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## POST HEARING MATTERS

# 4.0 POST HEARING MATTERS

## 4.1 Settlements and Stipulations

The Commission looks with favor upon settlements and is loath to second-guess the parties' (including Staff's) evaluation of their own interest. The Commission, like the Board, looks independently at such settlements to see whether they meet the public interest. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 205 (1997).

10 CFR § 2.759 expressly provides, and the Commission stresses, that the fair and reasonable settlement of contested initial licensing proceedings is encouraged. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3), ALAB-532, 9 NRC 279, 283 (1979). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171, 201 (2002); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 129 (2002). This was reiterated in the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981); see also Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), LBP-94-10, 39 NRC 126 (1994); Barnett Industrial X-ray, Inc. (Stillwater, Oklahoma), LBP-97-19, 46 NRC 237, 238 (1997).

The Presiding Officer may attempt to facilitate negotiations between parties when they are seeking to resolve some or all of the pending issues. International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), LBP-98-20, 48 NRC 137, 138 (1998).

Parties may seek appointment of a settlement judge in accordance with the Commission's guidance in Rockwell Int'l Corp., CLI-90-05, 31 NRC 337 (1990). The Commission encourages the appointment of settlement judges. Since settlement judges are not involved in a decision-making role and not bound by the ex parte rule, they may avail themselves of a wider array of settlement techniques without compromising the rights of any of the parties. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171, 202 (2002).

When a party requests to withdraw a petition pursuant to a settlement, it is appropriate for a licensing board to review the settlement to determine whether it is in the public interest. 10 C.F.R. § 2.759. See also Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71 (1994); Sequoyah Fuels Corp. and General Atomic (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 256-57 (1996); John Boschuk, Jr. (Order Prohibiting Involvement in NRC-licensed activities), LBP-98-15, 48 NRC 57, 59 (1998); Lourdes T. Boschuk (Order Prohibiting Involvement in NRC-licensed activities), LBP-98-16, 48 NRC 63, 65 (1998); Magdy Elamir, M.D. (Newark, NJ), LBP-98-25, 48 NRC 226, 227 (1998); 21st Century Technologies, Inc. (Fort Worth, TX), CLI-98-1, 47 NRC 13 (1998). (See also 3.18.1). When the board has held extensive hearing and has analyzed the record, it may not need to see the settlement agreement in order to conclude that the withdrawal of the petitioner is in the public interest. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-96-16, 44 NRC 59, 63-65 (1996).

A licensing Board may refuse to dismiss a proceeding "with prejudice" even though all the participants jointly request that action, unless it is persuaded by legal and factual

arguments in support of that request. General Public Utilities Nuclear Corp. et al. (Three Mile Island Nuclear Station, Unit 2), LBP-92-29, 36 NRC 225 (1992). A settlement agreement must be submitted to the Licensing Board for a determination as to whether it is "fair and reasonable" in accordance with 10 CFR 2.759. A petition may be dismissed with prejudice providing that a Board reviews the settlement agreement and finds, consistent with 10 CFR 2.759, that it is a "fair and reasonable settlement." General Public Utilities Nuclear Corp. et al. (Three Mile Island Nuclear Station, Unit 2), LBP-92-30, 36 NRC 227 (1992).

Pursuant to 10 C.F.R. § 2.203, in contested enforcement proceedings settlements are subject to the approval of a presiding officer, or if none has been assigned, the Chief Administrative Law Judge, according due weight to the position of staff. The settlement need not be immediately approved. If it is in the "public interest," an adjudication of the issues may be ordered. 10 C.F.R. § 2.203; Sequoyah Fuels Corp. and General Atomics, LBP-96-18, 42 NRC 150, 154 (1995); Barnett Industrial X-ray, Inc. (Stillwater, Oklahoma), LBP-97-19, 46 NRC 237, 238 (1997); Conam Inspection, Inc. (Itasca, IL), LBP 98-31, 48 NRC 369 (1998).

The Commission is willing to presume that its staff acted in the agency's best interest in agreeing to the settlements. Only if the settlement's opponents show some "substantial" public-interest reason to overcome that presumption will the Commission undo the settlement. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 208 (1997).

In the Orem case, although the Commission expressed reservations about aspects of the settlement agreement, the Commission permitted the agreement to take effect since it did not find the agreement to be, on balance, against the public interest. In the Matter of Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427 (1993). Cf. Safety Light Corp. (Bloomsburg Site Decontamination, Decommissioning, License Renewal Denials, and Transfer of Assets), LBP-94-41, 40 NRC 340, 341 (1994).

As true with court proceedings requiring judicial approval of settlements, see, e.g., Evans v. Jeff D., 475 U.S. 717, 727 (1986); Jeff D. V. Andrus, 899 F.2d 753, 758 (9th Cir. 1989); In re Warner Communications Sec. Litig., 798 F2d 35, 37 (2d Cir. 1986), a presiding officer does not have the authority to revise the parties' settlement agreement without their consent. A presiding officer thus must accept or reject the settlement with the provisions proposed by the parties. Eastern Testing and Inspection, Inc., LBP-96-11, 43 NRC 279, 282 n.1 (1996).

When the parties agree to settle an enforcement proceeding, the Licensing Board loses jurisdiction over the settlement agreement once the Board's approval under 10 C.F.R. § 2.203 becomes final agency action. Thereafter, supervisory authority over such an agreement rests with the Commission. Eastern Testing and Inspection, Inc., LBP-96-11, 43 NRC 279, 282 n.1 (1996) (citing Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4) , CLI-80-12, 11 NRC 514, 417 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757-58 (1983). The Commission looks with favor upon settlements. 21st Century Technologies, Inc. (Fort Worth, TX), LBP-98-1, 47 NRC 1 (1998); 21st Century Technologies, Inc. (Fort Worth, TX), CLI-98-1, 47 NRC 13, 16 (1998).

The NRC is not required under the AEA to adhere without compromise to the remedial plan of an enforcement order. Such a restriction would effectively preclude settlement because, by prohibiting any meaningful compromise as to remedy, it would eliminate the element of exchange which is the groundwork for settlements. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 219-220 (1997).

In examining a settlement of a enforcement proceeding, the Commission divides its public-interest inquiry into four parts: (1) whether, in view of the agency's original order and risks and benefits of further litigation, the settlement result appears unreasonable; (2) whether the terms of the settlement appear incapable of effective implementation and enforcement; (3) whether the settlement jeopardizes the public health and safety; and (4) whether the settlement approval process deprives interested parties of meaningful participation. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 202-224 (1997).

In reviewing risks and benefits, the Commission considers (1) the likelihood (or uncertainty) of success at trial; (2) the range of possible recovery and the related risk of uncollectibility of a larger trial judgement; and (3) the complexity, length, and expense of continued litigation. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 209 (1997).

The essence of settlements is compromise and the Commission will not judge them on the basis of whether the Staff (or any party) achieves in a settlement everything it could possibly attain from a fully and successfully litigated proceeding. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 210-211 (1997).

Pursuant to 10 CFR § 2.203, any negotiated settlement between the Staff and any of the parties subject to an enforcement order must be reviewed and approved by the presiding officer. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71 (1994); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 256 (1996), aff'd, CLI-97-13, 46 NRC 195 (1997).

The issue is not whether the matter before the Board presents the best settlement that could have been obtained. The Board's obligation instead is merely to determine whether the agreement is within the reaches of the public interest. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249, 257 (1996); Special Testing Laboratories, Inc., LBP-99-2, 49 NRC 38, 38 (1999). If the agreement is not in the public interest, the Board may require an adjudication of any issues that require resolution prior to termination of the proceeding. Sequoyah Fuels, supra, 44 NRC at 256. 21st Century Technologies, Inc. (Fort Worth, TX), LBP-98-1, 47 NRC 1 (1998).

10 CFR § 2.203 sets forth the Board's function in reviewing settlements in enforcement cases. It provides that (1) settlements are subject to the Board's approval; (2) the Board, in considering whether to approve a settlement, should "accord[] due weight to the position of the staff"; and (3) the Board may "order such adjudication of the issues as [it] may deem to be required in the public interest to dispose of the proceeding". Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 205 (1997).

## 4.2 Proposed Findings

Each party to a proceeding may file proposed findings of fact and conclusions of law with the Licensing Board. Despite the fact that a number of older cases have held that a Licensing Board is not required to rule specifically on each finding proposed by the parties (see Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 369 (1972), aff'd sub nom., Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974); Wisconsin Electric Power Co. (Point Beach Nuclear Power Station, Unit 2), ALAB-78, 5 AEC 319, 321 (1972)), the Appeal Board has indicated that a Licensing Board must clearly state the basis for its decision and, in particular, state reasons for rejecting certain evidence in reaching the decision. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977). 10 CFR § 2.754 permits the Licensing Board to vary its regularly provided procedures by altering the ordinary regulatory schedule for findings of fact. The NRC Staff is permitted to consider the position of other parties before finalizing its position. Consumers Power Co. (Big Rock Point Plant), LBP-82-51A, 16 NRC 180, 181 (1982).

10 CFR § 2.754(c) requires that a party's proposed findings of fact and conclusions of law be confined to the material issues of fact and law presented on the record. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). However, unless a board has previously required the filing of all arguments, a party is not precluded from presenting new arguments in its proposed findings of fact. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 NRC 1410, 1420-1421 (1983), reconsid. denied sub nom. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517 (1984).

Even though a party presents no expert testimony, it may advance proposed findings that include technical analyses, opinions, and conclusions, as long as the facts on which they are based are matters of record. The Licensing Board must do more than act as an "umpire blandly calling balls and strikes for adversaries appearing before it." The Board includes experts who can evaluate the factual material in the record and reach their own judgment as to its significance. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-35, 40 NRC 180, 192 (1994); Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-97-7, 45 NRC 265, 271 n.7 (1997).

Requiring the submission to a Licensing Board of proposed findings of fact or a comparable document is not a mere formality: it gives that Board the benefit of a party's arguments and permits it to resolve them in the first instance, possibly in the party's favor, obviating later appeal. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 906-907 (1982).

Where an intervenor chooses to file proposed findings, the Board is entitled to take that filing as setting forth all of the issues that were contested. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 371 (1983).

A pro se licensee in a civil penalty proceeding will not be held to strict compliance with the format requirements for proposed findings if it can make a convincing showing that it cannot comply with all the technical pleading requirements of 10 CFR § 2.754(c). Unlike

intervenors who voluntarily participate in licensing proceedings, a pro se licensee, who has requested a hearing, must participate in a civil penalty proceeding in order to protect its property interests. A Licensing Board will use its best efforts to understand and rule on the merits of the claims presented. Tulsa Gamma Ray, Inc., LBP-91-40, 34 NRC 297, 303-304 (1991).

When statements in applicant's proposed findings, which are based on applicant statements by witnesses under oath before the presiding officer or as part of its application, indicate a willingness to comply with all or a portion of specific, nationally recognized consensus standards, little purpose would be served in repeating the terms of these commitments as license conditions (or as presiding officer directives). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 410 (2000), citing Commonwealth Edison Co., (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 423-24 (1980).

### 4.2.1 Intervenor's Right to File Proposed Findings

An intervenor may file proposed findings of fact and conclusions of law only with respect to issues which that party placed in controversy or sought to place in controversy in the proceeding. 10 CFR § 2.754(c), 54 Fed. Reg. 33168, 33182 (August 11, 1989).

If an intervenor files additional filings that are not authorized by the board, they will not be considered in the board's decision. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, 346 (1998).

### 4.2.2 Failure to File Proposed Findings

Consistent with 10 CFR § 2.754(b), contentions for which findings have not been submitted may be treated as having been abandoned. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549, 1568 (1982).

The Appeal Board did not feel bound to review exceptions made by a party who had failed to file proposed findings on the issues with respect to which the exceptions were taken. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-280, 2 NRC 3, 4 n.2 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 964 (1974).

A Licensing Board in its discretion may refuse to rule on an issue in its initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

A party that fails to submit proposed findings as requested by a Licensing Board, relying instead on the submission of others, assumes the risk that such reliance might be misplaced; it must be prepared to live with the consequence that its further appeal rights will be waived. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982).

The filing of proposed findings of fact is optional, unless the presiding officer directs otherwise. The presiding officer is empowered to take a party's failure to file proposed findings, when directed to do so, as a default. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 21 (1983); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61 n.3 (1984). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1213 n.18 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-84-47, 20 NRC 1405, 1414 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-87-13, 25 NRC 449, 452-53 (1987).

Even when a Licensing Board order requesting the submission of proposed findings has been disregarded, the Commission's Rules of Practice do not mandate a sanction. Fermi, supra, 17 NRC at 23, citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 332-33 (1973).

The failure to file proposed findings is subject to sanctions only in those instances where a Licensing Board has directed such findings to be filed. That is the extent of the adjudicatory board's enforcement powers under 10 CFR § 2.754. Fermi, supra, 17 NRC at 23.

Absent a Board order requiring the submission of proposed findings, an intervenor that does not make such a filing is free to pursue on appeal all issues it litigated below. The setting of a schedule for filing proposed findings falls short of an explicit direction to file findings and thus does not form the basis for finding a party in default. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 371 (1983), citing, 10 CFR § 2.754; Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 21 (1983).

## 4.3 Initial Decisions

After the hearing has been concluded and proposed findings have been filed by the parties, the Licensing Board will issue its initial decision. This decision can conceivably constitute the ultimate agency decision on the matter addressed in the hearing provided that it is not modified by subsequent Commission review. Under 10 CFR § 2.764, the Licensing Board's decision authorizing issuance of an operating license is to be considered automatically stayed until the Commission completes a sua sponte review to determine whether to stay the decision. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27, 29 (1981).

Prior to 1979, an initial decision authorizing issuance of a construction permit (or operating license) was effective when issued, unless stayed. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978). At that time decisions were presumptively valid and, unless or until they were stayed or overturned by appropriate authority, were entitled to full recognition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-423, 6 NRC 115, 117 (1977)).

Under 10 C.F.R. § 2.760(a), an initial decision will constitute the final decision of the Commission forty (40) days from its issuance unless a petition for review is filed in accordance with 10 C.F.R. § 2.786, or the Commission directs otherwise. Private Fuel

Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 353 (2000).

With respect to authorization of issuance of construction permits, 10 CFR § 2.764(e) provides for Commission review, within 60 days of any Licensing Board decision that would otherwise authorize licensing action, of any stay motions timely filed. If none are filed, the Commission will within the same period of time conduct a sua sponte review and decide whether a stay is warranted. In so deciding the Commission applies the procedures set out in 10 CFR § 2.788. With regard to operating licenses, 10 CFR § 2.764(f) provides for the immediate effectiveness of a Licensing Board's initial decision authorizing the issuance of an operating license for fuel loading and low power testing (up to 5% of rated power). However, a Licensing Board's authorization of the issuance of an operating license at greater than 5% of rated power is not effective until the Commission has determined whether to stay the effectiveness of the decision.

10 C.F.R. 2.764(e) does not apply to manufacturing licenses. A manufacturing license can become effective before it becomes final. The Commission does not undertake an immediate effectiveness review of a Licensing Board decision authorizing its issuance. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), CLI-82-37, 16 NRC 1691 (1982). A Licensing Board decision on a manufacturing license becomes effective before it becomes final because the issuance of a manufacturing license does not conclude the construction permit process, such a license does not present health and safety issues requiring immediate review. Cf. 46 Fed. Reg. 47764, 47765 (September 30, 1981).

