has an opportunity to take corrective action (if necessary). As a practical matter, review of the Licensing Board’s ruling after a hearing on the internal tribal matters would provide no relief from the type of harm that conceivably could be suffered as a result of such an inquiry.<sup>6</sup> Because the possibility of such irreparable harm is obvious, it would be wasteful of time

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<sup>2</sup>The Band, for example, points to a Supreme Court case that seemingly counsels against federal interference in “intratribal disputes.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

<sup>3</sup>NRC Staff’s Request for a Stay Pending the Commission’s Consideration of Any Requests for Interlocutory Review of the Licensing Board’s Decision in LBP-02-08 Concerning Contention OGD O (Environmental Justice) (March 4, 2002), at 2 n.3 (electronic version).

<sup>4</sup>See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5-7 (2001); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000).

<sup>5</sup>10 C.F.R. § 2.786(g)(1). See also *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184-85 (1995).

<sup>6</sup>See *Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 421 (1993).

and effort, in our view, to await further petitions for review and responses before obtaining full briefs from the parties.

To allow meaningful Commission review, we also stay all Board proceedings and filings related to OGD's environmental justice contention. For the reasons suggested above, the Board decision raises serious merits questions going to its authority to act and also threatens the Band with irreparable injury. And no one will suffer significant harm from staying Board proceedings. Should the Commission, after review, affirm the Board decision or otherwise conclude that there must be a hearing on environmental justice, the Commission will direct the Board to reset its filing and hearing schedule, with due regard for fairness to all parties. It is reasonable and in the public interest for the Commission to proceed with caution in the sensitive area of relations between Indian tribes and the federal government. In short, prudent case management and the balance of equities favor staying Board proceedings pending Commission review of the environmental justice issue.<sup>7</sup>

We are aware that all parties are preparing for upcoming hearings in Utah. We have set the following briefing schedule in the expectation that it will provide enough time for diligent parties both to participate effectively in the hearings and to file useful Commission briefs on OGD's environmental justice contention:

1. All parties seeking reversal of LBP-02-8 shall file opening briefs on or before April 3, 2002. Opening briefs shall not exceed thirty-five pages.
2. All parties seeking affirmance of LBP-02-8 shall file answering briefs on or before April 30, 2002. Answering briefs shall not exceed thirty-five pages.
3. Parties seeking reversal may reply to the answering briefs on or before May 10, 2002. Reply briefs shall not exceed ten pages.
4. We invite the Bureau of Indian Affairs to file an *amicus curiae* brief in this case no later than April 15, 2002. The Secretary is directed to serve a copy of this Memorandum and Order on the Bureau immediately.

The parties shall submit briefs electronically (or by other means to ensure receipt by the Secretary of Commission by the due date), with paper copies to follow. Briefs in excess of ten pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, and like material.

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<sup>7</sup> *Cf.* 10 C.F.R. § 2.788 (setting out four-part test for stays pending appeal). While time considerations have precluded an extensive Commission merits review at this point in the proceeding, and we therefore have not assessed whether various arguments are "likely to prevail," to use the terms of section 2.788, we are satisfied that the Board decision raises serious legal questions, a threshold sufficient in the unusual current setting to allow a stay of proceedings to prevent possible irreparable injury.

## **CONCLUSION**

For the foregoing reasons, the Commission grants review of LBP-02-8, establishes the briefing schedule set out above, and stays all Licensing Board proceedings on OGD's environmental justice contention (OGD Contention O). All other Licensing Board proceedings should move forward on their current schedule.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 7th day of March 2002.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Alan S. Rosenthal**, Presiding Officer  
**Dr. Richard F. Cole**, Special Assistant

**In the Matter of**

**Docket No. 40-8681-MLA-11**  
**(ASLBP No. 02-795-02-MLA)**

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

**March 13, 2002**

In this Memorandum and Order in a Subpart L Materials License Amendment proceeding, the Presiding Officer denies the motions for a stay *pendente lite* of William Love and the Sierra Club and a related motion because they are untimely and do not satisfy the established criteria for grant of such relief.

**RULES OF PRACTICE: STAY OF AGENCY ACTION (TIMELINESS OF REQUEST)**

In circumstances where the NRC staff has failed to provide formal notice of its issuance of a materials license amendment, the 10-day period for the filing of a request for a stay of that action under 10 C.F.R. § 2.1263 should not be deemed to begin to run until the requestor has either acquired actual notice of the issuance or been given reasonable cause to make inquiry as to the current status of the amendment application.

**RULES OF PRACTICE: STAY OF AGENCY ACTION (CRITERIA)**

By virtue of 10 C.F.R. § 2.1263, the consideration of stay applications in Subpart L materials licensing proceedings is governed by the four criteria set forth

in 10 C.F.R. § 2.788. Although no one of them is dispositive, the most important criterion is whether the moving party will be irreparably injured unless a stay is granted. The mere fact that, in the absence of a stay, the controversy might become moot does not, however, constitute such injury.

**MEMORANDUM AND ORDER**  
**(Denying Motions for a Stay *Pendente Lite* and a Related Motion)**

On January 30, 2002, in LBP-02-6, 55 NRC 147, *appeal to the Commission pending*, I granted the separate hearing requests of William E. Love and the Sierra Club (more particularly, its Utah Chapter and that Chapter's Glen Canyon Group subsidiary (collectively Sierra)). Those requests were filed in connection with the application of the International Uranium (USA) Corporation (Licensee) for an amendment to a source material license possessed by it. The amendment in question would allow the Licensee to receive and process at its White Mesa Uranium Mill (Mill), a uranium recovery facility located near Blanding, Utah, certain alternate feed material originating at the Molycorp site in Mountain Pass, California (Molycorp material).

As will be discussed in greater detail below, the license amendment was issued by the NRC Staff several months ago — specifically, on December 11, 2001. By February 26 and 28, 2002, motions, Sierra and Mr. Love (collectively Petitioners) seek a stay of any activity authorized by the amendment pending the disposition of the controversy. In addition, on February 27, Sierra filed a second motion seeking the withdrawal of the Staff's issuance of the license amendment. The Licensee opposes all three motions.

For the reasons that follow, the stay motions must be denied for the independent reasons: (1) they are untimely; and (2) they do not satisfy the established criteria for the grant of stay relief *pendente lite*. Sierra's related motion also is denied.

**I. BACKGROUND**

The stay motions in hand must be considered in the context of a rather unusual series of prior events. More than a year ago, on January 9, 2001, the Commission published in the *Federal Register* a notice of opportunity for hearing on the application for a license amendment authorizing the receipt and processing of the Molycorp material. 66 Fed. Reg. 1,702. In response to that notice, a hearing request was timely filed by the Glen Canyon Group (Group), one of the two Sierra entities now before me. Upon consideration of that request, I denied it in April 2001 on the sole ground that the allegations in the request failed to establish that the Group had standing to challenge the proposed amendment. LBP-01-15, 53

NRC 344. On the Group's appeal, the Commission *affirmed*. CLI-01-21, 54 NRC 247 (2001).

That might have been the end of the matter insofar as possible adjudicatory action on the proposed amendment was concerned. On December 11, 2001, however, a second *Federal Register* notice surfaced in connection with this amendment. 66 Fed. Reg. 64,064. That notice recorded the NRC Staff's determination (in the form of a Finding of No Significant Impact (FONSI)) that the environmental impacts associated with the proposed activity were insignificant, with the consequence that there was no necessity to prepare an environmental impact statement. *See* 10 C.F.R. § 51.32(a)(2). Additionally, the notice accorded a fresh opportunity to seek a hearing on the license amendment.

Responding to this second notice, Mr. Love and Sierra filed timely hearing requests on December 15, 2001, and January 10, 2002, respectively. As above noted, on January 30 both requests were granted in LBP-02-6. For the reasons set forth in that decision, I concluded that the allegations contained in them, unlike those presented in the hearing request filed by the Glen Canyon Group almost a year earlier, established the requisite standing to challenge the proposed license amendment.

Thereafter, in a memorandum issued on February 15, I scheduled a telephone conference for February 21. The principal intended purpose of the conference was the scheduling of the submission of the written presentations called for by 10 C.F.R. § 2.1233 in proceedings that, as this one, are governed by the informal hearing procedures set forth in Subpart L of the Commission's Rules of Practice, 10 C.F.R. § 2.1201 *et seq.* Although it had elected not to be a party to the proceeding, I requested that the NRC Staff be represented at the conference and, further, asked that its counsel be prepared to advise me as to the then current status of the license amendment application.

Shortly before the conference commenced on February 21, I received a letter from Staff counsel that was dated the previous day. With it was enclosed a letter that the Staff had sent to the Licensee on December 11, 2001 — the very day of the publication of the second *Federal Register* notice of opportunity for hearing. In that December 11 letter, the Staff had informed the Licensee that the license amendment had been issued.

As noted in my February 25 memorandum and order (unpublished) memorializing the determinations made during the telephone conference, this was the first word that either Judge Cole or I had received respecting this development. The question immediately came to mind whether the hearing requestors had likewise been kept in the dark and, at an early point in the conference, I inquired of them. The Sierra representative responded that she had learned of the issuance in mid-January (Tr. 6). Mr. Love stated that he had become aware of it during the week of February 11 (*ibid.*).

In referring to these disclosures, I noted in the February 25 issuance that any endeavor to seek a stay of the effectiveness of the Staff's action in granting the license amendment would likely be found untimely. That observation had in mind the provision in 10 C.F.R. § 2.1263 to the effect that "any request for a stay of staff licensing action pending completion of an adjudication under this subpart must be filed at the time a request for a hearing . . . is filed or within 10 days of the staff's action, whichever is later."

Given the filing dates of the two hearing requests, a strict application of section 2.1263 would have made the Love and Sierra stay motions due, respectively, no later than December 21, 2001, and January 10, 2002. I was prepared to assume however, that, in light of the NRC Staff's apparent failure to have provided Petitioners with formal notice of the issuance of the license amendment, the 10-day period did not begin to run until the date upon which they had either acquired actual knowledge of that development or had been given reasonable cause to make inquiry as to the current status of the amendment application. (A party obviously is in no position to seek a stay of Staff licensing action that it has been given no reason to believe might have taken place.) But, in light of the representations of the two Petitioners during the conference, it appeared that, at the time of the issuance of the February 25 memorandum and order, indulging in that assumption would provide no assistance to either of them.

## II. ANALYSIS

### A. Timeliness

#### 1. *Sierra Stay Motion*

Notwithstanding the observations in the February 25 issuance with regard to the seeming untimeliness of any subsequent endeavor to obtain stay relief, on February 26 Sierra filed the motion now in hand. In a covering letter, its representative explained that the motion had been prepared immediately following the February 21 conference in the belief that, in the course of the conference, the time for filing such a motion had been extended. The representative went on to explain that, upon learning of the issuance of the license amendment "sometime after January 19," she had consulted section 2.1263 of the Rules of Practice.<sup>1</sup> As she read the section, 10 days already having elapsed since the filing of the hearing

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<sup>1</sup>At page 6 of its March 8, 2002 response to Sierra's stay motion, Licensee notes that it had expressly called attention to the December 11, 2001 issuance of the license amendment in its January 25, 2002 response to that party's hearing request. While Licensee also alludes to the fact that the issuance of the amendment had been mentioned in a document referenced in the December 11, 2001 *Federal Register* notice, neither Petitioner can appropriately be held accountable for not consulting that document. Instead, the notice seemingly should have referred itself to the license amendment issuance.

request, she could not employ that recently acquired knowledge as a basis for seeking a stay. Accordingly, she had taken no action in that regard in advance of the February 21 conference.

Unfortunately, this explanation cannot carry the day. To begin with, while the subject of stay relief was discussed during the February 21 conference, at no point was there an explicit extension of the time within which to seek such relief. Indeed, it is far from clear that I have the authority to grant such an extension once the time for taking the particular action has expired. Contrary to the stated belief of the Sierra representative, such authority does not seem to be implicitly conferred by 10 C.F.R. § 2.1209(k) and (l).

The Sierra representative correctly read section 2.1263 as not in terms attaching significance to when actual knowledge of the Staff's licensing action might have been acquired. There was, however, nothing to preclude Sierra, once it had learned of the issuance of the license amendment, from immediately seeking a stay of its effectiveness, justifying the delay in taking that step on the ground that it could not reasonably have been expected to seek such relief at an earlier point. Surely, its representative might have appreciated that, in the circumstances, there would have been considerable force to a claim that its motion should not be deemed time-barred (or, alternatively, that cause existed to allow it to be filed out-of-time). Instead, by its own admission, Sierra chose to take no action prior to the subject of stay relief being raised at the February 21 conference.

## **2. *Love Stay Motion***

As above noted, during the February 21 conference, and in response to my specific inquiry, Mr. Love had stated, without qualification, that he had learned of the license amendment issuance in the week of February 11. His stay motion, however, seeks to meet the untimeliness issue with the quite different assertion that he had simply heard "rumors from a citizen not associated with the NRC that he/she heard from someplace unknown to me that the license may or may not have already issued."

Acceptance of this radical departure from what I was previously told by him would not advance Mr. Love's cause.<sup>2</sup> True, as he suggests, it would impact the conclusion stated in the February 25 memorandum and order respecting when Mr. Love had obtained actual knowledge of the amendment issuance. But what is left

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<sup>2</sup> At page 6 of its March 8, 2002 response to Mr. Love's stay motion, Licensee points out that its December 31, 2001 response to his hearing request had called attention to the December 11, 2001 license amendment issuance. Apparently, Mr. Love had failed to take note of that disclosure. (Indeed, the same can be said of Judge Cole and me.) Moreover, it is surprising that Licensee's counsel did not refer to that disclosure when confronted with Mr. Love's claim during the February 21 telephone conference that he had just recently learned of the issuance. As will shortly be seen, however, it is not necessary to decide here what, if any, significance might attach to the revelation in Licensee's December 31 filing.

unexplained is why, having been alerted — irrespective of by whom — to at least the possibility that the amendment had already issued, he did not make inquiry of the NRC Staff to determine the precise status of the license amendment.

As has been seen, if the provisions of 10 C.F.R. § 2.1263 were to be applied strictly, Mr. Love’s time to file a stay motion would have expired 10 days after the filing of his hearing request on December 15 (because the 25th was a federal holiday the expiration date was on December 26). Although, once again, such application does not appear required in the somewhat unusual circumstances of this case, Mr. Love’s apparent decision to brush the “rumors” aside without further inquiry is equally unacceptable. In short, assuming that he did not have actual knowledge of the license amendment issuance at the time they came to his attention, the “rumors” gave him every reason to inquire into the then status of the amendment application. That being so, his February 28 stay motion is just as time-barred as is that of Sierra.<sup>3</sup>

## B. Merits

Even were they to be entertained on their merits at this late date, for the following reasons the stay motions would still require denial.

1. Section 2.1263 of 10 C.F.R. mandates that the consideration of stay applications such as those at hand be governed by the criteria set forth in 10 C.F.R. § 2.788. Those criteria, derived from the landmark decision in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), are as follows:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

In passing upon stay requests, no one of these criteria is dispositive. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985); *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255 (1992). As the Commission has pointed out, however, the most important criterion is that of irreparable harm, *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2),

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<sup>3</sup> While Mr. Love is not being held accountable for not having taken that step, both Petitioners might justifiably have deemed there to have been cause to inquire shortly after December 11 as to the status of NRC Staff action on the license amendment. Such an inquiry would certainly have been prudent given both the length of time that the amendment application had been pending before the Staff and the announcement in the *Federal Register* on that date that the Staff had concluded its environmental review with the issuance of a FONSI. That consideration does not, however, serve to justify the Staff’s failure to have informed Petitioners of the amendment issuance once the filing of the hearing requests came to its attention. Nor should Petitioners be penalized because they apparently chose to rely upon receiving prompt Staff notification of the amendment’s issuance.

CLI-90-3, 31 NRC 219, 258 (1990). In that connection, the mere fact that, in the absence of a stay, the controversy might become moot does not constitute such irreparable harm. It must also appear that a stay is required to avoid “concrete harm.” *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985).

2. Upon analysis, it is quite clear that Petitioners have fallen well short of meeting the four stay criteria. Most particularly, their moving papers do not establish either a likelihood of success on the merits or a high probability that irreparable harm to them will flow from a denial of stay relief.

To begin with, as observed in my decision last April with regard to the first endeavor to obtain a hearing on this license amendment proposal, over a period in excess of 20 years the White Mesa Uranium Mill has been engaged in the receipt and processing of conventional ores or alternate feed materials under explicit NRC authorization. LBP-01-15, 53 NRC at 346. It has not been established by either Petitioner that any of those activities produced significant harm to persons in the vicinity of the Mill (or along the transportation routes employed in bringing the material to the Mill). Indeed, the claim of both Petitioners that led to the grant of their hearing requests was that the composition of the Molycorp material is markedly different from that of the material previously received and processed at the Mill. According to Petitioners, the difference is significant in terms of the threat of harm posed by the proposed activity now in issue.

It remains to be seen whether Petitioners’ concerns in that regard are justified. At this very preliminary stage of the proceeding, with nothing more than allegations in hand, there is absolutely no basis upon which any judgment, let alone a confident one, could be made on that score. The short of the matter is that, on the basis of what is now before Judge Cole and me, the most that can be said is that it is possible that, when the presentations (written and perhaps oral as well) have been submitted and evaluated, Petitioners will prevail in their insistence that the lead content of the Molycorp material gives rise to unacceptable threats of harm not likewise associated with prior Mill activity. That possibility can hardly be converted, however, into a current finding of a likelihood of success on the merits. Nor does it allow for the conclusion that the grant of a stay is required to avoid irreparable harm to Mr. Love or Sierra members.

In these circumstances, the only consideration that might serve to support the grant of a stay is that (as feared by the Petitioners) in its absence the controversy might become moot before a decision is reached on its merits. I need not decide here whether, should the processing of the Molycorp material be undertaken and completed while the matter is still under consideration, the proceeding would necessarily be mooted.<sup>4</sup> Be that as it may, standing alone the mootness possibility

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<sup>4</sup> There might well remain issues pertaining to the storage of the residue.

is not determinative here (*Shoreham*, ALAB-810). Moreover, while also not a controlling factor, it is worthy of note that Petitioners can be thought to have contributed to that possibility.

Had they surfaced in response to the earlier notice of opportunity for hearing published in January 2001, the hearing requests filed subsequent to December 11, 2001, undoubtedly would have been granted in time to assure a decision on the merits of the controversy well before that date. Yet, despite the fact that the January 2001 notice disclosed the lead content of the Molycorp material, Mr. Love did not choose to take advantage of the hearing opportunity provided in that notice. And, although Sierra's Glen Canyon Group did file a hearing request in response to the January 2001 notice, that request did not rely to any extent on an asserted significant difference in composition between the Molycorp material and materials previously received at the Mill. As a consequence, it was denied in LBP-01-15 on the ground that it did not contain allegations of incremental harm sufficient to establish the Group's standing to challenge the proposed license amendment.

The reality thus is that, were it not for the publication of the second *Federal Register* notice, neither Petitioner would now be in a position to challenge the license amendment. During the February 21 conference, that publication was characterized by NRC Staff counsel as inadvertent (Tr. 8). In any event, Petitioners had no cause to expect that it would take place. Although that consideration does not affect Petitioners' entitlement to proceed on the hearing requests granted in LBP-02-6, it does undercut any claim that the stay motions have an impressive equitable foundation.

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For the foregoing reasons, the stay motions are *denied*. Also *denied* is Sierra's February 27, 2002 motion seeking an order withdrawing the NRC Staff's December 11, 2001 issuance of the license.<sup>5</sup>

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<sup>5</sup>To whatever extent the powers conferred on me by 10 C.F.R. § 2.1209 are (as Sierra would have it) broad enough to encompass the taking of such extraordinary action, the motion appears to be simply an endeavor to achieve through a differently labeled filing the same result as sought by Sierra's stay request. As such, it must fail for the same reasons that the latter has not succeeded.

It is so ORDERED.

BY THE PRESIDING OFFICER<sup>6</sup>

Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
March 13, 2002

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<sup>6</sup>Copies of this Memorandum and Order were sent this date by e-mail transmission to the counsel or other representative of all of the parties and the NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Charles Bechhoefer**, Chairman  
**Dr. Richard F. Cole**  
**Ann Marshall Young**

**In the Matter of**

**Docket Nos. 50-390-CivP  
50-327 CivP  
50-328-CivP  
50-259-CivP  
50-260-CivP  
50-296-CivP  
(ASLBP No. 01-791-01-CivP)  
(EA 99-234)**

**TENNESSEE VALLEY AUTHORITY  
(Watts Bar Nuclear Plant, Unit 1;  
Sequoyah Nuclear Plant, Units 1 and 2;  
Browns Ferry Nuclear Plant,  
Units 1, 2, and 3)**

**March 21, 2002**

In an enforcement proceeding based on an alleged violation by the Tennessee Valley Authority (TVA) of 10 C.F.R. § 50.7 for a claimed retaliation against a corporate chemistry manager for activities asserted by the NRC Staff to be “protected activities,” the Licensing Board denies TVA’s motion for summary disposition pursuant to 10 C.F.R. § 2.749(a). The Board determines that the facts presented demonstrate that the Staff is relying on several independent bases for its position, such as temporal proximity and possible differing interpretations as to intent of the Licensee in taking the action, and that a genuine dispute of material fact exists, warranting an evidentiary inquiry.

**RULES OF PRACTICE: SUMMARY DISPOSITION**

In considering a motion for summary disposition in an enforcement proceeding, a Licensing Board “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 . . . 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.” 10 C.F.R. § 2.749(d).

**RULES OF PRACTICE: SUMMARY DISPOSITION**

In considering a motion for summary disposition in an enforcement proceeding, a Licensing Board may apply the rules and standards used by the Federal courts for granting or denying summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

**RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PROOF)**

The party seeking summary disposition bears the burden of showing the absence of a genuine issue of any material fact, and the record must be viewed in the light most favorable to the party opposing summary disposition. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

**RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PROOF)**

The party opposing summary disposition must make a sufficient showing of each element of the case on which it has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 273 (1986).

**RULES OF PRACTICE: SUMMARY DISPOSITION (PROCEDURAL REQUIREMENTS; REPLY BRIEFS ON MOTIONS)**

The failure of a party to file in its motion for summary disposition a separate statement of “material facts as to which the moving party contends there is no genuine issue to be heard,” as required by 10 C.F.R. § 2.749(a), while asserting in its reply that its statement of undisputed facts actually appears in its brief, is arguably a procedural defect that warrants denial of summary disposition.

**RULES OF PRACTICE: SUMMARY DISPOSITION (LITIGABLE ISSUES)**

A motion for summary disposition must be denied when facts may be susceptible of differing interpretations as to intent, and where discriminatory or retaliatory intent behind otherwise routine activities is at issue. *See Hunt v. Cromartie*, 526 U.S. 541, 553, 143 L. Ed. 2d 731, 742 & n.9 (1999).

**RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PROOF)**

**ENFORCEMENT ACTIONS: LEGAL BASIS**

In situations where temporal proximity is the sole basis for an alleged claim of discrimination, mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action is sufficient evidence of causality to establish a prima facie case where the temporal proximity is "very close." *See, e.g., Clark County School District v. Breeden*, 532 U.S. 268, 273, 149 L. Ed. 2d 509, 515 (2001). However, "[t]he mere passage of time is not legally conclusive proof against retaliation," *Robinson v. SEPTA*, 982 F.2d 892, 894 (3d Cir. 1993), and "the absence of immediacy between the cause and effect does not disprove causation." *Kauchmar v. Sungard Data Systems, Inc.*, 109 F.3d 173, 178 (3d Cir. 1997).

**MEMORANDUM AND ORDER  
(Denying Motion for Summary Disposition)**

This proceeding involves an alleged violation by the Tennessee Valley Authority (TVA) of 10 C.F.R. § 50.7, based on its claimed retaliation against a corporate chemistry manager, Mr. Gary Fiser, for activities that have been asserted by the NRC Staff (Staff) to be "protected activities." The Staff issued a Notice of Violation and imposed a civil penalty of \$110,000, for TVA's alleged improper actions in eliminating Mr. Fiser's position and failing to select him for another position. *See* 66 Fed. Reg. 27,166 (May 16, 2001). On February 1, 2002, TVA filed a motion for summary disposition, pursuant to 10 C.F.R. § 2.749.<sup>1</sup> On February 20, 2002, the Staff timely filed its response, seeking denial of TVA's

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<sup>1</sup> "Tennessee Valley Authority's Motion for Summary Decision," dated February 1, 2002. Among the attachments to that motion was a "Brief in Support of Tennessee Valley Authority's Motion for Summary Decision" [TVA Brief].

motion.<sup>2</sup> On March 1, 2002, TVA filed a reply to the Staff's response,<sup>3</sup> and on March 4, 2002, the Staff filed an objection to our considering the reply.<sup>4</sup> For reasons set forth below, we are denying TVA's summary disposition motion.

## I. STANDARDS

Under 10 C.F.R. § 2.749(a), any party to a proceeding may move for a decision by the presiding officer — here, this Atomic Safety and Licensing Board — in that party's favor as to all or any part of matters involved in the proceeding. The moving party “shall annex to the motion a *separate*, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard (emphasis supplied).” 10 C.F.R. § 2.749(a). Any other party may serve an answer supporting or opposing the motion. That party similarly shall annex to its answer opposing the motion “a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard.” *Id.*

Under 10 C.F.R. § 2.749(d), the Licensing Board “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 . . . 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*” (emphasis supplied). In considering a motion for summary disposition, we may apply the rules and standards used by the Federal courts for granting or denying summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). The party seeking summary disposition bears the burden of showing the absence of a genuine issue of any material fact, and the record must be viewed in the light most favorable to the party opposing summary disposition. *Id.* The party opposing summary disposition must make a sufficient showing of each element of the case on which it has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 273 (1986).

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<sup>2</sup> NRC Staff Response to Tennessee Valley Authority's Motion for Summary Decision,” dated February 20, 2002 [NRC Staff Response]. The NRC Staff Response was accompanied by, *inter alia*, an “NRC Staff Statement of Material Disputed Facts” [Staff Factual Statement].

<sup>3</sup> “Reply in Support of Tennessee Valley Authority's Motion for Summary Decision,” dated March 1, 2002 [TVA Reply]. Reflecting the fact that 10 C.F.R. § 2.749 does not provide for the filing of a reply, TVA included with its reply a motion that we accept it.

<sup>4</sup> “NRC Staff Objection to Tennessee Valley Authority's Motion for Leave To Reply in Support of Motion for Summary Decision.” In the interest of the most efficient consideration of all pertinent arguments made by both parties, we are including TVA's reply in our consideration of its motion, as well as the Staff's response to the reply.

## II. LICENSING BOARD ANALYSIS

Under applicable standards outlined above, TVA's motion cannot be granted. Initially, we note that TVA has failed to comply with one of the specific mandates of 10 C.F.R. § 2.749(a): that the motion be accompanied by a separate statement of the "material facts as to which the moving party contends that there is no genuine issue to be heard." TVA filed no such separate statement, but claims in its reply that its statement of undisputed facts appears in its brief, at pp. 3-9. *See* TVA Reply at 1. Whether or not this is sufficient under 10 C.F.R. § 2.749, we need not rest our ruling herein on this arguable procedural deficiency.

TVA in the cited pages of its reply brief focuses on matters in dispute with the Staff, claiming that TVA's version is more accurate than the Staff's. Given the requirement that disputed facts are to be construed in favor of the party opposing summary disposition, TVA's motion must be denied on the ground that significant differences between the parties on material factual issues do in fact exist, thus leaving resolution of such differences for the evidentiary hearing (*see* further description of significant differences *infra*).

We base this conclusion on the Staff's demonstration in its statement of material facts that there exist genuine issues to be heard. This statement includes forty-seven facts asserted to be in dispute.<sup>5</sup> We need not recount them all to conclude that an abundance of disputed factual issues exists and should be heard and resolved through an evidentiary hearing.

For example, TVA asserts that "there is simply no evidence that McGrath was aware of any protected activity by Fiser" (TVA Brief at 9), whereas, in contrast, the Staff states that "McGrath had knowledge of Fiser's 1993 DOL [United States Department of Labor] Complaint prior to June, 1996" (Staff Factual Statement ¶ 6; *see* Staff Response at 32-33). Similarly, TVA claims that "the new [chemistry program manager specialist] positions were significantly different than the old [generalist chemistry and environmental protection program manager] positions" (TVA Brief at 8), whereas the Staff states that "[t]he Chemistry and Environmental Protection Program Manager position was substantially similar to the PWR Chemistry Program Manager position (Staff Factual Statement ¶ 26), relying on depositions of various TVA officials before DOL (Staff Response at 35-36).

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<sup>5</sup>The first five list actions taken by Mr. Fiser which, in the Staff's view, constitute "protected activity." *See* Staff Factual Statement ¶¶ 1-5. TVA, through its brief, claims that these actions do not constitute "protected activities." TVA Brief at 2. Because these statements are a mixture of fact and law, and because the factual elements involved are in dispute, we cannot at this stage determine that, as a matter of law, the actions do not constitute protected activity.

TVA also states (TVA Brief at 7) that:

As part of the workforce planning effort for the year 2001 and the budget planning process for Fiscal Year 1997, corporate Nuclear Power underwent a reorganization and reduction in the summer and fall of 1996. The goal for the year 2001 was for the overall corporate organization budget to be reduced by about 40 percent.

For its part, the Staff asserts (Staff Factual Statement ¶¶ 13, 14, 15) that:

13. McGrath rejected a reorganization plan in 1996 for the Corporate Chemistry organization that would not have resulted in the elimination of any of the incumbent Chemistry Managers.

14. McGrath insisted that Grover cut the Chemistry organization to two chemistry managers, ensuring that at least one incumbent would not have a position after the reorganization.

15. The Chemistry organization was the only organization within Operations Support that McGrath mandated the entire 40 percent budget reduction within the first year of a five year organization plan. Only one other organization suffered the same level of cuts as the Chemistry organization.

From our review of the record, we observe that these are not the only facts in dispute, and that, indeed, there is a plethora of disputed facts and factual inferences, on all elements of the Staff's case on which it arguably bears the burden of proof, which precludes a grant of summary disposition. This is particularly the case where, as here, facts may be susceptible of differing interpretations as to intent, and where discriminatory or retaliatory intent behind otherwise routine activities is at issue. *See Hunt v. Cromartie*, 526 U.S. 541, 553, 143 L. Ed. 2d 731, 742 & n.9 (1999).<sup>6</sup> Moreover, as indicated above, where there are disputes between the parties on factual matters, the record must be viewed in the light most favorable to the party opposing summary disposition. In such circumstances, the grant of summary disposition is inappropriate.<sup>7</sup>

Finally, TVA claims that, as a matter of law, the Staff cannot rely on the temporal proximity of Mr. Fiser's complaints to DOL and the elimination of his job with TVA, as evidence of discrimination, because the period of time between the two events is excessive (TVA Brief at 14). The cases cited by TVA, however, involve situations where proximity is the sole basis for the alleged claim of discrimination. *See, e.g., Clark County School District v. Breeden*, 532 U.S. 268, 273, 149 L. Ed. 2d 509, 515 (2001) ("[t]he cases that accept *mere temporal proximity* between an employer's knowledge of protected activity and an adverse

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<sup>6</sup> As the Court stated, "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt*, 546 U.S. at 553, 143 L. Ed. 2d at 742.

<sup>7</sup> TVA, in its reply, attempts to explain why the Staff's version of disputed facts is incorrect. This is a proper argument for the evidentiary hearing, but it is not appropriate at the summary disposition phase of the proceeding, where disputed facts are to be construed in a manner favoring the party opposing summary disposition.

employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close’”(emphasis supplied, citations omitted)). Here, no reference to temporal proximity is reflected in the Staff’s Notice of Violation or its Order Imposing Civil Monetary Penalty, but rather is found only (insofar as we are aware) in the Staff’s letter dated February 7, 2000, at 3, transmitting the Order Imposing Civil Monetary Penalty to TVA. The Staff has indicated that it is relying on proximity as only one of several bases for establishing causation for TVA’s acts (Staff Brief at 34; *see also* Tr. 122), citing a case stating that “[t]he mere passage of time is not legally conclusive proof against retaliation” (*Robinson v. SEPTA*, 982 F.2d 892, 894 (3d Cir. 1993)) and another case declaring that

[t]he element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation. *Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173, 178 (3d Cir. 1997).

In short, it is apparent that the Staff is using several independent bases, including to an extent temporal proximity, to demonstrate causation in this case. As such, the cases cited by TVA that would disallow temporal proximity only when it is the sole basis for a showing of causation are not in point here, and so do not provide any basis for granting summary disposition.

### III. CONCLUSION

For the reasons set forth herein, the Licensing Board finds sufficient disputed material facts to preclude a grant of summary disposition in this proceeding and, in addition, finds no legal basis for discarding the Staff’s claims in whole or in part as a matter of law. TVA’s motion for summary disposition is thus *denied*.

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE

Ann Marshall Young  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
March 21, 2002

[Copies of this Memorandum and Order have been transmitted this date by e-mail  
to counsel for each of the parties.]

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 70-3098-ML**

**DUKE COGEMA STONE &  
WEBSTER  
(Savannah River Mixed Oxide Fuel  
Fabrication Facility)**

**April 3, 2002**

Earlier in this proceeding to authorize construction of a mixed oxide (“MOX”) fuel fabrication facility, the Commission granted partial review, as to a terrorism contention, of Duke Cogema Stone & Webster’s petition for interlocutory review of the Licensing Board’s denial of reconsideration of its decision to admit several contentions. The Commission denies the remainder of DCS’s petition.

**RULES OF PRACTICE: INTERLOCUTORY REVIEW; APPELLATE REVIEW**

We generally deny petitions for interlocutory review of board orders. *See* CLI-02-7, 55 NRC 205, 213 (2002). Of course, an applicant may appeal, as of right, an order granting an intervention petition on the ground that the petition should have been wholly denied. *See* 10 C.F.R. § 2.714a(c).

**RULES OF PRACTICE: DISCRETIONARY INTERLOCUTORY REVIEW**

The criteria in 10 C.F.R. § 2.786(g) reflect the limited circumstances in which interlocutory review may be appropriate: where the Board’s ruling either threatens

a party with immediate and serious injury which cannot be remedied by a later appeal or “[a]ffects the basic structure of the proceeding in a pervasive or unusual manner.” See CLI-02-7, 55 NRC 205, 214 n.15 (2002); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998).