A Licensing Board's initial decision must be in writing. Although a Board's initial decision may refer to the transcript of its oral bench rulings, such practice should be avoided in complicated NRC licensing hearings because it is counterproductive to meaningful appellate review. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 727 n.61 (1985).

The findings and initial decision of the Licensing Board must be supported by reliable, probative and substantial evidence on the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187 (1975). The initial decision must contain record citations to support the findings. Virginia Electric & Power Co. (North Anna Power Station, Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 14 n.18 (1975). Of course, a Licensing Board's decision cannot be based on factual material that has not been introduced and admitted into evidence. Otherwise the parties would be deprived of the opportunity to impeach the evidence through cross-examination or to rebut it with other evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 351-52 (1978).

Licensing Boards have a general duty to insure that initial decisions contain a sufficient exposition of any ruling on a contested issue of law or fact to enable the parties and a reviewing tribunal to readily apprehend the foundation of the ruling. This is not a mere procedural nicety but it is a necessity. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 10-11 (1976); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-104, 6 AEC 179 n.2 (1973).

Clarity of the basis for the initial decision is important. In circumstances where a Licensing Board bases its ruling on an important issue on considerations other than those pressed

upon it by the litigants themselves, there is especially good reason why the foundation for that ruling should be articulated in reasonable detail. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 414 (1976). When resort is made to technical language which a layman could not be expected to readily understand, there is an obligation on the part of the opinion writer to make clear the precise significance of what is being said in terms of what is being decided. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), ALAB-336, 4 NRC 3 (1976).

The requirement that a Licensing Board clearly delineate the basis for its initial decision was emphasized by the Appeal Board in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977). Therein, the Appeal Board stressed that the Licensing Board must sufficiently inform a party of the disposition of its contentions and must, at a minimum, explain why it rejected reasonable and apparently reliable evidence contrary to the Board's findings.

Thus, a prior Licensing Board ruling in Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), LBP-77-7, 5 NRC 452 (1977), to the effect that a Board need not justify its findings by discounting proffered testimony as unreliable appears to be in error insofar as it is contrary to the Appeal Board's guidance in Seabrook. Although normally the Appeal Board was disinclined to examine the record to determine whether there is support for conclusions which the Licensing Board failed to justify, it evaluated evidence in one case because (1) the Licensing Board's decision preceded the Appeal Board's decision in Seabrook which clearly established this policy, and (2) it did not take much time for the Appeal Board to conduct its own evaluation. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 368 (1978).

In certain circumstances, time may not permit a Licensing Board to prepare and issue its detailed opinion. In this situation, one approach is for the Licensing Board to reach its conclusion and make a ruling based on the evidentiary record and to issue a subsequent detailed decision as time permits. The Appeal Board tacitly approved this approach in Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-460, 7 NRC 204 (1978). This approach has been followed by the Commission in the GESMO proceeding. See Mixed Oxide Fuel, CLI-78-10, 7 NRC 711 (1978).

It is the right and duty of a Licensing Board to include in its decision all determinations of matters on an appraisal of the record before it. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 30 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Partial initial decisions on certain contentions favorable to an applicant can authorize issuance of certain permits and licenses, such as a low-power testing license (or, in a construction permit proceeding, a limited work authorization), notwithstanding the pendency of other contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1137 (1983).

### 4.3.1 Reconsideration of Initial Decision

A Licensing Board has inherent power to entertain and grant a motion to reconsider an initial decision. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 646 (1974). (See also 4.5)

A presiding officer in a materials licensing proceeding retains jurisdiction to rule on a timely motion for reconsideration of his or her final initial decision even if one of the parties subsequently files an appeal. Curators of the University of Missouri, LBP-91-34, 34 NRC 159, 160-61 (1991), aff'd, Curators of the University of Missouri (Trump-S Project), CLI-95-1, 41 NRC 71, 93 (1995).

An authorized, timely-filed petition for reconsideration before the trial tribunal may work to toll the time period for filing an appeal. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983, 985 (1981).

A motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonably have been anticipated. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

Petitioners may be granted permission by the Commission to file a consolidated request for reconsideration if they have not had full opportunity to address the precise theory on which the Commission's first decision rests. Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 51 (2000) (emphasis from original).

A properly supported motion for reconsideration should not include previously presented arguments that have been rejected. Instead the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. Reconsideration may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-31, 52 NRC 340, 342 (2000).

## 4.4 Reopening Hearings

Hearings may be reopened, in appropriate situations, either upon motion of any party or sua sponte. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). Sua sponte reopening is required when a Board becomes aware, from any source, of a significant unresolved safety issue, Vermont Yankee, supra, or of possible major changes in facts material to the resolution of major environmental issues. Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). Where factual disclosures reveal a need for further development of an evidentiary record, the record may be reopened for the taking of supplementary evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 352 (1978). For reopening the record, the new evidence to be presented need not always be so significant that it would alter the Board's findings or conclusions when the taking of new evidence can be accomplished with little or no burden upon the parties. To exclude otherwise competent evidence because the Board's conclusions may be unchanged would not always satisfy the requirement that a record suitable for review be preserved (10 CFR § 2.756). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978). An Appeal Board indicated that it might be sympathetic to a motion to reopen a hearing if documents appended to an appellate brief constituted newly discovered evidence and

tended to show that significant testimony in the record was false. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3); (Perry Nuclear Power Plant, Units 1 and 2), ALAB-430, 6 NRC 457 (1977).

Until the full-power license for a nuclear reactor has actually been issued, the possibility of a reopened hearing is not entirely foreclosed; a person may request a hearing concerning that reactor, even though the original time period specified in the Federal Register notice for filing intervention petitions has expired, if the requester can satisfy the late intervention and reopening criteria. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), CLI-93-1, 37 NRC 1, 3-4 (1993).

Motions to reopen a record are governed by 10 CFR § 2.734, which requires that a motion to reopen a closed record be timely, that it address a significant safety or environmental issue, and that it demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-35, 40 NRC 180 (1994). A motion to reopen a closed record is designed to consider additional evidence of a factual or technical nature, and is not the appropriate method for advising a Board of a non-evidentiary matter such as a state court decision. A Board may take official notice of such non-evidentiary matters. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 521 (1988).

New regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981).

Where a record is reopened for further development of the evidence, all parties are entitled to an opportunity to test the new evidence and participate fully in the resolution of the issues involved. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830 (1976). Permissible inquiry through cross-examination at a reopened hearing necessarily extends to every matter within the reach of the testimony submitted by the applicants and accepted by the Board. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 94 (1977).

A Licensing Board lacks the power to reopen a proceeding once final agency action has been taken, and it may not effectively "reopen" a proceeding by independently initiating a new adjudicatory proceeding. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977).

The Licensing Board also lacks the jurisdiction to consider a motion to reopen the record after a petition to review a final order has been filed. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355, 357 (2000), n.3, citing, Philadelphia Electric Co., (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983); cf. Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 93-94 (1995).

An adjudicatory board does not have jurisdiction to reopen a record with respect to an issue when finality has attached to the resolution of that issue. This conclusion is not altered by the fact that the board has another discrete issue pending before it. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2),

LBP-83-25, 17 NRC 681, 684 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 n.9 (1984), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1588 (1984), clarified, ALAB-797, 21 NRC 6 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-821, 22 NRC 750, 752 (1985).

Where finality has attached to some, but not all, issues, new matters may be considered when there is a reasonable nexus between those matters and the issues remaining before the Board. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 n.9 (1984), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1588 (1984), clarified, ALAB-797, 21 NRC 6 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-821, 22 NRC 750, 752 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 306-07 (1988). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1714 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-930, 31 NRC 343, 346-47 (1990). The focus is on whether and what issues are still being reviewed. Waterford, supra, 20 NRC at 1589 n.4, citing, North Anna, supra, 9 NRC at 708.

A Board has no jurisdiction to consider a motion to reopen the record in a proceeding where it has issued its final decision and a party has already filed a petition for Commission review of the decision. The motion to reopen the record should be referred to the Commission for consideration. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773, 775 (1985).

Once an appeal has been filed, jurisdiction over the appealed issues passes to the appellate tribunal and motions to reopen on the appealed issues are properly entertained by the appellate tribunal. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326-27 (1982).

Under former practice, the Appeal Board dismissed for want of jurisdiction a motion to reopen hearings in a proceeding in which the Appeal Board had issued a final decision, followed by the Commission's election not to review that decision. The Commission's decision represented the agency's final action, thus ending the Appeal Board's authority over the case. The Appeal Board referred the matter to the Director of Nuclear Reactor Regulation because, under the circumstances, he had the discretionary authority to grant the relief sought subject to Commission review. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261,262 (1979). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-1330 (1983).

The fact that certain issues remain to be litigated does not absolve an intervenor from having to meet the standards for reopening the completed hearing on all other radiological health and safety issues in order to raise a new non-emergency planning contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1138 (1983).

### 4.4.1 Motions to Reopen Hearing

A motion to reopen the hearing can be filed by any party to the proceeding. A person or organization which was not a party to the proceeding may not file a motion to reopen the record unless it has filed for, and been granted, late intervention in the proceeding under 10 CFR § 2.714(a)(1). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1, 6 (1992), affirmed, Dow v. NRC, 976 F.2d 46 (D.C. Cir. 1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 76 (1992). Stringent criteria must be met in order for the record to be reopened. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-9, 39 NRC 122, 123 (1994). Pursuant to 10 CFR § 2.734, a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

> (a)(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
> (2) The motion must address a significant safety issue.
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.
> (b) The motion must be accompanied by one or more affidavits which set forth factual and/or technical bases for the movant's claim. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.734(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. . . . Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-9, 39 NRC 122, 123-24 (1994).

In addition, the motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claims. 10 CFR § 2.734(b); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC 725, 734 (1989), aff'd on other grounds, ALAB-949, 33 NRC 484 (1991). In addition, the movant is also free to rely on, for example, Staff-applicant correspondence to establish the existence of a newly discovered issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). A movant may also rely upon documents generated by the applicant or the NRC Staff in connection with the construction and regulatory oversight of the facility. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 17 & n.7 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).

As is well settled, the proponent of a motion to reopen the record has a heavy burden to bear. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19

NRC 282, 283 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-936, 32 NRC 75, 82 & n.18 (1990).

Where a motion to reopen relates to a previously uncontested issue, the moving party must satisfy both the standards for admitting late-filed contentions, 10 CFR § 2.714(a), and the criteria established by case law for reopening the record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 & n.4 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 & n.2 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 17 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 n.1 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.13, 34 (1990), aff'd, ALAB-936, 32 NRC 75 (1990).

The new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 CFR 2.714(b) for admissible contentions. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). The supporting information must be more than mere allegations; it must be tantamount to evidence which would materially affect the previous decision. Id.; Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 74 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). To satisfy this requirement, it must possess the attributes set forth in 10 CFR 2.743(c) which defines admissible evidence as "relevant, material, and reliable." Pacific Gas and Electric Co., supra, 19 NRC at 1366-67; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). Embodied in this requirement is the idea that evidence presented in affidavit form must be given by competent individuals with knowledge of the facts or by experts in the disciplines appropriate to the issues raised. Pacific Gas and Electric Co., supra, 19 NRC at 1367 n.18; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3),

ALAB-812, 22 NRC 5, 14, 50 n.58 (1985); Turkey Point, supra, 25 NRC at 962; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 43132 (1989).

Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991).

Exhibits which are illegible, unintelligible, undated or outdated, or unidentified as to their source have no probative value and do not support a motion to reopen. In order to comply with the requirement for "relevant, material, and reliable" evidence, a movant should cite to specific portions of the exhibits and explain the points or purposes which the exhibits serve. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 21 n.16, 42-43 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1366-67.

A draft document does not provide particularly useful support for a motion to reopen. A draft is a working document which may reasonably undergo several revisions before it is finalized to reflect the actual intended position of the preparer. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 43 n.47 (1985).

Where a motion to reopen is related to a litigated issue, the effect of the new evidence on the outcome of that issue can be examined before or after a decision. To the extent a motion to reopen is not related to a litigated issue, then the outcome to be judged is not that of a particular issue, but that of the action which may be permitted by the outcome of the licensing proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1142 (1983), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

#### 4.4.1.1 Time for Filing Motion to Reopen Hearing

A motion to reopen may be filed and the Licensing Board may entertain it at any time prior to issuance of the full initial decision. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972). Where a motion to reopen was mailed before the Licensing Board rendered the final decision but was received by the Board after the decision, the Board denied the motion on grounds that it lacked jurisdiction to take any action. The Appeal Board implied that this may be incorrect (referring to 10 CFR § 2.712(d)(3) -- now, 10 CFR § 2.712(e)(3) -- concerning service by mail), but did not reach the jurisdictional question since the motion was properly denied on the merits.

Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374 n.4 (1978).

Point Beach, supra, does not establish an ironclad rule with respect to timing of the motion. In deciding whether to reopen, the Licensing Board will consider both the timing of the motion and the safety significance of the matter which has been raised. The motion will be denied if it is untimely and the matter raised is insignificant. The motion may be denied, even if timely, if the matter raised is not grave or significant. If the matter is of great significance to public or plant safety, the motion could be granted even if it was not made in a timely manner. As such, the controlling consideration is the seriousness of the issue raised. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Vermont Yankee, ALAB-126, 6 AEC 393 (1973); Vermont Yankee, ALAB-124, 6 AEC 365 (1973). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 19 (1986) (most important factor to consider is the safety significance of the issue raised); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986). When timeliness is a factor, it is to be judged from the date of discovery of the new issue.

An untimely motion to reopen the record may be granted, but the movant has the increased burden of demonstrating that the motion raises an exceptionally grave issue rather than just a significant issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76, 78 (1988), citing, 10 CFR § 2.73-4(a)(1). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-927, 31 NRC 137, 139 (1990); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131, 140 (2002); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 446 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

A party cannot justify the untimely filing of a reopening motion based upon a particular event before one Licensing Board on the ground that a reopening motion based on the same event was timely filed and pending before a second Licensing Board which was considering related issues. Each Licensing Board only has jurisdiction to resolve those issues which have been specifically delegated to it. Seabrook, supra, 31 NRC at 140.

A Board will reject as untimely a motion to reopen which is based on information which has been available to a party for one to two years. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 201 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 445-46 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

A person seeking late intervention in a proceeding in which the record has been closed must also address the reopening standards, but not necessarily in the same petition. However, it is in the petitioner's best interest to address both the late intervention and reopening standards together. See Texas Utilities Electric

Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162 (1993).

For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 202 (1985). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982). A party cannot justify its tardiness in filing a motion to reopen by noting that the Board was no longer receiving evidence on the issue when the new information on that issue became available. Three Mile Island, supra, 22 NRC at 201-02.

A party's opportunity to gain access to information is a significant factor in a Board's determination of whether a motion based on such information is timely filed. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-52, 18 NRC 256, 258 (1983). See also Diablo Canyon, supra, 19 NRC at 1369.

A motion to reopen the record in order to admit a new contention must be filed promptly after the relevant information needed to frame the contention becomes available. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990).

A matter may be of such gravity that a motion to reopen may be granted notwithstanding that it might have been presented earlier. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 n.17 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822, 826 (1985).

The Vermont Yankee tests for reopening the evidentiary record are only partially applicable where reopening the record is the Board's sua sponte action. The Board has broader responsibilities than do adversary parties, and the timeliness test of Vermont Yankee does not apply to the Board with the same force as it does to parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978).

Where jurisdiction terminated on all but a few issues, a Board may not entertain new issues unrelated to those over which it retains jurisdiction, even where there are supervening developments. The Board has no jurisdiction to consider such matters. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-226 (1980).

### 4.4.1.2 Contents of Motion to Reopen Hearing

(RESERVED)

### 4.4.2 Grounds for Reopening Hearing

Where a motion to reopen an evidentiary hearing is filed after the initial decision, the standard is that the motion must establish that a different result would have been reached had the respective information been considered initially. Where the record has been closed but a motion was filed before the initial decision, the standard is whether the outcome of the proceeding might be affected. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983).

In certain instances the record may be reopened, even though the new evidence to be received might not be so significant as to alter the original findings or conclusions, where the new evidence can be received with little or no burden upon the parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978). Reopening has also been ordered where the changed circumstances involved a hotly contested issue. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 AEC 631 (1974). Moreover, considerations of fairness and of affording a party a proper opportunity to ventilate the issues sometimes dictate that a hearing be reopened. For example, where a Licensing Board maintained its hearing schedule despite an intervenor's assertion that he was unable to attend the hearing and prepare for cross-examination, the Appeal Board held that the hearing must be reopened to allow the intervenor to conduct cross-examination of certain witnesses. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

In order to reopen a licensing proceeding, an intervenor must show a change in material fact which warrants litigation anew. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-79-10, 10 NRC 675, 677 (1979).

A decision as to whether to reopen a hearing will be made on the basis of the motion and the filings in opposition thereto, all of which amount to a "mini record." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 523 (1973), reconsid. den., ALAB-141, 6 AEC 576. The hearing must be reopened whenever a "significant", unresolved safety question is involved. Vermont Yankee, ALAB-138, supra; Vermont Yankee, ALAB-124, 6 AEC 358, 365 n.10 (1973). The same "significance test" applies when an environmental issue is involved. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 Z 2), ALAB-291, 2 NRC 404 (1975); Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). (See also 3.13.3).

Matters to be considered in determining whether to reopen an evidentiary record at the request of a party, as set forth in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), are whether the matters sought to be addressed on the reopened record could have been raised earlier, whether such matters require further evidence for their resolution, and what the seriousness or gravity of such matters is. Carolina Power & Light Co. (Shearon

Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83 (1978). As a general proposition, a hearing should not be reopened merely because some detail involving plant construction or operation has been changed. Rather, to reopen the record at the request of a party, it must usually be established that a different result would have been reached initially had the material to be introduced on reopening been considered. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986). In fact, an Appeal Board has stated that, after a decision has been rendered, a dissatisfied litigant who seeks to persuade an adjudicatory tribunal to reopen the record "because some new circumstance has arisen, some new trend has been observed or some new fact discovered" has a difficult burden to bear. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976). At the same time, new regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981).

Unlike applicable standards with respect to allowing a new, timely filed contention, the Licensing Board can give some consideration to the substance of the information sought to be added to the record on a motion to reopen. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 n.15 (1984), citing, Vermont Yankee, ALAB-138, supra, 6 AEC at 523-24.

The proponent of a motion to reopen the record bears a heavy burden. Normally, the motion must be timely and addressed to a significant issue. If an initial decision has been rendered on the issue, it must appear that reopening the record may materially alter the result. Where a motion to reopen the record is untimely without good cause, the movant must demonstrate not only that the issue is significant, but also that the public interest demands that the issue be further explored. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 21 (1978); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 n.4 (1982), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-365 (1981); Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-90 (1984).

The criteria for reopening the record govern each issue for which reopening is sought; the fortuitous circumstance that a proceeding has been or will be reopened on other issues is not significant. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1720 (1985).

Whether to reopen a record in order to consider new evidence turns on the appraisal of several factors: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially? Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2031-32 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1065 n.7 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 578 n.2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1199 n.5 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 13 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 200 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-861, 23 NRC 1, 4-5 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 670 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 505-06 (1986), citing, 10 CFR 2.734; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 885-86 (1987), reconsid. denied, CLI-88-3, 28 NRC 1 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 149-50 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 49 (1988), vacated in part on other grounds, CLI-88-8, 28 NRC 419 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 71 n.17 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 283 n.8, 284, 292 (1989), aff'd, ALAB-940, 32 NRC 225, 241-44 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 21 & n.10 (1990), aff'd, ALAB-936, 32 NRC 75 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 443 n.47 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990); Public Service Co. of New Hampshire

(Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 486 n.3 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990); International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 59 (1997).

A party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. Fermi, supra, 17 NRC at 1065.

A motion to reopen an administrative record may rest on evidence that came into existence after the hearing closed. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 n.6 (1980).

A Licensing Board has held that the most important factor to consider is whether the newly proffered material would alter the result reached earlier. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672 (1986).

To justify the granting of a motion to reopen, the moving papers must be strong enough, in light of any opposing filings, to avoid summary disposition. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982), citing, Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

The fact that the NRC's Office of Investigations is investigating allegations of falsification of records and harassment of QA/QC personnel is insufficient, by itself, to support a motion to reopen. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5-6 (1986).

Evidence of a continuing effort to improve reactor safety does not necessarily warrant reopening a record. Diablo Canyon, supra, 11 NRC at 887.

Intervenors failed to raise a significant safety issue when they did not present sufficient evidence to show that an applicant's program and continuing compliance with an NRC Staff-prescribed enhanced surveillance program would not provide the requisite assurance of plant safety. The intervenors' request for harsher measures than the NRC Staff had considered necessary, without presenting any new information that the Staff had failed to consider, is insufficient to raise a significant safety issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487-88 (1990).

Differing analyses by experts of factual information already in the record do not normally constitute the type of information for which reopening of the record would be warranted. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 799 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 994-95 (1981).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Nor do generalized assertions to the effect that "more evidence is needed." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 63 (1981).

Newspaper allegations of quality assurance deficiencies, unaccompanied by evidence, ordinarily are not sufficient grounds for reopening an evidentiary record. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 286 (1984). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 n.2 (1986).

Generalized complaints that an alleged ex parte communication to a board compromised and tainted the board's decisionmaking process are insufficient to support a motion to reopen. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-840, 24 NRC 54, 61 (1986), vacated, CLI-86-18, 24 NRC 501 (1986) (the Appeal Board lacked jurisdiction to rule on the motion to reopen).

A movant should provide any available material to support a motion to reopen the record rather than rely on "bare allegations or simple submission of new contentions." Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 577 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989) (a movant's willingness to provide unspecified, additional information at some unknown date in the future is insufficient). Undocumented newspaper articles on subjects with no apparent connection to the facility in question do not provide a legitimate basis on which to reopen a record. Waterford, supra, 18 NRC at 1330; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-1090 (1984). The proponent of a motion to reopen a hearing bears the responsibility for establishing that the standards for reopening are met. The movant is not entitled to engage in discovery in order to support a motion to reopen. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). An adjudicatory board will review a motion to reopen on the basis of the available information. The board has no duty to search for evidence which will support a party's motion to reopen. Thus, unless the movant has submitted information which raises a serious safety issue, a board may not seek to obtain information relevant to a motion to reopen pursuant to either its sua sponte authority or the Commission's Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984). Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6-7 (1986).

A motion to reopen the record based on alleged deficiencies in an applicant's construction quality assurance program must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to whether the plant can be operated safely. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983), citing, Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 243-44 (1990). This standard also applies to an applicant's design quality assurance program. Pacific

Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986).

The untimely listing of "historical examples" of alleged construction QA deficiencies is insufficient to warrant reopening of the record on the issue of management character and competence. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1369-70.Long range forecasts of future electric power demands are especially uncertain as they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, and the general state of economy. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on continued use from historical data, range of years considered, the area considered, and extrapolations from usage in residential, commercial, and industrial sectors. The general rule applicable to cases involving differences or changes in demand forecasts is stated in Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). Accordingly, a possible one-year slip in construction schedule was clearly within the margin of uncertainty, and intervenors had failed to present information of the type or substance likely to have an effect on the need-for-power issue such as to warrant re-litigation. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-79-5, 9 NRC 607, 609-10 (1979).

Speculation about the future effects of budget cuts or employment freezes does not present a significant safety issue which must be addressed. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 223 (1990).

### 4.4.3 Reopening Construction Permit Hearings to Address New Generic Issues

Construction permit hearings should not be reopened upon discovery of a generic safety concern where such generic concern can be properly addressed and considered at the operating license stage. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975).

### 4.4.4 Discovery to Obtain Information to Support Reopening of Hearing is Not Permitted

The burden is on the movant to establish prior to reopening that the standards for reopening are met and "the movant is not entitled to engage in discovery in order to support a motion to reopen." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). See also Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235-36 & n.1 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672-673 n.33 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 26 NRC 410, 422 (1987).

## 4.5 Motions to Reconsider

Licensing Boards have the inherent power to entertain and grant a motion to reconsider an initial decision. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975).

Motions for reconsideration of Licensing Board decisions must be filed within 10 days of the date of issuance of a challenged order. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139 (1994).

A reconsideration request that is grossly out of time without good cause shown may be rejected. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 311 (2000).

When a Board has reached a determination of a motion in the course of an on-the-record hearing, it need not reconsider that determination in response to an untimely motion but it may, in its discretion, decide to reconsider on a showing that it has made an egregious error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 283 (1982).

When a petition for review is filed with the Commission at the same time as a motion for reconsideration is filed with the Board, the Commission will delay considering the petition for review until after the Board has ruled. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 3 (2001), citing International Uranium Corp., (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24-25 (1997).

A petitioner lacks standing to seek reconsideration of a decision unless the petitioner was a party to the proceeding when the decision was issued. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 354 (1989).

In certain instances, for example, where a party attempts to appeal an interlocutory ruling, a Licensing Board can properly treat the appeal as a motion to the Licensing Board itself to reconsider its ruling. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1653 (1982).

A motion to reconsider a prior decision will be denied where the motion is not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead is an entirely new thesis and where the proponent does not request that the result reached in the prior decision be changed. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977).

"A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, or (2) previously presented arguments that have been rejected. Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision." Private Fuel Storage, L.L.C. (Independent Spent Fuel

Storage Installation), LBP-01-38, 54 NRC 490, 493 (2001) (citation omitted), citing, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998).

Reconsideration motions afford an opportunity to request correction of a Board error by refining an argument, or by pointing out a factual misapprehension or a controlling decision of law that was overlooked. New arguments are improper. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-2, 55 NRC 5, 7 (2002); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000), citing Louisiana Energy Services, L.P., (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

A motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonable have been anticipated. Ralph L.Tetrick (Denial of Application for Reactor Operator License), LBP-97-6, 45 NRC 130, 131 (1997), citing Texas Utilities Elec. Co. (Comanche Peak Steam Elec. Station, Units I and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

Petitioners may be granted permission by the Commission to file a consolidated request for reconsideration if they have not had full opportunity to address the precise theory on which the Commission's first decision rests. Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 51 (2000). (Emphasis added from original).

A party may not raise, in a petition for reconsideration, a matter which was not contested before the Licensing Board or on appeal. Tennessee Valley Authority (Hartsville Plant, Units 1A, 2A, 1B, 2B), ALAB-467, 7 NRC 459, 462 (1978). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241-42 (1989). In the same vein, a matter which was raised at the inception of a proceeding but was never pursued before the Licensing Board or on appeal cannot be raised on a motion for reconsideration. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-477, 7 NRC 766, 768 (1978).

Although some decisions hold that motions for reconsideration are generally disfavored when premised on new arguments or evidence rather than errors in the existing record, there also are cases that permit reconsideration based on new facts not available at the time of the decision in question and relevant to the particular issue under consideration which clarify information previously relied on and are potentially sufficient to change the result previously reached. See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69 (1998); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-21, 38 NRC 143 (1993); see also Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981). Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-01-17, 53 NRC 398, 403-04 (2001).

Motions to reconsider an order should be associated with requests for reevaluation in light of elaboration on or refinement of arguments previously advanced; they are not the occasion for advancing an entirely new thesis. Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998); see also Louisiana Energy Services, L.P. (Claiborne Enrichment

Center), CLI-97-2, 45 NRC 3, 4 (1977). Private Fuel Storage, L.L.C., LBP-99-39, 50 NRC 232, 237 (1999).

Additionally, an argument raised for the first time in a motion to reconsider does not serve as a basis for reconsideration of admission of a contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 292 (1988).

Motions for reconsideration are for the purpose of pointing out an error the Board has made. Unless the Board has relied on an unexpected ground, new factual evidence and new arguments are not relevant in such a motion. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984). In accordance to 10 CFR § 2.734, motions for reconsideration will be denied for failure to show that the Presiding Officer has made a material error of law or fact. International Uranium (USA) Corporations (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 59 (1997), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235 (1986), Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986).

A motion for leave to reargue or rehear a motion will not be granted unless it appears that there is some decision or some principle of law that would have a controlling effect and that has been overlooked or that there has been a misapprehension of the facts. Vogtle, supra, 40 NRC at 140 and n.1. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998).

Where a party petitioning the Court of Appeals for review of a decision of the agency also petitions the agency to reconsider its decision and the Federal court stays its review pending the agency's disposition of the motion to reconsider, the Hobbs Act does not preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 2 (1988).

A Board cannot reconsider a matter after it loses jurisdiction. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-226 (1980).

In accordance with 10 CFR §§ 2.771, 2.1259(b), a dissatisfied litigant in a 10 C.F.R. Part 2, Subpart L informal adjudicatory proceeding can seek reconsideration of a final determination by the Commission or a presiding officer based on the claim that the particular decision was erroneous. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 357 (1992).

Motions for reconsideration are for the purpose of pointing out errors in the existing record, not for stating new arguments. However, A Licensing Board may decide within its discretion to consider such new arguments where there is no pressure in the present status of a case. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-21, 38 NRC 143, 145 (1993).

## 4.6 Procedure on Remand

### 4.6.1 Jurisdiction of the Licensing Board on Remand

The question as to whether a Licensing Board, on remand, assumes its original plenary authority or, instead, is limited to consideration of only those issues specified in the remand order was, for some time, unresolved. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-389, 5 NRC 727 (1977). Of course, jurisdiction may be regained by a remand order of either the Commission or a court, issued during the course of review of the decision. Issues to be considered by the Board on remand would be shaped by that order. If the remand related to only one or more specific issues, the finality doctrine would foreclose a broadening of scope to embrace other discrete matters. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979).

However, a Licensing Board was found to be "manifestly correct" in rejecting a petition requesting intervention in a remanded proceeding where the scope of the remanded proceeding had been limited by the Commission and the petition for intervention dealt with matters outside that scope. This establishes that a Licensing Board has limited jurisdiction in a remanded proceeding and may consider only what has been remanded to it. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 11, 12 (1987) (the Licensing Board properly rejected an intervenor's proposed license conditions which exceeded the scope of the narrow remanded issue of school bus driver availability).

Although an adjudicatory board to which matters have been remanded would normally have the authority to enter any order appropriate to the outcome of the remand, the Commission may, of course, reserve certain powers to itself, such as, for example, reinstatement of a construction permit suspended pending the remand. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 961 (1978).

Where the Commission remands an issue to a Licensing Board it is implicit that the Board is delegated the authority to prescribe warranted remedial action within the bounds of its general powers. However, it may not exceed these powers. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 29 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

### 4.6.2 Jurisdiction of the Board on Remand

Jurisdiction over previously determined issues is not necessarily preserved by the pendency of other issues in a proceeding. Three Mile Island, supra, 19 NRC at 983, citing, North Anna, supra, 9 NRC at 708-09; Seabrook, supra, 8 NRC at 695-96.