#### **RULES OF PRACTICE: INTERLOCUTORY REVIEW**

Inappropriate admission of a contention, without more, does not meet our review criteria, for a party cannot use an interlocutory appeal merely to narrow the scope of a hearing. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 18-19 (2001). Admission of contentions that expand the issues for consideration does not affect the proceeding in a pervasive or unusual way: See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).

#### **RULES OF PRACTICE: INTERLOCUTORY REVIEW**

“The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceeding . . . .” *Rancho Seco*, CLI-94-2, 39 NRC at 94, quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987).

### **MEMORANDUM AND ORDER**

In this proceeding, Duke Cogema Stone & Webster (“DCS”) seeks authorization to construct a mixed oxide (“MOX”) fuel fabrication facility. DCS is before the Commission on a petition for interlocutory review contesting several contentions admitted for hearing by the Licensing Board. We previously granted DCS’s petition insofar as it sought Commission review of a terrorism-related contention.<sup>1</sup> That contention, together with similar contentions from three

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<sup>1</sup> See CLI-02-4, 55 NRC 158 (2002).

other cases,<sup>2</sup> remains before the Commission. Today, we consider the remainder of DCS's petition and deny it.

## I. BACKGROUND

On February 28, 2001, the DCS consortium submitted an application for authorization to construct a MOX fuel fabrication facility at the Department of Energy's Savannah River, South Carolina site. The MOX facility, if approved and constructed, will convert surplus weapons-grade plutonium to MOX fuel, a blend of uranium and plutonium oxides, that commercial nuclear power stations can use to generate electricity.

Recently, we upheld the lawfulness of a two-step MOX licensing process — an initial construction review and a later operating review.<sup>3</sup> Intervenor, Georgians Against Nuclear Energy ("GANE"), had contested the propriety of the two-step process. But, after reviewing our regulations at length, we found it permissible to limit the current initial hearing process to contentions pertinent to DCS's construction authorization request, environmental report, and quality assurance plan.<sup>4</sup> Hence, construction authorization requires discrete findings related to construction:

(1) a safety finding "that the design bases of the proposed MOX fuel fabrication facility's principal structures, systems, and components, together with the DCS quality assurance plan, 'provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents.' 10 CFR 70.23(b)"; and (2) an environmental finding, after a review under the National Environmental Policy Act ("NEPA"), that "the action called for is the issuance of the proposed license." 10 CFR 70.23(a)(7)."<sup>5</sup>

The agency will consider operation of the MOX facility later, subject to a separate hearing notice and another opportunity for public participation.

The Board admitted several of GANE's contentions in the construction authorization hearing, along with one contention and part of another contention of the Blue Ridge Environmental Defense League ("BREDL").<sup>6</sup> DCS requested the Board to reconsider its decision to admit GANE contentions 1 and 2, relating to consideration of material control and accounting and physical security issues; GANE contentions 5 and 8 and BREDL contention 9A, relating to the definition

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<sup>2</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-3, 55 NRC 155 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-5, 55 NRC 161 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-6, 55 NRC 164 (2002).

<sup>3</sup> See CLI-02-7, 55 NRC 205 (2002).

<sup>4</sup> *Id.* at 212 (citations omitted).

<sup>5</sup> *Id.* (citations omitted).

<sup>6</sup> See LBP-01-35, 54 NRC 403 (2001).

of the “controlled area” for the MOX fuel fabrication facility; and GANE contention 12, regarding the analysis of the impacts of terrorist acts under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* Alternatively, DCS requested that the Board certify the issues to the Commission. GANE and BREDL opposed the motion. The NRC Staff took no position as to contentions 5 and 8, but supported DCS’s motion as to the remaining contentions. The Board denied both reconsideration and certification.<sup>7</sup>

Subsequently, DCS filed with the Commission a petition for interlocutory review. In an earlier order, we granted DCS’s request to review the terrorism contention and set a briefing schedule on that issue, but made no decision regarding the remainder of the petition.<sup>8</sup> Today, we address the remainder of DCS’s petition for interlocutory review.

## II. DISCUSSION

As a general matter, the Commission disfavors interlocutory review. Nevertheless, the Commission in this case recently granted interlocutory review of GANE’s terrorism contention and also accepted review of similar issues in three other ongoing NRC adjudications. Those contentions are exceptional because they arise from the unprecedented terrorist acts of September 11, 2001; they involve issues that impact many other ongoing and future adjudicatory proceedings; and two Licensing Board panels reached different conclusions about the admissibility of the contentions. None of the other contentions for which DCS requests review rise to that extraordinary level of significance.

Nor do the contentions meet the criteria in 10 C.F.R. § 2.786(g), which reflect the limited circumstances in which interlocutory review may be appropriate: where the Board’s ruling either threatens a party with immediate and serious injury which cannot be remedied by a later appeal or “[a]ffects the basic structure of the proceeding in a pervasive or unusual manner.”<sup>9</sup> DCS does not claim immediate or serious injury, and none is obvious. Inappropriate admission of a contention, without more, does not meet our review criteria, for a party cannot use an interlocutory appeal merely to narrow the scope of a hearing.<sup>10</sup> Admission of contentions that expand the issues for consideration do not affect the proceeding in a pervasive or unusual way:<sup>11</sup>

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<sup>7</sup> See unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002).

<sup>8</sup> See CLI-02-4, 55 NRC 158.

<sup>9</sup> See CLI-02-7, 55 NRC at 214 n.15; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998).

<sup>10</sup> See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 18-19 (2001).

<sup>11</sup> See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).

The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceeding . . . .<sup>12</sup>

Accordingly, we generally deny petitions for interlocutory review of Board orders.<sup>13</sup> We follow that practice here.

Although we deny review, we add a cautionary note. We purposefully set boundaries for the subject matter of the MOX hearings. Under our two-step approach, the present Board's jurisdiction extends only to construction authorization issues.<sup>14</sup> Therefore, the Board must limit litigation of all contentions to design bases, quality assurance program, and environmental review issues.<sup>15</sup> Operation-related issues come into play later, after the receipt of the complete license application and the announcement of a new opportunity for a hearing on these issues.

### III. CONCLUSION

For the foregoing reasons, the Commission *denies* DCS's petition for interlocutory review as it relates to GANE contentions 1, 2, 5, and 8 and BREDL contention 9A.

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<sup>12</sup> *Id.* at 94, quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987).

<sup>13</sup> See CLI-02-7, 55 NRC at 213. Of course, an applicant may appeal, as of right, an order granting an intervention petition on the ground that the petition should have been wholly denied. See 10 C.F.R. § 2.714a(c).

<sup>14</sup> See CLI-02-7, 55 NRC at 217.

<sup>15</sup> We note in passing that there is a substantial disagreement among the parties as to, *inter alia*, whether physical protection and material control and accounting systems are within the intended scope of the "principal structures, systems, and components" referenced in 10 C.F.R. § 70.23(b). We also note that there are alleged to be several ways in which such design bases may be associated with the safety finding under § 70.23(b), and that the Board's bottom line is that the "design bases of the MC&A and physical protection systems of the [MOX fuel fabrication facility] are not precluded from consideration under section 70.23(b)." LBP-01-35, 54 NRC at 429. As we find an insufficient case for interlocutory review at this point, we are not deciding the extent to which the design bases of these two systems will be relevant or should be judged at this stage. However, we expect the Board to go forward in a manner that refines and specifies the standards by which these design basis issues will be deemed appropriately litigated and resolved.

IT IS SO ORDERED.

For the Commission<sup>16</sup>

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 3d day of April 2002.

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<sup>16</sup>Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 40-8681-MLA-11**

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

**April 3, 2002**

The Commission reviews an Atomic Safety and Licensing Board decision that grants two Petitioners' requests for hearing in this license amendment proceeding. The Commission affirms the decision.

**RULES OF PRACTICE: STANDING TO INTERVENE**

Absent a clear application of the facts or law, the Commission generally defers to a Presiding Officer's finding on standing. The Presiding Officer has a greater familiarity than the Commission with the precise allegations and nuances in the factual record before him.

**RULES OF PRACTICE: AREAS OF CONCERN**

Under current NRC regulations and practice governing materials licensing adjudications, a petitioner need only provide a concise statement of the areas of concern the requestor desires to raise at the hearing. The statement of concerns need not be extensive, but sufficient to establish that the issues fall generally within the range of matters that properly are subject to challenge in such a proceeding. Areas of concern provide the Presiding Officer with the minimal

information needed to ensure that the intervenor desires to litigate issues germane to the licensing proceeding and therefore should be allowed to take the additional step of making a full presentation under 10 C.F.R. § 2.1233.

## **RULES OF PRACTICE: REQUEST FOR STAY PENDING HEARING**

Our rules make clear that speedy requests — a Subpart L stay must be sought within 10 days of Staff action or at the time of a hearing request, whichever is later — are a prerequisite to obtaining stay relief. In addition, mere allegations, until substantiated, fall well short of meeting the key “likelihood of success” and “irreparable injury” requirements for a stay.

## **MEMORANDUM AND ORDER**

### **I. INTRODUCTION**

This case arises out of a license amendment granted to the International Uranium (USA) Corporation (“IUSA”) to receive and process, at its White Mesa Mill in Utah, waste material from a Molycorp site in California. Before us are two appeals, and a number of motions seeking expedition, stays, and the striking of an opponent’s brief. We affirm the Presiding Officer’s decision that two Intervenors, William Love and the Sierra Club, have standing, have asserted a germane area of concern, and can proceed to hearing.<sup>1</sup> We deny the Intervenors’ motion to stay the effect of the license amendment pending the hearing.<sup>2</sup> And we deny IUSA’s motion to strike the Sierra Club’s appellate brief. We find all other pending motions or requests for relief moot.

### **II. BACKGROUND**

The challenged license amendment authorizes IUSA to receive and process particular alternate feed material from the Molycorp facility in Mountain Pass, California. The material results from extraction of lanthanides and other rare earth metals from bastnasite ores. IUSA proposes to receive and process the material

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<sup>1</sup>LBP-02-6, 55 NRC 147 (2002).

<sup>2</sup>Recently, the Presiding Officer denied a request to stay the effect of the license amendment. *See* LBP-02-9, 55 NRC 227 (2002). The Intervenors purport to appeal that decision, and seek a temporary Commission stay pending the outcome of that appeal. *See* Sierra Club’s Memorandum in Support of Request for Stay, Appeal of LBP-02-9, and Request for Expedited Review (filed March 18, 2002); *see also* William E. Love’s Memorandum for the Appeal of LBP-02-9. No NRC rule authorizes such appeals. We construe the “appeals” as requests that the Commission issue a full stay. On April 2, 2002, IUSA filed responses opposing the Intervenors’ appeals.

for its uranium content, and to dispose of the byproduct material in tailings cells at the IUSA White Mesa Mill. The NRC Staff issued the license amendment on December 11, 2001.

At the outset, the Commission notes that this is the *second* NRC adjudicatory proceeding involving the Molycorp license amendment. The previous adjudication ended in November of last year with a finding that the hearing Petitioners lacked standing to obtain a hearing.<sup>3</sup> However, after the NRC Staff completed its review of the environmental impacts of the amendment, it inexplicably issued another federal notice and provided a second “opportunity for hearing.”<sup>4</sup> It is unusual, to say the least, for there to be two separate adjudicatory hearings on the same license amendment involving the same materials and activities. The common practice is to give notice “relating to the receipt of the application *or* to NRC environmental findings relating to the licensing request,” not both.<sup>5</sup> Given the substantial agency resources expended on the adjudicatory hearings process, it is the Commission’s general intent “that only one proceeding . . . be conducted” on a single materials licensing action.<sup>6</sup>

Nonetheless, for unexplained reasons, the NRC Staff did in fact offer two hearing opportunities here. The second notice generated three fresh petitions requesting a hearing. In LBP-02-6, the Presiding Officer rejected one of the hearing requests for lack of standing, but found standing and granted a hearing with respect to two other Petitioners: the Sierra Club and Mr. Love. The Presiding Officer held that these Petitioners had introduced new allegations not considered in the first Molycorp adjudication: high toxic lead content, Petitioners’ ongoing use of water and air in the area of the White Mesa Mill, and inadequate monitoring by IUSA.<sup>7</sup> These allegations, he held, sufficed for standing.

On appeal, IUSA emphasizes the earlier Molycorp proceeding. There, the Presiding Officer and the Commission concluded that the Petitioners lacked standing to intervene because they had failed to “show in enough detail how the proposed license amendment would affect [them].”<sup>8</sup> Comparing the two cases, IUSA argues that the allegations made this time are virtually the same as those raised previously.<sup>9</sup> IUSA therefore concludes that LBP-02-6’s standing determination cannot be squared with the prior decision rejecting standing on nearly the same facts. In addition, IUSA argues that the Presiding Officer committed several legal errors in LBP-02-6, including inappropriately applying

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<sup>3</sup> See CLI-01-21, 54 NRC 247 (2001).

<sup>4</sup> See 66 Fed. Reg. 64,064 (Dec. 11, 2001).

<sup>5</sup> Final Rule, “Informal Hearing Procedures for Materials Licensing Adjudications,” 54 Fed. Reg. 8269, 8271 (Feb. 28, 1989) (emphasis added).

<sup>6</sup> *Id.* at 8272; see also *id.* at 8271-72.

<sup>7</sup> See LBP-02-6, 55 NRC at 150-52.

<sup>8</sup> CLI-01-21, 54 NRC 247, 252 (2001) (agreeing with Presiding Officer that allegations lacked specificity).

<sup>9</sup> See IUSA’s Memorandum in Support of Appeal of LBP-02-06 (“IUSA Appeal Brief”) (Feb. 11, 2002) at 3, 10-12, 14-15, 17-18.

a “geographic proximity test” for standing, and looking only to see whether the Petitioners’ allegations were “germane,” but not to whether they alleged an actual “injury-in-fact” from this license amendment.

Subsequent to the filing of appellate briefs, IUSA moved to strike the Sierra Club’s brief as untimely, and also moved to expedite its appeal and to halt proceedings before the Presiding Officer in the meantime. The Sierra Club and William Love, in turn, have asked the Commission to stay the effect of the Molycorp license amendment pending the upcoming hearing. The Presiding Officer previously had rejected their stay requests as untimely and unjustified under Commission stay standards.<sup>10</sup> The Presiding Officer has set a filing schedule for the Subpart L hearing, with initial submissions due April 1.

### III. STANDING AND GERMANE AREAS OF CONCERN

We see no basis for overturning the Presiding Officer’s standing decision. Absent a “clear misapplication of the facts or law,” or an “irrational” conclusion, the Commission generally defers to a Presiding Officer’s finding on standing.<sup>11</sup> The Presiding Officer has a greater familiarity than the Commission with the precise allegations and nuances in the factual record before him. Here, we see no obvious error or other reason to reverse his finding, and therefore exercise our customary deference. Indeed, this particular Presiding Officer also presided over other cases involving IUSA, and thus was uniquely well positioned to parse and judge the distinctions in the Petitioners’ claims.

IUSA’s appeal is premised on the notion that the allegations in this proceeding are essentially identical to those raised in the previous Molycorp proceeding. IUSA thus objects to the different result in this proceeding. The Commission finds, however, that while there may be similarities, the case record is not the same. There are new affidavits by different individuals, and the intervention petitions themselves present new allegations. “Standing jurisprudence is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief.”<sup>12</sup> Here, “contrary to the insistence of the Licensee,” the Presiding Officer found that “the Love and Sierra [Club] hearing requests, *unlike the one rejected last year* in LBP-01-15, satisfy the conditions precedent to their grant.”<sup>13</sup> He drew several distinctions between the cases.

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<sup>10</sup> See LBP-02-9, 55 NRC at 230-32 (timeliness), 232-34 (stay standards).

<sup>11</sup> *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995); *Accord Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001); *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998).

<sup>12</sup> *National Wildlife Federation v. Hodel*, 839 F.2d 694, 703 (D.C. Cir. 1988).

<sup>13</sup> LBP-02-6, 55 NRC at 149 (emphasis added).

The Presiding Officer pointed out, for instance, that in the prior case Sierra Club member Mr. McHarg had alluded to drinking from “waters that he believes might be affected by the materials handled at the mill,” but “provide[d] not the slightest illumination respecting where those waters might be located.”<sup>14</sup> Here, the Presiding Officer found that Mr. Weisheit’s affidavit indicates that “both his professional and his personal recreational activities bring him in close proximity to the facility,”<sup>15</sup> and that while “Mr. Love might have been more precise with regard to how far from the mill [his] specified activities take place,” the allegations were nevertheless sufficient to show that he has actual contacts with the mill area.<sup>16</sup>

IUSA argues that the Presiding Officer “ignore[d] his prior decision” and “abuse[d] his discretion” when he found that Mr. Love sufficiently had alleged a distinct new threat posed by the lead content of the Molycorp material.<sup>17</sup> IUSA argues that in the earlier case there also were allegations concerning the “presence of lead in the material,” and yet the Presiding Officer in that case rejected the notion that the mere existence of lead would pose any incremental threat of harm to the Petitioners.<sup>18</sup> But, as the Presiding Officer stressed, in this case Petitioners focus not simply on the mere presence of lead, but on the potential new risk associated with an asserted *high concentration* of lead, an allegation that surfaced only in this case.<sup>19</sup>

The Presiding Officer emphasized that whether the concerns over high lead content and various “asserted deficiencies in the Licensee’s protective and monitoring capabilities” will prove correct is a merits question to be decided later.<sup>20</sup> IUSA, though, apparently suggests that the Presiding Officer should have found at the threshold that the processing of the Molycorp material at the White Mesa Mill simply cannot pose any new hazard.<sup>21</sup> To that effect, IUSA cites particular comments from the Commission’s decision in the earlier case, where we indicated that particular groundwater or air impacts are “unlikely” or “implausible.”<sup>22</sup> IUSA treats these statements as incontrovertible findings of fact. But in actuality they were simply the Commission’s characterization of the earlier case record bearing on standing, with the intent to emphasize that the

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<sup>14</sup> LBP-01-15, 53 NRC 344, 350 (2001).

<sup>15</sup> LBP-02-6, 55 NRC at 152.

<sup>16</sup> *Id.* at 151 n.4.

<sup>17</sup> IUSA Appeal Brief at 10.

<sup>18</sup> *See id.* at 10-12.

<sup>19</sup> *See, e.g.*, LBP-02-6, 55 NRC at 152 (“As has Mr. Love, Mr. Weisheit focuses on the high concentration of lead in the Molycorp material”). *See also* John Weisheit Affidavit at 1; William Love Affidavit at 1; Sierra Club Petition for Hearing at 2.

<sup>20</sup> LBP-02-6, 55 NRC at 151.

<sup>21</sup> *See* IUSA Appeal Brief at 14 n.9, 15; *see also* LBP-02-6, 55 NRC at 151-52 (“the Licensee vigorously insists that Mr. Love’s concerns are not well founded,” but whether the “concern[s] advanced are . . . meritorious is for later consideration”).

<sup>22</sup> *See* IUSA Appeal Brief at 14 n.9, 15.

Petitioners in that case had nowhere plausibly traced how particular forms of contamination might harm them.

IUSA argues that, just as before, the Petitioners' standing allegations fail to adequately detail potential harm to the Intervenor. But this argument takes inadequate account of the differing allegations in the two cases. In the current case the Sierra Club's petition and attached letter focus at great length and detail upon alleged deficiencies in the NRC Staff's Environmental Assessment and FONSI [Finding of No Significant Impact]. Many of these allegations are entirely new, particularly given that the Environmental Assessment had not yet been issued at the time of the earlier proceeding. There are also new allegations about "deficiencies in the Licensee's protective and monitoring capabilities" which the Presiding Officer accepted as plausible.<sup>23</sup> These include concerns that: (1) there currently is no testing for a number of contaminants, including lead, and thus no way to be assured that leakage of these contaminants has not and will not occur; and (2) State of Utah data suggest that the White Mesa Mill has contaminated the groundwater with chloroform, and that other contaminants could spread in the same fashion. Unlike the earlier case record, the record here contains sufficiently detailed allegations of "the company's inability to protect . . . the surrounding area from lead contamination."<sup>24</sup>

IUSA makes a number of additional points on appeal, but we find them unpersuasive. First, IUSA claims that the Presiding Officer improperly relied upon "the geographic proximity presumption" in according Mr. Love standing to intervene.<sup>25</sup> More specifically, IUSA claims that the Presiding Officer merely looked to whether Mr. Love was "geographically proximate to the proposed activity" and had expressed a germane "area of concern," but did not require Mr. Love to set forth an "injury-in-fact" from the license amendment.<sup>26</sup> We disagree. While the Presiding Officer's analysis was terse, it is clear that he listed several allegations going to Mr. Love's "threatened injury-in-fact," all dealing with potential contamination of groundwater, air, or vegetation in areas frequented by Mr. Love.<sup>27</sup> The Presiding Officer found these allegations sufficient to assert a "risk to [Mr. Love's] health and well-being."<sup>28</sup>

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<sup>23</sup> See LBP-02-6, 55 NRC at 151.

<sup>24</sup> See *id.* This is not to suggest that the allegations will prove true, only that we think that the Presiding Officer reasonably declined to reject them out of hand at the threshold standing stage. Notably, the hearing file in this case now contains documents in which the NRC Staff brings up questions similar to those raised by the Sierra Club and by Mr. Love. See, e.g., Hearing File (Tab 1) (NRC Staff Letter to IUSA dated January 14, 2002); Hearing File (Tab 7) (NRC Staff Letter to IUSA dated Nov. 27, 2001).

<sup>25</sup> IUSA Appeal Brief at 6-7. "The rule of thumb generally applied in reactor licensing proceedings (a presumption of standing for persons who reside or frequent the area within a 50-mile radius of the facility) is not applied in materials licensing cases." *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994).

<sup>26</sup> IUSA Appeal Brief at 8.

<sup>27</sup> See LBP-02-6, 55 NRC at 151.

<sup>28</sup> *Id.*

Next, IUSA takes exception to the Presiding Officer's failure to specifically address whether Mr. Love's "alleged injuries are likely to be redressed by a favorable decision."<sup>29</sup> But, as the Presiding Officer held, Mr. Love alleged new risks to himself, stemming from the high concentration of lead in the Molycorp material. Presumably, if there proves to be any basis to Mr. Love's concerns, they could be redressed by conditions placed on the license or other measures taken to prevent any harm from occurring due to the receipt, processing, and disposal of *this* particular material. Given Mr. Love's allegations, we find the "redressability" question easy and its answer obvious. The absence in the Presiding Officer's decision of an explicit analysis of redressability does not constitute reversible error.

Finally, IUSA claims that the Presiding Officer accepted Mr. Love's areas of concern without analyzing how detailed, "concrete[]," or "particulari[zed]" those concerns were.<sup>30</sup> The Presiding Officer found that Mr. Love had "set forth with particularity one or more germane areas of concern."<sup>31</sup> That conclusion plainly is reasonable, as Mr. Love's concerns on their face relate to the subject matter of the license amendment at issue, the safe storage and handling of the Molycorp materials.

Under current NRC regulations and practice governing materials licensing adjudications, a petitioner need only provide a "concise statement of the areas of concern the requestor desires to raise at the hearing."<sup>32</sup> The statement of concerns "need not be extensive, but . . . sufficient to establish that the issues the requester wants to raise regarding the licensing action *fall generally* within the range of matters that properly are subject to challenge in such a proceeding."<sup>33</sup> Areas of concern "provide the Presiding Officer with the *minimal information* needed to ensure the intervenor desires to litigate issues germane to the licensing proceeding and therefore should be allowed to take the additional step of making a full written presentation under § 2.1233."<sup>34</sup> We cannot say that the Presiding Officer erred in finding that Mr. Love had satisfied these "modest" standards.<sup>35</sup>

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<sup>29</sup> IUSA Appeal Brief at 9.

<sup>30</sup> *Id.*

<sup>31</sup> LBP-02-6, 55 NRC at 151-52.

<sup>32</sup> Final Rule, "Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8269, 8271-72 (Feb. 28, 1989). *See also* 10 C.F.R. § 2.1205(e)(3). The Commission is considering a proposed rule that would change the requirements for intervention in materials licensing cases by requiring detailed "contentions" rather than germane "areas of concern." *See* Proposed Rule: "Changes in Adjudicatory Process," 66 Fed. Reg. 19,609 (2001).

<sup>33</sup> *Id.* at 8272 (emphasis added).

<sup>34</sup> *Id.* (emphasis added); *see also Northern States Power Co. (Pathfinder Atomic Plant)*, LBP-90-3, 31 NRC 40, 46-47 (1990) (explaining reasons behind "relaxed standard" for areas of concern).

<sup>35</sup> *See Sequoyah Fuels Corp.*, CLI-01-2, 53 NRC at 16.

#### IV. PROCEDURAL MATTERS

The Commission also has before it a number of procedural matters. The first is IUSA's motion to strike the Sierra Club's response to IUSA's appeal. IUSA correctly points out that the response was due within "fifteen days (15) of the service of the appeal brief."<sup>36</sup> Our rules also add 5 days to filing deadlines when service is by mail.<sup>37</sup> IUSA, though, claims that it "served" the Sierra Club by electronic mail or facsimile, and that therefore the added 5 days does not apply. IUSA thus concludes that the Sierra Club's response — which was filed 18 days after IUSA's appeal — was 3 days late.

We disagree. IUSA's Certificate of Service indicates that the appeal was "served by electronic mail or facsimile . . . and by first class mail."<sup>38</sup> Our rules do not contemplate official service upon other parties by electronic mail or facsimile unless explicitly authorized in a case-specific order in which all parties received prior notice.<sup>39</sup> Accordingly, for the purpose of calculating the Sierra Club's deadline, we must consider that the Sierra Club received official service by mail, and thus enjoyed the additional 5 days in which to respond. Its response to IUSA's appeal therefore was timely.

IUSA also filed a motion for expedited Commission appellate review of LBP-02-6, and further requested that the Commission direct the Presiding Officer to hold the hearing in abeyance until the Commission completes its review of the standing issue. In view of today's decision, IUSA's requests now are moot.

Finally, we turn to the Intervenors' request that the Commission stay the effectiveness of the Molycorp license amendment pending the upcoming hearing.<sup>40</sup> We decline to issue a stay for the reasons given by the Presiding Officer.<sup>41</sup> Although, as the Presiding Officer explained, Mr. Love and the Sierra Club did not receive prompt notice of the NRC Staff's issuance of the license amendment on December 11, 2001, the Presiding Officer reasonably found that both had knowledge of the amendment's issuance well before they sought stays in late February 2002.<sup>42</sup> Our rules make clear that speedy requests — a Subpart L stay

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<sup>36</sup> Motion to Strike the Glen Canyon Group of the Sierra Club's Response to IUSA's Appeal of LBP-02-06 (Mar. 6, 2002) at 2 (quoting 10 C.F.R. § 2.1205(o)).

<sup>37</sup> See 10 C.F.R. § 2.710.

<sup>38</sup> Certificate of Service (Feb. 11, 2002) (emphasis added).

<sup>39</sup> See 10 C.F.R. § 2.712(e). In contrast, service *on the Secretary* may be accomplished by facsimile. See *id.* § 2.712(d)(4)(iii). The Commission is considering a proposed rule that would address service upon parties by electronic mail or facsimile. See 66 Fed. Reg. at 19,634.

<sup>40</sup> See note 2, *supra*, and accompanying text.

<sup>41</sup> See LBP-02-9, 55 NRC at 230-34.

<sup>42</sup> See *id.* at 230-31.

must be sought within 10 days of Staff action or at the time of a hearing request, whichever is later — are a prerequisite to obtaining stay relief.<sup>43</sup>

Besides their procedural default, the Intervenors' stay requests also are substantively deficient. Thus far, they have submitted only allegations. Until substantiated, these fall, as the Presiding Officer said, "well short" of meeting the key "likelihood of success" and "irreparable injury" requirements for a stay.<sup>44</sup> If in fact the Intervenors prevail at the hearing, effective remedies may well be available — e.g., imposition of additional environmental or safety conditions or, if appropriate, revocation of the amendment.<sup>45</sup>

## V. CONCLUSION

For the reasons stated in this Decision, the Commission hereby *affirms* LBP-02-6, *denies* IUSA's motion to strike the Sierra Club's response, *denies* the Intervenors' requests for a stay, and declares *moot* the requests to expedite review of this appeal and to direct the Presiding Officer to hold this proceeding in abeyance.

IT IS SO ORDERED.

For the Commission<sup>46</sup>

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 3d day of April 2002.

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<sup>43</sup> See 10 C.F.R. § 2.1263. The Presiding Officer found that the Sierra Club had learned of the amendment's issuance in mid-January and that Mr. Love had learned of it during the week of February 11. See LBP-02-9, 55 NRC at 229, 230-31, 232. Moreover, IUSA's December 31 response to Mr. Love's hearing request had called attention to issuance of the license. See *id.* at 231 n.2. The Sierra Club filed its stay request on February 26, and Mr. Love filed his on February 28. See *id.* at 228. The long and short of the matter is that even if we were to consider the Intervenors' lack of actual notice of the amendment as tolling section 2.1263's 10-day deadline, they did not act promptly — i.e., within 10 days — when the amendment did come to their attention.

<sup>44</sup> See LBP-02-9, 55 NRC at 232 (citing 10 C.F.R. § 2.788).

<sup>45</sup> See also *id.* at 233 n.4 ("There might well remain issues pertaining to the storage of the residue").

<sup>46</sup> Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 72-22-ISFSI**

**PRIVATE FUEL STORAGE, L.L.C.**  
**(Independent Spent Fuel Storage**  
**Installation)**

**April 3, 2002**

**STAY OF PROCEEDINGS**

In determining whether to grant a stay of a licensing proceeding, the Commission looks at four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; (2) whether the petitioner faces irreparable injury if a stay is not granted; (3) whether the issuance of a stay would harm other interested parties; and (4) where the public interest lies. *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975).

**STAY OF PROCEEDINGS**

The proponent of the stay has the burden of demonstrating that the four factors are met. *See Hydro Resources Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 (1998); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

### **STAY OF PROCEEDINGS: IRREPARABLE INJURY**

It is well established in Commission case law that the incurrence of litigation expenses does not constitute irreparable injury for the purposes of a stay decision. *See Sequoyah Fuels Corp. and General Atomics*, CLI-94-9, 40 NRC at 6. *See also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

### **STAY OF PROCEEDINGS: HARM TO OPPOSING PARTIES**

The inconvenience of being forced to reschedule attorney and expert time when a scheduled hearing is imminent constitutes harm to opposing parties militating against granting a stay of proceedings. (The argument that opposing party will actually benefit by saving litigation costs if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative, PFS does not agree and opposes the stay. The proceedings, which have gone on for over 4 years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience.

The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

## **MEMORANDUM AND ORDER**

This Order concerns two documents filed by the State of Utah on February 11, 2002, relating to the pending license application submitted by Private Fuel Storage, L.L.C. (PFS). Utah's "Suggestion of Lack of Jurisdiction" argues that the Nuclear Waste Policy Act of 1982, as amended (NWPA),<sup>1</sup> deprives the Commission of "jurisdiction" over PFS's application for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians. In its "Petition to Institute Rulemaking and to Stay Licensing Proceeding," Utah asks the Commission to amend its regulations in accordance with this theory, and to suspend related proceedings while the rulemaking is pending.

For the reasons set forth below, we deny the request for stay, set a schedule for interested parties to submit briefs on the substantive issue whether the NRC

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<sup>1</sup> 42 U.S.C. § 10101 *et seq.*

has authority under federal law to issue a license for the proposed privately owned, away-from-reactor spent fuel storage facility, and defer a decision on the rulemaking petition until we have had the opportunity to decide this threshold legal question.

## I. BACKGROUND

In 1980, the NRC promulgated its regulations allowing for licensing of ISFSIs, 10 C.F.R. Part 72, under its general authority under the Atomic Energy Act (AEA) to regulate the use and possession of special nuclear material.<sup>2</sup> This was 2 years before Congress enacted the NWPA.

In both its Petition for Rulemaking and “Suggestion of Lack of Jurisdiction,” Utah argues that the NWPA contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel and does not authorize private, away-from-reactor storage facilities such as the proposed PFS facility. Utah rests its argument on the following provision:

Notwithstanding any other provision of law, nothing in this act shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act.<sup>3</sup>

Thus, says Utah, the NWPA cannot be said to “authorize” a private, away-from-reactor ISFSI like the proposed PFS facility. Utah claims that because the NWPA established a comprehensive system for dealing with spent nuclear fuel, it is the only possible source for NRC’s jurisdiction over spent fuel storage and overrides the Commission’s general authority under the AEA to regulate the handling of spent fuel.

PFS opposes Utah’s petitions, and argues that nothing in the NWPA expressly repeals the NRC’s general, AEA-based licensing authority over spent fuel. PFS emphasizes that the NWPA provision on which Utah relies does not explicitly prohibit a private, away-from-reactor facility. The NRC Staff opposes Utah’s petitions on procedural grounds.

## II. DISCUSSION

### A. Request for Stay of Proceedings Pending Review

We find that Utah’s request does not meet the four-part test for a stay of Board proceedings. In determining whether to grant a stay of a licensing proceeding, the

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<sup>2</sup> See 45 Fed. Reg. 74,693 (Nov. 12, 1980).

<sup>3</sup> NWPA § 135(h).

Commission looks at four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; (2) whether the petitioner faces irreparable injury if a stay is not granted; (3) whether the issuance of a stay would harm other interested parties; and (4) where the public interest lies.<sup>4</sup> The proponent of the stay has the burden of demonstrating that these factors are met.<sup>5</sup>

First, Utah does not make a strong showing of probable success on the merits. The NWPA on its face does not prohibit private, away-from-reactor spent fuel storage. The NWPA section on which Utah relies, if intended to prohibit such storage, certainly does not do so directly. It says only that “*nothing in this act . . . encourage[s], authorize[s], or require[s]*” the use of such facilities. It does not, in terms, prohibit storage of spent nuclear fuel at any privately owned, away-from-reactor facility — which is Utah’s position. We are willing to consider Utah’s complex legislative history and statutory structure arguments, but we are not prepared to say that Utah’s arguments are likely to prevail.

Second, we find no evidence that Utah faces “irreparable injury” if an immediate stay is not granted. Utah claims that it will suffer a loss of “costs, expenses, and attorneys’ fees” resulting from its participation in the PFS licensing proceeding.<sup>6</sup> It is well established in Commission case law, however, that we do not consider the incurrence of litigation expenses to constitute irreparable injury in the context of a stay decision.<sup>7</sup> Therefore, the State has failed to demonstrate that it would be irreparably harmed if a stay is not granted.

We also find that the third and fourth factors of the stay test are not met. Utah argues that PFS is not harmed, and will in fact benefit by saving litigation costs, if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative, PFS does not agree and opposes the stay. The proceedings, which have gone on for over 4 years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience. The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

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<sup>4</sup> See *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975); cf. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 225 n.7 (2002). This is the same test set forth in our regulations for determining whether to grant a stay of the effectiveness of a presiding officer’s decision. 10 C.F.R. § 2.788(e).

<sup>5</sup> See *Hydro Resources Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 (1998); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

<sup>6</sup> Rulemaking Petition at 37-38.

<sup>7</sup> See *Sequoyah Fuels Corp. and General Atomics*, CLI-94-9, 40 NRC at 6. See also *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

For the foregoing reasons, we deny Utah's request for a stay of these proceedings.

## **B. Commission Consideration of NWPA Issue on the Merits**

Both the NRC Staff and PFS argue that the Commission should not consider the NWPA issue at this time because the Suggestion of Lack of Jurisdiction is untimely. They maintain that the "suggestion" constitutes an untimely interlocutory appeal of a 1998 Atomic Safety and Licensing Board decision ruling on Contention Utah A.<sup>8</sup>

Utah first made its NWPA argument in 1997 in its Contention Utah A in the proceedings before the Licensing Board.<sup>9</sup> On April 22, 1998, the Board rejected the contention as an impermissible challenge to the Commission's regulations.<sup>10</sup> Utah's newly filed "suggestion" could be viewed as merely a misnamed interlocutory appeal of the 1998 Board ruling, particularly because NRC's rules of practice have no provision for a pleading or motion called a "Suggestion of Lack of Jurisdiction." A petition for interlocutory Commission review, if desired, should have come 15 days after the Board entered the ruling.<sup>11</sup> Otherwise, interlocutory rulings must wait for resolution until a final decision is entered.

Despite the reasonableness of the Staff's and Applicant's timeliness argument, we find countervailing concerns that make immediate merits consideration appropriate. The issue presented here raises a fundamental issue going to the very heart of this proceeding. If in fact NRC has no authority to issue PFS a license, completion of the licensing process would be a waste of resources for all parties as well as the Commission. In addition, Utah has filed a petition for rulemaking, arguing that NRC's regulations must be amended in accordance with the state's legal theory. The underlying legal question, whether the law requires a rule change, must be resolved before NRC can accept or deny that petition.

We have decided that the legal issue is better resolved in an adjudicatory format — i.e., through legal briefs — than in a rulemaking format. We therefore take

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<sup>8</sup> See "NRC Staff's Response to the State of Utah's (1) Request to Stay Proceeding, and (2) Suggestion of Lack of Jurisdiction" (Feb. 26, 2002), at 7-8; "Applicant's Response to Utah's Suggestion of Lack of Jurisdiction" (Feb. 21, 2002), at 4-7.

<sup>9</sup> See "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage L.L.C. for an Independent Spent Fuel Storage Facility" (Nov. 23, 1997). ("Congress has not authorized the NRC to issue a license to a private entity for a 4000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility.")

<sup>10</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 183 (1998).

<sup>11</sup> See 10 C.F.R. § 2.786(b).

review in the exercise of our inherent supervisory authority over adjudications and rulemakings.<sup>12</sup>

The parties to this adjudication are intimately concerned and eminently well informed about the legal question raised in Utah's petition. These litigation parties, as opposed to the general public, are likely to be the source of the most pertinent arguments and information. Public comment is likely to be less useful here, in a situation calling for pure legal analysis, than in the usual situation where the rulemaking proceeding raises scientific, policy, or safety issues. We do consider, however, that persons outside this litigation should have an opportunity to weigh in on the NWPA issue and therefore invite any interested persons to submit *amicus curiae* briefs.

We conclude that the rulemaking process should be put on hold until the Commission rules on the threshold issue of whether the NWPA deprives it of authority to license a private, away-from-reactor spent fuel storage facility. If the legal issue is ultimately resolved in Utah's favor, then a formal revision clarifying Part 72 could be issued at that time.

### III. BRIEFS

We already have before us extensive arguments by Utah (in its Suggestion and Rulemaking Petition) and PFS (in its Response to Utah's Suggestion of Lack of Jurisdiction and attachments). We will consider the legal arguments set forth in those documents.

If these parties wish to supplement the arguments made therein, they may submit further briefs to the Commission by May 15. In addition, interested persons are invited to submit *amicus curiae* briefs by May 15. Briefs should be no longer than thirty pages and should be submitted electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow. Briefs in excess of ten pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, and like material.

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<sup>12</sup> See, e.g., *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI -98-18, 48 NRC 129 (1998); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52-53 (1998); cf. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-5, 49 NRC 199 (1999).

#### IV. CONCLUSION

For the foregoing reasons, the request for a stay of proceedings is denied, the petition for rulemaking is deferred, Commission review of the NWPA issue is granted, and the adjudicatory parties and any interested *amicus curiae* are authorized to file briefs as set out above.

IT IS SO ORDERED.

For the Commission<sup>13</sup>

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 3d day of April 2002.

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<sup>13</sup>Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

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

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

**April 12, 2002**

The Commission invites the parties to file responses to two questions.

**MEMORANDUM AND ORDER**

This is an unusual license transfer proceeding in that two of the four Petitioners raise numerous arguments that do not challenge Pacific Gas & Electric Company's (PG&E) instant license transfer application, but rather call into question certain antitrust-related language in the NRC Staff's notice of opportunity for hearing (67 Fed. Reg. 2455 (Jan. 17, 2002)). In that notice, the Staff indicated that it may reject some of PG&E's requested changes to the antitrust conditions in its current licenses. More specifically, the Staff suggested that it might approve changes to the antitrust conditions such that the conditions would apply solely to those entities that would own and operate the Diablo Canyon plant following the transfer, but *not* to any of the other entities that PG&E has proposed retaining or including on the licenses for antitrust purposes. Under PG&E's pending

Bankruptcy Reorganization Plan, those other entities would not, after bankruptcy, be involved in activities requiring an NRC license.

Two of the four Petitioners to intervene have endorsed the Licensee's proposal and object to the Staff's contemplated approach. A third Petitioner has broadly supported PG&E's transfer proposal, including, presumably, the proposed amendments to the antitrust conditions. Therefore, the legal underpinning for PG&E's proposal to amend the antitrust license conditions to include entities who would not be engaged in activities requiring an NRC license is central to deciding whether to grant intervention or admit issues for adjudication. *See* 10 C.F.R. §§ 2.1306, 2.1308.

Before proceeding further, we seek briefs from the Petitioners and the Applicant on the following questions:

1. What is the Commission's authority under the Atomic Energy Act to approve the proposed license transfers and related license amendments where the current licensee (PG&E) as well as a company engaged solely in transmission activities would not, after the transfer, be engaged in activities at Diablo Canyon requiring a license, yet would remain or become named licensees on the Diablo Canyon licenses?
2. Have recent filings and developments in PG&E's bankruptcy proceeding had any effect on the pending motions to hold this license transfer proceeding in abeyance?

The briefs should not exceed 25 pages and should be filed by May 10, 2002.

IT IS SO ORDERED.

For the Commission<sup>1</sup>

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 12th day of April 2002.

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<sup>1</sup> Commissioners Dicus and Merrifield were not present for the affirmation of this Order. If they had been present, they would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 40-8681-MLA-10**

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

**April 12, 2002**

The Commission reviews an Atomic Safety and Licensing Board decision that denied requests for hearing and leave to challenge a materials license amendment. The Commission vacates the decision and remands the proceeding to the Presiding Officer.

**LICENSING BOARD: DISCRETION IN MANAGING  
PROCEEDINGS**

In procedural and scheduling matters, where first-hand contact with and appreciation for all the circumstances surrounding a case are necessary, maximum reliance on the proper discretion of a presiding officer is necessary.

**LICENSING BOARD: DISCRETION IN MANAGING  
PROCEEDINGS**

Despite the substantial deference we accord presiding officers' procedural decisions, such decisions are reviewable on appeal for abuse of discretion. We require an adequate record to perform our review function.

# MEMORANDUM AND ORDER

## I. INTRODUCTION

The Glen Canyon Group of the Utah Sierra Club (“Sierra Club”) has appealed its dismissal from this license amendment proceeding. In LBP-02-3, 55 NRC 35 (2002), the Presiding Officer found that the Sierra Club (as well as other Petitioners) had failed to show any threat of injury from the proposed license amendment, and therefore lacked standing to intervene and to obtain an adjudicatory hearing. The proposed amendment would authorize the International Uranium (USA) Corporation (“IUSA”) to receive and process up to 600,000 cubic yards (840,000 tons) of particular alternative feed material from a site in Maywood, New Jersey. The Maywood material consists of byproducts from the processing of thorium and lanthanum from monazite sands.

On appeal, the Sierra Club alleges two procedural errors by the Presiding Officer: (1) that he failed to issue a ruling on whether the Sierra Club could submit additional affidavits; and (2) that he unreasonably rejected a Sierra Club response to an IUSA supplemental filing. These two procedural decisions, the Sierra Club claims, “led to the [Presiding Officer’s] order to deny standing.”<sup>1</sup> We do not disturb the Presiding Officer’s ruling on the additional affidavits, but vacate and remand his ruling on the Sierra Club response.

## II. BACKGROUND

The Sierra Club and two other Petitioners (who have not appealed LBP-02-3) filed timely requests for hearing and petitions for leave to intervene. To aid in understanding the Petitioners’ claims, the Presiding Officer held a telephone prehearing conference devoted to the issue of the Petitioners’ standing. At the conference, the Petitioners raised concerns over increased truck traffic, alleging a greater potential for “accidents and spills.”<sup>2</sup> The Presiding Officer thus focused the discussion upon the “incremental” impact from the added number of trucks associated with the Maywood license amendment.<sup>3</sup> Among the factors he considered was the number of truckloads used per week to transport the Maywood materials to the IUSA White Mesa Mill site.<sup>4</sup> In addition, because there were allegations of “cumulative” injury, resulting from the *total* number of trucks

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<sup>1</sup> Petitioners’ Brief on Appeal of Order Rejecting Petitioners’ Brief and Denying Standing to Intervene (Feb. 5, 2002) (“Appeal Brief”) at 1.

<sup>2</sup> See, e.g., Transcript of Telephone Conference (Nov. 28, 2001) (“Transcript”) at 19.

<sup>3</sup> See, e.g., *id.* at 20, 47.

<sup>4</sup> *Id.* at 16.

bringing still-ongoing shipments of alternate feed to the mill from different parts of the country under various previous IUSA license amendments, the Presiding Officer also sought to learn how many trucks in all — including the added number from the Maywood amendment — might be heading to the IUSA mill site “on any particular day.”<sup>5</sup> After much discussion about the total numbers of trucks, counsel for IUSA offered to clear up any “confus[ion]” on the traffic issue by submitting a written supplemental filing providing a detailed description of the truck traffic in the mill area.<sup>6</sup> The Presiding Officer “accept[ed] that invitation.”<sup>7</sup>

At the prehearing conference, the Sierra Club was for the first time in this proceeding represented by counsel. The Sierra Club had submitted its original petition for intervention (as well as one filed later) *pro se*.<sup>8</sup> Acknowledging that its earlier petitions had “not been supported [adequately] by affidavit or testimony,” the Sierra Club’s counsel asked the Presiding Officer “to permit some leeway in having . . . me supplement [those] concerns that the Sierra Club has raised with additional affidavits.”<sup>9</sup> She acknowledged that in an earlier IUSA-related license amendment proceeding, the Sierra Club also had “brought in [counsel only] at the last minute . . . because they had had difficulty finding an attorney in this area that would represent them.”<sup>10</sup> In response, the Presiding Officer stated that he would consider the Sierra Club’s request “that it be allowed to supplement what is already on file,” and would rule on the request in due course.<sup>11</sup>

The telephone conference also included discussion of a truck accident that occurred in September 1999, involving a truck headed for the White Mesa Mill. When questioned about the accident, IUSA stated that it would provide specific information on the accident in its supplemental filing on truck traffic.<sup>12</sup> The Presiding Officer made clear that the Petitioners would have the opportunity to respond to IUSA’s supplemental filing on truck traffic and on the 1999 truck accident.<sup>13</sup>

On December 5, 2001, IUSA submitted its supplemental filing.<sup>14</sup> The only Petitioner to respond was the Sierra Club. Shortly after the Sierra Club filed its response, however, the Presiding Officer issued an order rejecting it as

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<sup>5</sup>Memorandum (Nov. 15, 2001) (setting forth questions to be answered at telephone conference).

<sup>6</sup>Transcript at 33.

<sup>7</sup>*Id.*

<sup>8</sup>The Sierra Club filed its original petition on September 24, 2001, but it lacked any supporting affidavits. Without seeking leave to do so, the Sierra Club filed on October 18, 2001, what appears to be another petition, titled “Petitioner’s Brief to Request Hearing to Intervene,” with two attached affidavits. While noting that this later filing was “clearly unauthorized,” the Presiding Officer accepted and considered it. *See* LBP-02-3, 55 NRC at 42.

<sup>9</sup>Transcript at 10-11.

<sup>10</sup>*Id.* at 30-32.

<sup>11</sup>*Id.* at 57.

<sup>12</sup>*Id.* at 45.

<sup>13</sup>*Id.* at 45-46, 57.

<sup>14</sup>*See* “International Uranium (USA) Corporation’s Supplemental Filing in Response to Presiding Officer’s Request for Additional Information” (Dec. 5, 2001) (“IUSA’s Supplemental Filing”).

overbroad.<sup>15</sup> He reasoned that “in significant part the submission extends well beyond the matter of the accuracy or significance of the factual information supplied by the Licensee. In a word, it seeks to raise entirely new issues and, as such, manifestly cannot be deemed simply the response to the December 5 filing that had been authorized.”<sup>16</sup> Later, the Presiding Officer turned to the Sierra Club’s request to file additional affidavits, but “found no good cause” to allow the additional filing, given the absence of “some indication as to who might supply those affidavits and what they might contain.”<sup>17</sup>

On the standing question itself, the Presiding Officer found that the Sierra Club’s “broad interest in environmental protection . . . is shared by many others and, as such, is of no assistance to it here.”<sup>18</sup> The Presiding Officer ruled that the specific claims of the Sierra Club’s members fared no better because they provide no “basis for a claim that the Maywood shipments would pose a threat to the affiant not present with regard to previously licensed activities at the mill.”<sup>19</sup>

The Sierra Club appealed, challenging as “arbitrary and capricious” both the Presiding Officer’s failure to allow additional affidavits and his rejection of the Sierra Club’s response to IUSA’s supplemental filing.<sup>20</sup>

### III. ANALYSIS

#### 1. *Timeliness of Appeal*

IUSA initially urges dismissal of the Sierra Club’s appeal as untimely. Under our rules, appeals are due “within ten (10) days of service of the [Presiding Officer’s] order.”<sup>21</sup> IUSA argues that the order at issue here (LBP-02-3) was “served” on January 16, 2002, the date of the decision, and that therefore the Sierra Club’s appeal brief was due on January 26, 2002. Because the Sierra Club did not file its appeal until January 31, 2002, IUSA claims the appeal was 5 days late. IUSA is incorrect. Our rules add 5 days to filing deadlines when service is “by mail.”<sup>22</sup> The 5 extra days come into play here. The certificate of service attached to the Presiding Officer’s order states that “copies have been served” upon the parties “by U.S. mail, first class.”

Apparently, the Presiding Officer in this case also sent courtesy copies by electronic mail that the parties may have received prior to the official “service

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<sup>15</sup> See Memorandum and Order (Rejecting Unauthorized Filing) (Jan. 2, 2002) (“Order Rejecting Filing”).

<sup>16</sup> *Id.* at 2.

<sup>17</sup> LBP-02-3, 55 NRC at 47.

<sup>18</sup> *Id.* at 16.

<sup>19</sup> *Id.*

<sup>20</sup> Appeal Brief at 1.

<sup>21</sup> 10 C.F.R. § 2.1205(o).

<sup>22</sup> 10 C.F.R. § 2.710.

copy” sent by the Commission’s Office of the Secretary. But under our rules it is the “service copy” that counts for the purpose of calculating deadlines. Because the Sierra Club had a total of 15 days in which to file an appeal, its appeal was timely.

## 2. *The Presiding Officer’s Procedural Rulings*

The Sierra Club’s appeal maintains: (a) that the Presiding Officer “failed to issue” a ruling on its request to file additional affidavits, and (b) that it was “patently unfair” for the Presiding Officer to reject the Sierra Club’s response to IUSA’s supplemental filing while at the same time giving “free rein” to IUSA.<sup>23</sup> These, of course, are fundamentally issues of case management and fair play, areas where we are loath to second-guess the judgments of our presiding officers. “In procedural and scheduling matters, where first-hand contact with and appreciation for all the circumstances surrounding a case are necessary, maximum reliance on the proper discretion of a [presiding officer] is essential.”<sup>24</sup> Indeed, the Commission expects “presiding officers to instill discipline in the hearing process,”<sup>25</sup> and to “take appropriate action to avoid delay.”<sup>26</sup>

Despite the substantial deference we accord presiding officers’ procedural decisions, such decisions are reviewable on appeal for abuse of discretion.<sup>27</sup> We require an adequate record to perform our review function.<sup>28</sup> Here, the record shows that the Presiding Officer did not ignore the Sierra Club’s request to file additional affidavits, but rejected it, and for good reason. The reasons for the Presiding Officer’s rejection of the Sierra Club’s response to IUSA’s supplemental filing are not as clear. It is not obvious why the Presiding Officer viewed the Sierra Club response as significantly different from the IUSA supplemental filing — which the Presiding Officer accepted and considered in his standing decision. Because we cannot discern from the record good reason for rejecting the Sierra Club’s response, we are remanding that aspect of the case for the Presiding Officer to reconsider (or re-explain) his ruling, and if appropriate, to consider further the underlying question of the Sierra Club’s standing.

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<sup>23</sup> Appeal Brief at 3-4, 5.

<sup>24</sup> *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313, 314 (1974).

<sup>25</sup> “Statement of Policy on Conduct of Adjudicatory Proceedings,” CLI-98-12, 48 NRC 18, 19, 21-22 (1998).

<sup>26</sup> 10 C.F.R. § 2.1209.

<sup>27</sup> See *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 116-17 (1995).

<sup>28</sup> Cf. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-12, 46 NRC 52, 53 (1997) (“The Commission considers an immediate remand . . . the most efficient way to deal with what we view as an unclear Board discussion”).

*a. The Additional Affidavits*

The Sierra Club argues that the Presiding Officer simply “failed to issue a ruling” on its request to submit additional affidavits.<sup>29</sup> This is manifestly incorrect. In the Presiding Officer’s ultimate decision rejecting the Sierra Club’s standing, he referred specifically to the request to file additional affidavits, and rejected it for failure to give “good reason” — i.e., an explanation of the source and content of the proposed affidavits:

Indeed, in seeking at the telephone conference leave to supplement the hearing request with further affidavits, Sierra counsel acknowledged the shortcomings of the papers that had been earlier filed by a lay person within the organization. Without, however, some indication as to who might supply those affidavits and what they might contain by way of a showing of an injury-in-fact above and beyond harm that might flow from already licensed activities, no good reason existed for granting such leave. No such information was supplied during the conference, and none was forthcoming in response to the opportunity accorded counsel to make an offer of proof on the matter following the conference.<sup>30</sup>

Previously, when rejecting the Sierra Club’s response to IUSA’s supplemental filing, the Presiding Officer had explained in similar terms his disinclination to accept additional affidavits in the absence of any showing of good reason.<sup>31</sup>

In short, contrary to the Sierra Club’s position on appeal, there *was* a Presiding Officer decision on the additional affidavits. Far from treating the Sierra Club severely, the Presiding Officer gave it repeated opportunities to make a case in favor of allowing additional affidavits, including an opportunity to file a written offer of proof.<sup>32</sup> The Sierra Club chose not to provide the information requested. It proceeded at its own risk when it left the Presiding Officer with little or no basis for allowing further affidavits. The Sierra Club cannot now complain that the Presiding Officer viewed the absence of an offer of proof in an unfavorable light. With the Sierra Club having supplied no persuasive reasons for allowing last-second additional affidavits, the Presiding Officer’s decision to reject further affidavits was not “arbitrary and capricious.”

*b. The Sierra Club’s Response to IUSA*

We turn now to the last issue raised on appeal: whether the Presiding Officer erred in rejecting the Sierra Club’s December 24, 2001 response to IUSA’s December 5 supplemental filing on truck traffic impacts. The Presiding Officer rejected the Sierra Club response in its entirety, stating that it raised “entirely new

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<sup>29</sup> Appeal Brief at 5.

<sup>30</sup> LBP-02-3, 55 NRC at 47.

<sup>31</sup> See Order Rejecting Filing at 2-3.

<sup>32</sup> LBP-02-3, 55 NRC at 43.

issues” and went “well beyond” responding to the “accuracy or significance of the factual information supplied by the Licensee.”<sup>33</sup> By contrast, according to the Presiding Officer, IUSA’s supplemental filing “was appropriately limited to supplying and commenting upon the significance of . . . factual information that I had requested.”<sup>34</sup>

On appeal, the Sierra Club argues that IUSA’s filing itself exceeded the scope of the information called for. “[A]t least one half of IUSA’s supplemental pleading” was devoted to additional topics regarding the new waste’s risk of harm,” the Sierra Club claims.<sup>35</sup> The Sierra Club therefore argues that it was “patently unfair to restrict Petitioner but allow IUSA free rein in its pleading.”<sup>36</sup> The Sierra Club goes on to emphasize that it was especially “unfair” for the Presiding Officer to have rejected the filing in its entirety, given that “he failed to set forth with any particularity or specificity which statements or arguments contained in the Petitioners’ response” were excessive.<sup>37</sup>

Having reviewed both IUSA’s December 5 filing and the Sierra Club’s response, we cannot readily ascertain why the Presiding Officer apparently relied on<sup>38</sup> the IUSA supplemental filing but rejected the Sierra Club’s response outright. Both filings seemingly addressed issues beyond what the Presiding Officer had intended.

As the Presiding Officer describes, IUSA was to

file a post-conference memorandum *limited* to providing certain additional factual information relating to *two very specific matters*: (1) truck traffic volume along the transportation corridor that the shipments in question here would employ; and (2) the circumstances of a 1999 accident that had been referred to by a petitioner in the course of the conference.<sup>39</sup>

IUSA’s December 5 submission, though, went beyond these two narrow topics. IUSA presented additional argument addressing whether the shipment of materials would have any significant impacts.<sup>40</sup> Instead of simply addressing the actual truck volume in the area and the 1999 accident, IUSA devoted an entire section of its filing — fully one-third — to its argument on environmental impacts.<sup>41</sup>

IUSA pointed to specific NRC and Department of Transportation studies on the transportation of radioactive materials. These studies were said by IUSA to “conclu[de] . . . that the transportation of radioactive materials, such as the

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<sup>33</sup> Order Rejecting Filing at 2.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> Appeal Brief at 3.

<sup>36</sup> *Id.* at 3-4.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> See LBP-02-3, 55 NRC at 43-45.

<sup>39</sup> Order Rejecting Filing at 1 (emphasis added).

<sup>40</sup> See IUSA’s Supplemental Filing at 2, 8-11.

<sup>41</sup> *Id.* at 8; see also *id.* at 10-11.

Maywood materials, in accordance with all applicable . . . regulations would not create a significant impact on public health and safety and the environment.”<sup>42</sup> IUSA went on to address the radiological “analyses that IUSA conducted in connection with a license amendment application for the Heritage Minerals, Inc. (‘HMI’) materials,” and then to compare the radiological activity of the Maywood materials — at issue in this proceeding — with that of the HMI materials.<sup>43</sup> This “analysis shows,” argued IUSA, that there could be “no significant incremental impact from truck traffic” because of the specific radiological “nature of the materials being transported.”<sup>44</sup>

In short, contrary to the Presiding Officer’s characterization, IUSA’s submission does not appear “appropriately limited to supplying and commenting upon” the narrow subjects of local truck traffic volume and a specific truck accident. The Sierra Club’s submission also went beyond what the Presiding Officer intended, but much of it was in response to IUSA’s entire submission, not merely to IUSA’s truck traffic and accident information. A large portion of the Sierra Club response does address the traffic and accident issues,<sup>45</sup> but other portions deal with IUSA’s comparison of the Maywood materials to the HMI materials,<sup>46</sup> IUSA’s reliance upon particular NRC transportation studies,<sup>47</sup> and IUSA’s reliance upon the transportation impacts analysis provided in a 1979 Final Environmental Statement prepared for the White Mesa Mill.<sup>48</sup>

Although some of the Sierra Club’s filing may have gone beyond even IUSA’s submission, much of it responded to it. It is not clear, then, why the Presiding Officer rejected *all* of the Sierra Club’s filing. Perhaps there were sound reasons of case management or fairness for the Presiding Officer’s incongruent handling of seemingly similar supplemental filings. But the record before us does not make those reasons apparent.

In these circumstances, where we are uncertain of the basis for the Presiding Officer’s ruling, we have decided to return the case to him for reconsideration and clarification. The Presiding Officer has greater knowledge than the Commission of the precise issues involved in this proceeding, and is therefore in a better position to assess what portions of the Sierra Club’s filing, if any, might be permissible. He may — and indeed ought — to “strike any portion” of pleadings before him that he finds “cumulative, irrelevant, immaterial, or unreliable.” *See* 10 C.F.R. § 2.1233(e).

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<sup>42</sup> *Id.* at 10.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 11.

<sup>45</sup> *See, e.g.* Sierra Club’s Response to IUSA’s Supplemental Filing (Dec. 24, 2001) (“Sierra Club’s Response”) at 7-13.

<sup>46</sup> *See id.* at 15-20.

<sup>47</sup> *Id.* at 14, 20-21.

<sup>48</sup> *Id.* at 9-10, 15.

Accordingly, we direct the Presiding Officer to reconsider whether to accept any portion of the Sierra Club's filing, and if appropriate, to reconsider the Sierra Club's standing to intervene in this proceeding.

## V. CONCLUSION

For the reasons stated in this Decision, the Commission hereby *vacates* LBP-02-3 and the unpublished Memorandum and Order (Rejecting Unauthorized Filing) of January 2, 2002. The Commission *remands* the proceeding to the Presiding Officer to reconsider whether to accept any portion of the Sierra Club's response to IUSA's supplemental filing, and if appropriate, to reconsider the Sierra Club's standing to intervene in this proceeding.

IT IS SO ORDERED.

For the Commission<sup>49</sup>

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 12th day of April 2002.

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<sup>49</sup>Commissioners Dicus and Merrifield were not present for the affirmation of this Order. If they had been present, they would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve, Chairman**  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket Nos. 50-369-LR**  
**50-370-LR**  
**50-413-LR**  
**50-414-LR**  
**(consolidated)**

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

**April 12, 2002**

The Commission reverses the Licensing Board's decision admitting a contention involving the possible use of mixed oxide (MOX) fuel in the McGuire and Catawba reactors.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY);**  
**ADMISSIBILITY OF CONTENTIONS**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS**

The Commission's rules governing licensing proceedings require that a petitioner to intervene raise at least one admissible contention. Our contention pleading rules require a detailed, fact-based showing that a genuine and material dispute of law or fact exists. Moreover, a contention is not admissible unless it falls

within the scope of the proceeding, as that scope is defined by the Commission in its Referral Order and in the relevant regulatory and statutory provisions.

**RULES OF PRACTICE: SCOPE OF PROCEEDING**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS: SCOPE**

**ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

**ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

The scope of license renewal proceedings is narrow. In our Order referring this proceeding to the Licensing Board, we specifically limited the case's scope under the Atomic Energy Act ("AEA") to "a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses." CLI-01-20, 54 NRC 211, 212 (2001).

**RULES OF PRACTICE: SCOPE OF PROCEEDING**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS: SCOPE**

**ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

**ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

We likewise specifically limited the proceeding's scope under the National Environmental Policy Act ("NEPA") to issues specified in 10 C.F.R. §§ 51.71(d) and 51.95(c) (identifying which environmental issues are exempt from consideration in the Staff's site-specific environmental impact statement). Our regulations divide environmental review for such applications into generic ("Category 1") and plant-specific ("Category 2") components, based on an extensive study of potential environmental consequences of operating a nuclear power plant for an additional 20 years. Under our regulations, applicants must include in their environmental reports analyses of the plant-specific Category 2 issues only (e.g., impact of extended operation on endangered or threatened species); they are generally not required to provide analyses of Category 1 issues (e.g., impacts from principal noise sources). However, the applicant must provide additional analysis of even a Category 1 issue if new and significant information has surfaced

that may bear on the applicability of the Category 1 finding at the plant that is the subject of the application.

## **GENERIC ENVIRONMENTAL IMPACT STATEMENT**

### **OPERATING LICENSE RENEWAL**

#### **LICENSE RENEWAL PROCEEDINGS**

The federal courts have recognized GEISs as a legitimate means by which this agency can avoid pointlessly “relitigat[ing] issues that may be established fairly and efficiently in a single rulemaking.” *See, e.g., Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir.), *cert. denied*, 515 U.S. 1159 (1995).

## **SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**

### **OPERATING LICENSE RENEWAL**

#### **LICENSE RENEWAL PROCEEDINGS**

Under our NEPA rules, the NRC Staff will prepare a site-specific Supplemental Environmental Impact Statement (“SEIS”) that augments the GEIS. The SEIS will consider public comments, including plant-specific claims and “new and significant” information on generic findings, and will weigh all expected environmental impacts — both generic and plant-specific.

## **WAIVER OF REGULATIONS**

### **OPERATING LICENSE RENEWAL**

#### **LICENSE RENEWAL PROCEEDINGS**

The Commission’s rules provide a vehicle by which a petitioner may seek to raise issues that would otherwise be beyond the scope of a license renewal proceeding. Pursuant to 10 C.F.R. § 2.758, a petitioner may seek a waiver of one or more of the Commission’s AEA- or NEPA-related license renewal rules. To obtain such a waiver, however, the petitioner must demonstrate that a strict application of the rule would not serve the purposes for which it was promulgated.

## **NONADJUDICATORY WAYS TO EXPRESS CONCERNS TO THE COMMISSION**

### **OPERATING LICENSE RENEWAL**

#### **LICENSE RENEWAL PROCEEDINGS**

The intervenor or petitioner may also raise its concerns outside the context of an adjudication by filing either an enforcement petition under 10 C.F.R. § 2.206 or a rulemaking petition under 10 C.F.R. § 2.802. In addition, the intervenor or petitioner may use the notice-and-comment process for the Supplemental Environmental Impact Statement (SEIS) and ask the Commission to forgo use of a questionable generic finding and to suspend license renewal proceedings, pending a rulemaking or an update of the GEIS. Finally, the Commission itself solicits comments from the public and then reviews (and revises as necessary) its license renewal rules every 10 years, beginning 7 years after the last review. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001).

### **RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY, AEA); ADMISSIBILITY OF CONTENTIONS**

#### **OPERATING LICENSE RENEWAL**

#### **LICENSE RENEWAL PROCEEDINGS: SCOPE (AEA REVIEW)**

#### **MOX FUEL**

#### **ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

#### **ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

The Board's view that license renewal contemplates inquiry into future, inchoate plans of the licensee would, as a general matter, invite petitioners in license renewal cases to raise safety issues involving a myriad of possible future license amendments. Here, while Duke apparently has a contractual arrangement to purchase MOX fuel, the proposed MOX fuel production facility remains unbuilt and is in the early stages of a contested NRC licensing proceeding. To actually use MOX fuel at Catawba and McGuire, Duke will have to obtain an NRC license amendment, for which Duke has not yet even applied. Nothing in our case law or regulations suggests that license renewal is an occasion for far-reaching speculation about unimplemented and uncertain plans like Duke's MOX plan.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY, AEA);  
ADMISSIBILITY OF CONTENTIONS**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS: SCOPE (AEA REVIEW)**

**REGULATIONS: INTERPRETATION (10 C.F.R. §§ 54.29(a), 54.2 —  
CURRENT LICENSING BASIS)**

**CURRENT LICENSING BASIS**

**MOX FUEL**

**ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

**ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

The Board's reliance on 10 C.F.R. § 54.29(a) to admit the MOX contention is misplaced. This rule, by its very terms, focuses on the "current" licensing basis, not some future licensing basis. This temporal limitation is also expressly spelled out in the regulatory definition of "[c]urrent licensing basis," i.e., "NRC requirements . . . that are docketed and in effect." 10 C.F.R. § 54.3 (emphasis added). Because Duke's future plan to use MOX fuel is not a part of the *current* licensing basis for the four plants, it is perforce not part of the licensing basis that is "docketed and in effect."