### 4.6.3 Stays Pending Remand to Licensing Board

10 CFR § 2.788 does not expressly deal with the matter of a stay pending remand of a proceeding to the Licensing Board. Prior to the promulgation of Section 2.788, the

Commission held that the standards for issuance of a stay pending remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977). In this vein, the Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balancing of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings.

Where judicial review discloses inadequacies in an agency's environmental impact statement prepared in good faith, a stay of the underlying activity pending remand does not follow automatically. Whether the project need be stayed essentially must be decided on the basis of (1) traditional balancing of equities, and (2) consideration of any likely prejudice to further decisions that might be called for by the remand. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 784-85 (1977). The seriousness of the remanded issue is a third factor which a Board will consider before ruling on a party's motion for a stay pending remand. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1543 (1984), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 521 (1977).

### 4.6.4 Participation of Parties in Remand Proceedings

Where an issue is remanded to the Licensing Board and a party did not previously participate in consideration of that issue, submitting no contentions, evidence or proposed findings on it and taking no exceptions to the Licensing Board's disposition of it, the Licensing Board is fully justified in excluding that party from participation in the remanded hearing on that issue. Status as a party does not carry with it a license to step in and out of consideration of issues at will. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 268-69 (1978).

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## 5.0 APPEALS

Prior to 1991 the Commission used a three-tiered adjudicatory process. As is the case now, controversies were resolved initially by an Atomic Safety and Licensing Board or presiding officer acting as a trial level tribunal. Licensing Board Initial Decisions (final decisions on the merits) and decisions wholly granting or denying intervention were subject to non-discretionary appellate review by the Atomic Safety and Licensing Appeal Board. Appeal Board decisions were subject to review by the Commission as a matter of discretion.

The Appeal Board was abolished in 1991, thereby creating a two-tiered adjudicatory system under which the Commission itself conducts all appellate review. Most Commission review of rulings by Licensing Boards and Presiding Officers, including Initial Decisions, is now discretionary. See 10 C.F.R. § 2.786 (a) - (f). A party must petition for review and the Commission, as a matter of discretion, determines if review is warranted. Appeals of orders wholly denying or granting intervention remain non-discretionary. See 10 C.F.R. § 2.714a.

The standards for granting interlocutory review have remained essentially the same. Under Appeal Board and Commission case law interlocutory review was permitted in extraordinary circumstances. These case-law standards were codified in 1991 when the Appeal Board was abolished and the two-tiered process was developed. See 10 C.F.R. § 2.786(g).

Although the Appeal Board was abolished in 1991, Appeal Board precedent, to the extent it is consistent with more recent case law and rule changes, may still be cited. The following section refers to some Appeal Board decisions that may be useful in understanding NRC practice.

### 5.1 Commission Review

As a general matter, the Commission conducts review in response to a petition for review filed pursuant to 10 C.F.R. 2.786, in response to an appeal filed pursuant to section 2.714a, or on its own motion (sua sponte).

#### 5.1.1 Commission Review Pursuant to 2.786(b)

In determining whether to grant, as a matter of discretion, a petition for review of a licensing board order, the Commission gives due weight to the existence of a substantial question with respect to the considerations set forth in 10 CFR § 2.786(b)(4). The considerations set out in section 2.786(b)(4) are: (I) a clearly erroneous finding of material fact; (ii) a necessary legal conclusion that is without governing precedent or departs from prior law; (iii) a substantial and important question of law, policy, or discretion; (iv) a prejudicial procedural error; and (v) any other consideration deemed to be in the public interest. Kenneth G. Pierce (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 184 (1993); Piping Specialists, Inc., and Forrest L. Roudebush (d.b.a. PSI Inspection and d.b.a. Piping Specialists, Inc., Kansas City, Missouri), CLI-92-16, 36 NRC 351 (1992). In re: Aharon Ben-Haim, Ph.D., CLI-99-14, 49 NRC 361, 363 (1999). See also Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001).

The standards for Commission review in 10 CFR § 2.786(b)(4) have been incorporated into Subpart L in 10 CFR § 2.1253. Babcock and Wilcox (Pennsylvania Nuclear Service Operations, Parks Township, Pa.), CLI-95-4, 41 NRC 248, 249 (1995).

Under 10 C.F.R. § 2.786(b)(4)(1), the Commission will grant a petition for review if the petition raises a "substantial question" whether a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding. The general reviewability standards set out in 10 C.F.R. § 2.786 apply to subpart K by virtue of 10 C.F.R. § 2.1117, which makes the general Subpart G rules applicable "except where inconsistent" with Subpart K. Subpart K has no reviewability rules of its own. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001), n. 6.

In determining whether to take review of a Licensing Board Order approving a settlement agreement, the Commission may ask the staff to provide an explanation for its agreement in the settlement if such reasons are not readily apparent from the settlement agreement or the record of the proceeding. Randall C. Orem, D.O. (Byproduct Material License No. 34-26201-01), CLI-92-15, 36 NRC 251 (1992).

The Commission may dismiss its grant of review even though the parties have briefed the issues. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), CLI-82-26, 16 NRC 880, 881 (1982), citing, Jones v. State Board of Education, 397 U.S. 31 (1970). 10 C.F.R. § 2.786, describes when the Commission "may" grant a petition for review but does not mandate any circumstances under which the Commission must take review. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-12, 46 NRC 52, 53 (1997).

### 5.1.2 Sua Sponte Review

Sua sponte review, although rarely exercised, is taken in extraordinary circumstances. See, e.g., Ohio Edison Co., et. al. (Perry & Davis-Besse), CLI-91-15, 34 NRC 269 (1991).

Because the Commission is responsible for all actions and policies of the NRC, the Commission has the inherent authority to act upon or review sua sponte any matter before an NRC tribunal. To impose on the Commission, to the degree imposed on the judiciary, requirements of ripeness and exhaustion would be inappropriate since the Commission, as part of a regulatory agency, has a special responsibility to avoid unnecessary delay or excessive inquiry. Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 228-29 (1990).

Sua sponte review may be appropriate to ensure that there are no significant safety issues requiring corrective action. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814, 889 (1983), aff'd on other grounds, CLI-84-11, 20 NRC 1 (1984).

If sua sponte review uncovers problems in a Licensing Board's decision or a record that may require corrective action adverse to a party's interest, the consistent practice is to give the party ample opportunity to address the matter as appropriate. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 891 n.8, citing, Sacramento Municipal Utility District (Rancho Seco Nuclear

Generating Station), ALAB-655, 14 NRC 799, 803 (1981); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309-313 (1980).

Although the absence of an appeal does not preclude appellate review of an issue contested before a Licensing Board, caution is exercised in taking up new matters not previously put in controversy. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 247 (1978). In the course of its review of an initial decision in a construction permit proceeding, the Appeal Board was free to sua sponte raise issues which were neither presented to nor considered by the Licensing Board. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 707 (1979). On review it may be necessary to make factual findings, on the basis of record evidence, which are different from those reached by a Licensing Board. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 42 (1977). On appeal a Licensing Board's regulatory interpretation is not necessarily followed even if no party presses an appeal on the issue. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 135 n.10 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 247 (1978). A decision reviewing a Board order may be based upon grounds completely foreign to those relied upon by the Licensing Board so long as the parties had a sufficient opportunity to address those new grounds with argument and, where appropriate, evidence. Id.

### 5.1.3 Effect of Commission's Denial of Petition for Review

When a discrete issue has been decided by the Board and the Commission declines to review that decision, agency action is final with respect to that issue and Board jurisdiction is terminated. Pacific Gas and Electric co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-782, 20 NRC 838, 841 (1984) (citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-766, 19 NRC 981, 983 (1984); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708-09 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-513, 8 NRC 694, 695 (1978)).

The Commission's refusal to entertain a discretionary interlocutory review does not indicate its view on the merits. Nor does it preclude a Board from reconsidering the matter as to which Commission review was sought where that matter is still pending before the Board. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 260 (1978).

When the time within which the Commission might have elected to review a Board decision expires, any residual jurisdiction retained by the Board expires. 10 CFR § 2.717(a); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), ALAB-501, 8 NRC 381, 382 (1978).

### 5.1.4 Commission Review Pursuant to 2.714a

NRC regulations contain a special provision (10 CFR § 2.714a) allowing an interlocutory appeal from a Licensing Board order on a petition for leave to intervene.

Under 10 CFR § 2.714a(b), a petitioner may appeal such an order but only if the effect thereof is to deny the petition in its entirety -- i.e., to refuse petitioner entry into the case. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant (Units 1 & 2), ALAB-823, 26 NRC 154, 155 (1987), citing 10 C.F.R. 2.714a; Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472, 473 (1980); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-683, 16 NRC 160 (1982), citing, Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC 1, 2 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 18 n.6 (1986); Houston Lighting and Power Co. (Allens Creek Nuclear Generating station, Unit 1), ALAB-535, 9 NRC 377, 384 (1979); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-712, 17 NRC 81, 82 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 235-36 (1991). Only the petitioner denied leave to intervene can take an appeal of such an order. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 22 n.7 (1983), citing, 10 CFR § 2.714a(b). A petitioner may appeal only if the Licensing Board has denied the petition in its entirety, i.e., has refused the petitioner entry into the case. A petitioner may not appeal an order admitting petitioner but denying certain contentions. 10 CFR § 2.714(b); Power Authority of the state of New York (Greene County Nuclear Plant), ALAB-434, 6 NRC 471 (1977); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-302, 2 NRC 856 (1975); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-273, 1 NRC 492, 494 (1975); Boston Edison Co. (Pilgrim Nuclear Generating station, Unit 2), ALAB-269, 1 NRC 411 (1975); Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-206, 7 AEC 841 (1974). Appellate review of a ruling rejecting some but not all of a petitioner's contentions is available only at the end of the case. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251, 252 (1978). Similarly, where a proceeding is divided into two segments for convenience purposes and a petitioner is barred from participation in one segment but not the other, that is not such a denial of participation as will allow an interlocutory appeal under 10 CFR § 2.714a. Gulf States Utility Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

An order admitting and denying various contentions is not immediately appealable under 10 CFR § 2.714a where it neither wholly denies nor grants a petition for leave to intervene/ request for a hearing. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 252 (1993).

A State participating as an "interested State" under 10 CFR § 2.715(c) may appeal an order barring such participation, but it may not seek review of an order which permits the State to participate but excludes an issue which it seeks to raise. Gulf States Utility Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

Unlike a private litigant who must file at least one acceptable contention in order to be admitted as a party to a proceeding, an interested state may participate in a proceeding regardless of whether or not it submits any acceptable contentions. Thus, an interested state may not seek interlocutory review of a Licensing Board rejection of any or all of its contentions because such rejection will not prevent an interested state from

participating in the proceeding. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), ALAB-838, 23 NRC 585, 589-90 (1986).

Only the petitioner may appeal from an order denying it leave to intervene. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976). The appellant must file a notice of appeal and supporting brief within 10 days after service of the Licensing Board's order. 10 CFR § 2.714a; Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265 (1991). Other parties may file briefs in support of or in opposition to the appeal within 10 days of service of the appeal. The Applicant, the NRC Staff or any other party may appeal an order granting a petition to intervene or request for a hearing in whole or in part, but only on the grounds that the petition or request should have been denied in whole. 10 CFR § 2.714(c); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-896, 28 NRC 27, 30 (1988).

A Licensing Board's failure, after a reasonable length of time, to rule on a petition to intervene is tantamount to a denial of the petition. Where the failure of the Licensing Board to act is both unjustified and prejudicial, the petitioner may seek interlocutory review of the Licensing Board's delay under 10 CFR § 2.714a. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

The action of a Licensing Board in provisionally ordering a hearing and in preliminarily ruling on petitions for leave to intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioners denied intervention may qualify on refiling. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978). Similarly, a Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors outweigh the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition seeking leave to intervene. Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power station), ALAB-595, 11 NRC 860, 864 (1980); Greenwood, supra; Philadelphia Electric Co. (Limerick Generating station, Unit 1), ALAB-833, 23 NRC 257, 260-61 (1986); Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978).

Where the Presiding Officer has reviewed an extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 45, 46 (2001).

Once the time prescribed in section 2.714a for perfecting an appeal has expired, the order below becomes final. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 84 n.1 (1983).

### 5.1.5 Effect of Affirmance as Precedent

Affirmance of the Licensing Board's decision cannot be read as necessarily signifying approval of everything said by the Licensing Board. The inference cannot be drawn that there is agreement with all the reasoning by which the Licensing Board justified its decision or with the Licensing Board's discussion of matters which do not have a direct bearing on the outcome. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 208 n.4 (1974); Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2-3 (1985).

Stare decisis effect is not given to Licensing Board conclusions on legal issues not reviewed on appeal. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 85 (1983), citing, Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978); General Electric Co. (Vallecitos Nuclear Center - General Electric Test Reactor, Operating License No. TR-1), ALAB-720, 17 NRC 397, 402 n.7 (1983); Consumers Power Co. (Big Rock Point Plant), ALAB-795, 21 NRC 1, 2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-826, 22 NRC 893, 894 n.6 (1985). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988); Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998). In re: Aharon Ben-Haim, Ph.D., CLI-99-14, 49 NRC 361, 363 (1999).

### 5.1.6 Precedential Effect of Unpublished Opinions

Unless published in the official NRC reports, decisions and orders of Appeal Boards are usually not to be given precedential effect in other proceedings. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-592, 11 NRC 744, 745 (1980).

### 5.1.7 Precedential Weight Accorded Previous Appeal Board Decisions

The Commission abolished the Atomic Safety and Licensing Appeal Board Panel in 1991, but its decisions still carry precedential weight. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994).

## 5.2 Who Can Appeal

The right to appeal or petition for review is confined to participants in the proceeding before the Licensing Board. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-433, 6 NRC 469 (1977); Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 2), ALAB-369, 5 NRC 129 (1977); Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 88 (1976); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-294, 2 NRC 663, 664 (1975); Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-251, 8 AEC 993, 994 (1974); Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 & 2), ALAB-237, 8 AEC 654 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 252 (1986). Thus, with the single exception of a State which is participating under

the "interested State" provisions of 10 CFR § 2.715(c), a nonparty to a proceeding may not petition for review or appeal from a Licensing Board's decision. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

Although an interested State is not a party to a proceeding in the traditional sense, the "participational opportunity" afforded to an interested State under 10 CFR § 2.715(c) includes the ability for an interested State to seek review of an initial decision. USERDA (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 392 (1976); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-317, 3 NRC 175, 177-180 (1976).

The selection of parties to a Commission review proceeding is clearly a matter of Commission discretion (10 CFR § 2.786(d), formerly § 2.786(b)(6)). A major factor in the Commission decision is whether a party has actively sought or opposed Commission review. This factor helps reveal which parties are interested in Commission review and whether their participation would aid that review. Therefore, a party desiring to be heard in a Commission review proceeding should participate in the process by which the Commission determines whether to conduct a review. An interested State which seeks Commission review is subject to all the requirements which must be observed by other parties. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535 (1977).

In this vein, a person who makes a limited appearance before a Licensing Board is not a party and, therefore, may not appeal from the Board's decision. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

As to petitions for review by specific parties, the following should be noted:

(1) A party satisfied with the result reached on an issue is normally precluded from appealing with respect to that issue, but is free to challenge the reasoning used to reach the result in defending that result if another party appeals. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-282, 2 NRC 9, 10 n.1 (1975). The prevailing party is free to urge any ground in defending the result, including grounds rejected by the Licensing Board. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975). See also Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1597 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 141 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 n.8 (1982), citing, Black Fox, supra, 10 NRC at 789.