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY, AEA);  
ADMISSIBILITY OF CONTENTIONS**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS: SCOPE (AEA REVIEW)**

**CURRENT LICENSING BASIS**

**MOX FUEL**

**REGULATIONS: INTERPRETATION (10 C.F.R. § 54.29(a))**

**ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

**ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

The Board takes out of context the phrase "changes made to the plant's [current licensing basis]," in an effort to include changes made after submission of the license renewal application. The words immediately following this phrase, however, make clear that the "changes" referenced are only those that are necessary "in order to comply with [section 54.29(a)]," i.e., necessary to satisfy

the “standards for issuance of a renewed license.” In other words, if “managing the effects of aging,” or some other specific license renewal requirement, requires any changes in the current licensing basis, then the NRC will consider the overall lawfulness and reasonableness of those changes under the AEA and under NRC regulations. But a future plan to change from low-enriched uranium fuel to MOX fuel is not the kind of “change” to which section 54.29(a) refers.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY, AEA);  
ADMISSIBILITY OF CONTENTIONS**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS: SCOPE (AEA REVIEW)**

**MOX FUEL**

**ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

**ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

In short, we do not consider the AEA-related MOX issue suitable for adjudication in this proceeding and we therefore reverse the Board’s admission of this issue. Duke may (or may not) ultimately use MOX fuel at its Catawba and McGuire plants. The MOX issue may well become ripe for NRC consideration down the road, i.e., when and if Duke seeks a license amendment to use MOX fuel, but it is not ripe now. While our ruling to exclude the MOX issue from a license renewal case is consistent with the limited nature of license renewal proceedings, we also note that, as a general matter, contentions that are based on projected changes to a license, not currently before the NRC in any proceeding or application, are not sufficient to support admission of a contention. An NRC proceeding considers the application presented to the agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing proceeding.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY, NEPA);  
ADMISSIBILITY OF CONTENTIONS**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS: SCOPE (NEPA REVIEW)**

**ENVIRONMENTAL IMPACT STATEMENT: PROPOSAL**

**ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

**ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

**NEPA: ENVIRONMENTAL IMPACT STATEMENT (PROPOSAL);  
SCOPE**

In *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the Supreme Court ruled against environmental groups seeking to force the United States Department of the Interior (and other agencies regulating the coal industry) to prepare a comprehensive EIS covering all projects related to coal mining in the Northern Great Plains region. The Court found such an EIS inappropriate because the agency did not have pending before it a “proposal” for regionwide action. *Id.* at 414-15. The Court concluded that only “when several *proposals* for . . . actions that will have *cumulative or synergistic environmental impact* upon a region are *pending concurrently* before an agency, [must] their environmental consequences . . . be considered together.” *Id.* at 410 (emphasis added). The Court held that agencies are not required to consider “possible environmental impacts of *less imminent actions* when preparing the impact statement on proposed actions” (*id.* at 410 n.20 (emphasis added)) and specifically reversed the court of appeals’ ruling that the government must include within its NEPA review any significant federal actions merely under “consideration” — as compared with those that are actually proposed. *Id.* at 404.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY, NEPA);  
ADMISSIBILITY OF CONTENTIONS**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS: SCOPE (NEPA REVIEW)**

**NEPA: ENVIRONMENTAL IMPACT STATEMENT (PROPOSAL)**

**ENVIRONMENTAL IMPACT STATEMENT: PROPOSAL**

**ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

**ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

**NEPA: SCOPE**

*Kleppe* was decided a quarter-century ago and the case has been subject to a wide range of judicial interpretations, many seemingly inconsistent with each other and even with *Kleppe* itself. Our collective reading of the post-*Kleppe* rulings suggests that, to bring NEPA into play, a possible future action must at least constitute a “proposal” pending before the agency (i.e., ripeness), and must be in some way interrelated with the action that the agency is actively considering (i.e., nexus). The United States Court of Appeals for the District of Columbia Circuit said as much in *National Wildlife Federation v. FERC*, 912 F.2d 1471, 1478 (D.C. Cir. 1990).

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY, NEPA);  
ADMISSIBILITY OF CONTENTIONS**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS: SCOPE (NEPA REVIEW)**

**NEPA: ENVIRONMENTAL IMPACT STATEMENT (PROPOSAL)**

**ENVIRONMENTAL IMPACT STATEMENT: PROPOSAL**

**ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

**ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

**NEPA: SCOPE**

The possibility that Duke might use MOX fuel at some point in the future in its McGuire and Catawba facilities does not satisfy the “ripeness” test. The issue of ripeness ultimately boils down to what constitutes a “proposal.” Many courts have required concrete or reasonably certain projects, not projects that are “merely contemplated.” NEPA is governed by a “rule of reason.” This

approach is reasonable, especially as applied in the context of this Commission's responsibilities under NEPA. At this point, we have before us no details about Duke's future MOX fuel plans. We would, to say the least, have a very difficult time analyzing the environmental effects of a "merely contemplated" license application that we have never seen, and we would have an even more difficult time appraising how those effects would combine with those of another action to create "cumulative impacts."

The Commission of course recognizes that Duke *could* file a license amendment application to use MOX fuel. Indeed, Duke has even signed a contract with DOE which would, at some point in the future, oblige Duke to use such fuel at its McGuire and Catawba facilities. DOE, however, has recently modified its plutonium disposition program in a way that will postpone until the fall of 2008 the delivery of the first MOX fuel assemblies to McGuire. During the next 6½ years, any number of events could occur that would render a license amendment application to use MOX fuel unnecessary. The mere possibility that Duke might, at some undetermined future time, file a MOX-related amendment application is speculative by its very nature. We see no reason to doubt Duke's statement that its submittal of a MOX license amendment application is uncertain. Given the major uncertainties surrounding Duke's potential filing of a MOX application, we consider such an application simply too inchoate to rise to the level of a "proposal" within the meaning of *Kleppe* and its progeny. Consequently, we conclude that the possible MOX application fails the "ripeness" test and should not be considered in this proceeding.

**RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY, NEPA);  
ADMISSIBILITY OF CONTENTIONS**

**OPERATING LICENSE RENEWAL**

**LICENSE RENEWAL PROCEEDINGS: SCOPE (NEPA REVIEW)**

**NEPA: ENVIRONMENTAL IMPACT STATEMENT (PROPOSAL)**

**ENVIRONMENTAL IMPACT STATEMENT: PROPOSAL**

**ADJUDICATORY PROCEEDINGS: SCOPE OF REVIEW**

**ADJUDICATORY HEARINGS: SCOPE OF REVIEW**

**NEPA: SCOPE**

The possibility that Duke might use MOX fuel at some point in the future in its McGuire and Catawba facilities does not satisfy the "nexus" test. We apply the test the court of appeals set forth in *Webb v. Gorsuch*, 699 F.2d 157 (4th Cir. 1983). There, the court stated that, when developing an EIS, an agency must consider

the impact of other proposed projects “only if the projects are so interdependent that it would be unwise or irrational to complete one without the other.” We see no “interdependence” *at all* between Duke’s license renewal application and any potential fuel-related amendment application. License renewal obviously can go forward without reference to the MOX issue. The Catawba and McGuire plants could operate throughout their current licensing term plus an additional 20-year renewal term (if license renewal is approved) without using MOX fuel, just as they have to date. Likewise, assuming Commission authorization, the plants could use MOX fuel during the remainder of their current operating licenses regardless of whether Duke had sought any license renewals. License renewal and MOX use are, in short, separate questions. For these reasons, we conclude that the possible MOX application fails the “nexus” test and need not be considered in this license renewal proceeding. NIRS and BREDL are of course free to raise MOX-related safety and environmental issues (including the question whether the use of MOX fuel will aggravate any aging effects) when and if Duke submits a license amendment application seeking permission to possess and use MOX fuel.

## MEMORANDUM AND ORDER

This Order addresses portions of the appeals submitted by Licensee Duke Energy Corporation (Duke) and the NRC Staff from the Atomic Safety and Licensing Board’s (Board) January 24, 2002, order in this license renewal proceeding involving four of Duke’s nuclear power plants. *See* LBP-02-4, 55 NRC 49 (2002). The Board in LBP-02-4 granted petitions to intervene and requests for hearing of the Blue Ridge Environmental Defense League (BREDL) and the Nuclear Information and Resource Service (NIRS). The Board ruled that BREDL and NIRS had each demonstrated standing and that each had filed at least one admissible contention challenging Duke’s application to renew its operating licenses for Units 1 and 2 of the McGuire Nuclear Station and Units 1 and 2 of the Catawba Nuclear Station. Among other things, the Board admitted a contention concerning the possible use of mixed oxide (MOX) fuel<sup>1</sup> at the McGuire and Catawba facilities.<sup>2</sup>

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<sup>1</sup> MOX fuel is a mixture of uranium and plutonium oxides. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-9, 55 NRC 245 (2002).

<sup>2</sup> The Board also admitted issues concerning the completeness of the Severe Accident Mitigation Alternatives (“SAMA”) evaluation that Duke had included in its environmental reports and certified to the Commission the Petitioners’ issues related to risks from acts of terrorism. Duke and the NRC Staff have each filed an appeal challenging the admissibility of the SAMA issues. On February 6, 2002, the Commission issued CLI-02-6 accepting the certification of the terrorism issues. We address neither the SAMA nor the terrorism issues in this Memorandum and Order but will do so in future Commission issuances.

Both Duke and the NRC Staff argue on appeal that the MOX contention is inadmissible. We agree and therefore reverse the MOX ruling in LBP-02-4. Our reversal of the MOX ruling renders moot the Staff's motion for stay and interlocutory review of the Board's March 1, 2002 order granting discovery and scheduling a hearing on the MOX issues. Since the reversal also renders discovery and the hearing on this issue unnecessary, we also dismiss the Staff's motion to vacate the Board's March 1st order.

## I. PROCEDURAL BACKGROUND

This proceeding stems from Duke's June 13, 2001, application to renew licenses for four nuclear power plants for an additional 20 years of operation, effective at their licenses' respective expiration dates. The current operating licenses for Units 1 and 2 of the McGuire Nuclear Station and Units 1 and 2 of the Catawba Nuclear Station expire in 2021, 2023, 2024, and 2026, respectively. On July 16th, this agency published in the *Federal Register* a notice that it had received Duke's application<sup>3</sup> and, on August 15th, we published a notice of opportunity for hearing on the application.<sup>4</sup> In response to the August 15th notice, BREDL and NIRS each submitted a timely petition to intervene and request for hearing to oppose Duke's license renewal application. On October 4th, the Commission referred those petitions and requests to the Licensing Board Panel.<sup>5</sup>

On October 23, 2001, BREDL filed a petition asking the Commission to dismiss, as legally invalid, Duke's license renewal application or, alternatively, to hold this adjudication in abeyance pending major anticipated changes in the current licensing basis, i.e., the use of MOX fuel and changes to account for increased security threats. In support of its two requests for relief, BREDL offered arguments relating to the risk of terrorist attacks, the use of MOX fuel, and the impropriety of the NRC Staff's exempting Duke from a filing requirement.

On December 28, 2001, we issued CLI-01-27, denying BREDL's petition. In that order, we rejected the abeyance request on the grounds that the instant adjudication would address many issues entirely unconnected to terrorism, would result in no immediate licensing action, and would cause BREDL no injury other than litigation costs.<sup>6</sup> We rejected BREDL's exemption request on the grounds that it raises fact-sensitive questions of when and whether exemption-related issues may be raised in an adjudicatory hearing, and that we generally preferred

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<sup>3</sup> 66 Fed. Reg. 37,072.

<sup>4</sup> 66 Fed. Reg. 42,893.

<sup>5</sup> CLI-01-20, 54 NRC 211 (2001).

<sup>6</sup> CLI-01-27, 54 NRC 385, 389-91 (2001).

for the Licensing Board to address such questions in the first instance, allowing us ultimately to consider them after development of a full record.<sup>7</sup>

On January 24, 2002, the Board issued LBP-02-4 in which it concluded that each Petitioner has standing and has offered at least one admissible contention. More specifically, the Board admitted two contentions (reframed by the Board) relating to the anticipated use of MOX fuel in the four subject facilities and to severe accident mitigation alternatives (SAMA). In addition, the Board declined to rule on the admissibility of issues relating to terrorism risks and instead certified those issues to the Commission. The Board rejected as inadmissible the remainder of NIRS's and BREDL's contentions.

On February 6, 2002, the Commission issued CLI-02-6, accepting certification of the terrorism issues and setting a briefing schedule.<sup>8</sup> On February 25 and March 12, 2002, the parties filed briefs on the terrorism issues. In addition, on February 4, 2002, pursuant to 10 C.F.R. § 2.714a(c), the NRC Staff and Duke filed interlocutory appeals of the Board's admission of the MOX and SAMA contentions. The Staff and Duke do not contest Intervenors' standing. NIRS and BREDL oppose the appeals.

On March 1, 2002, the Board issued an order granting discovery and scheduling a July hearing date on NIRS's MOX issues. On March 11, 2002, the NRC Staff filed a motion for stay and interlocutory review of the Board's March 1st order.

## II. ADMISSIBILITY OF NIRS'S AND BREDL'S CONTENTIONS

### A. The Commission's Standards for Admissibility of Contentions

The Commission's rules governing licensing proceedings require that a petitioner to intervene raise at least one admissible contention.<sup>9</sup> Our contention pleading rules require a detailed, fact-based showing that a genuine and material dispute of law or fact exists.<sup>10</sup> Moreover, a contention is not admissible unless it falls within the scope of the proceeding, as that scope is defined by the

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<sup>7</sup> *Id.* at 391-92.

<sup>8</sup> The Commission simultaneously issued similar orders agreeing to address terrorism issues in three other proceedings: *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-3, 55 NRC 155 (2002), *accepting referral of* LBP-01-37, 54 NRC 476 (2001) (denying admission of terrorism contention and referring issue to the Commission); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-5, 55 NRC 161 (2002), *accepting referral of* LBP-02-5, 55 NRC 131 (2002) (denying admission of terrorism contention and referring issue to the Commission); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-4, 55 NRC 158 (2002), *granting in part petition for interlocutory review of* unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002) (denying reconsideration of admission of terrorism contention).

<sup>9</sup> 10 C.F.R. § 2.714(b)(1).

<sup>10</sup> *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001).

Commission in its Referral Order<sup>11</sup> and in the relevant regulatory and statutory provisions.<sup>12</sup>

The scope of license renewal proceedings is narrow.<sup>13</sup> In our order referring this proceeding to the Licensing Board, we specifically limited the case's scope under the Atomic Energy Act ("AEA") to "a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses."<sup>14</sup>

We likewise specifically limited the proceeding's scope under the National Environmental Policy Act ("NEPA") to issues specified in 10 C.F.R. §§ 51.71(d) and 51.95(c) (identifying which environmental issues are exempt from consideration in the Staff's site-specific environmental impact statement).<sup>15</sup> Our regulations divide environmental review for such applications into generic ("Category 1") and plant-specific ("Category 2") components, based on an extensive study of potential environmental consequences of operating a nuclear power plant for an additional 20 years.<sup>16</sup> Under our regulations, applicants must include in their environmental reports analyses of the plant-specific Category 2 issues only (e.g., impact of extended operation on endangered or threatened species); they are generally not required to provide analyses of Category 1 issues (e.g., impacts from principal noise sources). However, the applicant must provide additional analysis of even a Category 1 issue if new and significant information has surfaced that may bear on the applicability of the Category 1 finding at the plant that is the subject of the application.<sup>17</sup>

Under our NEPA rules, the NRC Staff will prepare a site-specific Supplemental Environmental Impact Statement ("SEIS") which augments the GEIS. The SEIS will consider public comments, including plant-specific claims and "new

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<sup>11</sup> CLI-01-20, 54 NRC 211, 212-13 (2001).

<sup>12</sup> *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000).

<sup>13</sup> Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,465, 22,481 (May 8, 1995).

<sup>14</sup> CLI-01-20, 54 NRC at 212-13, *citing* Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461 (May 8, 1995), and 10 C.F.R. §§ 54.4, 54.21(a), (c). *See also* CLI-01-27, 54 NRC at 391, *citing Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 6-13 (2001). *See generally Turkey Point*, CLI-01-17, 54 NRC at 7, 8, 9, 10, 13.

<sup>15</sup> CLI-01-20, 54 NRC at 213, *citing* NUREG-1437, "Generic Environmental Impact Statement ("GEIS") for License Renewal of Nuclear Plants (May 1996)," and Final Rule, "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 61 Fed. Reg. 28,467 (June 5, 1996), *amended*, 61 Fed. Reg. 66,537 (Dec. 18, 1996).

<sup>16</sup> 10 C.F.R. Part 51, Subpart A, Appendix B. *See also* GEIS. The federal courts have recognized GEISs as legitimate means by which this agency can avoid pointlessly "relitigat[ing] issues that may be established fairly and efficiently in a single rulemaking." *See, e.g., Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir.), *cert. denied*, 515 U.S. 1159 (1995).

<sup>17</sup> *Turkey Point*, CLI-01-17, 54 NRC at 11.

and significant’’ information on generic findings, and will weigh all expected environmental impacts — both generic and plant-specific.<sup>18</sup>

Finally, the Commission’s rules provide a vehicle by which a petitioner may seek to raise issues that would otherwise be beyond the scope of a license renewal proceeding. Pursuant to 10 C.F.R. § 2.758, a petitioner may seek a waiver of one or more of the Commission’s AEA- or NEPA-related license renewal rules. To obtain such a waiver, however, the petitioner must demonstrate that a strict application of the rule would not serve the purposes for which it was promulgated.<sup>19</sup>

## **B. Description and Analysis of Petitioners’ MOX Contentions**

### ***1. Petitioners’ MOX Contentions and Their Admission by the Board***

The Board admitted NIRS’s two MOX-related contentions:

1.1.1: MOX fuel use will have a significant impact on the safe operation of Catawba and McGuire during the license renewal period and must be considered in the license renewal application. [AEA-related MOX contention]

1.2.4: Environmental reports do not consider MOX fuel use. [NEPA-related MOX contention]<sup>20</sup>

However, the Board combined the two into the following reformulated contention:

Anticipated MOX fuel use in the Duke plants will have a significant impact on aging [AEA] and environmental [NEPA] license renewal issues during the extended period of operations in the Duke plants, through mechanisms including changes in the fission neutron spectrum and the abundances of fission products, and must therefore be considered in the license renewal application and addressed in the Supplemental EIS.<sup>21</sup>

The Board concluded that NIRS’s Contention 1.1.1 fell within the scope of the AEA portion of this proceeding because Duke was *planning* to amend its operating licenses so as to permit the use of MOX fuel at the four plants. The Board relied specifically on the language of 10 C.F.R. § 54.29(a) which provides

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<sup>18</sup> *Id.* at 12, 15.

<sup>19</sup> See also *Turkey Point*, CLI-01-17, 54 NRC at 10 (regarding AEA health-and-safety issues), 12 and 15 (regarding NEPA environmental issues). The intervenor or petitioner may also raise its concerns outside the context of an adjudication by filing either an enforcement petition under 10 C.F.R. § 2.206 or a rulemaking petition under 10 C.F.R. § 2.802. In addition, the intervenor or petitioner may use the notice-and-comment process for the Supplemental Environmental Impact Statement (SEIS) and ask the Commission to forgo use of a questionable generic finding and to suspend license renewal proceedings, pending a rulemaking or an update of the GEIS. Finally, the Commission itself solicits comments from the public and then reviews (and revises as necessary) its license renewal rules every 10 years, beginning 7 years after the last review. See *Turkey Point*, CLI-01-17, 54 NRC at 12.

<sup>20</sup> NIRS Contentions at 2, 20.

<sup>21</sup> LBP-02-4, 55 NRC at 107.

that, for a plant's operating license to be renewed, there must be "reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the [current licensing basis], and that *any changes made* to the plant's [current licensing basis] in order to comply with this paragraph are in accord with the [AEA] and the Commission's regulations."<sup>22</sup> The Board construed the regulation's reference to "any changes made" as including future changes in the current licensing basis — such as future authorization to use MOX fuel — and therefore concluded that Contention 1.1.1 was admissible as an AEA-related issue in this license renewal proceeding.<sup>23</sup>

The Board also concluded that NIRS's Contention 1.2.4 was admissible as a NEPA-related issue in this proceeding:

[The contention] presents a specific statement of the issue NIRS wishes to raise; provides a brief explanation of the bases of the contention; provides a fact-based argument sufficient to show a genuine dispute on the material issue of combined fact and law, of whether future anticipated use of MOX fuel in the Duke plants is sufficiently definite to constitute a "proposal" under the law, with a connection, "cumulative impact," "interdependence," or similar relationship to matters at issue in this license renewal proceeding, to warrant being addressed in the SEIS for this proceeding. NIRS has also identified the failure of the [license renewal application] to contain information on the use of MOX fuel in the plants, and provided supporting reasons why it believes the information should be included in the application.

Looking at the contention from the standpoint of whether it falls within the scope of license renewal, we find that NIRS has presented sufficient indication that the use of MOX fuel in the Duke plants could affect . . . the environment with regard to thermal discharges, that we find it to be within the scope of a license renewal proceeding.<sup>24</sup>

## 2. *Admissibility of NIRS's AEA-Related MOX Contention*

We disagree with the Board's expansive reading of our AEA-based license renewal regulations.<sup>25</sup> The Board's view that license renewal contemplates inquiry into future, inchoate plans of the Licensee would, as a general matter, invite petitioners in license renewal cases to raise safety issues involving a myriad of possible future license amendments. Here, while Duke apparently has a contractual arrangement to purchase MOX fuel, the proposed MOX fuel production facility remains unbuilt and is in the early stages of a contested NRC

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<sup>22</sup> *Id.* at 95 (emphasis added).

<sup>23</sup> *Id.* at 96.

<sup>24</sup> *Id.* at 107 (emphasis omitted).

<sup>25</sup> We also disagree with the Board's interpretation of the following language in CLI-01-27: "We believe it is generally preferable for the Licensing Board to address such questions [as the MOX issue] in the first instance, allowing us ultimately to consider them after *development of a full record*." See CLI-01-27, 54 NRC at 392 (emphasis added). The Board construed the italicized phrase as essentially a requirement that the Board accept the MOX contentions and hold an evidentiary hearing. See LBP-02-4, 55 NRC at 105-07. This was not our intent. Our phrase "full record" referred merely to those documents necessary to a ruling on admissibility, i.e., proposed contentions, responses to those contentions, and the transcript of a prehearing conference at which admissibility would be discussed.

licensing proceeding.<sup>26</sup> To actually use MOX fuel at Catawba and McGuire, Duke will have to obtain an NRC license amendment, for which Duke has not yet even applied. Nothing in our case law or regulations suggests that license renewal is an occasion for far-reaching speculation about unimplemented and uncertain plans like Duke's MOX plan.<sup>27</sup>

The Board's reliance on 10 C.F.R. § 54.29(a) to admit the MOX contention is misplaced. This rule, by its very terms, focuses on the "current" licensing basis, not some future licensing basis. This temporal limitation is also expressly spelled out in the regulatory definition of "current licensing basis," i.e., "NRC requirements . . . *that are docketed and in effect.*"<sup>28</sup> Because Duke's future plan to use MOX fuel is not a part of the *current* licensing basis for the four plants, it is perforce not part of the licensing basis that is "docketed and in effect."

The Board takes out of context the phrase "changes made to the plant's [current licensing basis]," in an effort to include changes made after submission of the license renewal application. The words immediately following this phrase, however, make clear that the "changes" referenced are only those that are necessary "in order to comply with [section 54.29(a)]," i.e., necessary to satisfy the "standards for issuance of a renewed license." In other words, if "managing the effects of aging,"<sup>29</sup> or some other specific license renewal requirement, requires any changes in the current licensing basis, then the NRC will consider the overall lawfulness and reasonableness of those changes under the AEA and under NRC regulations. But a future plan to change from low-enriched uranium fuel to MOX fuel is not the kind of "change" to which section 54.29(a) refers.

In short, we do not consider the AEA-related MOX issue suitable for adjudication in this proceeding and we therefore reverse the Board's admission of this issue. Duke may (or may not) ultimately use MOX fuel at its Catawba and McGuire plants. The MOX issue may well become ripe for NRC consideration down the road, i.e., when and if Duke seeks a license amendment to use MOX fuel, but it is not ripe now. While our ruling to exclude the MOX issue from a license renewal case is consistent with the limited nature of license renewal

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<sup>26</sup> See *Savannah River*, CLI-02-9, 55 NRC 245.

<sup>27</sup> See further discussion at pp. 295-97, *infra*; cf. *Turkey Point*, CLI-01-17, 54 NRC at 24 & n.18 (only "tangible plan" requires consideration, not a "speculative" assumption).

<sup>28</sup> 10 C.F.R. § 54.3 (emphasis added). *Accord Turkey Point*, CLI-01-17, 54 NRC at 9 (the current licensing basis includes only those requirements "applicable to a specific plant *that are in effect at the time of the license renewal application*" (emphasis added)). See also Final Rule, "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,949 (Dec. 13, 1991) ("1991 Final Rule") ("the current licensing basis . . . is the set of NRC requirements applicable to a specific plant and a licensee's written commitments for ensuring compliance with and operation within applicable NRC requirements and the plant-specific design basis . . . *that are docketed and are in effect*" (emphasis added)), 64,950 ("the Commission has revised the [current licensing basis] definition to restrict commitments to those that are written and *on the plant-specific docket*" (emphasis added)), *superseded in other respects* by Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461 (May 8, 1995) ("Final Rule"); the 1991 Final Rule's discussion of "current licensing basis" remains valid (see 60 Fed. Reg. at 22,473).

<sup>29</sup> 10 C.F.R. § 54.29(a)(1).

proceedings,<sup>30</sup> we also note that, as a general matter, contentions that are based on projected changes to a license, not currently before the NRC in any proceeding or application, are not sufficient to support admission of a contention. An NRC proceeding considers the application presented to the agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing proceeding.<sup>31</sup>

### 3. *Admissibility of NIRS's NEPA-Related MOX Contention*

For similar reasons, we also disagree with the Board's ruling that NIRS's MOX contentions fall within the scope of the NEPA portion of this proceeding. In CLI-01-27, we described the issue as follows:

BREDL's [MOX] "fuel" argument raises a much-litigated environmental law issue: the so-called "cumulative impact" issue. In this proceeding, the issue is styled: whether the NRC Staff is obliged to consider in an Environmental Impact Statement the cumulative effect of the instant license extension action together with an as-yet-unfiled application for an amendment permitting use of plutonium/MOX fuel.<sup>32</sup>

In *Kleppe v. Sierra Club*, the Supreme Court ruled against environmental groups seeking to force the United States Department of the Interior (and other agencies regulating the coal industry) to prepare a comprehensive EIS covering all projects related to coal mining in the Northern Great Plains region. The Court found such an EIS inappropriate because the agency did not have pending before it a "proposal" for regionwide action.<sup>33</sup> The Court concluded that only "when several proposals for . . . actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, [must] their environmental consequences . . . be considered together."<sup>34</sup> The Court held that agencies are not required to consider "possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions"<sup>35</sup> and specifically reversed the court of appeals' ruling that the government must include within its NEPA review any significant federal actions merely under "consideration" — as compared with those that are actually proposed.<sup>36</sup>

Taken literally, *Kleppe* invalidates NIRS's NEPA contention because Duke has submitted no "proposal" (i.e., a license amendment application) to use MOX

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<sup>30</sup> See, e.g., CLI-01-27, 54 NRC at 391 ("License renewal, by its very nature, contemplates a limited inquiry"); *Turkey Point*, CLI-01-17, 54 NRC at 7-10.

<sup>31</sup> See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 257, 267 (1996).

<sup>32</sup> 54 NRC at 392 (footnote omitted), citing, *inter alia*, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

<sup>33</sup> *Kleppe*, 427 U.S. at 414-15.

<sup>34</sup> *Id.* at 410 (emphasis added).

<sup>35</sup> *Id.* at 410 n.20 (emphasis added).

<sup>36</sup> *Id.* at 404.

fuel in the Catawba and McGuire reactors. *Kleppe*, however, was decided a quarter-century ago, and as the Licensing Board's extensive digest of subsequent federal decisions indicates,<sup>37</sup> the case has been subject to a wide range of judicial interpretations, many seemingly inconsistent with each other and even with *Kleppe* itself. Thus, the matter warrants a closer look.

Our collective reading of the post-*Kleppe* rulings suggests, as the Board indicated, that to bring NEPA into play, a possible future action must at least constitute a "proposal" pending before the agency (i.e., ripeness), and must be in some way interrelated with the action that the agency is actively considering (i.e., nexus).<sup>38</sup> The United States Court of Appeals for the District of Columbia Circuit said as much in *National Wildlife Federation v. FERC*:

*Kleppe* . . . clearly establishes that an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue.<sup>39</sup>

We believe that the possibility of a future MOX application satisfies neither the ripeness nor the nexus test.

The issue of ripeness ultimately boils down to what constitutes a "proposal." Many courts have required concrete or reasonably certain projects, not projects that are "merely contemplated."<sup>40</sup> This approach is reasonable,<sup>41</sup> especially as applied in the context of this Commission's responsibilities under NEPA. At this point, we have before us no details about Duke's future MOX fuel plans. We would, to say the least, have a very difficult time analyzing the environmental effects of a "merely contemplated" license application that we have never seen, and we would have an even more difficult time appraising how those effects would combine with those of another action to create "cumulative impacts."<sup>42</sup>

The Commission of course recognizes that Duke *could* file a license amendment application to use MOX fuel. Indeed, Duke has even signed a contract with DOE

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<sup>37</sup> See LBP-02-4, 55 NRC at 97-103.

<sup>38</sup> See *id.* at 104.

<sup>39</sup> 912 F.2d 1471, 1478 (D.C. Cir. 1990) (emphasis added).

<sup>40</sup> See, e.g., *Society Hill Towers Owners Association v. Rendell*, 210 F.3d 168, 182 (3d Cir. 2000); *Crouse Corp. v. Interstate Commerce Commission*, 781 F.2d 1176, 1194-95 (6th Cir. 1986); *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1015-16 (5th Cir. 1980).

<sup>41</sup> NEPA is governed by a "rule of reason." See generally *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1300 (D.C. Cir. 1984), *reh'g en banc granted on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985), *aff'd on reh'g en banc*, 789 F.2d 26 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 923 (1986) (applying a "rule of reason" in deciding whether the EIS for the licensing of the Diablo Canyon nuclear power plant had to be supplemented to include discussion of possible environmental consequences of a core melt accident).

<sup>42</sup> See *Crouse*, 781 F.2d at 1193-96 (ruling that the ICC had justified the limited scope of its analysis on the grounds that "the lack of final design and engineering plans made it impossible to conduct an in-depth analysis"). See generally *Kleppe*, 427 U.S. at 402 ("Absent an overall plan for regional development, it is impossible to predict the level of coal-related activity that will occur in the region").

which would, at some point in the future, oblige Duke to use such fuel at its McGuire and Catawba facilities. DOE, however, has recently modified its plutonium disposition program in a way that will postpone until the fall of 2008 the delivery of the first MOX fuel assemblies to McGuire. During the next 6½ years, any number of events could occur that would render a license amendment application to use MOX fuel unnecessary. The mere possibility that Duke might, at some undetermined future time, file a MOX-related amendment application is speculative by its very nature. We see no reason to doubt Duke's statement that its submittal of a MOX license amendment application is uncertain:

Duke is currently participating in an international program to reduce stockpiles of surplus weapons plutonium in the United States and Russia. This program may eventually involve the use of MOX fuel at McGuire and/or Catawba. However, the future use of MOX fuel at McGuire and Catawba reactors is not a certainty. Substantial uncertainties and contingencies continue to surround the program. . . . Duke . . . has filed no license amendment request with the Commission for the approval of such use. [T]he ultimate use of any MOX fuel is dependent on a number of factors entirely outside Duke's control. These include, but are not limited to, actions by the U.S. Department of Energy, including the consummation of certain international agreements, the outcome of the current licensing proceeding for the proposed MOX fuel fabrication facility in South Carolina, and plutonium disposition activities in Russia.<sup>43</sup>

Given these major uncertainties surrounding Duke's potential filing of a MOX application, we consider such an application simply too inchoate to rise to the level of a "proposal" within the meaning of *Kleppe* and its progeny.<sup>44</sup> Consequently, we conclude that the possible MOX application fails the "ripeness" test and should not be considered in this proceeding.

Moving now to the need for the license renewal and the MOX amendment to be interrelated (i.e., the nexus test), we apply the test the court of appeals

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<sup>43</sup> See Duke's Memorandum of Law in Support of Appeal from LBP-02-04, dated Feb. 4, 2002, at 4-5 (citation and footnote omitted).

<sup>44</sup> See *Sierra Club v. Marsh*, 976 F.2d 763, 768 (1st Cir. 1992):

Whether a particular set of impacts is definite enough to take into account, or too speculative to warrant consideration, reflects several different factors. With what confidence can one say that the impacts are likely to occur? Can one describe them "now" with sufficient specificity to make their consideration useful? If the decisionmaker does not take them into account "now," will the decisionmaker be able to take account of them before the agency is so firmly committed to the project that further environmental knowledge, as a practical matter, will prove irrelevant to the government's decision? [Citations omitted.]

See also *Kleppe*, 427 U.S. at 412 ("The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility" (emphasis added)); *Concerned Citizens on I-190 v. Secretary of Transportation*, 641 F.2d 1, 6 (1st Cir. 1981) (relying in part on "the existence of continuing opportunities to limit its adverse effects," the Court upheld the EIS against a challenge that it failed to take sufficient account of the impact of such future development on Boston's drinking water supply). Regarding the third question, see *United States Department of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982) (in rejecting a request for a cumulative impact statement, the Commission cited *Kleppe* and ruled that "site preparation as proposed will not result in any irreversible or irretrievable commitments to the remaining segments of the . . . project"), *rev'd and remanded per curiam on other grounds sub nom. Natural Resources Defense Council v. NRC*, 695 F.2d 623 (D.C. Cir. 1982).

set forth in *Webb v. Gorsuch*.<sup>45</sup> There, the court stated that, when developing an EIS, an agency must consider the impact of other proposed projects “only if the projects are so interdependent that it would be unwise or irrational to complete one without the other.”<sup>46</sup> We see no “interdependence” at all between Duke’s license renewal application and any potential fuel-related amendment application. License renewal obviously can go forward without reference to the MOX issue. The Catawba and McGuire plants could operate throughout their current licensing term plus an additional 20-year renewal term (if license renewal is approved) without using MOX fuel, just as they have to date. Likewise, assuming Commission authorization, the plants could use MOX fuel during the remainder of their current operating licenses regardless of whether Duke had sought any license renewals.<sup>47</sup> License renewal and MOX use are, in short, separate questions.

For these reasons, we conclude that the possible MOX application fails the “nexus” test and need not be considered in this license renewal proceeding. NIRS and BREDL are of course free to raise MOX-related safety and environmental issues (including the question whether the use of MOX fuel will aggravate any aging effects) when and if Duke submits a license amendment application seeking permission to possess and use MOX fuel.

#### IV. CONCLUSION

We grant the interlocutory appeals in part, defer consideration of the SAMA and terrorism issues, and reverse the MOX ruling in LBP-02-4. We also dismiss as moot the NRC Staff’s motion for stay and interlocutory review and vacate the

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<sup>45</sup> 699 F.2d 157 (4th Cir. 1983).