(2) A third party entering a special appearance to defend against discovery may appeal. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87-88 (1976).

(3) As to orders denying a petition to intervene, only the petitioner who has been excluded from the proceeding by the order may appeal. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976). In such an appeal, other parties may file briefs in support of or opposition to the appeal. Id.

(4) A party to a Licensing Board proceeding has no standing to press the grievances of other parties to the proceeding not represented by him. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-631, 13 NRC 87, 89 (1981), citing, Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30 (1979); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-543 n.58 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 135 & n.3 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 203 n.3 (1986).

One seeking to appeal an issue must have participated and taken all timely steps to correct the error. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447 (1980).

The Commission has long construed its Rules of Practice to allow the Staff to petition for review of initial decisions. Although a party generally may appeal only on a showing of discernible injury, the Staff may appeal on questions of precedential importance. A question of precedential importance is a ruling that would with probability be followed by other Boards facing similar questions. A question of precedential importance can involve a question of remedy. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 23-25 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

### 5.2.1 Participating by filing an Amicus Curiae Brief

10 CFR § 2.715 allows a nonparty to file a brief amicus curiae with regard to matters before the Commission. The nonparty must submit a motion seeking leave to file the brief, and acceptance of the brief is a matter of discretion. 10 CFR § 2.715(d).

Our rules contemplate amicus curiae briefs only after the Commission grants a petition for review, and do not provide for amicus briefs supporting or opposing petitions for review. See 10 C.F.R. § 2.715(d). Louisiana Energy Services, L.P. (Claiborne Enrichment Center),CLI-97-7, 45 NRC 437, 438-39 (1997).

The opportunity of a nonparty to participate as amicus curiae has been extended to Licensing Board proceedings. A U.S. Senator lacked authorization under his State's laws to represent his State in NRC proceedings. However, in the belief that the Senator could contribute to the resolution of issues before the Licensing Board, an Appeal Board authorized the Senator to file amicus curiae briefs or to present oral arguments on any legal or factual issue raised by the parties to the proceeding or the evidentiary record. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987).

Requests for amicus curiae participation do not often arise in the context of Licensing Board hearings because factual questions generally predominate and an amicus customarily does not present witnesses or cross-examine other parties' witnesses. This happenstance, however, "does not perforce preclude the granting of leave in appropriate circumstances to file briefs or memoranda amicus curiae (or to present oral

argument) on issues of law or fact that still remain for Licensing Board consideration." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987). Thus, in the context of a proceeding in which a legal issue predominates, permitting a petitioner that lacks standing to file an amicus pleading addressing that issue is entirely appropriate. General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 161 n.13 (1996).

A state that does not seek party status or to participate as an "interested state" in the proceedings below is not permitted to file a petition for Commission review of a licensing board ruling. If the Commission takes review, the Commission may permit a person who is not a party, including a state, to file a brief amicus curiae. 10 C.F.R. §2.715(d). Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-96-3, 43 NRC 16,17 (1996).

Third parties may file amicus briefs with respect to any appeal, even though such third parties could not prosecute the appeal themselves. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), ALAB-369, 5 NRC 129 (1977); Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 7 (1976). If a matter is taken up by the Commission pursuant to 10 C.F.R. § 2.786(b), a person who is not a party may, in the discretion of the Commission, be permitted to file a brief amicus curiae. 10 C.F.R. § 2.715(c). A person desiring to file an amicus brief must file a motion for leave to do so in accordance with the procedures in section 2.715(c). Sequoyah Fuels Corporation and General Atomics, CLI-96-3, 43 NRC 16, 17 (1996).

Petitioner is free to monitor the proceedings and file a post-hearing amicus curiae brief at the same time the parties to the proceeding file their post-hearing submissions under 10 C.F.R. § 2.1322(c). North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999).

### 5.2.2 Aggrieved Parties Can Appeal

Petitions for review should be filed only where a party is aggrieved by, or dissatisfied with, the action taken below and invokes appellate jurisdiction to change the result. A petition for review is unnecessary and inappropriate when a party seeks to appeal a decision whose ultimate result is in that party's favor. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 202 (1978); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958, 959-60 (1982), citing, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-478, 7 NRC 772, 773 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 n.1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, 1177, affirmed, CLI-75-1, 1 NRC 1 (1975); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973); Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393 n.21 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 914 (1981); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-790, 20 NRC 1450, 1453 (1984); Long Island Lighting Co. (Shoreham Nuclear

Power Station, Unit 1), ALAB-832, 23 NRC 135, 141 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 252 (1986).

An appeal from a ruling or a decision is normally allowed if the appellant can establish that, in the final analysis, some discernible injury to it has been sustained as a consequence of the ruling. Toledo Edison Co. (Davis Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975).

There is no right to an administrative appeal on every factual finding. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 n.5 (1978). As a general rule, a party may seek appellate redress only on those parts of a decision or ruling which he can show will result in some discernible injury to himself. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975). An intervenor may appeal only those issues which it placed in controversy or sought to place in controversy in the proceeding. 10 CFR § 2.762(d)(1), 54 Fed. Reg. 33168, 33182 (August 11, 1989).

In normal circumstances, an appeal will lie only from unfavorable action taken by the Licensing Board, not from wording of a decision with which a party disagrees but which has no operative effect. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-482, 7 NRC 979, 980 (1978). For a case in which the Appeal Board held that a party may not file exceptions to a decision if it is not aggrieved by the result, see Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393 (1978).

The fact that a Board made an erroneous ruling is not sufficient to warrant appellate relief. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 756 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-827, 23 NRC 9, 11 (1986) (appeals should focus on significant matters, not every colorable claim of error); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 143 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987). A party seeking appellate relief must demonstrate actual prejudice - that the Board's ruling had a substantial effect on the outcome of the proceeding. Shoreham, supra, 20 NRC at 1151, citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 278, 280 (1987) (intervenors failed to show any specific harm resulting from erroneous Licensing Board rulings).

### 5.2.3 Parties' Opportunity to be Heard on Appeal

Requests for emergency relief which require adjudicators to act without giving the parties who will be adversely affected a chance to be heard ought to be reserved for

palpably meritorious cases and filed only for the most serious reasons. Emergency relief without affording the adverse parties at least some opportunity to be heard in opposition will be granted only in the most extraordinary circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 780 n.27 (1977).

## 5.3 How to Petition for Review

The general rules for petitions for review of a decision of a board or presiding officer are set out in 10 CFR § 2.786(b). The general rules for an appeal from a Licensing Board decision wholly granting or denying intervention, are set out in 10 CFR 2.714a.

Under 10 C.F.R. § 2.786(b)(4)(1), the Commission will grant a petition for review if the petition raises a "substantial question" whether a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding. The general reviewability standards set out in 10 C.F.R. § 2.786 apply to subpart K by virtue of 10 C.F.R. § 2.1117, which makes the general Subpart G rules applicable "except where inconsistent" with Subpart K. Subpart K has no reviewability rules of its own. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001), n.6.

The NRC page limits on petitions for review and briefs are intended to encourage parties to make their strongest arguments clearly and concisely, and to hold all parties to the same number of pages of argument. The Commission should not be expected to sift unaided through large swaths of earlier briefs filed before the Presiding Officer in order to piece together and discern a party's particular concerns or the grounds for its claims. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 46 (2001). The intervenor bears responsibility for any misunderstanding of their claims. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 46 (2001).

The Commission's rule providing for review of decisions of a presiding officer plainly states that a "petition for review . . . must be no longer than ten (10) pages." See 10 C.F.R. § 2.786(b)(2). Where a petitioner resorts to the use of voluminous footnotes, references to multipage sections of earlier filings, and supplementation with affidavits that include additional substantive arguments, the Commission views this as an attempt to circumvent the intent of the page-limit rule. See Production and Maintenance Employees Local 504 v. Roadmaster Corp., 954 F.2d 1397, 1406 (7th Cir. 1992); see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI- 89-8, 29 NRC 399, 406 n.1 (1989). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001).

Page limits "are intended to encourage parties to make their strongest arguments clearly and concisely, and to hold to all parties to the same number of pages of argument." Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 46 (2001). The Commission expects parties to abide by its current page-limit rules, and if they cannot, to file a motion to enlarge the number of pages permitted. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001).

## 5.4 Time for Seeking Review

As a general rule, only "final" actions are appealable. The test for "finality" for appeal purposes is essentially a practical one. For the most part, a Licensing Board's action is final when it either disposes of a major segment of a case or terminates a party's right to participate. Rulings that do neither are interlocutory. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-690, 16 NRC 893, 894 (1982), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1256 (1982); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-77, 18 NRC 1365, 1394-1395 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 636-37 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-933, 31 NRC 491, 496-98 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-943, 33 NRC 11, 12-13 (1991).

Where a major segment of a case has been remanded to a Licensing Board, there is no final Licensing Board action for appellate purposes until the Licensing Board makes a final determination of all the remanded matters associated with that major segment. Seabrook, supra, 33 NRC at 13. One may not appeal from an order delaying a ruling, when appeal will lie from the ruling itself. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469, 470 (1980).

Administrative orders generally are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. Sierra Club v. NRC, 862 F.2d 222, 225 (9th Cir. 1988).

A Licensing Board's partial initial decision in an operating license proceeding, which resolves a number of safety contentions, but does not authorize the issuance of an operating license or resolve all pending safety issues, is nevertheless appealable since it disposes of a major segment of the case. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-28, 22 NRC 232, 298 n.21 (1985), citing, Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981).

The requirement of finality applies with equal force to both appeals from rulings on petitions to intervene pursuant to 10 CFR § 2.714a, and appeals from initial decisions. Waterford, supra, 16 NRC at 895 n.2.

Licensing board rulings denying waiver requests pursuant to 10 CFR § 2.758, which are interlocutory, are not considered final for purposes of appeal. Louisiana Energy Services (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995), questioning Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-920, 30 NRC 121, 125-26 (1989).

In determining whether an agency has issued a final order so as to permit judicial review, courts look to whether the agency's position is definitive and if the agency action is affecting

plaintiff's day-to-day activities. General Atomics v. U.S. Nuclear Regulatory Com'n., 75 F.3d 536, 540 (1996).

Judicial review of administrative agency's jurisdiction should rarely be exercised before final decision from agency; sound judicial policy dictates that there be exhaustion of administrative remedies. Exhaustion of administrative remedies doctrine requires that the administrative agency be accorded opportunity to determine initially whether it has jurisdiction. General Atomics v. U.S. Nuclear Regulatory Com'n., 75 F.3d 536, 541 (1996).

In general, an immediately effective Licensing Board initial decision is a "final order," even though subject to appeal within the agency, unless its effectiveness has been administratively stayed pending the outcome of further Commission review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976). In other areas, an order granting discovery against a third party is "final" and appealable as of right. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87 (1976); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). Similarly, a Licensing Board order on the issue of whether offsite activity can be engaged in prior to issuance of an LWA or a CP is appealable. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 3 NRC 771, 774 (1976). When a Licensing Board grants a Part 70 license to transport and store fuel assemblies during the course of an OL hearing, the decision is not interlocutory and is immediately appealable. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976). Partial initial decisions which do not yet authorize construction activities nevertheless may be significant and, therefore, are subject to appellate review. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975). Similarly, a Licensing Board's decision authorizing issuance of an LWA and rejecting the applicant's claim that it is entitled to issuance of a construction permit is final for the purposes of appellate review. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978).

A protracted withholding of action on a request for relief may be treated as tantamount to a denial of the request and final action. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426, 428 (1977). At least in those instances where the delay involves a Licensing Board's failure to act on a petition to intervene, such a "denial" of the petition is appealable. Greenwood, supra.

As previously noted, an appeal is taken by the filing of a petition for review within 15 days after service of the initial decision. Licensing Boards may not vary or extend the appeal periods provided in the regulations. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-310, 3 NRC 33 (1976); Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975). While a motion for a time extension may be filed, mere agreement among the parties is not sufficient to show good cause for an extension. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 827 (1973).

The rules for taking an appeal also apply to appeals from partial initial decisions. Once a partial initial decision is rendered, review must be filed immediately in accordance with the regulations or the review is waived. Mississippi Power and Light Co. (Grand Gulf Nuclear

Station, Units 1 and 2), ALAB-195, 7 AEC 455, 456 n.2 (1974). See also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 and 2), ALAB-301, 2 NRC 853, 854 (1975).

In the interest of efficiency, all rulings that deal with the subject matter of the hearing from which a partial initial decision ensues should be reviewed by the Commission at the same time. Therefore, the time to ask the Commission's review of any claim that could have affected the outcome of a partial initial decision, including bases that were not admitted or that were dismissed prior to the hearing, is immediately after the partial initial decision is issued. The parties should assert any claims of error that relate to the subject matter of the partial initial decision, whether the specific issue was admitted for the hearing or not, and without regard to whether the issue was originally designated a separate "contention" or a "basis" for a contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 353 (2000).

Efficiency does not require the Commission to review orders dismissing contentions or bases (or other preliminary order) unrelated to the subject matter of the hearing on which the Licensing Board issues its partial hearing. Absent special circumstances, review of preliminary rulings unrelated to the partial initial decision must wait until either the Board considers the issue in a relevant partial initial decision or until the Board completes its proceedings, depending on the nature of the preliminary ruling. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 354 (2000).

Although the time limits established by the Rules of Practice with regard to review of Licensing Board decisions and orders are not jurisdictional, policy is to construe them strictly. Hence untimely appeals are not accepted absent a demonstration of extraordinary and unanticipated circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982), citing, Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980); 10 CFR Part 2, App. A, IX(d)(4); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 635 (1988). Failure to file an appeal in a timely manner amounts to a waiver of the appeal. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 392-93 (1974). The same rule applies to appeals of partial initial decisions. A party must file its petition for review without waiting for the Licensing Board's disposition of the remainder of the proceeding. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-195, 7 AEC 455, 456 n.2 (1974).

When a petition for review is filed with the Commission at the same time as a motion for reconsideration is filed with the Board, the Commission will delay considering the petition for review until after the Board has ruled. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 3 (2001), citing International Uranium Corp. (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24-25 (1997).

The timeliness of a party's brief on appeal from a Licensing Board's denial of the party's motion to reopen the record is determined by the standards applied to appeals from final orders, and not 10 CFR § 2.714a(b), which is specifically applicable to appeals from board orders "wholly denying a petition for leave to intervene and/or request for a hearing".

Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 18 n.6 (1986).

It is accepted appellate practice for the appeal period to be tolled while the trial tribunal has before it an authorized and timely-filed petition for reconsideration of the decision or order in question. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983 (1981).

Pursuant to 10 CFR § 2.714a, an appeal concerning an intervention petition must await the ultimate grant or denial of that petition. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978). A Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors outweigh the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition seeking leave to intervene. Greenwood, supra, 7 NRC at 571.

Finality of a decision is usually determined by examining whether it disposes of at least a major segment of the case or terminates a party's right to participate. The general policy is to strictly enforce time limits for appeals following a final decision. However, where the lateness of filing was not due to a lack of diligence, but, rather, to a misapprehension about the finality of a Board decision, the appeal may be allowed as a matter of discretion. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 159-160 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 635-637 (1988).

A petitioner's request that the denial of his intervention petition be overturned, treated as an appeal under 10 CFR § 2.714a, will be denied as untimely where it was filed almost 3 months after the issuance of a Licensing Board's order, especially in the absence of a showing of good cause for the failure to file an appeal on time. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638, 639 (1979).