<sup>46</sup> *Id.* at 161. *Accord Park County Resource Council, Inc. v. USDA*, 817 F.2d 609, 623 (10th Cir. 1987); *Society Hill*, 210 F.3d at 181; *Webb v. Gorsuch*, 699 F.2d at 161; *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426 (10th Cir. 1996) (ruling that additional components of the airport expansion Master Plan were “not so interdependent that it would be unwise or irrational to complete the runway . . . upgrade without them,” and that there was no “inextricable nexus” between the runway upgrade and the other parts of the plan, such that the rest of the plan could not be abandoned “without destroying the [runway upgrade’s] functionality”). See generally *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) (concluding that the environmental effects of an action need not be considered in an EIS regarding a second action so long as the first action has “independent utility,” i.e., so long as the agency might reasonably take the first action without taking the second); *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000) *cert. denied*, 122 S. Ct. 41 (2001) (same). But see *Fritiofson v. Alexander*, 772 F.2d 1225, 1241 n.10 (5th Cir. 1985) (“there may be circumstances in which proposals that are not functionally or economically interdependent may, because of cumulative impacts, trigger the requirement to prepare a comprehensive EIS”).

<sup>47</sup> As the Board itself acknowledges, Duke has twice stated its intent to move forward with the license renewal process regardless of whether it uses MOX fuel in any of its four plants. See LBP-02-4, 55 NRC at 95, citing Duke’s Response to Amended Petitions to Intervene filed by [NIRS] and [BREDL],” dated Dec. 13, 2001, at 15, and Duke’s Response to [BREDL]’s Petition to Dismiss Licensing Proceeding or, in the Alternative, Hold It in Abeyance,” dated Nov. 5, 2001, at 10-11.

Board's March 1, 2002 order granting discovery and scheduling a hearing on the MOX issues.

IT IS SO ORDERED.

For the Commission<sup>48</sup>

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 12th day of April 2002.

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<sup>48</sup>Commissioners Dicus and Merrifield were not present for the affirmation of this Order. If they had been present, they would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

**Docket No. 72-22-ISFSI**

**PRIVATE FUEL STORAGE, L.L.C.**  
**(Independent Spent Fuel Storage**  
**Installation)**

**April 12, 2002**

**ORDER**

By this Order, the Commission grants the April 5, 2002 Motion filed by Intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) for a Protective Order in connection with the pending Commission review of LBP-02-8, 55 NRC 171 (2002). *See* CLI-02-8, 55 NRC 222 (2002). The Band's motion sought to add, by agreement of all interested parties,<sup>1</sup> two one-page documents to the list of documents already covered by a Protective Order entered by the Atomic Safety and Licensing Board on February 22, 2002.

The two documents at issue were attached as Exhibits A and B to Exhibit EE, the Declaration of Leon D. Bear, which, in turn, was attached to the Skull Valley Band's Motion for Directed Certification. The Band also attached the Bear affidavit to its initial brief (filed on April 5, 2002). The exhibits consist of confidential financial documents, and thus proprietary information, of the Band; namely, one page of a bank statement showing deposits made into a Skull Valley Band account, and a dividend check issued to a member of the Band.

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<sup>1</sup>The interested parties are Private Fuel Storage, L.L.C. (PFS), Ohngo Gaudadeh Devia (OGD), and the NRC Staff.

Previously (on November 27, 2001) the Band, PFS, and OGD entered into a Confidentiality Agreement to protect from public view various listed exhibits containing sensitive financial information. The Licensing Board then entered a Protective Order on February 22, 2002, in reference to that Confidentiality Agreement. According to counsel for the Band, OGD and PFS have agreed to amend the November 27, 2001 Confidentiality Agreement to add these two documents to the coverage of that Agreement. The NRC Staff does not oppose the Band's Motion for Protective Order.

After reviewing the proposed protective order request, we adopt the following terms as governing disclosure of the items in question:

Absent further order of the Board or the Commission,

1. The NRC Office of the Secretary (SECY) should continue to treat the documents attached as Exhibits A and B to Exhibit EE, Declaration of Leon D. Bear, as nonpublic documents;

2. OGD, PFS, and the Skull Valley Band shall treat these two exhibits as confidential in accordance with the November 27, 2001 confidentiality agreement among OGD, PFS, and the Skull Valley Band that formed the basis for the Board's February 22, 2002 Protective Order; and

3. The two exhibits covered by this Order need be provided only to OGD, PFS, and the NRC Staff, as they are the parties involved in the Commission's review of LBP-02-8.

IT IS SO ORDERED.

For the Commission,<sup>2</sup>

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 12th day of April 2002.

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<sup>2</sup>Commissioners Dicus and Merrifield were not present for the affirmation of this Order. If they had been present, they would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Alan S. Rosenthal**, Presiding Officer  
**Dr. Richard F. Cole**, Special Assistant

**In the Matter of**

**Docket No. 40-8681-MLA-11**  
**(ASLBP No. 02-795-02-MLA)**

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

**April 26, 2002**

In this Memorandum and Order in a Subpart L Materials License Amendment proceeding, the Presiding Officer rejected legal claims of the Ute Tribe that the Staff had failed to comply with certain Executive Orders before issuing the requested license amendment in December 2001.

**EXECUTIVE ORDERS: APPLICABILITY TO NUCLEAR  
REGULATORY COMMISSION**

Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000), concerned with consultation and coordination with Indian tribal governments, in terms does not apply to independent regulatory agencies such as the Nuclear Regulatory Commission.

**EXECUTIVE ORDERS: COMPLIANCE**

Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994), does not require examination of the subsistence consumption patterns of Indian tribal members in

the absence of a determination that the licensing activity in question might pose a significant threat to the Tribe's environment.

**MEMORANDUM AND ORDER**  
**(Denying Request for an Order Directing the Withdrawal of**  
**Issued License Amendment)**

This proceeding is before me on the requests of Petitioners William E. Love and the Utah Sierra Club (Sierra) for a hearing on an application for a source material license amendment. Submitted by the International Uranium (USA) Corporation (Licensee), the application's purpose was to obtain authority to receive and process at the White Mesa Uranium Mill located near Blanding, Utah, alternate feed material originating at the Molycorp site in California.

On a determination that both Petitioners possessed the requisite standing and had specified at least one germane area of concern (*see* 10 C.F.R. § 2.1205(h)), I granted their hearing requests. *See* LBP-02-6, 55 NRC 147 (2002), *aff'd*, CLI-02-10, 55 NRC 251 (2002). As the consequence of unusual circumstances not currently relevant, by then the sought license amendment had already been issued by the NRC Staff. The Petitioners thus later endeavored to obtain a stay *pendente lite* of its effectiveness. That relief was denied by me in LBP-02-9, 55 NRC 227 (2002), and subsequently by the Commission in CLI-02-10.

In addition to the Licensee and the two Petitioners, the participants in the proceeding now include the Ute Mountain Ute Tribe (Tribe) and the NRC Staff. At its request, and by March 18, 2002 order (unpublished), the Tribe was granted interested governmental entity status pursuant to the provisions of 10 C.F.R. § 2.1211(b). For its part, the Staff initially exercised its option under 10 C.F.R. § 2.1213 to remain on the sideline. By April 1, 2002 order (unpublished), however, and as authorized by the same section of the Rules of Practice, I directed that the Staff become a full party to the proceeding. I did so for the stated reason that, its action in granting the license amendment being the focal point of the Petitioners' attack, it seemed appropriate to call upon the Staff to explain and justify that action.

Under the schedule established for the proceeding, the written presentations of the Petitioners and the Tribe are now on file and the responsive presentations of the Licensee and NRC Staff are due, under an extension, on May 20, 2002. *See* 10 C.F.R. § 2.1233. In its March 28, 2002 presentation, the Tribe asserted, *inter alia*, that the issuance of the license amendment violated certain specified Executive Orders, with the consequence that the amendment should be ordered withdrawn.

More particularly, according to the Tribe, by virtue of the cited Executive Orders, the NRC Staff was required both (1) to consult with the Tribe in connection with its environmental assessment of the sought license amendment; and (2) to acquire data pertaining to tribal members' subsistence consumptive uses of fish and wildlife. The Tribe would have it that there is no evidence that these requirements were satisfied.

Given its possible significance in terms of the continued viability of the license amendment, I decided to single out this narrow, purely legal issue for expedited consideration and disposition prior to addressing the other issues presented in the various presentations.<sup>1</sup> Accordingly, the Licensee and NRC Staff were directed to respond separately to the Tribe's Executive Orders claims.

Those responses, filed on April 9, are now in hand. Both the Licensee and the NRC Staff take the position that the Executive Orders in question do not have the effect that the Tribe would assign to them. I agree.

A. The first Executive Order relied upon by the Tribe is Number 13175, which was issued by President Clinton on November 6, 2000, and published in the *Federal Register* three days thereafter. 65 Fed. Reg. 67,249. Entitled "Consultation and Coordination with Indian Tribal Governments," it imposes certain obligations in that realm upon those federal agencies that are subject to its terms.

The Nuclear Regulatory Commission is, however, not one of those agencies. Section 1(c) of the Executive Order expressly excludes from its mandatory provisions "independent regulatory agencies, as defined in 44 U.S.C. 3502(5)." For its part, the Section 3502(5) definition includes by name the Nuclear Regulatory Commission.

It is true that section 8 of Executive Order 13175 "encourage[s]" independent regulatory agencies to comply with the provisions of the Order. But that exhortation scarcely can be translated into a mandatory obligation that, if not honored, might have the effect of vitiating action taken by the agency. In addition, in its April 9 response to the Tribe (at 3), the NRC Staff noted that, in actuality, it had "recognize[d] the importance of maintaining open communication with Indian tribes which may be affected by its actions." To this end, "the Staff has maintained continuous communication with the Tribe on issues related to the White Mesa mill" although, "due to an unfortunate administrative oversight," the Tribe was not furnished with a copy of the Draft Environmental Assessment regarding the license amendment in issue. *Ibid.* In that connection, the Staff

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<sup>1</sup> All of those issues have a decided factual element and many of them appear to be of some complexity.

insists that the oversight did not diminish “the Tribe’s ability to consult with [it] on issues relating to this license amendment request.” *Ibid.*<sup>2</sup>

B. The other Executive Order invoked by the Tribe, Number 12898, was issued by President Clinton on February 11, 1994, and published in the *Federal Register* 5 days later. 59 Fed. Reg. 7629. As its title states, it is concerned with “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.”

Although, as an independent regulatory agency, the Nuclear Regulatory Commission likely was not subject to the Executive Order, in a March 31, 1994, letter its then Chairman advised the President that the agency would nonetheless comply with its provisions. That letter led a Licensing Board to determine that the Commission was obligated to carry out the Executive Order in good faith in its implementation of “programs, policies, and activities that substantially affect human health or the environment.” *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367, 376 (1997), *reversed on other grounds*, CLI-98-3, 47 NRC 77 (1998).<sup>3</sup>

On the basis of what the Tribe has set forth in its written presentation, there is no warrant for a conclusion that the NRC Staff failed to meet that obligation in this instance. Contrary to the Tribe’s seeming belief, there is nothing in section 2-2 of Executive Order 12898 (or elsewhere in that Order) requiring any particular Staff consultation with the Tribe as part of its environmental assessment of the proposed license amendment. Nor can the Tribe derive comfort from the provisions of section 4-4 of the Executive Order, upon which it also relies.

“In order to assist in identifying the need for ensuring protection of populations with differential patterns of subsistence consumption of fish and wildlife,” section 4-4 calls upon federal agencies, “whenever practicable and appropriate” to:

collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Federal agencies shall communicate to the public the risks of those consumption patterns.

For present purposes, it may be assumed, without deciding, that had the Staff determined, in the course of its assessment of the proposed license amendment,

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<sup>2</sup>In connection with its reliance on Executive Order 13175, the Tribe also asserts (March 28 Presentation at 2) that consultation with it was required by the National Environmental Policy Act. As the NRC Staff observes (April 9 Response at 4), the Commission regulations implementing that statute do not contain a requirement for making draft environmental assessments (as distinguished from draft environmental impact statements) available to affected Indian tribes for comment. *Compare* 10 C.F.R. §§ 51.26, 51.28(a)(5), 51.74(a)(6) *with id.* §§ 51.30, 51.31.

<sup>3</sup>It should be noted, however, that, as stated in its section 6-609, Executive Order 12898 “is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.” Section 6-609 goes on to preclude judicial review involving compliance or noncompliance with the Order. Consequently, in CLI-98-3, 47 NRC at 102, the Commission took pains to point out that the Order “establishes no new rights or remedies.”

that the receipt and processing of the Molycorp material posed a significant threat to the environment in the vicinity of the White Mesa Mill, section 4-4 would have come into play. Specifically, in that circumstance, the Staff might have been obliged to examine the subsistence consumption patterns of the tribal members to ascertain whether, because of those patterns, the ascertained environmental threat would have a particular impact upon the Tribe.

As reflected by its Environmental Assessment (EA) of the proposed license amendment (included in the hearing file at Tab 6) the Staff reached, however, the quite opposite conclusion that the proposed activity was entirely devoid of such effects with regard to the entire population of the area — including, necessarily, the tribal members. Indeed, the EA (in section 6-0) contains the express statement that “[b]ecause the Staff has determined that there will be no significant impacts associated with this action, there can be no disproportionately high and adverse effects and impacts on minority and low-income populations.”<sup>4</sup>

That being so, it is difficult to see any foundation for a present conclusion that the Staff failed, as a matter of law, to fulfill an obligation that the Executive Order imposed upon it. This is not to say that the findings and conclusions in the Staff’s EA perforce are sustainable. They have been vigorously attacked by the Petitioners and it remains to be seen whether that attack will carry the day. There is nothing in the Tribe’s presentation, however, to permit, let alone require, a finding at this stage of a likely both harmful and disparate impact upon Tribe members stemming from tribal subsistence consumption patterns. Indeed, that presentation does little more on that score than to raise questions as to whether to date there has been sufficient verification of compliance with existing water quality standards.

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For the foregoing reasons, the Ute Mountain Ute Tribe has failed to establish an unwarranted failure on the part of the NRC to comply with the provisions of the two cited Executive Orders. Accordingly, to the extent based on that asserted failure, the Tribe’s request for an order directing the withdrawal of the license amendment in issue must be, and hereby is, *denied*.<sup>5</sup>

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<sup>4</sup>The manner in which the EA dealt with the environmental justice issue seems totally consistent with the guidance provided by the Office of Nuclear Material Safety and Safeguards (NMSS), the Commission program office having the responsibility for the issuance of materials licenses and amendments thereto. See NMSS Policy and Procedures Letter 1-50, Revision 2, “Environmental Justice in NEPA Documents,” 1999, Section II “Policy,” quoted in the Staff’s April 9 Response at 7.

<sup>5</sup>I find nothing in the Tribe’s April 22 reply to the responses of the Licensee and NRC Staff on the Executive Orders issue that might serve to cut against any part of the foregoing analysis and conclusions. As noted in the text, the Tribe’s March 28 written presentation also raised questions pertaining to the verification of compliance with water quality standards. Although at this point the Licensee and NRC Staff were called upon to address only the Executive Order claims advanced by the Tribe, the Licensee’s response covered those additional questions as well. Presumably, the Staff will confront them in its full written presentation now due on May 20, 2002.

(Continued)

It is so ORDERED.

BY THE PRESIDING OFFICER<sup>6</sup>

Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
April 26, 2002

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Once all of the written presentations are in hand, I will decide whether the Petitioners and the Tribe should be given an opportunity to reply to those of the Licensee and Staff and, if so, within what time frame. Assuming that such replies should be authorized, the Tribe will be free to respond in its reply to the Licensee and Staff positions on the water quality standard issues.

<sup>6</sup>Copies of this Memorandum and Order were sent this date by e-mail transmission to the counsel or other representative of all of the parties.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Alan S. Rosenthal**, Presiding Officer  
**Dr. Richard F. Cole**, Special Assistant

In the Matter of

**Docket No. 40-8681-MLA-10**  
**(ASLBP No. 02-793-01-MLA-R)**

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

**April 26, 2002**

**MEMORANDUM AND ORDER**  
**(Responding to Commission Remand in CLI-02-13)**

**I. INTRODUCTION**

This proceeding was instituted by the filing of three hearing requests in connection with the application of the International Uranium (USA) Corporation (Licensee) for an amendment to its source material license (SUA-1358). The amendment would allow the receipt and processing at the Licensee's White Mesa Uranium Mill, located near Blanding, Utah, of up to 600,000 cubic yards (840,000 tons) of alternate feed material from a site located in Maywood, New Jersey (the Maywood material). That material consists of by-products from the processing of thorium and lanthanum from monazite sands.

The Utah Chapter of the Sierra Club (Sierra) was one of the three hearing requestors. In common with those of the other two requestors (the City of Moab, Utah, and John Francis Darke), its hearing request focused upon the asserted potential harm that would be associated with the truck transportation of the

materials on Highway 191 from the Cisco, Utah railhead through Moab to the Mill (a total distance of approximately 140 miles).

In LBP-02-3, 55 NRC 35 (2002), I denied all three hearing requests on the common and sole ground that none of the requestors had established the requisite standing. This was because, in my view, the requests did not “assert the existence of an actual or threatened injury-in-fact that is distinct from, and in addition to, such potential injury associated with previously authorized activities at the White Mesa Mill.” LBP-02-3, 55 NRC at 47.

Sierra (but not either Moab or Mr. Darke) appealed this outcome to the Commission. Its appeal rested in its entirety on claims of two procedural errors on my part in the course of the proceeding. In CLI-02-13, 55 NRC 269 (2002), the Commission addressed the claims. It found one of them without merit. *Id.* at 274. As to the other, however, because it could not “discern from the record good reason” for the challenged ruling, it was vacating both that ruling and LBP-02-3 and calling upon me “to reconsider (or re-explain) [the] ruling and if appropriate, to consider further the underlying question of the Sierra Club’s standing.” *Id.* at 273.

This Memorandum and Order is in response to that directive. I begin by accepting the invitation to “re-explain” the ruling that the Commission found troublesome. Although hopeful that the further illumination regarding what undergirded the ruling will remove the concern, I nonetheless go on to consider whether the ruling had a material bearing on the issue of Sierra’s standing to attack the license amendment before me — in other words, whether, in the absence of that ruling, its hearing request would have warranted acceptance. Because I conclude that a negative answer is required, I conclude that no cause exists to alter the result reached in LBP-02-3 on the issue of Sierra’s standing.

## II. BACKGROUND

A. The ruling in question was contained in an unpublished January 2, 2002 Memorandum and Order. It was addressed to a Sierra December 24, 2001 filing. That filing was offered as an authorized response to a Licensee’s December 5, 2001 submission that, in turn, had been occasioned by my request that it furnish certain factual information on two questions that had been discussed in a November 28, 2001 telephone conference held with the parties. Because it was clear to both Judge Cole and me that the December 24 filing went well beyond responding to the Licensee’s submission, the January 2 order rejected it as unauthorized.

In CLI-02-13, the Commission questioned whether this rejection could be squared with the acceptance of the Licensee’s submission, given that it did not appear that the latter was itself narrowly confined to the two matters on which

further factual information had been solicited. 55 NRC at 275-76. It was that concern regarding possible uneven-handed treatment of the two litigants that led to the ordered remand.

B. No less than most challenged procedural rulings made in the course of a vigorously contested proceeding, the January 2 ruling under scrutiny here must be examined in context. Much of the setting for that ruling is to be found in the Memorandum and Order that accompanied it. Additionally, some of it is set forth in either LBP-02-3 or the discussion in CLI-02-13 of the other, and rejected, claim of procedural error. Nonetheless, to understand fully the considerations that were at the foundation of my belief that the ruling was both (a) consistent with the requirement that even-handed treatment be accorded the litigants; and (b) fully warranted by the dictates of sound case management, it seems important to chronicle here the complete background.

To begin with, this was not the first proposed amendment to this particular source material license to come before me on a challenge by the Utah Sierra Club. In February of last year, as authorized in a *Federal Register* notice published the prior month, Sierra's Glen Canyon Group affiliate sought a hearing with regard to a license amendment that would permit the receipt and processing at the White Mesa Mill of alternate feed material originating at the Molycorp site in California (the Molycorp material). The hearing request was filed by a lay member of the organization without apparent legal assistance.

Thereafter, as is my custom in materials licensing cases under Subpart L of the Commission's Rules of Practice, 10 C.F.R. § 2.1201 *et seq.*, I scheduled a telephone conference with the parties to explore further their positions on the issue of Sierra's standing.<sup>1</sup> At that April 11, 2001 conference, Sierra was represented for the first time by legal counsel. Although she made a concerted effort to overcome the deficiencies in the hearing request, the endeavor did not succeed. In LBP-01-15, 53 NRC 344 (2001), I denied the hearing request for lack of standing. On Sierra's appeal (submitted by counsel), the Commission affirmed. CLI-01-21, 54 NRC 247 (2001).

In the present matter concerned with the Maywood material, the Sierra hearing request surfaced on September 24, 2001. Despite Sierra's experience with regard to the Molycorp amendment, once again the request was submitted (and presumably had been prepared) by a lay member of the organization. Moreover, the submission fell far short of complying with the standing requirement imposed by the Rules of Practice and, accordingly, might well have been summarily dismissed.

On October 18, however, Sierra filed a document that its lay author chose to denominate "Petitioner's Brief to Request Hearing to Intervene," and which

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<sup>1</sup> Such conferences appear particularly useful in circumstances where the hearing requests have been filed by lay persons without the apparent assistance of legal counsel.

included the affidavits of two Sierra members. While prior leave had not been sought to submit this clearly unauthorized paper, and notwithstanding the Licensee's objection, I decided to accept it. As later explained in LBP-02-3, 55 NRC at 42, I believed that "some latitude may appropriately be given to lay participants."

The next step was the scheduling of my customary telephone conference to explore further the issue of the standing of Sierra and the two other hearing requestors (Moab and Mr. Darke). Because, to that point, all three had lay representation, for the purpose of facilitating the exploration my November 15, 2001 memorandum (unpublished), I called the parties' attention to several recent decisions denying for want of standing hearing requests directed to proposed amendments to the license. Moreover, I attached to the memorandum a copy of the Commission's affirmance just a day earlier (in CLI-01-21) of my decision denying Sierra's hearing request with regard to the Molycorp material.

As provided in the November 15 memorandum, the conference was held on November 28. Mr. Darke continued to represent himself and its City Manager participated on behalf of Moab. In a repeat of what had transpired when the Molycorp amendment proceeding had reached the conference stage, Sierra was represented by the same counsel who had appeared for it some 7 months earlier.

As the Commission noted in CLI-02-13, 55 NRC at 271 (citing Transcript of November 28, 2001 Prehearing Conference at 10-11), during the conference Sierra counsel acknowledged that her client's written submissions in this matter had "not been supported [adequately] by affidavit or testimony" and went on to request that she be given the opportunity to supplement the concerns that Sierra had raised by the furnishing of additional affidavits. This request was taken under advisement. In that regard, I provided counsel with the opportunity to furnish an offer of proof respecting "who might supply those affidavits and what they might contain by way of showing of an injury-in-fact above and beyond harm that might flow from already licensed activities." LBP-02-3, 55 NRC at 47 (quoted in CLI-02-13, 55 NRC at 274). The invitation was not accepted, however, and, in LBP-02-3, the request to submit further affidavits was denied.

Because all three hearing requests in hand focused exclusively upon the transportation of the Maywood material to the Mill, the discussion at the conference necessarily was confined to the possible impact of that aspect of the activity sought to be licensed. In the course of the discussion, I called upon the Licensee to file a supplemental memorandum in which it was to provide certain additional factual information relating to two very specific matters. They were (1) truck traffic volume along the transportation corridor that the Maywood shipments would utilize in moving from Cisco to the Mill; and (2) the circumstances of a traffic accident that had been referred to by Moab during the conference. The hearing requestors were provided with an opportunity to respond to whatever information might be contained in the Licensee's submission.

On December 5, the Licensee submitted its supplemental memorandum. In addition to addressing the matters on which further information had been sought, the submission contained a considerable discussion of the environmental impacts of the truck transportation of the Maywood material. According to the Licensee, the studies and analyses to which it referred during the course of the discussion demonstrated that the truck traffic would not occasion a significant incremental impact.

In its December 24 responsive filing, Sierra stated (at 3) that it proposed to address both the Licensee's supplemental submission and what it deemed to be questions that the Licensee had left "unanswered." What followed included an extended discussion that included averments that had no relationship to the truck transportation concerns that had been the exclusive focus of the three hearing requests.

In none of those requests — or at the telephone conference — was there any claim that the Maywood material might be so materially different in content from the material previously received and processed at the Mill as to give rise to new risks of injury. In its December 24 submission (at 22), however, Sierra concluded that the "history and contamination of this material is not documented nor is it understood other than in [a] vague general manner" and it "poses a greater risk of harm than any other material previously received at the mill for processing and disposal." On the latter score, Sierra asserted (*id.* at 22-23) that the

handling of the Maywood thorium material at the mill, and/or the clean up of any material as the result of an accident, would require additional procedures that would be protective of the health and safety of the workers involved, and protective of the public's health and safety and the environment.

Moreover, the December 24 submission maintained (at 21) that, without knowledge of the precise content of the Maywood material, "there is no way of knowing with complete particularity and specificity how [this] material will impact the ground water at the Maywood site as the [material accumulates], along with other materials, in an unlined and unprotected area for an undetermined period of time." In context, it would appear that Sierra intended to refer to the Mill site; otherwise, the sentence obviously makes little sense. In any event, no issue had been previously raised regarding groundwater impact at any site.

It was solely because of this transparent endeavor to inject entirely new issues into the proceeding that, in the January 2 memorandum and order, I summarily rejected the submission. As stated in part (at 3):

Sierra counsel seemingly now has seized upon the opportunity afforded to her to respond to the Licensee's December 5 filing as opening the door to a further attempt to cure what she deems to have been inadequacies in the manner in which her client's case was presented before she entered the picture. This plainly is unacceptable. The December 5 filing was

appropriately limited to supplying and commenting upon the significance of some additional factual information that I had requested. That being so, it should scarcely require discussion that the response had to be similarly confined in scope.

### III. DISCUSSION

A. As above noted, in CLI-02-13, the Commission expressed concern regarding whether my rejection of the Sierra December 24 filing could be squared with the prior acceptance of the Licensee's December 5 submission. The Commission acknowledged that the former may have gone beyond a response to the latter. It took issue, however, with my characterization of the Licensee's submission as being "appropriately limited" to supplying *and commenting upon the significance of* the factual information that I had requested. *Id.* at 276.

With due deference, I stand behind that characterization although, as reflected in LBP-02-3, in deciding the standing question I refrained from any comment, let alone reliance, upon anything other than the information furnished in specific response to the questions that I had posed during the conference. Even were, however, the Licensee deemed to have exceeded the charter that had been given it, the inescapable fact remains that its submission was confined to the single ultimate issue that had been raised by the three hearing requests before me — the possible incremental impact of the truck transportation of the Maywood material en route to the Mill from the railhead at Cisco.

As just seen, the same cannot be said for the Sierra December 24 filing. To the contrary, it is beyond cavil that, in addition to responding to the Licensee's submission, that filing sought to introduce entirely new issues into the proceeding that had absolutely nothing to do with the truck transportation of the Maywood materials.

Even without the past history respecting Sierra's participation in this proceeding, that endeavor might well have merited a significant sanction. Given that history, however, I deemed the endeavor to be manifestly beyond toleration in the carrying out of the responsibility entrusted in me by the Commission's Rules of Practice to ensure that the proceeding received proper case management.<sup>2</sup>

As the Commission itself noted in dealing in CLI-02-13 with the other procedural issue raised by Sierra's appeal of LBP-02-3, I had provided Sierra "repeated opportunities to make a case in favor of allowing additional affidavits." 55 NRC at 274. Yet, advantage had been taken of none of those opportunities. Instead, passing up the invitation to furnish an offer of proof, Sierra chose a backdoor approach to opening the proceeding at a very late date to claims far

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<sup>2</sup>On that score, in CLI-02-13, the Commission reiterated its expectation that presiding officers will instill discipline in the hearing process and take appropriate action to avoid delay. 55 NRC at 273. Surely, that expectation would not be realized were firm measures not taken against attempts to enlarge illicitly the scope of a proceeding.

removed from anything that either it or the other hearing requesters had put on the table.

In a nutshell, then, I remain of the belief that there was no unjustifiable inconsistency between my treatment of the two submissions in question. Nor, upon reassessment, do I believe that, in the totality of circumstances, the outright rejection of the Sierra filing was unduly Draconian. While of the long-held view that some latitude may appropriately be given to parties represented by lay persons, at the same time it seems totally reasonable to require lawyers to turn square corners in our proceedings. Being persuaded that such had not occurred here, the warranted course appeared to be the one taken in the January 2 issuance.

There was yet another (albeit unspoken) consideration undergirding the direct action taken against what I perceived to be an endeavor by counsel to subvert the orderly conduct of the adjudicatory process. Less than a month after the issuance of CLI-01-21 affirming my determination that Sierra lacked standing to challenge the Molycorp license amendment application, the NRC Staff published a second *Federal Register* notice providing a fresh opportunity to seek a hearing with regard to that application. *See* 66 Fed. Reg. 64,064 (Dec. 11, 2001). That notice had produced an immediate hearing request by an individual. There was little doubt in my mind that Sierra would take the same step before the 30-day deadline was reached (with a hearing request significantly different from the one that previously had been found insufficient).

For obvious reasons, I was most anxious to avoid a repetition of what had occurred with regard to the Maywood license amendment in the wake of Sierra's action (for a second time) in having a lay person file its hearing request and then much later calling upon a lawyer to step in to represent it. Notwithstanding my disapproval of such a practice given its unhappy result in two instances, there appeared to be nothing standing in the way of Sierra choosing, if so inclined, to adopt it yet another time. I deemed it very important, however, to make it clear to Sierra that there were definite limits to the extent that I was willing to continue to allow it to cure deficiencies in lay-prepared submissions. More specifically, I desired to get across as emphatically as possible the message that my indulgence in that regard did not extend to attempts to introduce wholly new claims into a proceeding at the eleventh hour. Striking the entire December 24 submission that contained claims of just that stripe seemed then, as it does now, the most appropriate mechanism for conveying that message.<sup>3</sup>

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<sup>3</sup> As anticipated, on January 10, 2002 Sierra filed a new and timely hearing request regarding the Molycorp license amendment. Although submitted by a lay person, it contained allegations sufficient to allow the conclusion that Sierra had demonstrated standing to challenge the amendment. *See* LBP-02-6, 55 NRC 147 (2002), *aff'd*, CLI-02-10, 55 NRC 251 (2002). There is no current indication that Sierra intends to seek legal representation at a later stage of the proceeding; it is worthy of note, however, that its lay representation to date has been conducted in a thoroughly responsible manner.

B. Despite my continued confidence in the appropriateness of the January 2 ruling, I have examined so much of the Sierra December 24 filing as was in response to the portion of the Licensee's December 5 submission that provided the sought factual information. That examination does not call for an alteration of the conclusion reached in LBP-02-3 on the standing issue.

At the outset, it should be noted that, while maintaining that the rejection of its December 24 filing was "arbitrary and capricious," Sierra's brief to the Commission in support of its appeal of LBP-02-3 did not endeavor to show prejudice stemming from that rejection. More particularly, the Commission was not favored with an explanation as to how a consideration of the December 24 filing would (or at least might) have required a result different from that actually reached in LBP-02-3.

The conclusion that Sierra lacked standing had rested upon the absence of anything in the Sierra hearing request or the affidavits belatedly submitted in support of it that could serve as a basis for either organizational or representational standing. *See* LBP-02-3, 55 NRC at 46-47. Manifestly, none of the factual information supplied by the Licensee in its December 5 submission served to cure the shortcomings in Sierra's affirmative presentation. Thus the question is whether, despite the lack of any such demonstration on its appeal to the Commission, Sierra's December 24 filing established either that the information furnished by the Licensee was materially inaccurate or that that information supported the claim of standing.

Insofar as the 1999 truck accident at Cisco is concerned, the Licensee's uncontroverted explanation of the circumstances surrounding it were considered in connection with the discussion in LBP-02-3 of Moab's standing. Nothing in the Sierra December 24 filing sheds doubt upon the validity of the conclusion that that mishap provided no reason to believe that an accident involving trucks carrying the Maywood materials was any more likely than one involving other shipments to the Mill pursuant to prior amendments to the license in issue.

This leaves the matter of the volume of truck traffic that might be associated with the movement of the Maywood material from Cisco to the Mill. In LBP-02-3, 55 NRC at 43-45, I discussed in some detail the disclosures in the Licensee's December 5 submission with respect to that matter. I see no need to repeat that discussion here. Suffice it to say that the estimates presented by the Licensee appeared to have a reasonable calculational basis. They indicated that at the very most (and then only for a short period of time when there would also be Molycorp material shipments), the total weekly truck trips to and from the Mill on Highway 191 would be 172 in number and, as such, would represent only 2.7% of the total truck traffic through Moab. (Without factoring in Molycorp shipments, the weekly trips would total approximately 107 in number which would amount to approximately 1.6% of the total truck traffic.)

The Sierra December 24 filing made no effort to embark upon a similar analysis. And while it asserted (at 5) that, in reality, the Licensee is “asking to transport [two and one-half] times the amount [of alternate feed material] transported for the last 14 years,” I am unable to discern how that figure was obtained and, therefore, see no reason to credit it.

The fact is that the basic license necessarily contemplated that material destined for processing at the Mill would likely travel at least in part by truck along Highway 191. Indeed, according to the uncontroverted representation of the Licensee (December 5 submission at 4), that license covers the processing of up to 2000 tons of conventional ore per day, which would involve approximately 100 daily round trips of ore trucks.

To be sure, this does not perforce mean that, in considering an amendment to the license to allow the receipt and processing at the Mill of particular alternate feed material (such as the Maywood material hereininvolved), no consideration should be extended to any expressed transportation concerns. Given, however, the number of previously authorized amendments involving such materials, in order to obtain such consideration in this proceeding Sierra could appropriately be expected to provide some reason to believe that the transportation of the Maywood material might pose a unique threat of injury-in-fact, i.e., one not previously encountered in the assessment of the prior amendment applications. This was not done.

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For the foregoing reasons, I *adhere* to the conclusion reached in LBP-02-3 that the Sierra Club lacks standing to challenge the proposed license amendment at issue in this proceeding with the consequence that its hearing request must be, and hereby is, *denied*.<sup>4</sup> If so inclined, it may appeal this Order to the Commission within ten (10) days in the manner prescribed in 10 C.F.R. § 2.1205(o).

It is so ORDERED.

BY THE PRESIDING OFFICER<sup>5</sup>

Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
April 26, 2002

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<sup>4</sup> In this regard, I interpret CLI-02-13 as vacating only so much of LBP-02-3 as related to Sierra. Not only was Sierra the only hearing requestor to have taken an appeal from that decision, but the January 2, 2002 ruling successfully challenged by it had not been addressed to any other party. Thus, this Order has no application to hearing requestors City of Moab and Mr. Darke.