### 5.4.1 Variation In Time Limits on Appeals

Only the Commission may vary the time for taking appeals; Licensing Boards have no power to do so. See Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975).

Of course, mere agreement of the parties to extend the time for the filing of an appeal is not sufficient to show good cause for such a time extension. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 827 (1973).

## 5.5 Scope of Commission Review

A petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the considerations listed in 10 C.F.R. § 2.786(b)(4)(I)-(v). These considerations include a finding of material fact is erroneous, or in conflict with precedent; a substantial question of law or policy; or prejudicial procedural error.

When an issue is of obvious significance and is not fact-dependent, and when its present resolution could materially shorten the proceedings and guide the conduct of other pending proceedings, the Commission will generally dispose of the issue rather than remand it. Seabrook, supra, 5 NRC at 517.

The Commission is not obligated to rule on every discrete point adjudicated below, so long as the Board was able to render a decision on other grounds that effectively dispose of the appeal. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 466 n.25 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 15 (1981).

Where the Presiding Officer has reviewed an extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 45-46 (2001).

On appeal evidence may be taken -- particularly in regard to limited matters as to which the record was incomplete. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 (1978). However, since the Licensing Board is the initial fact-finder in NRC proceedings, authority to take evidence is exercised only in exceptional circumstances. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-891, 27 NRC 341, 351 (1988).

A Staff appeal on questions of precedential importance may be entertained. A question of precedential importance is a ruling that would with probability be followed by other Boards facing similar questions. A question of precedential importance can involve a question of remedy. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 23-25 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

Opinions that, in the circumstances of the particular case, are essentially advisory in nature are reserved (if given at all) for issues of demonstrable recurring importance. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.4 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284-85 (1988).

There is some indication that a matter of recurring importance may be entertained on appeal in a particular case even though it may no longer be determinative in the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

On a petition for review, petitioner must adequately call the Commission's attention to claimed errors in the Board's approach. Where petitioner has submitted a complex set of pleadings that includes numerous detailed footnotes, attachments, and incorporations by reference. The Commission deems waived any arguments not raised before the Board or not clearly articulated in the petition for review. See Hydro Resources, Inc., CLI-01-4, 53 NRC at 46; Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999); Curators of the University of Missouri, CLI-95-1, 41 NRC 71,

132 n.81(1995). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

### 5.5.1 Issues Raised for the First Time on Appeal or In a Petition for Review

Ordinarily an issue raised for the first time on appeal will not be entertained. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978) (issues not raised in either proposed findings or exceptions to the initial decision). Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982), citing, Hartsville, supra; Public Service Electric and Gas Co. (Salem Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 22 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 (1986); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 133 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 358, 361 n.120 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 397 n.101 (1990); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000). Thus, as a general rule, an appeal may be taken only as to matters or issues raised at the hearing. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 28 (1978); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830, 842 n.26 (1976); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1021 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 343 (1973); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 221 (1997). A contention will not be entertained for the first time on appeal, absent a serious substantive issue, where a party has not pursued the contention before the Licensing Board through proposed findings of fact. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 143 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). The disinclination to entertain an issue raised for the first time on appeal is particularly strong where the issue and factual averments underlying it could have been, but were not, timely put before the Licensing Board. Puerto Rico Electric Power Authority (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34 (1981).

Once an appeal has been filed from a Licensing Board's decision resolving a particular issue, jurisdiction over that issue passes from the Licensing Board. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987); See Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 93 (1995). Once a partial initial decision (PID) has been appealed, supervening factual developments relating to major safety issues considered in the PID are properly before the appellate body, not the Licensing Board. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-383, 5 NRC 609 (1977).

An intervenor who seeks to raise a new issue on appeal must satisfy the criteria for reopening the record as well as the requirements concerning the admissibility of late-

filed contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 248 n.29 (1986).

An intervenor must raise an issue before the Presiding Officer or the intervenor will be precluded from supplementing the record before the Commission. Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 243 (2000).

Jurisdiction to rule on a motion to reopen filed after an appeal has been taken to an initial decision rests with the appellate body rather than the Licensing Board. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 n.3 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1713 n.5 (1985).

An appeal may only be based on matters and arguments raised below. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 496 n.28 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 235 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 281 (1987). Even though a party may have timely appealed a Licensing Board's ruling on an issue, the appeal may not be based on new arguments offered by the party on appeal and not previously raised before the Licensing Board. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82-83 (1985). Cf. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 131 n.2 (1985). See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 812 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222, 229-30 (9th Cir. 1988). A party cannot be heard to complain later about a decision that fails to address an issue no one sought to raise. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 47-48 (1984). A party is not permitted to raise on appellate review Licensing Board practices to which it did not object at the hearing stage. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985). "In Commission practice the Licensing Board, rather than the Commission itself, traditionally develops the factual record in the first instance." Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-11, 46 NRC 49, 51 (1997), citing Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-10, 42 NRC 1, 2 (1995); accord Ralph L. Tetrick (Denial of Application for Reactor Operator License), CLI-97-5, 45 NRC 355, 356 (1997).

### 5.5.2 Effect on Appeal of Failure to File Proposed Findings

A party's failure to file proposed findings on an issue may be "taken into account" if the party later appeals that issue, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974); Consumers

Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 333 (1973), absent a Licensing Board order requiring the submission of proposed findings of fact and conclusions of law, an intervenor that does not make such a filing nevertheless is free to pursue on appeal all issues it litigated below. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 19, 20 (1983).

### 5.5.3 Matters Considered on Appeal of Ruling Allowing Late Intervention

One exception to the rule prohibiting interlocutory appeals is that a party opposing intervention may appeal an order admitting the intervenor. 10 CFR § 2.714a. See also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 n.7 (1976). However, since Licensing Boards have broad discretion in allowing late intervention, an order allowing late intervention is limited to determining whether that discretion has been abused. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 107 (1976); Marble Hill, supra. The papers filed in the case and the uncontroverted facts set forth therein will be examined to determine if the Licensing Board abused its discretion. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8 (1977).

### 5.5.4 Consolidation of Appeals on Generic Issues

Where the issues are largely generic, consolidation will result in a more manageable number of litigants, and relevant considerations will likely be raised in the first group of consolidated cases. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-540, 9 NRC 428, 433 (1979), reconsid. denied, ALAB-546, 9 NRC 636 (1979). The Appeal Board consolidated and scheduled for hearing radon cases where intervenors were actively participating, and held the remaining cases in abeyance.

## 5.6 Standards for Reversing Licensing Board on Findings of Fact and Other Matters

Licensing board rulings are affirmed where the brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of a Board's decision. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000).

Licensing Boards are the Commission's primary fact finding tribunals. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 867 (1975).

The normal deference that an appellate body owes to the trier of the facts when reviewing a decision on the merits is even more compelling at the preliminary state of review. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 133 (1982), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 629 (1977).

In general, the Licensing Board findings may be rejected or modified if, after giving the Licensing Board's decision the probative force it intrinsically commands, the record compels

a different result. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975); accord, Northern Indiana Public Service Co., ALAB-303 supra; Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 834 (1984); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181-82 (1989); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 13-14 (1990). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 397-98 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 365 n.278 (1991). The same standard applies even if the review is sua sponte. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981). In fact, where the record would fairly sustain a result deemed "preferable" by the agency to the one selected by the Licensing Board, the agency may substitute its judgment for that of the lower Board. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 402-405 (1976). Nevertheless, a finding by a Licensing Board will not be overturned simply because a different result could have been reached. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187-1188 (1975); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972). Moreover, the "substantial evidence" rule does not apply to the NRC's internal review process and hence does not control evaluation of Licensing Board decisions. Catawba, supra, 4 NRC at 402-405. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

Where Board's decision for the most part rests on its own carefully rendered fact findings, the Commission has repeatedly declined to second-guess plausible Board decisions. See, e.g., Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 45 (2001); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998); Kenneth G. Pierce (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382 (2001).

The Commission is generally not inclined to upset the Board's fact-driven findings and conclusions, particularly where it has weighed the affidavits or submissions of technical experts. Where the Board analyzed the parties' technical submissions carefully, and made intricate and well-supported findings in a 42-page opinion, the Commission saw no basis, on appeal, to redo the Board's work. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 388 (2001), affirming LBP-00-12, 51 NRC 247, 269-280 (2000).

The Board could not be said to have given short shrift to Intervenor's quality assurance concerns where the Board admitted the issue for hearing, allowed discovery, obtained written evidence, heard oral argument, and the Board ultimately devoted some 11 pages of its order to discussing the quality assurance issue on the merits. The Commission would not

ordinarily second-guess Board fact findings, particularly those reached with this degree of care. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 391 (2001).

A remand, very possibly accompanied by an outright vacation of the result reached below, would be the usual course where the Licensing Board's decision does not adequately support the conclusions reached therein. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42 (1977). Thus, a Licensing Board's failure to clearly set forth the basis for its decision is ground for reversal. Although the Licensing Board is the primary fact-finder, the Commission may make factual findings based on its own review of the record and decide the case accordingly. See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983).

Licensing Board determinations on the timeliness of filing of motions are unlikely to be reversed on appeal as long as they are based on a rational foundation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 159-160 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987). A Licensing Board's determination that an intervenor has properly raised and presented an issue for adjudication is entitled to substantial deference and will be overturned only when it lacks a rational foundation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

A determination of fact in an adjudicatory proceeding which is necessarily grounded wholly in a nonadversary presentation is not entitled to be accorded generic effect, even if the determination relates to a seemingly generic matter rather than to some specific aspect of the facility in question. Washington Public Power Supply System (WPPSS Nuclear Projects No. 3 & 5), ALAB-485, 7 NRC 986, 980 (1978).

Adjudicatory decisions must be supported by evidence properly in the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980). A Licensing Board finding that is based on testimony later withdrawn from the record will stand, if there is sufficient evidence elsewhere in the record to support the finding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 84 (1986).

Where a Licensing Board imposed an incorrect remedy, on appeal there may be a search for a proper one. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 234-235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

If conditions on a license are invalid, the matter will be either remanded to the Board or the Commission may prescribe a remedy itself. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 31 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Appeal Board would not ordinarily conduct a de novo review of the record and make its own independent findings of fact since the Licensing Board is the basic fact-finder under Commission procedures. Wisconsin Electric Power Co. (Point Beach Nuclear Plant No. 2), ALAB-78, 5 AEC 319 (1972). In this regard, Appeal Boards were reluctant to make essentially basic environmental findings which did not receive Staff consideration in the FES

or adequate attention at the Licensing Board hearing. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-260, 1 NRC 51, 55 (1975).

The Commission's review of a Board's settlement decision is de novo, although the Commission gives respectful attention to the Board's views. In its review, the Commission uses the "due weight to...staff" and "public-interest" standards set forth in 10 CFR § 2.203 and New York Shipbuilding Co., 1 AEC 842 (1961). Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 206 (1997).

The Staff's position, while entitled to "due weight," is not itself dispositive of whether an enforcement settlement should be approved. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 207-09 (1997).

The Commission ordinarily defers to the Licensing Board standing determinations, and upheld the Presiding Officer's refusal to grant standing for Petitioner's failure to specify its proximity-based standing claims. Atlas Corp. (Moab, Utah Facility), CLI-97-8, 46 NRC 21, 22 (1997).

### 5.6.1 Standards for Reversal of Rulings on Intervention

A Licensing Board has wide latitude to permit the amendment of defective petitions prior to the issuance of its final order on intervention. The Board's decision to allow such amendment will not be disturbed on appeal absent a showing of gross abuse of discretion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 194 (1973).

On specific matters, a Licensing Board's determination as to a petitioner's "personal interest" will be reversed only if it is irrational. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 193 (1973). In the absence of a clear misapplication of the facts or misunderstanding of the law, the Licensing Board's judgment at the pleading stage that a party has standing is entitled to substantial deference. Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 14 (2001).

A Licensing Board's determination that good cause exists for untimely filing will be reversed only for an abuse of discretion. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Power station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); Public Service Co. of Indiana (Marble Hill Nuclear Generating station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976); Gulf states Utilities Co. (River Bend station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

A Licensing Board ruling on a discretionary intervention request will be reversed only if the Licensing Board abused its discretion. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532 (1991).

The Commission generally defers to the presiding officer's determinations regarding standing, absent an error of law or an abuse of discretion. International Uranium Corporation (White Mesa Uranium Mill), CLI 98-6, 47 NRC 116, 118 (1998); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 (1998); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), CLI-98-20, 48 NRC 183 (1998); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1988).

The principle that Licensing Board determinations on the sufficiency of allegations of affected interest will not be overturned unless irrational presupposes that the appropriate legal standard for determining the "personal interest" of a petitioner has been invoked. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

Licensing Boards have broad discretion in balancing the five factors which make up the criteria for late-filed contentions listed in 10 CFR § 2.714(a)(1). However, a Licensing Board's decision may be overturned where no reasonable justification can be found for the outcome that is determined. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985), citing, Washington Public Power Supply System (WPPSS Nuclear Project 3), ALAB-747, 18 NRC 1167, 1171 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20-21 (1986) (abuse of discretion by Licensing Board). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 443 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 922 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 481-82 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), dismissed as moot, ALAB-946, 33 NRC 245 (1991).

## 5.7 Stays

The Rules of Practice do not provide for an automatic stay of an order upon the filing of an appeal. A specific request must be made. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 97 (1983). The provision for stays in 10 CFR § 2.788 provides only for stays of decisions or actions in the proceeding under review. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993).

A stay of the effectiveness of a Licensing Board decision pending review of that decision may be sought by the party appealing the decision. 10 CFR § 2.788 confers the right to seek stay relief only upon those who have filed (or intend to file) a timely petition for review of a decision or order sought to be stayed. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 68-69 (1979).

Such a stay is normally sought by written motion, although, in extraordinary circumstances, a stay ex parte may be granted. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420 (1974). The movant may submit affidavits in support of his motion; opposing parties may file opposing affidavits, and it is appropriate for the appellate tribunal to accept and consider such affidavits in ruling on the motion for a stay. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-356, 4 NRC 525 (1976). The party seeking a stay bears the burden of marshalling the evidence and making the arguments which demonstrate his entitlement to it. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 785 (1977).

General assertions, in conclusionary terms, of alleged harmful effects are insufficient to demonstrate entitlement to a stay. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983), citing Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978).

In the past it has been held that, as a general rule, motions for stay of a Licensing Board action should be directed to the Licensing Board in the first instance. Under those earlier rulings, the Appeal Board made it clear that, while filing a motion for a stay with the Licensing Board is not a jurisdictional prerequisite to seeking a stay from the Appeal Board, Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976), the failure, without good cause, to first seek a stay from the Licensing Board is a factor which the Appeal Board would properly take into account in deciding whether it should itself grant the requested stay. See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772 (1977); Public Service Co. of New Hampshire, ALAB-338 supra. See also Toledo Edison Co. (Davis-Besse Nuclear Power Plant), ALAB-25, 4 AEC 633, 634 (1971). More recently, however, amendments to 10 CFR § 2.788 on stays pending review have made it clear that a request for stay of a Licensing Board decision, pending the filing of a petition for Commission review, may be filed with either the Licensing Board or the Commission. 10 CFR § 2.788(f).

Where the Commission issues a stay wholly as a matter of its own discretion, it does not need to address the factors listed in 10 C.F.R. §2.788. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 60 (1996).