<sup>5</sup> Copies of this Memorandum and Order were sent this date by e-mail transmission to the counsel or other representative of all of the parties.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve**, Chairman  
**Greta Joy Dicus**  
**Nils J. Diaz**  
**Edward McGaffigan, Jr.**  
**Jeffrey S. Merrifield**

**In the Matter of**

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

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

**June 25, 2002**

This proceeding concerns the application for approval of license transfers for Diablo Canyon Nuclear Power Plant, Units 1 and 2. The Commission denies three petitions to intervene, but grants participant status to two of those Petitioners if a hearing is later granted in this proceeding. The Commission also addresses various procedural issues, but reserves ruling on the two remaining petitions to intervene.

**LICENSE TRANSFER: ABEYANCE OF PROCEEDING**

**RULES OF PRACTICE: ABEYANCE OF PROCEEDING**

We do not here face imminent mootness, but merely the “common” situation of “multiforum” transfer reviews. The Commission repeatedly has refused to suspend license transfer proceedings merely because related proceedings at the NRC, in state court, or in state or other federal agencies are pending. Our general policy is to expedite our adjudicatory proceedings, particularly in the time-sensitive license transfer area. *See* Final Rule: “Streamlined Hearing Process for NRC Approval of License Transfers,” 63 Fed. Reg. 66,721, 66,721-22 (Dec. 3,

1998); *see also* *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998). PG&E's bankruptcy case is moving forward in due course. We thus see no reason here to deviate from our usual practice of completing our license transfer reviews promptly despite the pendency of related matters elsewhere. Accordingly, we deny the pending motions to hold this proceeding in abeyance.

## **LICENSE TRANSFER**

### **RULES OF PRACTICE: SUBPART M (FORMAL HEARING); WAIVER OF REGULATION**

#### **10 C.F.R. §§ 2.1322(d), 2.1329**

Our regulations expressly prohibit a request for a Subpart G proceeding for a license transfer adjudication. *See* 10 C.F.R. § 2.1322(d); *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 130, (2001) (*Indian Point 2*) and references cited therein. Recognizing this, CPUC invokes 10 C.F.R. § 2.1329, which authorizes the Commission to waive a rule when, “because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted.” In addition to its “complex nature of the . . . issues” argument, CPUC contends that the “matters in this license transfer are not strictly ‘financial in nature’ as contemplated in the promulgation of Subpart M.” We have denied requests for Subpart G hearings that petitioners have made on these same grounds in other license transfer proceedings.

## **LICENSE TRANSFER**

### **RULES OF PRACTICE: SUBPART M**

Our Subpart M rules cover all license transfer issues. “Our Subpart M rules are intended to apply to more than just those cases presenting only financial issues. We expected when promulgating Subpart M that most issues would be financial . . . . However, we also predicted that Petitioners would raise other categories of issues as well (such as foreign ownership, technical qualifications, and appropriate critical staffing levels) . . . . For that reason, when promulgating Subpart M, we expressly declined to adopt [a commenter’s] suggestion that we limit the scope of Subpart M proceedings to financial matters.” *Power Authority of the State of New York* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 290-91 (2000) (*Indian Point 3*) (citation omitted). We still consider this to be sound policy. Accordingly, we deny CPUC’s request for a Subpart G hearing.

**LICENSE TRANSFER: INTERVENTION**

**INTERVENTION: STANDING**

**ATOMIC ENERGY ACT**

**10 C.F.R. § 2.1306**

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

**LICENSE TRANSFER: INTERVENTION**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

**RULES OF PRACTICE: SUBPART M**

To demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
  - (a) alleging a concrete and particularized injury (actual or threatened) that
  - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
  - (c) is likely to be redressed by a favorable decision, and
  - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

*See* 10 C.F.R. §§ 2.1306, 2.1308; *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) and references cited therein.

**LICENSE TRANSFER: INTERVENTION**

**INTERVENTION: STANDING**

**RULES OF PRACTICE: INTERVENTION PETITIONS (PLEADING REQUIREMENTS)**

“The burden of setting forth a clear and coherent argument for standing and intervention is on the petitioner.” *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999). *See U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54

NRC 267, 272 (2001) (“petitioners bear the burden to allege facts sufficient to establish standing”).

**LICENSE TRANSFER**

**INTERVENTION: STANDING (ECONOMIC INTERESTS)**

The “zone of interests” test for standing in an NRC proceeding does not encompass economic harm that is not directly related to environmental or radiological harm.

**LICENSE TRANSFER**

**INTERVENTION: STANDING (ECONOMIC INTERESTS)**

The standing discussion in CPUC’s petition, labeled “interests,” demonstrates that the interests CPUC protects are economic in nature, i.e., ratepayer interests. The nine or so pages of the “interests” discussion deal with PG&E’s bankruptcy plan and submissions to FERC, CPUC’s alternative reorganization plan, the preemption of California statutes sought by PG&E, and CPUC’s motion to stay the NRC proceedings. The discussion contains only two references to public health and safety, the subject of the NRC’s license transfer review. Both references are very general. These bare mentions of health and safety cannot be used to establish standing where the essence of CPUC’s concern is economics, not safety.

**LICENSE TRANSFER**

**INTERVENTION: STANDING (ECONOMIC INTERESTS)**

The Commission has long held that ratepayer interests do not confer standing. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 n.4 (1983) *citing Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976).

**LICENSE TRANSFER**

**INTERVENTION: STANDING**

CPUC’s focus is on the alleged illegality of PG&E’s bankruptcy plan and unfairness of the power sale agreement (“PSA”) on which the plan is founded. This NRC license transfer proceeding is not an appropriate forum to resolve CPUC’s economic controversy with PG&E.

**LICENSE TRANSFER**

**INTERVENTION: STANDING**

**RULES OF PRACTICE: INTERVENTION PETITIONS (PLEADING REQUIREMENTS)**

The Commission is entitled to take CPUC's standing claim at face value. We cannot be expected "to sift through the parties' pleadings to uncover and resolve arguments not made by the parties themselves." *See Zion*, CLI-99-4, 49 NRC at 194.

**LICENSE TRANSFER: INTERVENTION**

**RULES OF PRACTICE: SUBPART M**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

**10 C.F.R. § 2.1306**

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

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

*See* 10 C.F.R. § 2.1306; *Indian Point 2*, CLI-01-19, 54 NRC at 133-34 and references cited therein.

**LICENSE TRANSFER**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

**RULES OF PRACTICE: INTERVENTION PETITIONS (PLEADING REQUIREMENTS)**

Commission rules require articulation of detailed threshold issues to trigger an agency hearing. Vague, unparticularized issues are impermissible.

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

We reject CPUC's financial qualifications issue. Before us is a financial plan — albeit contingent on FERC and bankruptcy court approval — that includes a long-term power sale contract at specified rates. The rates are currently before FERC, the responsible agency, for approval or rejection. CPUC has not argued that the transferee's funding would be insufficient if FERC and the bankruptcy court approve the proffered PSA.

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS;  
ADMISSIBILITY OF ISSUES**

**INTERVENTION: STANDING (ECONOMIC INTERESTS)**

CPUC essentially challenges the economic reasonableness and fairness of the PSA. CPUC's financial concerns are outside NRC's bailiwick and not relevant to this license transfer proceeding.

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS;  
ADMISSIBILITY OF ISSUES**

NRC's role in evaluation of the transferee's financial qualifications is to decide whether the plan as proposed, including the PSA, will meet our financial qualifications regulations. CPUC has made no allegation that the plan will not do so. CPUC asks, in essence, for a revision of the PSA, a matter not within NRC's jurisdiction. *See Indian Point 2*, CLI-01-19, 54 NRC at 139-40. FERC is the appropriate forum for addressing this issue and the matter is currently pending before that agency.

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS;  
ADMISSIBILITY OF ISSUES**

PG&E's license transfer application includes, as required by 10 C.F.R. § 50.33(f)(2), data regarding costs and revenues for the first 5 years of operation after the requested license transfer. The fact that these projections are grounded on a contested PSA does not defeat PG&E's position, for the NRC Staff can condition the license transfer on any portion of the PSA that is essential to the demonstration of financial qualifications of the proposed licensee. Then, should FERC not approve the financial foundation of the license transfer application, the transfer will not occur.

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS**

**DECOMMISSIONING FUNDS**

**10 C.F.R. § 50.75**

A reactor licensee must provide assurance of adequate resources to fund the decommissioning of a nuclear facility by one of the methods described in 10 C.F.R. § 50.75(e). *See* 10 C.F.R. § 50.75(a). The regulations also specify the minimum amount of funds necessary to demonstrate reasonable assurance of funds for decommissioning. *See* 10 C.F.R. § 50.75(c).

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS**

**DECOMMISSIONING FUNDS**

**LICENSE TRANSFER: ADMISSIBILITY OF ISSUES**

We find no litigable issue relating to decommissioning funding. CPUC's argument focuses principally on whether PG&E should be permitted to transfer the beneficial interests in the trust fund to a non-CPUC regulated entity and who has the authority to permit such transfers. CPUC does not assert that, if the license transfer application were approved as proposed by PG&E, the transferee would not meet the Commission's decommissioning funding requirements. CPUC's concerns about maintaining its regulatory authority over the decommissioning trusts are not within the NRC's area of expertise and are more appropriately resolved by the bankruptcy court and FERC. Nor are they issues that the NRC need decide in considering the transfer application. Licensee's application proposes to transfer the beneficial interests in the trust fund to Diablo Canyon LLC. Thus the Staff's review is based on the assumption that this transfer will take place. The NRC can condition the license transfer on PG&E's lawful transfer of the decommissioning funds (through the bankruptcy proceeding or otherwise) and segregation from the trust of the proper decommissioning funding amount, as described in our regulations.

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS;  
DECOMMISSIONING EXPENSES; ADMISSIBILITY OF ISSUES**

**RULES OF PRACTICE: CHALLENGE OF COMMISSION RULE**

**10 C.F.R. § 2.1329**

CPUC's request for a detailed study of the likely actual costs of decommissioning amounts to an impermissible challenge to a generic decision made by the Commission in its decommissioning rulemaking not to require site-specific cost

estimates. We do not permit attacks on our regulations in a licensing proceeding, absent a proper request for a waiver of a regulation, pursuant to 10 C.F.R. § 2.1329.

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS;  
DECOMMISSIONING EXPENSES; ADMISSIBILITY OF ISSUES**

**10 C.F.R. § 50.75**

A showing of compliance with 10 C.F.R. § 50.75 conclusively demonstrates sufficient assurance of decommissioning funding. *See Indian Point 2*, CLI-01-19, 54 NRC at 142; *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999).

**LICENSE TRANSFER: DECOMMISSIONING EXPENSES**

**10 C.F.R. § 50.75**

Prepayment is the strongest and most reliable of the funding devices described in 10 C.F.R. § 50.75(e)(1). *See Seabrook*, CLI-99-6, 49 NRC at 218.

**LICENSE TRANSFER**

**DECOMMISSIONING FUNDS**

**LICENSE TRANSFER: ADMISSIBILITY OF ISSUES**

CPUC alleges the license transfers would not be in the “public interest.” The public interest is not a suitable standard for an NRC hearing:

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

*Indian Point 2*, CLI-01-19, 54 NRC at 149. Accordingly, we decline to admit the public interest aspects of the decommissioning funding issue.

**LICENSE TRANSFER**

**RULES OF PRACTICE: INTERVENTION**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

**NRC: AUTHORITY**

CPUC asserts that transfer of the DCPD licenses would reduce California's regulatory responsibilities over nuclear power to the detriment of the public health, safety, and welfare of the citizens of California. But issues regarding preemption of certain California laws must be resolved by the bankruptcy court. These are not matters for the NRC.

**LICENSE TRANSFER: ADMISSIBILITY OF ISSUES**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

**NRC: AUTHORITY**

CPUC cites numerous state interests in regulating utilities that PG&E is seeking to "trump" through bankruptcy court approval of its plan and FERC approval of the rates proposed in the PSA. According to CPUC, state regulation has significant advantages over federal regulation. We decline to admit this issue for two reasons. First, NRC approval of the license transfers would not alter the regulatory role of the CPUC. Second, there is no basis for CPUC's argument that its oversight is necessary for the protection of public health and safety with respect to radiological risks. This role is reserved to the NRC. *See Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 205-13 (1983) (federal government maintains complete control of safety and "nuclear" aspects of energy generation, whereas states exercise their traditional authority over economic questions such as ratemaking and the need for additional generating capacity).

**LICENSE TRANSFER: ADMISSIBILITY OF ISSUES**

**RULES OF PRACTICE: INTERVENTION**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

CPUC alleges generally that the public safety and welfare are threatened by the proposed license transfers. Through deprivation of concurrent state jurisdiction over an NRC-regulated facility, says CPUC, important safeguards to public health and safety will be lost. CPUC's generalized complaint that public health and safety will suffer in the absence of concurrent state jurisdiction over an NRC-regulated

facility cites no safety concern that is directly connected to the proposed license transfers. To support this issue, CPUC offers only speculation and suspicions about several marginally related topics. This issue is inadmissible.

**LICENSE TRANSFER: ADMISSIBILITY OF ISSUES**

**RULES OF PRACTICE: INTERVENTION**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

The challenge regarding the cost-cutting that CPUC predicts is insufficient, as it is mere guess, unrooted in factual information, and it does not specifically dispute any information in the license transfer application. *See Dominion Nuclear Connecticut Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 361 (2001). CPUC has provided no support other than conjecture for its thesis that the transferee will subordinate safety to profits. Moreover, if the plants' safety becomes compromised, our enforcement and investigation programs are sufficient to identify the problem and prescribe corrective action (including, in extreme cases, plant shutdown).

**LICENSE TRANSFER: ADMISSIBILITY OF ISSUES**

**RULES OF PRACTICE: INTERVENTION**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

**RULES OF PRACTICE: INTERVENTION PETITIONS (PLEADING REQUIREMENTS)**

CPUC says that it can "safely presume" that the transferee will try to downsize its workforce, follow the "industry trend" and not hire the full complement of staff from the current owner, and probably increase its use of overtime. According to CPUC, "[s]afety and reliability can only be negatively affected by the *likely* implementation of such policies." But PG&E's license application itself states that, after license transfer, there will be no operational changes and essentially no staff or management changes. CPUC has not provided a sound basis to dispute the information provided in the application. *See Oyster Creek*, CLI-00-6, 51 NRC at 209; *Millstone*, CLI-01-24, 54 NRC at 363 (generalized challenges regarding cost-cutting are insufficient without specifically disputing the information in the application). Accordingly, we decline to admit this issue.

**LICENSE TRANSFER: TECHNICAL QUALIFICATIONS;  
ADMISSIBILITY OF ISSUES**

**10 C.F.R. § 50.54(m)**

The NRC has regulations requiring specific staffing levels and qualifications for the key positions necessary to operate a plant safely. *See* 10 C.F.R. § 50.54(m). We will not assume that licensees will contravene our regulations. *See Indian Point 3*, CLI-00-22, 52 NRC at 313; *Oyster Creek*, CLI-00-6, 51 NRC at 207.

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS;  
ADMISSIBILITY OF ISSUES**

**INTERVENTION: ADMISSIBILITY OF ISSUES**

**RULES OF PRACTICE: INTERVENTION PETITIONS (PLEADING  
REQUIREMENTS)**

CPUC distrusts the relationship between the transferee and its parent, and alleges that profits will flow upward to the parent, which is isolated from responsibility for plant operation and safety. CPUC fails to provide any specific challenge to the financial information provided in the transfer application. As such, this issue is inadmissible. The Commission has consistently ruled that limited liability companies are not precluded from owning and operating nuclear power plants. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173 (2000); *Oyster Creek*, CLI-00-6, 51 NRC at 208 (limited liability companies are no different from corporations in that both are structured to limit the liability of their shareholders); *Northern States Power Co.* (Monticello Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 57 (2000). Vague allegations about the “character” of the transferee and its business relationships are insufficient to support admissibility of this issue. *See Millstone*, CLI-01-24, 54 NRC at 365-67.

**LICENSE TRANSFER: ADMISSIBILITY OF ISSUES**

**INTERVENTION: ADMISSIBILITY OF ISSUES (ECONOMIC  
INTERESTS)**

Ratepayers’ economic interests, without specific ties to radiological risk, are not cognizable in an NRC license transfer proceeding.

## **LICENSE TRANSFER: FINANCIAL QUALIFICATIONS**

### **RULES OF PRACTICE: GOVERNMENTAL PARTICIPATION; INTERVENTION BY GOVERNMENTAL AGENCY**

Although CPUC has raised no issues within the scope of a license transfer review with the level of specificity required under Subpart M, the Commission “has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc.” See *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 344 (1999); *Indian Point 3*, CLI-00-22, 52 NRC at 295. See also 10 C.F.R. § 2.1306(b)(2)(iv). CPUC, as a California state agency representing the interests of consumers of electricity, might provide us with useful insights. We therefore permit the CPUC to participate in this proceeding as an agency of an interested State, in a manner analogous to that described in 10 C.F.R. § 2.715(c), if we grant a hearing after considering the still-pending petitions of NCPA and TANC or if timely filed and admissible late issues arise. Cf. 10 C.F.R. § 2.715(c). In proceedings conducted under 10 C.F.R. Part 2, Subpart G, the presiding officer will afford representatives of an interested State, county, or agencies thereof a reasonable opportunity to participate.

## **LICENSE TRANSFER: INTERVENTION**

Although the Official Committee of Unsecured Creditors of PG&E (“Committee”) alludes generally to health and safety considerations, it points to no likely adverse effects of the proposed license transfers. In short, it does not challenge any part of the application. Accordingly, we deny the Committee’s petition to intervene without reaching the question of its standing.

## **LICENSE TRANSFER: INTERVENTION**

### **RULES OF PRACTICE: DISCRETIONARY INTERVENTION**

Our policy is to allow discretionary intervention for a petitioner who is not entitled to intervention as a matter of right but who may nevertheless make some contribution to the proceeding. We have long permitted such intervention for petitioners who lack standing and we have set out factors bearing on the exercise of this discretion. See *Pebble Springs*, CLI-76-27, 4 NRC at 614-17 (answering in the affirmative a certified question whether intervention may be permitted as a matter of discretion to petitioners who lack standing to intervene in a proceeding as a matter of right); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 177-78 (1998), *aff’d*, CLI-98-13, 48 NRC 26, 34-35 (1998).

**LICENSE TRANSFER: INTERVENTION**

**RULES OF PRACTICE: DISCRETIONARY INTERVENTION**

We have never permitted discretionary intervention for petitioners who do not specify any issues of concern to them. We did not intend that a petitioner should be entitled to discretionary intervention without an issue of its own worthy of exploration in an adjudication. *See Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), LBP-82-52, 16 NRC 183, 194 (1982). Accordingly, we deny the Committee discretionary intervention in this proceeding.

**LICENSE TRANSFER: INTERVENTION**

**INTERVENTION: STANDING**

**RULES OF PRACTICE: INTERVENTION BY GOVERNMENTAL AGENCY**

The County undoubtedly has governmental standing. As the Diablo Canyon nuclear units are located within its boundaries, the County, as it points out, has a vital public safety interest in the plants' safe operation and eventual decommissioning. If the Licensee is not financially qualified, unsafe conditions could threaten the health and safety of the County's citizens. The County's position is analogous to that of an individual living or working within a few miles of the plant. *See Indian Point 3*, CLI-01-19, 54 NRC at 295; *Vermont Yankee*, CLI-00-22, 52 NRC at 164.

**LICENSE TRANSFER**

**RULES OF PRACTICE: SUBPART M; INTERVENTION (LATE FILING); UNTIMELY INTERVENTION PETITIONS (GOOD CAUSE)**

**10 C.F.R. § 2.1308**

Our Subpart M regulations provide that untimely intervention petitions may be denied unless the petitioner establishes good cause for failure to file on time. *See* 10 C.F.R. § 2.1308(b); *Seabrook*, CLI-99-6, 49 NRC at 222-23.

## LICENSE TRANSFER

### **RULES OF PRACTICE: SUBPART M; INTERVENTION (LATE FILING); UNTIMELY INTERVENTION PETITIONS (GOOD CAUSE)**

#### **10 C.F.R. § 2.1308**

In addition to good cause, 10 C.F.R. § 2.1308(b) provides that, in reviewing a late petition, the Commission will consider “(1) The availability of other means by which the . . . petitioner’s interest will be protected or represented by other participants in a hearing; and (2) The extent to which the issues will be broadened or final action on the application delayed.” 10 C.F.R. § 2.1308(b)(1)-(2).

## LICENSE TRANSFER

### **RULES OF PRACTICE: SUBPART M; INTERVENTION (LATE FILING); UNTIMELY INTERVENTION PETITIONS (GOOD CAUSE)**

Good cause is the most important element of our late-filing standards. *See Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 515 (2001). *Cf.* 10 C.F.R. § 2.714(a) for 10 C.F.R. Part 2, Subpart G proceedings and *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 246-47 (1991), *aff’d in part on other grounds and appeal denied*, CLI-92-11, 36 NRC 47 (1992).

## LICENSE TRANSFER

### **RULES OF PRACTICE: SUBPART M; INTERVENTION (LATE FILING); UNTIMELY INTERVENTION PETITIONS**

The County says that the trigger point for its untimely filing was a bankruptcy court decision permitting CPUC to file an alternate plan of reorganization that is distinctly different from PG&E’s plan. However, no license transfer at all will be needed if the bankruptcy court approves CPUC’s plan of reorganization. The critical — and unchanged — fact is that PG&E’s license transfer application at the NRC is still founded on its own plan, which is independent of the new development in the bankruptcy case. Moreover, nothing in the County’s petition to intervene depends on the CPUC plan; all of the County’s objections are associated with PG&E’s license transfer application, which has been before the Commission for many months. Recent developments in the bankruptcy proceeding, while new to the bankruptcy case, simply do not constitute *new information related to the Diablo Canyon license transfer application*. Thus, the County has not established good cause — or, indeed, any cause — for untimely presentation of its issues,

all of which the County could have filed long ago in a timely petition based on PG&E's application, which incorporated the plan the County opposes.

#### **LICENSE TRANSFER**

#### **RULES OF PRACTICE: SUBPART M; INTERVENTION (LATE FILING); UNTIMELY INTERVENTION PETITIONS**

In the absence of good cause for its late filing, the County must show strong countervailing reasons that override the lack of good cause. *See Seabrook*, CLI-99-6, 49 NRC at 223.

#### **LICENSE TRANSFER: FINANCIAL QUALIFICATIONS; ADMISSIBILITY OF ISSUES**

#### **RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS)**

The County, in any event, raises no litigable issues. General concerns about Gen's financial viability and about ETrans's financial ability to provide offsite power at Diablo Canyon do not suffice for intervention.

## **MEMORANDUM AND ORDER**

### **I. INTRODUCTION**

This proceeding involves a November 30, 2001 application seeking the Commission's authorization for Pacific Gas and Electric Co. ("PG&E") to transfer its licenses for the Diablo Canyon Nuclear Power Plant, Units 1 and 2 (collectively, "DCPP") in connection with a comprehensive Plan of Reorganization that PG&E filed under Chapter 11 of the United States Bankruptcy Code.<sup>1</sup> Under the restructuring plan PG&E submitted to the bankruptcy court, the transfer of the licenses would be to a new generating company named Electric Generation LLC ("Gen"), which would operate DCP, and to a new wholly

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<sup>1</sup> *See* 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the Atomic Energy Act of 1954 ("AEA") and gives its consent in writing). *See also* 10 C.F.R. § 50.80, which restates the requirements of the AEA, sets forth the filing requirements for a license transfer application, and establishes a two-part test for approval of applications: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders.

owned subsidiary of Gen named Diablo Canyon LLC (“Diablo”), which would hold title to DCPD and lease it to Gen.<sup>2</sup>

In response to its published notice of the Diablo Canyon application,<sup>3</sup> the Commission received four petitions to intervene and requests for hearing. The Petitioners are the Northern California Power Agency (“NCPA”), the Official Committee of Unsecured Creditors of PG&E (“Committee”), the California Public Utilities Commission (“CPUC”), and the following group: the Transmission Agency of Northern California; M-S-R Public Power Agency; Modesto Irrigation District; the California Cities of Santa Clara, Redding, and Palo Alto; and the Trinity Public Utility District (collectively, “TANC”). Two of the Petitioners, TANC and NCPA, are concerned primarily with the treatment, after license transfer, of antitrust conditions in the current licenses.<sup>4</sup> The Committee has expressed interest in the financial qualifications of the future licensees, but supports PG&E’s reorganization plan. CPUC vigorously opposes license transfer to the extent it proceeds according to PG&E’s plan. Pursuant to 10 C.F.R. § 2.1316, the NRC Staff is not a party to this proceeding.

Approximately 3 months after the published deadline, the County of San Luis Obispo (“County”) submitted its intervention petition and request for a hearing. The County has expressed concern regarding both technical and financial qualifications of the transferees and ETrans, but has not raised any issues in the antitrust arena.

Today we consider and decide the petitions to intervene and requests for hearing of CPUC, the Committee, and the County and various requests to dismiss or abate this license transfer proceeding.<sup>5</sup> For the reasons set forth below, we deny the intervention petitions of CPUC and the County, but grant those entities participant status in this license transfer proceeding. We also deny the Committee’s petition and the pending motions to dismiss or suspend this proceeding.

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<sup>2</sup>Other components of the restructuring include separating PG&E’s electric transmission business to ETrans LLC and its gas transmission assets and liabilities to GTrans LLC. ETrans and GTrans will also become indirect wholly owned subsidiaries of PG&E Corporation, which will change its name. PG&E will retain most of the remaining assets and liabilities and will continue to conduct local electric and gas distribution operations and related customer services. After disaggregation of the businesses, PG&E Corporation will declare a dividend and distribute the common stock of PG&E to its public shareholders, thus separating PG&E from PG&E Corporation. PG&E expects that value realized will provide cash and increased debt capacity to enable it to repay creditors, restructure existing debt, and emerge from the bankruptcy. See “Answer of Pacific Gas and Electric Company to California Public Utilities Commission Petition for Leave to Intervene, Motion to Dismiss Application or, in the Alternative, Request for Stay of Proceedings, and Request for Subpart G Hearing” at 2-3 (Feb. 15, 2002).

<sup>3</sup>See 67 Fed. Reg. 2455 (Jan. 17, 2002).

<sup>4</sup>At our request the parties have submitted briefs regarding both the antitrust issue and developments in the bankruptcy proceeding that might affect pending motions to dismiss this license transfer proceeding or hold it in abeyance. See CLI-02-12, 55 NRC 267 (2002).

<sup>5</sup>In a separate order we will consider the antitrust-based intervention petitions of TANC and NCPA.

## II. DISCUSSION

### A. Preliminary Procedural Matters

#### 1. *Motions To Suspend or Dismiss*

Three of the four timely intervention petitions and the County's petition included requests to dismiss this proceeding or hold it in abeyance because of the parallel proceedings in the bankruptcy court and at FERC. Only the petition of the Committee omitted such a request. CPUC cited the uncertainty whether PG&E's plan is lawful until the bankruptcy court renders a ruling on various questions of state law preemption and whether to permit the filing of CPUC's alternate plan of reorganization. NCPA sought abeyance of this proceeding only until the plan is finalized for submission to the creditors and the bankruptcy court approves such submission. Since the transfer cannot take place without confirmation of the plan, NCPA suggested that the case before the Commission is not ripe for adjudication, for it rests on contingent future events that may not occur as anticipated, or may not occur at all. TANC emphasized the waste of resources in persisting with the license transfer adjudication because both the Federal Energy Regulatory Commission ("FERC") and the bankruptcy court need to approve PG&E's transfer plan and one of the Petitioners (CPUC) is vigorously contesting the plan in both places.

To assist us in ruling on the requests to hold this proceeding in abeyance, we sought from the Petitioners and the Applicant briefs addressing the question, "Have recent filings and developments in PG&E's bankruptcy proceeding had any effect on the pending motions to hold this license transfer proceeding in abeyance?"<sup>6</sup> The responses indicate (1) that the bankruptcy court has approved the disclosure statement for PG&E's plan; (2) that the court heard objections to CPUC's alternate plan in early May; (3) that June 17, 2002, is the target date to send ballots to creditors regarding the two proffered plans of reorganization; (4) that confirmation hearings will probably occur in September 2002; and (5) that a plan could be confirmed by the end of the calendar year. In short, the bankruptcy matter is progressing and there have been no developments that suggest that PG&E's plan cannot be confirmed.

Those Petitioners in favor of abeyance all offered kindred reasons for their position. NCPA believed that, before proceeding with the license transfer case, we should await an indication that PG&E's plan is more likely to be confirmed than CPUC's plan. CPUC asserts that, until a plan is approved by the bankruptcy court, we should hold this proceeding in abeyance because the threshold issue of whether the Diablo Canyon plants require a license transfer remains unresolved.

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<sup>6</sup> See CLI-02-12, 55 NRC at 268.

As no license transfer is necessary under the CPUC plan, this proceeding could become moot. TANC still desires to suspend this proceeding and states that the situation is analogous to that in *Nine Mile Point*, where we did suspend a license transfer proceeding in view of contractual arrangements likely to render the proposed transfer moot in the near future.<sup>7</sup> PG&E and the Committee oppose holding the proceeding in abeyance.

Unlike *Nine Mile Point*, we do not here face imminent mootness, but merely the “common” situation of “multiforum” transfer reviews.<sup>8</sup> The Commission repeatedly has refused to suspend license transfer proceedings merely because related proceedings at the NRC, in state court, or in state or other federal agencies are pending.<sup>9</sup> “[I]t would be productive of little more than untoward delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval.”<sup>10</sup> Our general policy is to expedite our adjudicatory proceedings, particularly in the time-sensitive license transfer area.<sup>11</sup> PG&E’s bankruptcy case is moving forward in due course; it could yield a final decision late this year. We thus see no reason here to deviate from our usual practice of completing our license transfer reviews promptly despite the pendency of related matters elsewhere. Accordingly, we deny the pending motions to hold this proceeding in abeyance. However, we instruct all remaining Petitioners and parties to inform the Commission promptly of any court or administrative decision that directly impacts, or renders moot, the instant proceeding.

## 2. Request for Subpart G Hearing<sup>12</sup>

CPUC has requested that we conduct this adjudicatory proceeding under 10 C.F.R. Part 2, Subpart G, rather than under the Subpart M procedures that normally

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<sup>7</sup> See *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 342-44 (1999).

<sup>8</sup> *Id.* at 343.

<sup>9</sup> See *Power Authority of the State of New York* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 288-90 (2000) (*Indian Point 3*) (denying motions for stay pending decisions by New York courts, Internal Revenue Service, FERC, and New York State Department of Environmental Conservation); *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 228-30 (2001) (*Indian Point 2*) (denying request to suspend proceeding until completion of *Indian Point 3* license transfer and decision on 10 C.F.R. § 2.206 enforcement petition); *Nine Mile Point*, CLI-99-30, 50 NRC at 343-44 (granting short suspension pending decisions on rights of first refusal, but denying further suspension until conclusion of New York Public Service Commission proceeding).

<sup>10</sup> *Nine Mile Point*, CLI-99-30, 50 NRC at 344 (quoting *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974)).

<sup>11</sup> See Final Rule: “Streamlined Hearing Process for NRC Approval of License Transfers,” 63 Fed. Reg. 66,721, 66,721-22 (Dec. 3, 1998); see also *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998).

<sup>12</sup> NCPA has requested that we conduct this license transfer proceeding under 10 C.F.R. Part 2, Appendix A, Section X, Proceedings for the Consideration of Antitrust Aspects of Facility License Applications. We will consider that request in a later order.

apply to license transfer adjudications. Because of the complex nature of the legal, policy, and factual issues it raises, CPUC asserts that the application of Subpart M, especially in cross examination and discovery, would not serve the purposes for which the rule was intended, i.e., a full and fair hearing on the license transfer on an expedited basis.

Our regulations expressly prohibit a request for a Subpart G proceeding for a license transfer adjudication.<sup>13</sup> Recognizing this, CPUC invokes 10 C.F.R. § 2.1329, which authorizes the Commission to waive a rule when, “because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted.” In addition to its “complex nature of the . . . issues” argument, CPUC contends that the “matters in this license transfer are not strictly ‘financial in nature’ as contemplated in the promulgation of Subpart M.”<sup>14</sup> We have denied requests for Subpart G hearings that petitioners have made on these same grounds in other license transfer proceedings.<sup>15</sup> Our Subpart M rules cover all license transfer issues:

Our Subpart M rules are intended to apply to more than just those cases presenting only financial issues. We expected when promulgating Subpart M that most issues would be financial . . . . However, we also predicted that Petitioners would raise other categories of issues as well (such as foreign ownership, technical qualifications, and appropriate critical staffing levels) . . . . For that reason, when promulgating Subpart M, we expressly declined to adopt [a commenter’s] suggestion that we limit the scope of Subpart M proceedings to financial matters.<sup>16</sup>

We still consider this to be sound policy. Accordingly, we deny CPUC’s request.

## **B. CPUC’s Petition**

To intervene as of right in a licensing proceeding, a petitioner must demonstrate standing, i.e., that its “interest may be affected by the proceeding.”<sup>17</sup> In a license transfer proceeding, the petition to intervene must also raise at least one admissible issue.<sup>18</sup> PG&E maintains in its response to CPUC’s petition that CPUC has neither

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<sup>13</sup> See 10 C.F.R. § 2.1322(d); *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 130 (2001) (*Indian Point 2*), and references cited therein.

<sup>14</sup> Petition of the California Public Utilities Commission for Leave to Intervene, and Motion to Dismiss Application, or in the Alternative, Request for Stay of Proceedings, and Request for Subpart G Hearing Due to Special Circumstances’ at 3 (Feb. 5, 2002) (hereinafter, “Petition”).

<sup>15</sup> See, e.g., *Indian Point 2*, CLI-01-19, 54 NRC at 130; *Indian Point 3*, CLI-00-22, 52 NRC at 290-91; *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000).

<sup>16</sup> *Indian Point 3*, CLI-00-22, 52 NRC at 290-91 (citation omitted).

<sup>17</sup> See Atomic Energy Act § 189a, 42 U.S.C. § 2239(a).

<sup>18</sup> See 10 C.F.R. § 2.1306.

demonstrated its standing nor articulated an admissible issue. We agree. For the reasons set out in detail below, we deny CPUC's petition to intervene.

### 1. *Standing of CPUC*

To demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
  - (a) alleging a concrete and particularized injury (actual or threatened) that
  - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
  - (c) is likely to be redressed by a favorable decision, and
  - (d) lies arguably within the "zone of interests" protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.<sup>19</sup>

"The burden of setting forth a clear and coherent argument for standing and intervention is on the petitioner."<sup>20</sup>

CPUC's petition says little about its standing. Without citing any California statutes, CPUC points to its responsibility for regulating electric corporations within the State of California and asserts that it has "a statutory mandate to represent the interests of electric consumers throughout California in proceedings before the Commission" and "currently exercises regulatory authority over DCPP."<sup>21</sup> It maintains that "these fundamental interests and responsibilities . . . are directly threatened by the proposed license transfer."<sup>22</sup> But CPUC provides no facts, or even legal argument, suggesting that it represents California citizens on nuclear safety issues, as opposed to electricity rate issues. The "zone of interests" test for standing in an NRC proceeding does not encompass economic harm that is not directly related to environmental or radiological harm.<sup>23</sup>

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<sup>19</sup> See 10 C.F.R. §§ 2.1306, 2.1308; *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) and references cited therein.

<sup>20</sup> *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999). See *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001) ("petitioners bear the burden to allege facts sufficient to establish standing").

<sup>21</sup> Petition at 4.

<sup>22</sup> *Id.*

<sup>23</sup> See *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976) (zone of interests created by the AEA is avoidance of a threat to health and safety of the public as a result of radiological releases). See also *International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265 (1998) (rejecting standing for petitioners who asserted a bare economic injury, unlinked to any radiological harm); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 9, 11 (1998), *aff'd sub nom. Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999) (Purely competitive interests, unrelated to any radiological harm to itself, do not bring petitioner within zone of interests of AEA; fact that economic interest or motivation is involved will not preclude standing, but petitioner must also be threatened by environmental harm). In addition, the Commission has long held that ratepayer interests do not confer standing. See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 n.4 (1983) *citing Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976).

The standing discussion in CPUC’s petition, labeled ‘interests,’ demonstrates that the interests CPUC protects are economic in nature, i.e., ratepayer interests. The nine or so pages of the ‘interests’ discussion deal with PG&E’s bankruptcy plan and submissions to FERC, CPUC’s alternative reorganization plan, the preemption of California statutes sought by PG&E, and CPUC’s motion to stay the NRC proceedings. The discussion contains only two references to public health and safety, the subject of the NRC’s license transfer review. Both references are very general. First, CPUC states that its own alternative reorganization plan does not require the bankruptcy court or FERC to reject the application of century-old state regulatory statutes “critical to health, safety, and welfare of thirty million citizens.”<sup>24</sup> Second, CPUC cites a case that held that the Bankruptcy Code does not preempt state statutes or regulations “intended to protect the public safety and welfare.”<sup>25</sup> These bare mentions of health and safety cannot be used to establish standing where the essence of CPUC’s concern is economics, not safety.<sup>26</sup>

CPUC’s focus is on the alleged illegality of PG&E’s bankruptcy plan and unfairness of the power sale agreement (“PSA”) on which the plan is founded. The plan requires preemption of certain California laws and, according to CPUC, would amount to a “regulatory jailbreak” — PG&E’s escape from CPUC and State rate regulation.<sup>27</sup> The preemption issue is before the bankruptcy court. CPUC’s challenge to the fairness of the PSA is before FERC, an economic regulatory agency that considers rate-related, not safety-related, issues.<sup>28</sup> This NRC license transfer proceeding is not an appropriate forum to resolve CPUC’s economic controversy with PG&E. In short, CPUC’s cursory standing submission fails to show an independent health and safety interest and fails to articulate a sufficient interest in economic matters *that have a potential to produce radiological harm*.<sup>29</sup>

CPUC does allude generally to safety in the separate “issues” portion of its petition.<sup>30</sup> But, as we have seen, CPUC’s “interests” (i.e., standing) discussion is essentially silent on health and safety. The Commission is entitled to take CPUC’s standing claim at face value. We cannot be expected “to sift through the parties’ pleadings to uncover and resolve arguments not advanced by the litigants themselves.”<sup>31</sup> In any event, as we explain below, even if we were willing to glean

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<sup>24</sup> Petition at 7.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Cf. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

<sup>27</sup> See Petition at 5 and reference cited therein.

<sup>28</sup> The Federal Power Act, subchapter II, 16 U.S.C. § 824 *et seq.*, gave FERC’s predecessor, the Federal Power Commission, jurisdiction over the transmission of electric energy at wholesale in interstate commerce. The Act prohibits unreasonable rates with respect to any transmission or sale subject to FERC’s jurisdiction. See 16 U.S.C. § 824d.

<sup>29</sup> See note 23, *supra*.

<sup>30</sup> See Petition at 21, 23.

<sup>31</sup> See *Zion*, CLI-99-4, 49 NRC at 194.

from the “issues” discussion enough information to grant standing to CPUC, we could not permit CPUC to intervene because it has not submitted an admissible issue. We turn to the admissibility issue next.

## 2. *Admissibility of CPUC’s Issues*

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

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting the petitioner’s position on such issues, together with references to the sources and documents on which petitioner intends to rely.<sup>32</sup>

All of CPUC’s proposed issues are either immaterial to license transfer or too vague to define a genuine dispute with the Applicant. Commission rules require articulation of detailed threshold issues to trigger an agency hearing.<sup>33</sup> Vague, unparticularized issues are impermissible.<sup>34</sup>

We turn now to the issues CPUC has proposed in this case and consider their admissibility under 10 C.F.R. § 2.1308. For convenience, we have treated issues in the four categories CPUC enumerated: financial qualifications issues, decommissioning funding, California’s regulatory responsibilities, and public safety and welfare concerns.

### a. *Financial Qualifications Issues*

CPUC avers generally that the proposed transferee is not financially qualified to be the NRC’s licensee for DCP. CPUC claims that Gen’s finances are “highly questionable” and it is “uncertain that Gen will have the resources to carry out the critical plant maintenance and public safety-related functions that will enable [Diablo Canyon] to meet the Commission’s rigorous regulatory requirements.”<sup>35</sup>

According to CPUC, it is “imprudent in the extreme to license untested, financially unstable entities” like Gen to own and operate a commercial nuclear

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<sup>32</sup> See 10 C.F.R. § 2.1306; *Indian Point 2*, CLI-01-19, 54 NRC at 133-34 and references cited therein.

<sup>33</sup> See *Indian Point 3*, CLI-00-22, 52 NRC at 295; *Vermont Yankee*, CLI-00-20, 52 NRC at 164.

<sup>34</sup> See *Indian Point 3*, CLI-00-22, 52 NRC at 295.

<sup>35</sup> See 10 C.F.R. § 50.33(f)(2)-(3).

<sup>36</sup> Petition at 21.

reactor.<sup>37</sup> CPUC argues that FERC cannot approve the rates in the proposed PSA that underpins PG&E's bankruptcy reorganization plan. If, as CPUC urges, FERC permits the collection of only cost-based rates for the power DCPD produces, rather than the allegedly "unjust and unreasonable" rates proposed in the plan, the "house of cards on which PG&E's applications . . . are based, will quickly collapse. *In such event*, Gen will not be a financially viable entity" and thus not qualified to hold the DCPD licenses.<sup>38</sup>

The stressed phrase in the previous sentence is the key to our rejection of this issue. Before us is a financial plan — albeit contingent on FERC and bankruptcy court approval — that includes a long-term power sale contract at specified rates. Although CPUC contests this characterization, the rates, according to the Applicant, are market-based; moreover, the rates are currently before FERC, the responsible agency, for approval or rejection.<sup>39</sup> *CPUC has not argued that the transferee's funding would be insufficient if FERC and the bankruptcy court approve the proffered PSA.* For example, CPUC does not contend that the estimated capacity factors or cost estimates are unrealistic, that revenues under the PSA are insufficient for safe operation of the plants, that the PSA would be unenforceable, or that monies earned by the transferee would be uncollectible from the buyer. These are the kinds of issues the NRC typically considers in license transfer cases.<sup>40</sup>

CPUC, though, essentially challenges the economic reasonableness and fairness of the PSA. Indeed, in its reply to PG&E's answer in our proceeding, CPUC characterizes its financial qualifications argument succinctly as a FERC fairness issue: "[T]he proposed transferees will not be financially able to meet their basic health and safety-related obligations without approval by the Federal

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 22-23 (emphasis added).

<sup>39</sup> CPUC says that the proposed rates are fundamentally unreasonable and unjust to California retail customers who will foot the bill. To support its proposed issues before the NRC, CPUC relies primarily on the "declaration" of David R. Effross, a public utilities regulatory analyst employed by CPUC, and its filings before FERC and the bankruptcy court. (Applicants have not challenged Mr. Effross's expertise.) PG&E's benchmark analysis, presented to FERC, misses the mark, according to the declaration of Mr. Effross. The PSA, he says, must be evaluated in comparison with otherwise applicable rates — the proper comparison is with utility-retained generation (such as in the alternative reorganization plan CPUC has formulated for PG&E to emerge from bankruptcy without disposing of its electric generation assets.) Rates determined on a traditional cost-of-service basis are approximately one-half of those in the PG&E plan. According to Mr. Effross, PG&E's benchmark analysis in support of the PSA contains several defects, including the following: (1) PG&E uses a comparison period in which the California wholesale electricity markets exhibited extreme dysfunction; (2) PG&E uses comparison contracts the negotiation of which PG&E previously contended was subject to the exercise of market power; (3) PG&E used a regional market instead of the relevant national market; (4) negotiation of the comparison contracts took place in the 18 months during which the California market was at its most dysfunctional; (5) the comparison group contracts are not comparable in either size or technology; (6) in addition to the fixed high revenues it will receive for the next 12 years, Gen will receive PG&E's electric generation assets for a fraction of their value; and (7) PG&E's argument that a supplier of 7100 MW of generation in northern California does not have market power "fails the straight face test." See "Declaration of David R. Effross," Exh. G to Petition (Feb. 5, 2002), ¶¶ 12, 13, 21, 24, 27, 28, 30, 32. Issues like these plainly are for FERC, not the NRC, to decide.

<sup>40</sup> See, e.g., *Indian Point 2*, CLI-01-19, 54 NRC at 135-38.

Energy Regulatory Commission of illegal, unjust and unreasonable rates.’’<sup>41</sup> This issue statement plainly illustrates why CPUC’s financial concerns are outside NRC’s bailiwick and not relevant to this license transfer proceeding. NRC’s role in evaluation of the transferee’s financial qualifications is to decide whether the plan as proposed, including the PSA, will meet our financial qualifications regulations. *CPUC has made no allegation that the plan will not do so.* CPUC asks, in essence, for a revision of the PSA, a matter not within NRC’s jurisdiction.<sup>42</sup> FERC is the appropriate forum for addressing this issue and the matter is currently pending before that agency.<sup>43</sup>

PG&E’s license transfer application includes, as required by 10 C.F.R. § 50.33(f)(2), data regarding costs and revenues for the first 5 years of operation after the requested license transfer. The fact that these projections are grounded on a contested PSA does not defeat PG&E’s position, for the NRC Staff can condition the license transfer on any portion of the PSA that is essential to the demonstration of financial qualifications of the proposed licensee. Then, should FERC not approve the financial foundation of the license transfer application, the transfer will not occur.

*b. Decommissioning Funding*

A reactor licensee must provide assurance of adequate resources to fund the decommissioning of a nuclear facility by one of the methods described in 10 C.F.R. § 50.75(e).<sup>44</sup> PG&E currently has in place a Nuclear Decommissioning Trust, consisting of monies set aside for the decommissioning of the two Diablo Canyon units and the idle Humboldt Bay Nuclear Unit No. 3. PG&E desires to transfer to a newly created holding company, Diablo Canyon LLC, the beneficial interest in those portions of the decommissioning trust that are associated with the DCP. CPUC maintains that since PG&E does not have the legal authority to make this transfer, the proposed licensee will have no decommissioning funding assurance, and, therefore, the Commission cannot approve the requested license transfer.<sup>45</sup>

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<sup>41</sup> “Reply of the California Public Utilities Commission (“CPUC”) to the Answer of Pacific Gas & Electric Company to the CPUC’s Petition for Leave to Intervene, Motion to Dismiss Application, Etc.” at 7 (Feb. 20, 2002).

<sup>42</sup> See *Indian Point 2*, CLI-01-19, 54 NRC at 139-40.

<sup>43</sup> Mr. Effross asserts that Gen’s finances are “highly questionable.” See “Declaration of David R. Effross,” Exh. G to Petition (Feb. 5, 2002), ¶ 5. However, his analysis centers on persuading FERC that (1) it should allow Gen to collect only cost-based rates rather than market-based rates for DCP and (2) that the benchmark analysis PG&E performed to justify its requested market-based rates is severely flawed. See note 39, *supra*. His declaration does not concretely challenge PG&E’s financial qualifications in the event that FERC and the bankruptcy court approve, respectively, the PSA and the plan.

<sup>44</sup> See 10 C.F.R. § 50.75(a). The regulations also specify the minimum amount of funds necessary to demonstrate reasonable assurance of funds for decommissioning. See 10 C.F.R. § 50.75(c).

<sup>45</sup> See Petition at 12-13.

CPUC also argues that the bankruptcy court cannot require CPUC to authorize a transfer, as PG&E has requested. (This issue is now before the bankruptcy court for consideration.) Further, the funds are not transferable, except on sale of a plant, and then only with prior approval of CPUC. According to CPUC, the trust monies cannot be assigned without its approval, and it will not give that approval because it believes that assignment is not in the public interest.<sup>46</sup>

In addition, CPUC argues that since the trust also provides for decommissioning of the Humboldt Bay unit, as well as the two Diablo Canyon units, there are practical difficulties and potential inequities in allocating the trust among the three nuclear units. The trust documents themselves do not provide for such an allocation. CPUC asserts that a detailed study of likely decommissioning costs is needed to apportion the trust monies. Otherwise, CPUC says, it is likely that a facility will have inadequate funds to decommission properly, resulting in impact on ratepayers and potential health, safety, and welfare concerns.

When we examine CPUC's concerns relating to decommissioning funding, we find no litigable issue. CPUC's argument focuses principally on whether PG&E should be permitted to transfer the beneficial interests in the trust fund to a non-CPUC regulated entity and who has the authority to permit such transfers.<sup>47</sup> As with its financial qualifications issue, CPUC does not assert that, if the license transfer application were approved as proposed by PG&E, the transferee would not meet the Commission's decommissioning funding requirements. CPUC's concerns about maintaining its regulatory authority over the decommissioning trusts are not within the NRC's area of expertise and are more appropriately resolved by the bankruptcy court and FERC. Nor are they issues that the NRC need decide in considering the transfer application. Licensee's application proposes to transfer the beneficial interests in the trust fund to Diablo Canyon LLC. Thus the Staff's review is based on the assumption that this transfer will take place. The NRC can condition the license transfer on PG&E's lawful transfer of the decommissioning funds (through the bankruptcy proceeding or otherwise) and segregation from the trust of the proper decommissioning funding amount, as described in our regulations.

CPUC's request for a detailed study of the likely actual costs of decommissioning amounts to an impermissible challenge to a generic decision made by the Commission in its decommissioning rulemaking not to require site-specific cost estimates.<sup>48</sup> We do not permit attacks on our regulations in a licensing proceeding,

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<sup>46</sup> See *id.* at 13.

<sup>47</sup> See *id.* at 15-19. PG&E has asked the bankruptcy court to compel CPUC to approve the transfer. *Id.* at 14; PG&E's Answer at 17. PG&E is also seeking approval from FERC of the transfer of those portions of the trust under FERC jurisdiction. PG&E's Answer at 17.

<sup>48</sup> See *Indian Point 2*, CLI-01-19, 54 NRC at 143; *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 n.8 (1999); *Indian Point 3*, CLI-01-19, 52 NRC at 303; *Vermont Yankee*, CLI-00-20, 52 NRC at 165-66.

absent a proper request for a waiver of a regulation, pursuant to 10 C.F.R. § 2.1329.<sup>49</sup> Absent such a waiver, a showing of compliance with 10 C.F.R. § 50.75 conclusively demonstrates sufficient assurance of decommissioning funding.<sup>50</sup> We therefore decline to admit this aspect of CPUC's decommissioning funding issue.

We turn briefly to another facet of CPUC's decommissioning funding issue — namely, the allegation that assignment of the trusts' assets pursuant to the PG&E plan, and, presumably, the associated license transfers themselves, would not be in the "public interest."<sup>51</sup> The public interest is not a suitable standard for an NRC hearing:

This issue is too broad and vague to be suitable for adjudication. Moreover, NRC's mission is solely to protect the public health and safety. It is not to make general judgments as to what is or is not otherwise in the public interest — other agencies, such as the Federal Energy Regulatory Commission and state public service commissions, are charged with that responsibility.<sup>52</sup>

Accordingly, we decline to admit the public interest aspects of the decommissioning funding issue.

*c. California's Regulatory Responsibilities*

CPUC asserts that transfer of the DCPD licenses would reduce California's regulatory responsibilities over nuclear power to the detriment of the public health, safety, and welfare of the citizens of California. But issues regarding preemption of certain California laws must be resolved by the bankruptcy court, for PG&E's plan requires either approvals by CPUC that it is loath to give or a court decision to allow PG&E to implement its plan notwithstanding CPUC's opposition. These are not matters for the NRC.

CPUC cites numerous state interests in regulating utilities that PG&E is seeking to "trump" through bankruptcy court approval of its plan and FERC approval of the rates proposed in the PSA. These include (1) a basic interest in regulating public utilities (which would be thwarted by a transfer of the Diablo Canyon licenses to an unregulated limited liability company); (2) an interest in ensuring universal service and fair and just utility rates; (3) an interest in protecting financial

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<sup>49</sup> Based on its argument regarding conducting these proceedings under 10 C.F.R. Part 2, Subpart G, we conclude that CPUC is aware of the requirements of 10 C.F.R. § 2.1329. See Section II.A.2 of this Order, *supra*.

<sup>50</sup> See *Indian Point 2*, CLI-01-19, 54 NRC at 142; *Seabrook*, CLI-99-6, 49 NRC at 217. PG&E proposes to meet section 50.75 by prepaying, by means of existing trust funds, an amount sufficient to cover the decommissioning costs at the expected time of termination of operation. See 10 C.F.R. § 50.75(e)(1)(i). Prepayment is the strongest and most reliable of the funding devices described in 10 C.F.R. § 50.75(e)(1). See *Seabrook*, CLI-99-6, 49 NRC at 218.

<sup>51</sup> See Petition at 17-19.

<sup>52</sup> *Indian Point 2*, CLI-01-19, 54 NRC at 149.

integrity and dedication of service; (4) an interest in preventing loss of in-state generation facilities; (5) an interest in preventing, through affiliate transaction rules, improper intercompany transactions; (6) an interest in preventing misuse of the holding company structure; and (7) an interest in requiring utilities to share gains on sale with ratepayers. According to CPUC, state regulation has significant advantages over federal regulation.

We decline to admit this issue for two reasons. First, NRC approval of the license transfers would not alter the regulatory role of the CPUC. It is true that the bankruptcy court and/or FERC might make decisions preliminary to the license transfers that would alter the CPUC's role. But the Commission's possible endorsement of an application that is based on receiving those preliminary approvals is obviously not the root of CPUC's apparent discomfiture. Second, there is no basis for CPUC's argument that its oversight is necessary for the protection of public health and safety with respect to radiological risks. This role is reserved to the NRC.<sup>53</sup>

*d. Public Safety and Welfare Concerns*

CPUC alleges generally that the public safety and welfare are threatened by the proposed license transfers. Through deprivation of concurrent state jurisdiction over an NRC-regulated facility, says CPUC, important safeguards to public health and safety will be lost.<sup>54</sup> CPUC's generalized complaint that public health and safety will suffer in the absence of concurrent state jurisdiction over an NRC-regulated facility cites no safety concern that is directly connected to the proposed license transfers. To support this issue, CPUC offers only speculation and suspicions about several marginally related topics. As an example, CPUC refers to the threat of terrorist attacks, but such attacks are neither caused by nor result from the proposed license transfers. Plant security is an ongoing operational issue and is decidedly outside the scope of a license transfer proceeding.<sup>55</sup>

CPUC also contends that the transferee "will *certainly* attempt to reduce operating expenses, which, in turn, could *very conceivably* affect plant safety and reliability, and lead to disaster."<sup>56</sup> The challenge regarding the cost-cutting that CPUC predicts is insufficient, as it is mere guess, unrooted in factual information, and it does not specifically dispute any information in the license

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<sup>53</sup> See *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 205-13 (1983) (federal government maintains complete control of safety and "nuclear" aspects of energy generation, whereas states exercise their traditional authority over economic questions such as ratemaking and the need for additional generating capacity).

<sup>54</sup> This issue overlaps significantly with the issue described immediately above (in Section II.B.2.c).

<sup>55</sup> In the aftermath of the September 11, 2001, attacks on New York City and the Pentagon, the NRC has undertaken a comprehensive review of all aspects of security at nuclear facilities. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 378-79 (2001).

<sup>56</sup> Petition at 54 (emphasis added).

transfer application.<sup>57</sup> CPUC has provided no support other than conjecture for its thesis that the transferee will subordinate safety to profits. Moreover, if the plants' safety becomes compromised, our enforcement and investigation programs are sufficient to identify the problem and prescribe corrective action (including, in extreme cases, plant shutdown).<sup>58</sup>

As another example, CPUC says that it can "safely presume" that the transferee will try to downsize its workforce, follow the "industry trend" and not hire the full complement of staff from the current owner, and probably increase its use of overtime. According to CPUC, "[s]afety and reliability can only be negatively affected by the *likely* implementation of such policies."<sup>59</sup> But PG&E's license application itself states that, after license transfer, there will be no operational changes and essentially no staff or management changes. CPUC has not provided a sound basis to dispute the information provided in the application.<sup>60</sup> Accordingly, we decline to admit this issue.

We also note that the NRC has regulations requiring specific staffing levels and qualifications for the key positions necessary to operate a plant safely.<sup>61</sup> We will not assume that licensees will contravene our regulations.<sup>62</sup> And CPUC's reference to the purported "industry trend" on staffing after license transfers is a bare assertion, without supporting documentation. Moreover, we are reviewing the proposed Diablo Canyon license transfer in this proceeding, not the entire nuclear power generation industry.

Further, CPUC distrusts the relationship between the transferee and its parent, and alleges that profits will flow upward to the parent, which is isolated from responsibility for plant operation and safety.<sup>63</sup> CPUC asserts that "Diablo, as a nested LLC, will provide a source of profit to Parent in good times, but will be forced to stand on its own when profits go negative . . . the LLC structure will allow the holding company to bankrupt Diablo and avoid financial responsibility."<sup>64</sup> To the extent that CPUC is raising an issue concerning Diablo's financial qualifications to be a licensee, CPUC fails to provide any specific challenge to the financial information provided in the transfer application. As such, this issue is inadmissible. Further, to the extent that CPUC is raising a challenge to the fact that Diablo will be a limited liability company, we note that the Commission has consistently ruled that limited liability companies

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<sup>57</sup> See *Dominion Nuclear Connecticut Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 361 (2001).

<sup>58</sup> See *Oyster Creek*, CLI-00-6, 51 NRC at 209.

<sup>59</sup> Petition at 55 (emphasis added).

<sup>60</sup> See *Oyster Creek*, CLI-00-6, 51 NRC at 209; *Millstone*, CLI-01-24, 54 NRC at 363 (generalized challenges regarding cost-cutting are insufficient without specifically disputing the information in the application).

<sup>61</sup> See 10 C.F.R. § 50.54(m).

<sup>62</sup> See *Indian Point 3*, CLI-00-22, 52 NRC at 313; *Oyster Creek*, CLI-00-6, 51 NRC at 207.

<sup>63</sup> See Petition at 54-55, 56.

<sup>64</sup> *Id.* at 56.

are not precluded from owning and operating nuclear power plants.<sup>65</sup> Vague allegations about the “character” of the transferee and its business relationships are insufficient to support admissibility of this issue.<sup>66</sup>

Lastly, CPUC states that the proposed license transfers will signal the “death knell” of the Diablo Canyon Independent Safety Committee. CPUC’s concerns about the possible dissolution of the Diablo Canyon Independent Safety Committee — which does not operate under the auspices of the NRC — are beyond the scope of NRC’s authority. Thus, this issue is not admissible.

*e. Summary*

In summary, for the reasons given above, we find that CPUC has not submitted any admissible issues. Every issue that CPUC has proffered is either too broad and vague for our consideration or simply lies outside the scope of an NRC license transfer review. Ratepayers’ economic interests, without specific ties to radiological risk, are not cognizable in an NRC license transfer proceeding.

**3. Status of CPUC**

Although CPUC has raised no issues within the scope of a license transfer review with the level of specificity required under Subpart M,<sup>67</sup> the Commission “has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc.”<sup>68</sup> We believe that the CPUC, as a California state agency representing the interests of consumers of electricity, might provide us with useful insights. We therefore permit the CPUC to participate in this proceeding as an agency of an interested State, in a manner analogous to that described in 10 C.F.R. § 2.715(c),<sup>69</sup> if we grant a hearing after considering the still-pending petitions of NCPA and TANC or if timely filed and admissible late issues arise. In this Subpart M proceeding, participation may include introduction of evidence on admitted issues, submitting proposed questions to the presiding officer, and filing proposed findings.

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<sup>65</sup> See *Vermont Yankee*, CLI-00-20, 52 NRC at 173; *Oyster Creek*, CLI-00-6, 51 NRC at 208 (limited liability companies are no different from corporations in that both are structured to limit the liability of their shareholders); *Northern States Power Co.* (Monticello Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 57 (2000).

<sup>66</sup> See *Millstone*, CLI-01-24, 54 NRC at 365-67.

<sup>67</sup> See 10 C.F.R. § 2.1306(b)(2)(iv).

<sup>68</sup> *Nine Mile Point*, CLI-99-30, 50 NRC at 344 (1999); *Indian Point 3*, CLI-00-22, 52 NRC at 295.

<sup>69</sup> Cf. 10 C.F.R. § 2.715(c). In proceedings conducted under 10 C.F.R. Part 2, Subpart G, the presiding officer will afford representatives of an interested State, county, or agencies thereof a reasonable opportunity to participate.

### C. Committee's Petition

In its petition, the Committee has recited its interests in this proceeding, but has not even attempted to formulate an admissible issue for our consideration. Indeed, the Committee, which has entered into an agreement with PG&E in which the Committee pledged to support the plan, has no dispute with the Applicant.

The gist of the Committee's petition is:

As the representative of the collective interests of PG&E's unsecured creditors, the Committee has an interest in ensuring that [the Diablo Canyon power plants'] operating licenses are transferred to a financially capable licensee that has all the necessary qualifications to continue to operate [the power plants] in a safe, reliable and efficient manner, particularly in light of the fact that approximately 40% of the consideration to be received . . . by unsecured creditors under the [reorganization plan] will be in the form of long-term notes of at least 10 years in duration (including long-term notes in [one of the transferees]). The Committee submits that it is entitled to intervene in this proceeding as a matter of right because its interests in ensuring the financial capability of the transferee could be directly impacted if the license transfers adversely affect health and safety.<sup>70</sup>

Although the Committee alludes generally to health and safety considerations, it points to no likely adverse effects of the proposed license transfers. In short, it does not challenge any part of the application. Accordingly, we deny the Committee's petition to intervene without reaching the question of its standing.

The Committee has requested that we exercise our power to allow discretionary intervention. Our policy is to allow such discretionary intervention for a petitioner who is not entitled to intervention as a matter of right but who may nevertheless make some contribution to the proceeding. We have long permitted such intervention for petitioners who lack standing and we have set out factors bearing on the exercise of this discretion.<sup>71</sup> We have never, however, endorsed this practice for petitioners who do not specify any issues of concern to them. As opined by a licensing board 20 years ago, we did not intend that a petitioner should be entitled to discretionary intervention without an issue of its own worthy of exploration in an adjudication.<sup>72</sup> Accordingly, we deny the Committee discretionary intervention in this proceeding. Nevertheless, we wish to point out that there are other means by which the Committee can contribute to this proceeding if we grant a hearing; specifically, by serving as witnesses for other parties or by *amicus* filings at appropriate times.<sup>73</sup>

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<sup>70</sup> "Petition to Intervene of the Official Committee of Unsecured Creditors of Pacific Gas and Electric Company" at 4 (Feb. 6, 2002).

<sup>71</sup> See *Pebble Springs*, CLI-76-27, 4 NRC at 614-17 (answering in the affirmative a certified question whether intervention may be permitted as a matter of discretion to petitioners who lack standing to intervene in a proceeding as a matter of right); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 177-78 (1998), *aff'd*, CLI-98-13, 48 NRC 26, 34-35 (1998).

<sup>72</sup> See *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), LBP-82-52, 16 NRC 183, 194 (1982).

<sup>73</sup> See *Private Fuel Storage*, CLI-98-13, 48 NRC at 35.

#### D. The County's Petition

We turn finally to the County's late-filed intervention petition. The County undoubtedly has governmental standing.<sup>74</sup> As the Diablo Canyon nuclear units are located within its boundaries, the County, as it points out, has a vital public safety interest in the plants' safe operation and eventual decommissioning. If the Licensee is not financially qualified, unsafe conditions could threaten the health and safety of the County's citizens. The County's position is analogous to that of an individual living or working within a few miles of the plant.<sup>75</sup> Nevertheless, we deny the County's intervention petition, as the County has not advanced a legitimate reason for the tardy filing of its petition.

Our Subpart M regulations provide that untimely intervention petitions may be denied unless the petitioner establishes good cause for failure to file on time.<sup>76</sup> In addition to good cause, 10 C.F.R. § 2.1308(b) provides that, in reviewing a late petition, the Commission will consider "(1) The availability of other means by which the . . . petitioner's interest will be protected or represented by other participants in a hearing; and (2) The extent to which the issues will be broadened or final action on the application delayed."<sup>77</sup> However, good cause is the most important element of our late-filing standards.<sup>78</sup>

The County says that the trigger point for its untimely filing was a bankruptcy court decision permitting CPUC to file an alternate plan of reorganization that is distinctly different from PG&E's plan. The County asserts that the new "regulatory" developments governing a proceeding amount to "good cause" justifying late intervention. To support its position, the County cites *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980). But that case is inapposite. In *Zimmer*, the Licensing Board considered a situation where the NRC's criteria for emergency planning had undergone vast changes since the beginning of the proceeding, and the scope of relief that the Commission could consider had expanded accordingly. In other words, the emergency planning questions at issue in *Zimmer* had changed materially. Here, by contrast, there has been no change in the PG&E license transfer application. It is impossible to see how CPUC's submission of a competing bankruptcy plan changes the license transfer plan before us.

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<sup>74</sup> PG&E does not contest the County's standing in this proceeding.

<sup>75</sup> See *Indian Point 3*, CLI-01-19, 54 NRC at 295; *Vermont Yankee*, CLI-00-22, 52 NRC at 164.

<sup>76</sup> See 10 C.F.R. § 2.1308(b); *Seabrook*, CLI-99-6, 49 NRC at 222-23 (denying late-filed intervention petition alleging failure to read regulations carefully as reason for tardiness).

<sup>77</sup> 10 C.F.R. § 2.1308(b)(1)-(2).

<sup>78</sup> See *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 515 (2001). Cf. 10 C.F.R. § 2.714(a) for 10 C.F.R. Part 2, Subpart G proceedings and *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 246-47 (1991), *aff'd in part on other grounds and appeal denied*, CLI-92-11, 36 NRC 47 (1992).

What the County seemingly ignores is that no license transfer at all will be needed if the bankruptcy court approves CPUC's plan of reorganization. The critical — and unchanged — fact is that PG&E's license transfer application at the NRC is still founded on its own plan, which is independent of the new development in the bankruptcy case. Moreover, nothing in the County's petition to intervene depends on the CPUC plan; all of the County's objections are associated with PG&E's license transfer application, which has been before the Commission for many months. Recent developments in the bankruptcy proceeding, while new to the bankruptcy case, simply do not constitute *new information related to the Diablo Canyon license transfer application*.<sup>79</sup> Thus, the County has not established good cause — or, indeed, any cause — for untimely presentation of its issues, all of which the County could have filed long ago in a timely petition based on PG&E's application, which incorporated the plan the County opposes.<sup>80</sup>

In the absence of good cause for its late filing, the County must show strong countervailing reasons that override the lack of good cause.<sup>81</sup> But the County has not provided such reasons. The other Subpart M factors — the factor relating to the broadening of issues or the delaying of final action and the factor relating to the adequacy of existing participants to represent the petitioner's interests — cut in opposite directions, as they frequently do. The issues would be broadened by the County's participation, possibly resulting in a delay of the final action by lengthening any potential hearing. On the other hand, the County's interests, essentially the same as CPUC's, would not be represented at the hearing because we have rejected CPUC's intervention petition.<sup>82</sup> The County, in any event, raises no litigable issues. General concerns about Gen's financial viability and about ETrans's financial ability to provide offsite power at Diablo Canyon do not suffice for intervention.<sup>83</sup> We will, however, refer the County's petition to the NRC Staff as comments, pursuant to 10 C.F.R. § 2.1305. We direct the Staff to

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<sup>79</sup>We note also that changes in the bankruptcy case are not “regulatory” developments, the basis of the Licensing Board's holding in *Zimmer*.

<sup>80</sup>In its reply to PG&E's answer to the County's intervention petition, the County adds that PG&E's plan has undergone significant revision; however, the County describes neither the nature of the changes nor their significance. *See* Reply at 7. The County does not illuminate how these changes justify its tardy filing and we are not willing to guess. The County also tries to justify its late attempt to intervene by speculating that the bankruptcy court *could* adopt a modified plan, different from either of the two pending plans. If that happens, though, and material alterations in PG&E's transfer application result, the County is free to submit late-filed issues at the appropriate time.

<sup>81</sup>*See Seabrook*, CLI-99-6, 49 NRC at 223.

<sup>82</sup>The two timely intervention petitions we do not decide today, NCPA's and TANC's, primarily involve antitrust issues.