In ruling on stay requests, the Commission has held that irreparable injury is the most crucial factor. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000). See also Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

The effectiveness of conditions imposed in a construction permit may be stayed without staying the effectiveness of the permit itself. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977).

An appellate tribunal may entertain and grant a motion for a stay pending remand of a Licensing Board decision. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977).

The provisions of 10 CFR § 2.788 apply only to requests for stays of decisions of the licensing board, not decisions of the Commission itself. A request for a stay of a previous Commission decision and a stay of the issuance of a full-power license pending judicial review is more properly entitled a "Motion for Reconsideration" and/or a "Motion to Hold in Abeyance." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251 (1993). The date of service for purposes of computing the time for filing a stay motion under Section 2.788 is the date on which the Docketing and Service Branch of the Office of the Secretary of the Commission serves the order or decision. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, No. 2), ALAB-414, 5 NRC 1425, 1427-1428 (1977).

The Commission may issue a temporary stay to preserve the status quo without waiting for the filing of an answer to a motion for stay. 10 C.F.R. § 2.788(f). The issuance of a temporary stay is appropriate where petitioners raise serious questions, that, if petitioners are correct, could affect the balance of the stay factors set forth in 10 C.F.R. § 2.788(e). Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-3, 47 NRC 7 (1998); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), CLI-98-4, 47 NRC 111, 112 (1998).

Where a party files a stay motion with the Commission pursuant to 10 CFR § 2.730 (which contains no standards by which to decide stay motions), the Commission will turn for guidance to the general stay standards in section 2.788. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). Thus, a full stay pending judicial review of a Commission decision may require the movant to meet the Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), criteria. See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974).

If, absent a stay pending appeal, the status quo will be irreparably altered, grant of a stay may be justified to preserve the Commission's ability to consider, if appropriate, the merits of a case. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-6, 17 NRC 333, 334 (1983).

### 5.7.1 Requirements for a Stay Pending Review

The Commission may stay the effectiveness of an order if it has ruled on difficult legal questions and the equities of the case suggest that the status quo should be maintained during an anticipated judicial review of the order. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 80 (1992), citing, Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

#### 5.7.1.1 Stays of Initial Decisions

Stays of an initial decision will be granted only upon a showing similar to that required for a preliminary injunction in the Federal courts. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-81, 5 AEC 348 (1972). The test to be applied for such a showing is that laid down in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Public Service Co. of New

Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-221, 8 AEC 95, 96 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-199, 7 AEC 478, 480 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420, 421 (1974). See also Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27 (1981); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898 (1981); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-30, 14 NRC 357 (1981); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 691 (1982); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1184-85 (1982); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 96-97 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 803 n.3 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1440 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1632 n.7 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1599 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1618 (1985); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 178 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 193, 194 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.5 (1985); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121-122 (1986); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 5 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 435 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 290 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989); Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 146 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 257 & n.59 (1990); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 267 (1990); Curators of the University of Missouri, LBP-90-30, 32 NRC 95, 103-104 (1990); Curators of the university of Missouri, LBP-90-35, 32 NRC 259, 265-66 (1990); Umetco Minerals Corp., LBP-92-20, 36 NRC 112, 115-116 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55 (1993); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).

### 5.7.1.2 Stays of Board Proceedings, Interlocutory Rulings & Staff Action

The Virginia Petroleum Jobbers rule applies not only to stays of initial decisions of Licensing Boards, but also to stays of Licensing Board proceedings in general, Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975), and stays pending judicial review, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974). In addition, the concept of a stay pending consideration of a petition for directed certification has been recognized. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-307, 3 NRC 17 (1976). The rule applies to stays of limited work authorizations, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630 (1977), as well as to requests for emergency stays pending final disposition of a stay motion. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 (1977). The rule also applies to stays of implementation and enforcement of radiation protection standards. Environmental Radiation Protection Standards for Nuclear Power Operations, (40 CFR 190), CLI-81-4, 13 NRC 298 (1981); Uranium Mill Licensing Requirements (10 CFR Parts 30, 40, 70 and 150), CLI-81-9, 13 NRC 460, 463 (1981). It also applies to postponements of the effectiveness of some license amendments issued by the NRC Staff. In the case of a request for postponement of an amendment, the Commission has stated that a bare claim of an absolute right to a prior hearing on the issuance of a license amendment does not constitute a substantial showing of irreparable injury as required by 10 CFR § 2.788(e). Nuclear Fuel Services, Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940 (1981). The rule has been applied to a stay of enforcement orders. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 146 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990).

However, the NRC Staff's issuance of an immediately effective license amendment based on a "no significant hazards consideration" finding is a final determination which is not subject to either a direct appeal or an indirect appeal to the Commission through the request for a stay. In special circumstances, the Commission may, on its own initiative, exercise its inherent discretionary supervisory authority over the Staff's actions in order to review the Staff's "no significant hazards consideration" determination. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986); 10 C.F.R. § 50.58(b)(6).

Where petitioners do not relate their stay request to any action in the proceeding under review, the request for stay is beyond the scope of 10 CFR § 2.788. Such a request is more properly a petition for immediate enforcement action under 10 CFR § 2.206. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993).

Interlocutory appeals or petitions to the Commission are not devices for delaying or halting licensing board proceedings. The stringent four-part standard set forth

in section 2.788(e) makes it difficult for a party to obtain a stay of any aspect of a licensing board proceeding. Therefore, only in unusual cases should the normal discovery and other processes be delayed pending the outcome of an appeal or petition to the Commission. Cf. 10 CFR § 2.730(g). Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).

A party may file a motion for the Commission to stay the effectiveness of an interlocutory Licensing Board ruling, pursuant to 10 CFR § 2.788, pending the filing of a petition for interlocutory review of that Board order. See Georgia Power Co., et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994).

The provisions of 10 CFR § 2.788 apply only to requests for stays of decisions of the licensing board, not decisions of the Commission itself. A request for a stay of a previous Commission decision and a stay of the issuance of a full-power license pending judicial review is more properly entitled a "Motion for Reconsideration" and/or a "Motion to Hold in Abeyance." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2) CLI-93-11, 37 NRC 251 (1993).

When ruling on stay motions in a license transfer proceeding, the Commission applies the four pronged test set forth in 10 C.F.R. § 2.1327(d):

(1) Whether the requestor will be irreparably injured unless a stay is granted;
(2) Whether the requestor has made a strong showing that it is unlikely to prevail on the merits;
(3) Whether the granting of a stay would harm other participants; and
(4) Where the public interest lies.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000).

The application for a stay will be denied when intervenors do not make a strong showing that they are likely to prevail on the merits or that they will be irreparably harmed pending appeal of the Licensing Board's decision. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

Note that 10 CFR § 2.788 does not expressly deal with the matter of a stay pending remand of a proceeding to the Licensing Board. Prior to the promulgation of Section 2.788, the Commission held that the standards for issuance of a stay pending proceedings on remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1, 2 & 3), CLI-77-8, 5 NRC 503 (1977). The Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balance of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-

89-15, 30 NRC 96, 100 (1989). Similarly, in Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772 (1977), the Appeal Board ruled that the criteria for a stay pending remand differ from those required for a stay pending appeal. Thus, it appears that the criteria set forth in 10 CFR § 2.788 may not apply to requests for stays pending remand. Where a litigant who has prevailed on a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all relevant equitable considerations. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978). In such circumstances, the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. at 7 NRC 160.

Where petitioners who have filed a request to stay issuance of a low-power license are not parties to the operating license proceeding, and where petitioners' request does not address the five factors for late intervention found in 10 CFR § 2.714(a)(1)(i)-(v), the request cannot properly be considered in that operating license proceeding. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 57-58 (1993).

### 5.7.1.3 10 C.F.R. § 2.788 & Virginia Petroleum Jobbers Criteria

The Virginia Petroleum Jobbers criteria for granting a stay have been incorporated into the regulations at 10 CFR § 2.788(e). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 130 (1982); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100 (1994) (the Commission will decline a grant of petitioner's request to halt decommissioning activities where petitioner failed to meet the four traditional criteria for injunctive relief); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998). Since that section merely codifies long-standing agency practice which parallels that of the courts, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978), prior agency case law delineating the application of the Virginia Petroleum Jobbers criteria presumably remains applicable.

Under the Virginia Petroleum Jobbers test, codified in 10 CFR 2.788(e), four factors are examined:

(1) has the movant made a strong showing that it is likely to prevail upon the merits of its appeal;
(2) has the movant shown that, without the requested relief, it will be irreparably injured;
(3) would the issuance of a stay substantially harm other parties interested in the proceeding;
(4) where does the public interest lie?

Section 2.788(b)(2) of 10 C.F.R. specifies that an application for a stay must contain a concise statement of the grounds for stay, with reference to the factors

specified in paragraph (e) of that section. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993). See also Fansteel, Inc. (Muskogee, Oklahoma Facility), LBP-99-47, 50 NRC 409 (1999).

On a motion for a stay, the burden of persuasion on the four factors of Virginia Petroleum Jobbers (now set forth in 10 CFR § 2.788) is on the movant. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 270 (1978); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981).

Stays pending appellate review are governed by 10 C.F.R. § 2.788. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 262-263 (2002); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 392 (2001).

A decision to deny a petition for review terminates adjudicatory proceedings before the Commission, and renders moot the a motion for a stay pending appeal. Carolina Power & Light Co. (Shearon Harris Power Plant), CLI-01-11, 53 NRC 370, 392 (2001).

The Commission took no action on Intervenor's stay motion during its consideration of the Intervenor's petition for review because it saw no possibility of irreparable injury. The record indicates that the injury asserted by Intervenor could not occur until at least July 2, 2001, when the Licensee expects to place spent fuel pools C and D into service following testing. Even after July 2, the additional spent fuel stored at Shearon Harris will total no more that 150 fuel elements in the short term (i.e. during 2001). Moreover, Intervenor's claim of injury-offsite radiation exposure in the event of a spent fuel pool accident-is speculative. These facts taken together result in a small likelihood of an accident occurring , and does not amount to the kind of "certain and great" harm necessary for a stay. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 392-93 (2001). See Cuomo v. NRC, 772 F.2d 972, 976 (D.C. Cir. 1985); accord, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 747-48 & n.20 (1985).

Where the four factors set forth in 10 CFR § 2.788(e) are applicable, no one of these criteria is dispositive. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 232 (2002), see also 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). Rather, the strength or weakness of the movant's showing on a particular factor will determine how strong his showing on-the other factors must be in order to justify the relief he seeks. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-30, 14 NRC 357 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). Of the four stay factors, "the most crucial is whether irreparable injury will

be incurred by the movant absent a stay." Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). Accord Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001). International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227 (2002), see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990). In any event, there should be more than a mere showing of the possibility of legal error by a Licensing Board to warrant a stay. Philadelphia Electric Co., ALAB-221 supra; Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-158, 6 AEC 999 (1973). The establishment of grounds for appeal is not itself sufficient to justify a stay. Rather, there must be a strong probability that no ground will remain upon which the Licensing Board's action could be based. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977).

#### 5.7.1.3.1 *Irreparable Injury*

The factor which has proved most crucial with regard to stays of Licensing Board decisions is the question of irreparable injury to the movants if the stay is not granted. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-716, 17 NRC 341, 342 n.1 (1983); United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633 n.11 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1599 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 & n.7 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 436 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119 (1998); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 321 n.5 (1998). See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977); Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-507, 8 NRC 551, 556 (1978); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978). See also Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11

NRC 631, 662 (1980). It is the established rule that a party is not ordinarily granted a stay of an administration order without an appropriate showing of irreparable injury. Id., quoting Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968). A party must reasonably demonstrate, and not merely allege, irreparable harm. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633-35 (1984). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361-62 (1989); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 324 (1998).

In Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-481, 7 NRC 807, 808 (1978), the Appeal Board stressed the importance of the irreparable injury requirement, stating that a party is not ordinarily granted a stay absent an appropriate showing of irreparable injury. Where a decision as to which a stay is sought does not allow the issuance of any licensing authorization and does not affect the status quo ante, the movant will not be injured by the decision and there is, quite simply, nothing for the Appeal Board to stay. Jamesport, supra.

Where the Licensing Board's decision is itself the cause of irreparable injury, a stay of proceedings pending review is appropriate. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 225 (2002).

The irreparable injury requirement is not satisfied by some cost merely feared as liable to occur at some indefinite time in the future. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977). Mere economic loss does not constitute irreparable injury. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 81 (1992), citing, Ohio ex rel. Celebrezze v. NRC, 812 F.2d 288, 291 (6th Cir. 1987). Nor are actual injuries, however substantial in terms of money, time and energy necessarily expended in the absence of a stay, sufficient to justify a stay if not irreparable. Davis-Besse, supra. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437-38 (1987). Similarly, mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 263 (2002); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 779 (1977); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). The mere possibility that a stay would save other parties from incurring significant litigation expenses is insufficient to offset the movant's failure to demonstrate irreparable injury and a strong likelihood of success on the merits. Sequoyah Fuels Corporation, id. at 8. Discovery in a license amendment case does not constitute irreparable injury. Georgia

Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-8, 37 NRC 292, 298 (1993).

Similarly, the expense of an administrative proceeding is usually not considered irreparable injury. Uranium Mill Licensing Requirements (10 CFR Parts 30, 40, 70, and 150), CLI-81-9, 13 NRC 460, 465 (1981), citing, Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) and Hornblower and Weeks-Hemphill Noyes, Inc. v. Csaky, 427 F. Supp. 814 (S.D.N.Y. 1977).

An intervenor's claim that an applicant's commitment of resources to the operation of a facility pending an appeal will create a Commission bias in favor of continuing a license does not constitute irreparable injury. The Commission has clearly stated that it will not consider the commitment of resources to a completed plant or other economic factors in its decisionmaking on compliance with emergency planning safety regulations. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258-59 (1990), citing, Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025 (D.C. Cir. 1985). Additionally, a party's claim that discovery expenses might deplete assets allotted for decommissioning activities does not constitute irreparable injury. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). However, the Commission also noted that the commitment of resources and other economic factors are properly considered in the NEPA decisionmaking process. Seabrook, supra, 31 NRC at 258 n.62. Thus, a party challenging the alternative site selection process may be able to show irreparable injury if a stay is not granted to halt the development of a proposed site during the pendency of its appeal. Any resources which might be expended in the development of the proposed site would have to be considered in any future cost-benefit analysis and, if substantial, could skew the cost-benefit analysis in favor of the proposed site over any alternative sites. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 268-269 (1990).

The fact that an appeal might become moot following denial of a motion for a stay does not per se constitute irreparable injury. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 233 (2002). It must also be established that the activity that will take place in the absence of a stay will bring about concrete harm. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 411-12 (1989).

Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2),

CLI-84-5,19 NRC 953, 964 (1984); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 271 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 259-260 (1990).

The risk of harm to the general public or the environment flowing from an accident during low-power testing is insufficient to constitute irreparable injury. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 410 (1989). Similarly, irreversible changes produced by the irradiation of the reactor during low-power testing do not constitute irreparable injury. Seabrook, CLI-89-8, supra, 29 NRC at 411.

Mere exposure to the risk of full power operation of a facility does not constitute irreparable injury when the risk is so low as to be remote and speculative. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

The importance of a showing of irreparable injury absent a stay was stressed by the Appeal Board in Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978), where the Appeal Board indicated that a stay application which does not even attempt to make a showing of irreparable injury is virtually assured of failure.

A party who fails to show irreparable harm must make a strong showing on the other stay factors in order to obtain the grant of a stay. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 260 (1990); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).