<sup>83</sup>The County contradicts statements (regarding, for example, cost and revenue projections, ability to weather financially a 6-month outage, and ability to fund a planned independent spent fuel storage installation) that PG&E made in its license transfer application, but provides no foundation for its opposition. The County merely states that, in the interest of saving time, it has not had its experts prepare supporting affidavits, but its experts allegedly have performed a review of the application and support the County's issues. *See* “Petition of the County of San Luis Obispo for Leave to Intervene and Request for Hearing” at 17 n.4 (May 10, 2002). In its reply, the County continues

(Continued)

consider whether the County's comments call into question the proposed license transferees' ability to operate the Diablo Canyon power plants safely.<sup>84</sup>

In summary, besides having no tenable cause for its delay in filing an intervention petition, the County has provided no admissible issues. Accordingly, we deny the County's untimely petition. For reasons similar to those given above, we afford the County, like CPUC, participant status if we grant a hearing later in this proceeding.

### III. CONCLUSION

For the reasons set forth above, the Commission (1) *denies* CPUC's petition to intervene and request for hearing; (2) *denies* the Committee's petition to intervene and alternative request for discretionary intervention; (3) *denies* the County's late-filed petition to intervene; (4) *denies* CPUC's motion that any hearing be conducted under 10 C.F.R. Part 2, Subpart G; (5) *denies* all motions to abate or dismiss this proceeding; (6) *directs* the remaining Petitioners and parties to inform the Commission promptly of any court or administrative decision that directly impacts this proceeding; (7) *reserves* ruling on the remaining petitions to intervene; (8) *permits* CPUC and the County to participate as governmental entities if we grant a hearing in this proceeding; and (9) *refers* the petitions of the County and CPUC to the NRC Staff as comments for appropriate consideration.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 25th day of June 2002.

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to insist that it will bring the "appropriate expertise" to bear with respect to its contentions "at the appropriate time." *See* Reply at 13. The appropriate time has come and gone. A late petitioner "should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 166 (1993), and references cited therein. "Vague assertions regarding petitioner's ability or resources . . . are insufficient." *Id.* When an applicant makes a statement that, for example, it is financially qualified to be the licensee and provides the required 5-year cost and revenue projections, it is insufficient for an intervention petitioner to state, without more, that the applicant is not financially qualified. That is essentially what the County does in this case.

<sup>84</sup> Likewise, we refer CPUC's petition to the Staff, with the same instructions for its consideration. *See Duquesne Light Co.* (Beaver Valley Power Station, Units 1 and 2), CLI-99-23, 50 NRC 21, 22 (1999); CLI-99-25, 50 NRC 224, 226 (1999).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**G. Paul Bollwerk, III, Chairman**  
**Dr. Richard F. Cole**  
**Thomas D. Murphy**

**In the Matter of**

**Docket No. 30-35870-EA**  
**(ASLBP No. 02-800-01-EA)**  
**(EA-02-103)**

**UNITED EVALUATION SERVICES, INC.**  
**(Beachwood, New Jersey)**

**June 14, 2002**

Ruling on a licensee request to rescind an NRC Staff determination to make immediately effective an enforcement order suspending its byproduct materials license authorizing the possession and use of the material to conduct industrial radiography, the Licensing Board denies the Licensee's motion, concluding that the Staff had met its burden under 10 C.F.R. § 2.202(c)(2)(i) to establish by "adequate evidence" that (1) those charges are not based on "mere suspicion, unfounded allegations, or error," and (2) there is a need to make the order effective immediately.

**ENFORCEMENT ACTIONS: IMMEDIATE EFFECTIVENESS REVIEW (BURDEN OF GOING FORWARD; BURDEN OF PROOF)**

**RULES OF PRACTICE: BURDEN OF GOING FORWARD (IMMEDIATE EFFECTIVENESS REVIEW FOR ENFORCEMENT ORDERS); BURDEN OF PROOF (IMMEDIATE EFFECTIVENESS REVIEW FOR ENFORCEMENT ORDERS); IMMEDIATE EFFECTIVENESS REVIEW FOR ENFORCEMENT ORDERS (BURDEN OF GOING FORWARD; BURDEN OF PROOF)**

When a Staff immediate effectiveness determination is challenged, the Staff has the ultimate burden of persuasion to demonstrate that the order, and the Staff's determination that it is necessary to make the order immediately effective, are supported by "adequate evidence." The Licensee, however, bears the burden of going forward to demonstrate that the order, including the Staff's immediate effectiveness determination, is not based upon adequate evidence, but rather upon mere suspicion, unfounded allegations, or clear error. *See Eastern Testing and Inspection, Inc.*, LBP-96-9, 43 NRC 211, 216 (1996).

**ENFORCEMENT ACTIONS: LICENSEE'S OBLIGATIONS AND COMMITMENTS**

**LICENSEES: RESPONSIBILITY FOR EMPLOYEE ACTIONS**

A licensee is responsible for the actions of those individuals it employs to use radiological material and is entrusted, through its radiation safety officer and other management officials, with taking all reasonable steps to guarantee that technical, administrative, and other safeguards needed to protect and control those materials in accordance with agency regulations are in place and are followed. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 311-12 (1994), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (table).

**ENFORCEMENT ACTIONS: IMMEDIATE EFFECTIVENESS REVIEW (NEED FOR IMMEDIATE EFFECTIVENESS)**

**RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS REVIEW FOR ENFORCEMENT ORDERS (NEED FOR IMMEDIATE EFFECTIVENESS)**

To support an immediate effectiveness determination, in addition to showing that the bases for the order are supported by adequate evidence, the Staff must show there is a need for immediate effectiveness that is supported by adequate

evidence. That need can be established by showing either that the alleged violations or the conduct supporting the violations is willful/deliberate or that the public health, safety, or interest requires immediate effectiveness. *See Eastern Testing and Inspection*, LBP-96-9, 43 NRC at 227.

**MEMORANDUM AND ORDER**  
**(Denying Licensee Request To Set Aside Immediate Effectiveness)**

Pending with the Licensing Board is a May 17, 2002 request by Licensee/Petitioner United Evaluation Services, Inc. (UES), asking for rescission of an NRC Staff determination to make immediately effective a May 14, 2002 order suspending a byproduct material license held by UES that authorizes the possession and use of certain byproduct material to conduct industrial radiography. *See* Letter from Joseph J. Ferenc, UES President and Radiation Safety Officer to Secretary of the Commission (May 17, 2002) [hereinafter UES Request]. In a May 22, 2002 filing, the Staff opposes this challenge to its immediate effectiveness determination, which it supports with the affidavits of two NRC Office of Investigations (OI) special agents. *See* NRC Staff's Response to [UES] Request to Set Aside Immediate Effectiveness of Order Suspending License (May 22, 2002) [hereinafter Staff Response]; *id.*, Affidavit of Special Agent Jeffrey Teator (May 22, 2002) [hereinafter Teator Affidavit]; *id.*, Affidavit of Special Agent Kristin L. Monroe (May 22, 2002) [hereinafter Monroe Affidavit].<sup>1</sup> After receiving a UES reply to this Staff opposition, *see* Letter from Joseph J. Ferenc, UES President and Radiation Safety Officer to the Licensing Board (June 4, 2002) [hereinafter UES Reply], on June 6, 2002, the Board conducted an oral argument to provide an opportunity for the parties to explain further their positions on UES's request and for the Board to obtain clarification regarding the information provided by the parties. *See* Tr. at 1-50.

For the reasons set forth herein, we deny the UES request that the Staff's immediate effectiveness determination be rescinded. In addition, with this issuance we establish a deadline for the parties to provide a joint prehearing report regarding the further litigation of this proceeding.

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<sup>1</sup>In support of its response, the Staff provided the two affidavits of OI special agents outlining the basic factual information in support of the Staff's claims. During the June 6, 2001 immediate effectiveness oral argument, the Staff made a point of advising the Board that while these two investigators were involved in the UES inquiry, in fact the principal investigator was unavailable when the response had to be filed due to foreign travel. According to the Staff, however, she agreed with the substance of what was in the affidavits, a statement she affirmed on the record during the argument. *See* Tr. at 32.

While we understand the Staff's reasons for making its presentation in this manner, if this were to occur in the future, given the status of any section 2.202(c)(2) presentation as an oral argument, *see* 57 Fed. Reg. 20,194, 20,196 (1992), the better practice is for the investigator to submit a separate affidavit indicating agreement with any other submissions.

## I. BACKGROUND

### A. Regulatory Scheme for Immediate Effectiveness Orders

Pursuant to 10 C.F.R. § 2.202, the Commission may issue an order that suspends or revokes a license when evidence of a license violation exists. In addition, if the Commission determines that the “public health, safety, or interest so requires or that the violation or conduct causing the violation is willful,” the Commission may make the license suspension or revocation effective immediately on the date that the order is issued. 10 C.F.R. § 2.202(a)(5). In response to such an order, a licensee may, in addition to demanding a hearing on the merits of the order, request the presiding officer to set aside the order’s immediate effectiveness on the grounds that it is not based upon “adequate evidence but upon mere suspicion, unfounded allegations, or error.” 10 C.F.R. § 2.202(c)(2)(i). The licensee’s motion must state with particularity the reasons why the Commission’s order is not based upon adequate evidence and must provide affidavits or evidence to support its claims. *Id.*

In deciding whether to uphold an immediately effective suspension order, the presiding officer must determine whether the order is based upon adequate evidence. The Commission defines adequate evidence:

to exist when 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.

57 Fed. Reg. 20,194, 20,196 (May 12, 1992). In adopting this adequate evidence standard, the Commission likened it to probable cause, which it described as “less than must be shown in trial, but . . . more than uncorroborated suspicion or accusation.” *Id.* (citing *Horne Brothers, Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972)). Thus, to prevail on a motion to set aside the immediate effectiveness of a Staff enforcement order, the licensee must demonstrate that the Staff’s order was not based upon “adequate evidence.”

When a Staff immediate effectiveness determination is challenged, the Staff has the ultimate burden of persuasion to demonstrate that the order, and the Staff’s determination that it is necessary to make the order immediately effective, are supported by “adequate evidence.” The licensee, however, bears the burden of going forward to demonstrate that the order, including the Staff’s immediate effectiveness determination, is not based upon adequate evidence, but rather upon mere suspicion, unfounded allegations, or clear error. *See Eastern Testing and Inspection, Inc.*, LBP-96-9, 43 NRC 211, 216 (1996).

## B. Immediately Effective Suspension of UES License

UES, which is situated in Beachwood, New Jersey, is the holder of a byproduct nuclear material license, No. 29-28358-02, that authorizes UES to possess certain byproduct material for industrial radiography at temporary job sites anywhere in the United States where the NRC maintains jurisdiction to regulate the use of such material. *See* 67 Fed. Reg. 36,038 (May 22, 2002). The UES license suspension was precipitated by an event that occurred on September 25, 2001, in Baltimore, Maryland, in which a radiographer, employed by the Licensee, was exposed to radiation in excess of the regulatory limits.<sup>2</sup> In response to this incident, the Staff initiated an investigation that resulted in the suspension of UES Byproduct Material License No. 29-28385-02.

The May 14, 2002 suspension order required UES to (1) place all NRC-licensed material in secure storage; (2) suspend all activities under the license; (3) refrain from ordering, purchasing, receiving, or transferring material authorized by the license; and (4) maintain all records related to the license in their original, unaltered state. 67 Fed. Reg. at 36,039. This order was based upon four significant Staff findings.

First, the Staff alleges that the exposed radiographer did not receive annual refresher training as required by 10 C.F.R. § 34.43(d) or the annual refresher training exam. Indeed, with regard to the latter, the Staff contends that another individual, an assistant radiographer, completed the annual exam in the exposed radiographer's place. In addition, the Staff claims that the UES President, who also acts as the UES Radiation Safety Officer (RSO), certified and submitted to the Staff an inaccurate training record regarding this radiographer in violation of 10 C.F.R. §§ 30.9, 34.79(b). *Id.* at 36,038.

As a second basis for suspending the UES license, the Staff states that the former UES operations manager knowingly transported and used a radiographic device without the required end cap. According to the Staff, the end cap ensures the proper positioning, locking, and shielding of the source in the radiographic device. *Id.*

Third, the Staff claims that the President/RSO deliberately provided inaccurate information regarding the status and use of the radiographic equipment at the UES facility. According to the Staff, an October 9, 2001 response to an October 4, 2001 Staff confirmatory action letter (CAL), certified and signed by the UES President/RSO, stated that all locks, locking mechanisms, and end caps on the UES equipment were checked and in proper working condition. The Staff indicates, however, that on October 10, 2001, an agency inspection discovered a UES radiographic device that was missing an end cap. Further, the Staff

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<sup>2</sup> Acknowledging that the activity in question occurred in Maryland, an Agreement State, the Staff nonetheless pursued the investigation because UES was utilizing equipment it was authorized to possess and use pursuant to its NRC license, which UES holds by reason of its location in the non-Agreement State of New Jersey.

claims that this same device was used by the President/RSO to perform a job on October 2, 2001. *Id.* at 36,038-39.

Finally, the Staff alleges that UES management allowed an assistant radiographer to perform the duties of a radiographer even though UES management knew the assistant was not certified to perform such duties. According to the Staff, a UES report indicated that both the assistant radiographer and the radiographer performed work on a September 8, 2001 project in Paulsboro, New Jersey. The Staff claims, however, that its subsequent investigation determined that the radiographer did not perform work on that particular day. Instead, the work in question was performed by two assistant radiographers. *Id.* at 36,039.

In its order, the Staff declares that the agency must be able to rely on a licensee and its employees to comply with NRC requirements and to ensure that radiographers do not perform licensed activities without completing required training; that radiographic equipment should not be used if it is found to be defective; and that the agency must be able to rely upon information submitted by a licensee to be complete and accurate in all material respects. Nevertheless, the Staff asserts that the UES actions outlined above, which the Staff contends involve deliberately failing to comply with agency requirements and regulations and providing inaccurate information to the NRC, have raised serious doubts about the degree to which UES can be relied upon to comply with NRC requirements in the future. The Staff thus concludes that, in light of these findings as well as the significant health and safety impacts that can arise from radiology requirement violations such as the significant exposure that was suffered by the UES employee during the September 2001 Maryland incident, the UES license should be suspended. Additionally, the Staff finds that because of the safety significance involved when radiography is conducted by individuals who have not completed all required training and certification, the order should be made effective immediately on May 14, 2002.<sup>3</sup> *Id.*

## II. ANALYSIS

The responses provided by the UES President/RSO at the June 2002 oral argument make it apparent UES is a small evaluation testing operation that employs only nine individuals, including the President/RSO. Further, providing radiographic evaluation services apparently is an important part of UES's overall business operations, given that it constituted about 60% of its work before the license suspension. *See Tr.* at 12-13. As a consequence, the current license

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<sup>3</sup>In addition, the order contains a 10 C.F.R. § 2.204 demand for information that asks UES to explain why its license should not be revoked.

suspension undoubtedly has a significant impact upon the company and its employees. Moreover, in light of the small size of the firm and the seeming importance of its NRC license to its continued financial health, it would appear that UES radiographic operations should be a central focus for UES management. In reviewing the UES responses to the Staff's allegations, however, an unfortunate central theme seems to emerge: While clearly concerned about the various incidents cited by the Staff, the UES President/RSO declares he either knew nothing about them; or tried to take steps to address them that, for one reason or another, were not successfully carried out by company personnel; or will ensure they do not occur in the future. As we outline below, however, these explanations do not undercut or otherwise refute the Staff's showing in support of its effectiveness determination.

#### **A. Refresher Training Allegations**

Relative to the first Staff claim concerning annual refresher training for the radiographer involved in the September 2001 incident and this individual's annual refresher test that purportedly was taken by an assistant radiographer, in the various UES responses to the Staff order/request for immediate effectiveness, the UES President/RSO declares that he was not aware that the radiographer had not taken the test because he did not administer or witness the administration of the exam, but simply signed a certification generated by the assistant RSO. *See* UES Request at 2; UES Reply at 1. Further, in the face of a Staff showing in its response that the assistant to the RSO recalled refusing to sign the test form in his presence because of her belief that the handwriting did not match that of the radiographer, *see* Staff Response at 5, Teator Affidavit at 3, the UES President/RSO is unable to provide any explanation other than to deny that the incident ever occurred, *see* UES Reply at 2. With respect to providing the requisite annual refresher training, the Staff reports that the radiographer, when interviewed, denied receiving any training in 2001 (other than brief conversations with the assistant RSO). *See* Staff Response at 4, Teator Affidavit at 2. On the other hand, the President/RSO declares that, contrary to the Staff assertion, the alleged annual training deficiency claim is not valid because he personally provided "on the job" instruction on a regular basis, which he asserts would fulfill the annual radiographer training requirement in 10 C.F.R. § 34.43(a). *See* UES Request at 1; UES Reply at 1. Further, the UES President/RSO declares that he has now arranged for an outside firm to administer the annual testing program by providing the training and that he personally will administer/witness the annual exams, grade them, and recertify the individuals involved. *See* UES Request at 1; UES Reply at 2.

With respect to the purported UES failure to provide the radiographer involved in the Maryland incident with refresher training, while the Staff has indicated that the UES President/RSO's "on the job" approach might be acceptable, it notes

that this scheme still has a fatal flaw in this instance, i.e., it was never reported as such in accord with 10 C.F.R. §§ 30.9, 34.79(b).<sup>4</sup> *See* Staff Response at 4; Tr. at 36-37. UES does not refute this point, nor does it make any concerted attempt to contravene the Staff’s showing that the radiographer did not take the annual refresher test so as to place this information in the category of “inadequate evidence.” *Compare Eastern Testing and Inspection, Inc.*, LBP-96-9, 43 NRC at 220 (licensee showing that Staff supporting witness was dismissed for apparent dishonesty leaves presiding officer unable to credit witness testimony as sufficiently reliable to provide “adequate evidence” to support immediate effectiveness determination). Finally, the UES showing regarding corrective actions, while perhaps useful to provide a basis for settling this matter, does not render inadequate any aspect of the evidentiary basis for the Staff’s effectiveness determination. As a consequence, the Staff has provided “adequate evidence” to establish this refresher training matter as a relevant basis for its effectiveness determination.

## **B. Missing End Cap Claim**

Although initially admitting the Staff’s claims regarding this matter, UES subsequently raised questions about the real safety significance of the end cap by asserting that, while it protects the source assembly of the radiographic camera being used from water, mud, sand, and other matter during storage and transport in accordance with 10 C.F.R. § 34.20(c)(3), the end cap plays no role in keeping the radioactive material safely locked in a shielded position. *See* UES Request at 2; UES Reply at 2; Tr. at 17-19. Further, UES declared that as a corrective action regarding the missing end cap, the UES President/RSO has reviewed daily equipment inspection criteria with all UES radiographers and assistant radiographers, and made it clear that any piece that is not working properly should be “red-tagged” and removed from use until it is fixed or replaced. The UES President/RSO also states he will now perform these activities personally. *See* UES Request at 3.

As the Staff points out, the above-cited agency regulation requiring end cap placement during storage and transportation of radiographic cameras to prevent, among other things, corrosion that might impact the safe operation of internal camera components. *See* Tr. at 31-32. Moreover, without the end cap, the key used to lock the source in place cannot be removed from the camera, thus preventing the camera from being fully locked. *See* Tr. at 41-42. For its part, UES acknowledges the Staff’s claim that the end cap was not in place when the camera was stored and transported, and further provides nothing that would cause us to

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<sup>4</sup>Indeed, as the UES President/RSO indicated during the June 6 oral argument, even the radiologist being trained was not aware of the training. *See* Tr. at 25.

conclude that this failure lacks any regulatory significance. Once again, therefore, we find that the Staff has provided “adequate evidence” to establish this end cap matter as a relevant basis for its effectiveness determination.

### C. UES Response to Staff CAL

UES admits the substance of this claim, including the October 9, 2001 submission of a statement to the agency by UES that the locking mechanisms for all radiographic exposure devices were inspected and in good operating condition when, in fact, one was missing an end cap, and the President/RSO’s own use of a radiographic camera that lacked an end cap on October 2, 2001. The UES President/RSO declares that the missing cap only came to his attention at the end of the job when the equipment was being broken down, at which time he instructed the assistant radiographer (who had signed out the camera originally) to red tag the equipment for repair before further use. The UES President/RSO also asserts that after October 4, 2001, he gave instructions that all equipment be inspected and fixed and he assumed this had been done when he signed the October 9 UES CAL response letter. According to the UES President/RSO, however, as evidenced by the fact that the camera was identified during the Staff’s October 10, 2001 inspection as not being out of service, his initial instructions to “red tag” the camera, his later command to ensure that it and all other equipment was inspected and maintained, and a further October 9, 2001 directive to the Operations Manager to red tag the camera were not followed. *See* UES Request at 2-3; UES Reply at 2; Tr. at 21-22. Finally, the UES President/RSO declares that, as is the case with regard to the missing end cap matter, he has reviewed daily equipment inspection criteria with all UES radiographers and assistant radiographers and made it clear that any equipment that is not working properly should be “red-tagged” and removed from use until it is fixed or replaced, activities that the President/RSO will now perform personally. *See* UES Request at 3.

The information provided by UES regarding this CAL response claim, while apparently presented in an attempt to show that the UES President/RSO was aware of, and tried to deal with, the end-cap maintenance problem, does nothing to controvert the reliability of the basic information presented by the Staff to show that the UES October 9 CAL response letter was not correct and accurate.<sup>5</sup> As before, we find that the Staff has provided “adequate evidence” to establish this matter as a relevant basis for its effectiveness determination.

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<sup>5</sup> Although it should be apparent, it bears repeating that a licensee such as UES is responsible for the actions of those individuals it employs to use radiological material and is entrusted, through its RSO and other management officials, with taking all reasonable steps to guarantee that technical, administrative, and other safeguards needed to protect and control those materials in accordance with agency regulations are in place and are followed. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 311-12 (1994), *aff’d*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (table).

#### **D. Assistant Radiographer Acting as Radiographer**

In its rescission response, the Staff outlines the basis for this alleged 10 C.F.R. § 34.43(a)(1) violation, which it asserts occurred on September 8, 2001, when an assistant radiographer, with the acquiescence of UES management, performed the duties of a radiographer knowing that he was not certified to do so. According to the Staff, its investigators obtained a radiation report for work performed that date in Paulsboro, New Jersey, for a company, A & J Welding, that identifies a radiographer and radiographer assistant who purportedly did this job. Also, Staff investigators purport to have information gathered from the named radiographer that indicates she did not work between August 20 and September 18, 2001. Further, the Staff declares, a September 8, 2001 Licensee radiographic inspection report for client A & J Welding lists the assistant radiographer under the heading “radiographer” and lists another assistant radiographer under the heading “assistant.” Moreover, according to the Staff, when questioned by Staff investigators about this situation, the assistant radiographer declined to comment and terminated the interview. Finally, the Staff states that an A & J Welding co-owner advised Staff investigators that the radiographer identified in the radiation report did not perform work there in that capacity. *See* Staff Response at 6-7.

In addressing this matter in the UES rescission request, the later reply pleading, and at the oral argument, the UES President/RSO essentially declares that he knew nothing about this matter nor could he shed any light on why the assistant radiographer would perform the radiographer’s duties given it is not UES practice to send an assistant radiographer to a project to perform radiographer duties. *See* UES Request at 3; UES Reply at 3; Tr. at 22-23. As corrective action, however, the UES President/RSO indicates that over the past 6 months he has, and will continue to, supervise and review radiographic operation daily schedules to assure that there is a certified radiographer on each project. *See* UES Request at 3.

Although, as presented to us in the May 22 Staff response, this Staff claim is the most problematic in terms of its evidentiary underpinnings,<sup>6</sup> there nonetheless is “adequate evidence” to establish this matter as a basis for the Staff’s effectiveness

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<sup>6</sup>As described in the Staff’s May 22, 2002 responsive pleading, the alleged UES actions in connection with this purported section 34.43(a)(1) violation apparently have a number of factual bases, including a radiation report given to customer A & J Welding that, in contrast to the UES radiographic inspection report, identifies another radiographer as doing the September 8 work; a statement from an A & J Welding co-owner that indicates this radiographer did not perform work there as a radiographer; and “information gathered from the radiographer identified in the report, [indicating] she did not work from August 20, 2001 to September 18, 2001.” Staff Response at 6-7. None of this information, however, is set forth in the investigator affidavits that are provided in support of the Staff’s response. Indeed, the Monroe affidavit, which is the only one that mentions this incident, declares that during an April 24, 2002 interview the assistant radiographer “was confronted with evidence that the radiographer on [the A & J Welding radiation report for September 8, 2001] was absent from work for an extended period of a few weeks which included September 8, 2001.” Monroe Affidavit at 1. Yet, the source or substance of that evidence is not described, nor is there any affirmation of the veracity of the evidence by the assistant radiographer, who reportedly refused further comment when confronted with its substance. Based on this showing, the Board would be hard pressed to find that there is “adequate evidence” to support this Staff claim.

determination. We make this finding based principally on the Staff's identification of the Licensee radiographic inspection report as listing the assistant radiographer under the heading of "radiographer," *see* Staff Response at 6, and the statement in the May 30 UES reply that "[t]he assistant radiographer erroneously took it upon himself to perform the job on his own," UES Reply at 3.

**E. Need for Immediate Effectiveness of the UES Radiography License Suspension**

As was noted earlier, to support an immediate effectiveness determination, in addition to showing that the bases for the order are supported by adequate evidence, the Staff must show there is a need for immediate effectiveness that is supported by adequate evidence. That need can be established by showing either that the alleged violations or the conduct supporting the violations is willful/deliberate or that the public health, safety, or interest requires immediate effectiveness. *See Eastern Testing and Inspection*, LBP-96-9, 43 NRC at 227.

Regarding the suspension of the UES radiography license, the four Staff claims that we have found are supported by adequate evidence, taken together, likewise demonstrate the need for immediate effectiveness in accordance with this standard. With regard to the first item — the refresher training matter — it has an element both of willfulness and potentially serious public health and safety impacts. The circumstances surrounding the test-taking incident indicate willful misrepresentations on the part of those involved. Moreover, the serious health and safety consequences that can arise from a lack of meaningful refresher training as required by agency regulations are illustrated by the overexposure to the radiographer, who is the focus of this training matter. Matters two and three — the missing end cap and the related UES CAL response — respectively reveal a continuing, deliberate disregard for appropriate safety and maintenance procedures relative to radiographic equipment that, as the incident that triggered the Staff's investigation of UES again reflects, can result in significant health and safety impacts if it is mishandled or not properly maintained. Further, regarding item four — the assistant radiographer performing radiographer's duties — both willfulness and health and safety concerns again are implicated in the reported use of an assistant radiographer to perform a radiographer's duties. Finally, as the Staff points out, all four of these items in concert suggest that there are widespread problems with the UES program that raise significant health and safety concerns for both the public and UES employees so as to merit an immediately effective suspension. *See Tr.* at 34.

We thus find that, in toto, these claims are adequate to meet the Staff's burden relative to the suspension of the UES radiography license.

### III. JOINT PREHEARING REPORT

As the Board noted previously in its May 29, 2002 memorandum and order, to clarify the matters at issue in this proceeding, it requests that on or before *Monday, July 15, 2002*, UES and the Staff file a joint prehearing report that contains the following information:

A. With respect to the various legal and factual assertions that are set forth in the May 14, 2002 Staff order, the parties should provide a statement outlining the central issues for litigation in this proceeding. If the parties cannot agree on the wording or inclusion of any issue, the statement should set forth that issue separately with a notation identifying the sponsoring party. Each issue should reference any of the alleged violations that relate to that issue.

B. A statement identifying which, if any, of the issues specified in accordance with section III.A of this Memorandum and Order each party believes is amenable to a dispositive motion pursuant to 10 C.F.R. § 2.749 and whether discovery will be needed prior to filing a dispositive motion on that issue.

C. A statement indicating how long the parties estimate they will need to conduct discovery on the issues specified in accordance with section III.A of this Memorandum and Order. In this statement, the parties also should discuss whether the ongoing investigation and the pending Staff demand for information included as part of the May 14, 2002 order have any impact on the conduct of discovery in (or any other aspect of) this proceeding.

D. A statement indicating how long the parties estimate will be needed to conduct an evidentiary hearing on the issues specified in accordance with section III.A of this Memorandum and Order.

E. A statement describing the status of any settlement discussions between the parties.

### IV. CONCLUSION

Pursuant to 10 C.F.R. § 2.202(c)(2)(i), in the face of a Licensee challenge to a Staff immediate effectiveness determination, we are to uphold the Staff's determination that the order should be made immediately effective if it is supported by "adequate evidence." In this instance, after reviewing the allegations identified by the Staff as supporting immediate effectiveness for its May 14, 2002 order, we find with respect to items one through four that the Staff has met its burden of establishing by "adequate evidence" that (1) those charges are not based on "mere suspicion, unfounded allegations, or error"; and (2) there is a need to make the order effectively immediately.

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For the foregoing reasons, it is, this fourteenth day of June 2002, ORDERED that:

1. UES's May 17, 2002 request to set aside the immediate effectiveness of the Staff's May 14, 2002 order suspending UES Byproduct Material License No. 29-28385-02 is *denied*.

2. In accordance with 10 C.F.R. § 2.202(c)(2)(i), this Order upholding immediate effectiveness is final agency action on immediate effectiveness.

3. A joint prehearing report shall be submitted in accordance with section III above.

THE ATOMIC SAFETY AND  
LICENSING BOARD<sup>7</sup>

G. Paul Bollwerk, III, Chairman  
ADMINISTRATIVE JUDGE

Thomas D. Murphy  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
June 14, 2002

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<sup>7</sup> Copies of this Memorandum and Order are being sent this date by Internet e-mail transmission to UES President Joseph J. Ferenc and Staff counsel.

Judge Cole was not available to sign this Memorandum and Order, but reviewed its contents and agrees with the reasoning and result set forth therein.

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### DOMINION NUCLEAR CONNECTICUT, INC.

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket Nos. 50-336-LA, 50-423-LA; CLI-02-1, 55 NRC 1 (2002)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 50-423-LA-3 (Facility Operating License NPF-49); CLI-02-5, 55 NRC 161 (2002)

OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER (Late-Filed Contention Concerning Acts of Terrorism Affecting Spent Fuel Pool); Docket No. 50-423-LA-3 (ASLBP No. 00-771-01-LA-R) (Facility Operating License NPF-49); LBP-02-5, 55 NRC 131 (2002)

### DUKE COGEMA STONE & WEBSTER

MATERIALS LICENSE; MEMORANDUM AND ORDER; Docket No. 70-03098-ML; CLI-02-2, 55 NRC 5 (2002); CLI-02-4, 55 NRC 158 (2002); CLI-02-7, 55 NRC 205 (2002); CLI-02-9, 55 NRC 245 (2002)

### DUKE ENERGY CORPORATION

LICENSE RENEWAL; MEMORANDUM AND ORDER; Docket Nos. 50-369-LR, 50-370-LR, 50-413-LR, 50-414-LR (consolidated); CLI-02-6, 55 NRC 164 (2002); CLI-02-14, 55 NRC 278 (2002)

LICENSE RENEWAL; MEMORANDUM AND ORDER (Ruling on Standing and Contentions); Docket Nos. 50-369-LR, 50-370-LR, 50-413-LR, 50-414-LR (ASLBP No. 02-794-01-LR); LBP-02-4, 55 NRC 49 (2002)

### INTERNATIONAL URANIUM (USA) CORPORATION

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 40-8681-MLA-11; CLI-02-10, 55 NRC 251 (2002)

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 40-8681-MLA-10; CLI-02-13, 55 NRC 269 (2002)

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Denying Hearing Requests for Lack of Standing); Docket No. 40-8681-MLA-10 (ASLBP No. 02-793-01-MLA); LBP-02-3, 55 NRC 35 (2002)

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Granting Two Hearing Requests and Denying a Third Such Request); Docket No. 40-8681-MLA-11 (ASLBP No. 02-795-02-MLA); LBP-02-6, 55 NRC 147 (2002)

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Denying Motions for a Stay *Pendente Lite* and a Related Motion); Docket No. 40-8681-MLA-11 (ASLBP No. 02-795-02-MLA); LBP-02-9, 55 NRC 227 (2002)

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Denying Request for an Order Directing the Withdrawal of Issued License Amendment); Docket No. 40-8681-MLA-11 (ASLBP No. 02-795-02-MLA); LBP-02-11, 55 NRC 301 (2002)

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Responding to Commission Remand in CLI-02-13); Docket No. 40-8681-MLA-10 (ASLBP No. 02-793-01-MLA-R); LBP-02-12, 55 NRC 307 (2002)

### PACIFIC GAS AND ELECTRIC COMPANY

LICENSE TRANSFER; MEMORANDUM AND ORDER; Docket Nos. 50-275-LT, 50-323-LT; CLI-02-12, 55 NRC 267 (2002); CLI-02-16, 55 NRC 317 (2002)

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### PRIVATE FUEL STORAGE, L.L.C.

INDEPENDENT SPENT FUEL STORAGE INSTALLATION; MEMORANDUM AND ORDER; Docket No. 72-22-ISFSI; CLI-02-3, 55 NRC 155 (2002); CLI-02-8, 55 NRC 222 (2002); CLI-02-11, 55 NRC 260 (2002)

INDEPENDENT SPENT FUEL STORAGE INSTALLATION; ORDER; Docket No. 72-22-ISFSI; CLI-02-15, 55 NRC 299 (2002)

INDEPENDENT SPENT FUEL STORAGE INSTALLATION; MEMORANDUM AND ORDER (Ruling on Applicant's Motion for Summary Disposition of Part B of "Contention Utah L, Geotechnical"); Docket No. 72-22-ISFSI (ASLBP No. 97-732-02-ISFSI); LBP-02-1, 55 NRC 11 (2002)

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### TENNESSEE VALLEY AUTHORITY

CIVIL PENALTY; MEMORANDUM AND ORDER (Denying Motion for Summary Disposition); Docket Nos. 50-390-CivP, 50-327 CivP, 50-328-CivP, 50-259-CivP, 50-260-CivP, 50-296-CivP (ASLBP No. 01-791-01-CivP) (EA 99-234); LBP-02-10, 55 NRC 236 (2002)

### UNITED EVALUATION SERVICES, INC.

ENFORCEMENT ACTION; MEMORANDUM AND ORDER (Denying Licensee Request To Set Aside Immediate Effectiveness); Docket No. 30-35870-EA (ASLBP No. 02-800-01-EA) (EA-02-103); LBP-02-13, 55 NRC 351 (2002)

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