### 5.7.1.3.2 Possibility of Success on Merits

The "level or degree of possibility of success" on the merits necessary to justify a stay will vary according to the tribunal's assessment of the other factors that must be considered in determining if a stay is warranted. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977), citing, Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998). Where there is no showing of irreparable injury absent a stay and the other factors do not favor the movant, an overwhelming showing of likelihood of success on the merits is required to obtain a stay. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-1189 (1977); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985) (a virtual certainty of success on the merits). See also Florida Power & Light Co., ALAB-415, 5 NRC 1435,

1437 (1977) to substantially the same effect; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 439 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 362-63 (1989); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994).

To make a strong showing of likelihood of success on the merits, the movant must do more than list the possible grounds for reversal. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269-70 (1990). A party's expression of confidence or expectation of success on the merits of its appeal before the Commission or the Boards is too speculative and is also insufficient. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-805 (1984).

### 5.7.1.3.3 Harm to Other Parties and Where the Public Interest Lies

If the movant for a stay fails to meet its burden on the first two 10 CFR § 2.788(e) factors, it is not necessary to give lengthy consideration to balancing the other two factors. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing, Catawba, supra, 20 NRC at 1635; Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 363 (1989); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 270 (1990); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 8 (1994).

Although an applicant's economic interests are not generally within the proper scope of issues to be litigated in NRC proceedings, a Board may consider such interests in determining whether, under the third stay criterion, the granting of a stay would harm other parties. Thus, a Board may consider the potential economic harm to an applicant caused by a stay of the applicant's operating license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985). See, e.g., Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471, 477 (1985); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

The imminence of the hearing is also a factor in a determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 263 (2002).

In a decontamination enforcement proceeding where a licensee seeks a stay of an immediately effective order, the fourth factor - where the public interest lies - is the most important consideration. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-90-8, 31 NRC 143, 148 (1990), aff'd as modified, ALAB-931, 31 NRC 350, 369 (1990).

### 5.7.2 Stays Pending Remand to Licensing Board

10 CFR § 2.788 does not expressly deal with the matter of a stay pending remand of a proceeding to the Licensing Board. Prior to the promulgation of Section 2.788, the Commission held that the standards for issuance of a stay pending remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977). In this vein, the Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balancing of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings.

Where judicial review discloses inadequacies in an agency's environmental impact statement prepared in good faith, a stay of the underlying activity pending remand does not follow automatically. Whether the project need be stayed essentially must be decided on the basis of (1) traditional balancing of equities, and (2) consideration of any likely prejudice to further decisions that might be called for by the remand. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 784-85 (1977). The seriousness of the remanded issue is a third factor which a Board will consider before ruling on a party's motion for a stay pending remand. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1543 (1984), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 521 (1977).

### 5.7.3 Stays Pending Judicial Review

Requests for stays pending judicial review have been entertained under the Virginia Petroleum Jobbers criteria (see Section 5.7.1, supra) to determine if a stay is appropriate. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974); Natural Resources Defense Council, CLI-76-2, 3 NRC 76 (1976).

Section 10(d) of the Administrative Procedure Act (5 U.S.C. 705) pertains to an agency's right to stay its own action pending judicial review of that action. It confers no freedom on an agency to postpone taking some action when the impetus for the action comes from a court directive. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 783-84 (1977).

The Appeal Board suspended sua sponte its consideration of an issue in order to await the possibility of Supreme Court review of related issues, following the rendering of a decision by the First Circuit Court of Appeals, where certiorari had not yet been sought or ruled upon for such Supreme Court review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-548, 9 NRC 640, 642 (1979).

### 5.7.4 Stays Pending Remand After Judicial Review

Where a litigant who has prevailed upon a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all relevant equitable considerations. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978). In such circumstances, the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. at 7 NRC 160.

### 5.7.5 Immediate Effectiveness Review of Operating License Decisions

Under 10 CFR § 2.764(f)(2), upon receipt of a Licensing Board's decision authorizing the issuance of a full power operating license, the Commission will determine, sua sponte, whether to stay the effectiveness of the decision. Criteria to be considered by the Commission include, but are not limited to: the gravity of the substantive issue; the likelihood that it has been resolved incorrectly below; and the degree to which correct resolution of the issue would be prejudiced by operation pending review. Until the Commission speaks, the Licensing Board's decision is considered to be automatically stayed. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-13, 22 NRC 1, 2 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 n.2 (1985).

The Commission's immediate effectiveness review is usually based upon a full Licensing Board decision on all contested issues. However, the Commission conducted an immediate effectiveness review and authorized the issuance of a full power license for Limerick Unit 2, even though, pursuant to a federal court remand, Limerick Ecology Action v. NRC, 869 F.2d 719 (3rd Cir. 1989), there was an ongoing Licensing Board proceeding to consider environmental issues. The Commission noted that: (1) all contested safety issues had been fully heard and resolved; and (2) the National Environmental Policy Act (NEPA) does not always require resolution of all contested environmental issues and completion of the entire NEPA review process prior to the issuance of a license. Philadelphia Electric Co. (Limerick Generating Station, Unit 2), CLI-89-17, 30 NRC 105, 110 (1989), citing, 40 CFR 1506.1.

An intervenor's speculative comments are insufficient grounds for a stay of a Licensing Board's authorization of a full power operating license. The intervenor must challenge the Licensing Board's substantive conclusions concerning contested issues in the proceeding. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), CLI-87-1, 25 NRC 1, 4 (1987), aff'd, Eddleman v. NRC, 825 F.2d 46 (4th Cir. 1987).

Prior to moving for a stay of issuance of the operating license, a person or persons who are not parties to the license proceeding must petition for and be granted late intervention and reopening. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2) CLI-93-11, 37 NRC 251 (1993).

Where construction of a plant is "substantially completed" any request to stay construction is moot. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2) CLI-93-11, 37 NRC 251, 254 (1993).

The Commission's denial of a stay, pursuant to its immediate effectiveness review, does not preclude a party from petitioning under 10 CFR § 2.786 for appellate review of the Licensing Board's conclusions. Shearon Harris, supra, 25 NRC at 4 n.3, citing, 10 CFR § 2.764(9).

Before a full power license can be issued for a plant, the Commission must complete its immediate effectiveness review of the pertinent Licensing Board decision pursuant to 10 CFR § 2.764(f)(2). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 144 n.26 (1982).

## 5.8 Review as to Specific Matters

### 5.8.1 Scheduling Orders

Since a scheduling decision is a matter of Licensing Board discretion, it will generally not be disturbed absent a "truly exceptional situation." Virginia Electric & Power Co. (North Anna Power Station, Unit 1 & 2), ALAB-584, 11 NRC 451, 467 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 250 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986). See also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-344, 4 NRC 207, 209 (1976) (Appeal Board was reluctant to overturn or otherwise interfere with scheduling orders of Licensing Boards absent due process problems); and Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981) (Appeal Board was loath to interfere with a Licensing Board's denial of a request to delay a proceeding where the Commission has ordered an expedited hearing; in such a case there must be a "compelling demonstration of a denial of due process or the threat of immediate and serious irreparable harm" to invoke discretionary review); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21 (1987) (petitioner failed to substantiate its claim that a Licensing Board decision to conduct simultaneous hearings deprived it of the right to a fair hearing); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 68 (1987) (intervenors' concerns about infringement of procedural due process were premature); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 277 (1987) (intervenor failed to show specific harm resulting from the Licensing Board's severely abbreviated hearing schedule); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 420-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1

and 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-4, 29 NRC 243, 244 (1989).

In determining the fairness of a Licensing Board's scheduling decisions, the totality of the relevant circumstances disclosed by the record will be considered. Seabrook, supra, 25 NRC at 421; Seabrook, ALAB-889, supra, 27 NRC at 269.

Where a party alleges that a Licensing Board's expedited hearing schedule violated its right to procedural due process by unreasonably limiting its opportunity to conduct discovery, an Appeal Board will examine: the amount of time allotted for discovery; the number, scope, and complexity of the issues to be tried; whether there exists any practical reason or necessity for the expedited schedule; and whether the party has demonstrated actual prejudice resulting from the expedited hearing schedule. Seabrook, supra, 25 NRC at 421, 425-427. Although, absent special circumstances, the Appeal Board will generally review Licensing Board scheduling determinations only where confronted with a claim of deprivation of due process, the Appeal Board may, on occasion, review a Licensing Board scheduling matter when that scheduling appears to be based on the Licensing Board's misapprehension of an Appeal Board directive. See, e.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-468, 7 NRC 464, 468 (1978).

Matters of scheduling rest peculiarly within the Licensing Board's discretion; the Appeal Board is reluctant to review scheduling orders, particularly when asked to do so on an interlocutory basis. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 438 (1979).

### 5.8.2 Discovery Rulings

#### 5.8.2.1 Rulings on Discovery Against Nonparties

An order granting discovery against a nonparty is final and appealable by that nonparty as of right. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). An order denying such discovery is wholly interlocutory and immediate review by the party seeking discovery is excluded by 10 CFR § 2.730(f). Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 380-81 (1984).

#### 5.8.2.2 Rulings Curtailing Discovery

In appropriate instances, an order curtailing discovery is appealable. To establish reversible error from curtailment of discovery procedures, a party must demonstrate that the action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery is impossible. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). Absent such circumstances, however, an order denying discovery, and discovery orders in general are not immediately appealable since they are interlocutory. Houston Lighting and Power Co. (South

Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 472 (1981); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

### 5.8.3 Refusal to Compel Joinder of Parties

A Licensing Board's refusal to compel joinder of certain persons as parties to a proceeding is interlocutory in nature and, pursuant to 10 CFR § 2.730(f), is not immediately appealable. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

#### 5.8.3.1 Order Consolidating Parties

Just as an order denying consolidation is interlocutory, an order consolidating the participation of one party with others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Company (Trojan Nuclear Plant), ALAB-496, 8 NRC 308, 309-310 (1978); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 (1976).

### 5.8.4 Order Denying Summary Disposition

As is the case under Rule 56 of the Federal Rules of Civil Procedure, an order denying a motion for summary disposition under 10 CFR § 2.749 is not immediately appealable. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-220, 8 AEC 93 (1974). Similarly, a deferral of action on, or denial of, a motion for summary disposition does not fall within the bounds of the 10 CFR § 2.714a exception to the prohibition on interlocutory appeals, and may not be appealed. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175 (1977). (See also 3.5).

### 5.8.5 Procedural Irregularities

Absent extraordinary circumstances, alleged procedural irregularities will not be reviewed unless an appeal has been taken by a party whose rights may have been substantially affected by such irregularities. Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633, 634 (1974).

### 5.8.6 Matters of Recurring Importance

There is some indication that a matter of recurring procedural importance may be appealed in a particular case even though it may no longer be determinative in that case. However, if it is of insufficient general importance (for instance, whether existing guidelines concerning cross-examination were properly applied in an individual case), interlocutory review will be refused. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 316 (1978).

### 5.8.7 Advisory Decisions on Trial Rulings

Advisory decisions on trial rulings which resulted in no discernible injury ordinarily will not be considered on appeal. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858 (1973).

### 5.8.8 Order on Pre-LWA Activities

A Licensing Board order on the issue of whether offsite activity can be undertaken prior to the issuance of an LWA or a construction permit is immediately appealable as of right. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 3 NRC 771, 774 (1976).

### 5.8.9 Partial Initial Decisions

Partial initial decisions which do not yet authorize construction activities still may be significant and, therefore, immediately appealable. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-597, 11 NRC 870, 871 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975).

For the purposes of appeal, partial initial decisions which decide a major segment of a case or terminate a party's right to participate, are final Licensing Board actions on the issues decided. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 684 (1983). See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981).

In the interest of efficiency, all rulings that deal with the subject matter of the hearing from which a partial initial decision ensues should be reviewed by the Commission at the same time. Therefore, the time to ask the Commission's review of any claim that could have affected the outcome of a partial initial decision, including bases that were not admitted or that were dismissed prior to the hearing, is immediately after the partial initial decision is issued. The parties should assert any claims of error that relate to the subject matter of the partial initial decision, whether the specific issue was admitted for the hearing or not, and without regard to whether the issue was originally designated a separate "contention" or a "basis" for a contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 353 (2000).

### 5.8.10 Other Licensing Actions

When a Licensing Board, during the course of an operating license hearing, grants a Part 70 license to transport and store fuel assemblies, the decision is not interlocutory and is immediately appealable as of right. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976).

When a Licensing Board's ruling removes any possible adjudicatory impediments to the issuance of a Part 70 license, the ruling is immediately appealable. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 45

n.1 (1984), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 648 n.1 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-854, 24 NRC 783, 787 (1986) (a Licensing Board's dismissal by summary disposition of an intervenor's contention dealing with fuel loading and precriticality testing may be challenged in connection with the intervenor's challenge of the order authorizing issuance of the license).

### 5.8.11 Rulings on Civil Penalties

In a civil penalty case, an order by the Administrative Law Judge affirming the Director of Inspection and Enforcement's order imposing civil penalties on a licensee, but at the same time granting a request for a hearing to present facts to support mitigation of the amount of the penalty, is not appealable. An appeal at this point is foreclosed by 10 CFR § 2.730(f). Section 2.730(f) is a rule of general applicability governing civil penalty proceedings to the same extent as it does licensing proceedings. Pittsburgh-Des Moines Steel Co., ALAB-441, 6 NRC 725 (1977).

### 5.8.12 Evidentiary Rulings

While all evidentiary rulings are ultimately subject to appeal at the end of the proceeding, not all such rulings are worthy of appeal. Some procedural and evidentiary errors almost invariably occur in lengthy hearings where the presiding officer must rule quickly. Only serious errors affecting substantial rights and which might have influenced improperly the outcome of the hearing merit the hearing merit exception and briefing on appeal. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 836 (1974).

Evidentiary exclusions must affect a substantial right, and the substance of the evidence must be made known by way of an offer of proof or be otherwise apparent, before the exclusions can be considered errors. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 697-98 n.14 (1982).

For a discussion of the procedure necessary to preserve evidentiary rulings for appeal, see Section 3.11.4.

### 5.8.13 Authorization of Construction Permit

A decision authorizing issuance of a construction permit may be suspended. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-348, 4 NRC 225 (1976). Immediate revocation or suspension of a construction permit, upon review of the issuance thereof, is appropriate if there are deficiencies that:

(a) pose a hazard during construction;
(b) need to be corrected before further construction takes place;
(c) are incorrectable; or

(d) might result in significant environmental harm if construction is permitted to continue.

Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 401 (1975).

Whether a public utility commission's consent is required before construction contracts can be entered into and carried out is a question of State law. If the State authorities want to suspend construction pending the results of the public utility commission's review, it is their prerogative. But the construction permit will not be suspended on the "strength of nothing more than potentiality of action adverse to the facility being taken by another agency" (citation omitted). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 748 (1977).

### 5.8.14 Certification of Gaseous Diffusion Plants

To be eligible to petition for review of a Director's Decision on the certification of a gaseous diffusion plant, an interested party must have either submitted written comments in response to a prior Federal Register notice or provided oral comments at an NRC meeting held on the application or compliance plan. 10 C.F.R. § 76.62(c). U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 233-34, 236 (1996).

Individuals who wish to petition for review of an initial Director's decision must explain how their "interest may be affected." 10 C.F.R. § 76.62(c). For guidance, petitioners may look to the Commission's adjudicatory decisions on standing. U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), 44 NRC 231, 234-36 (1996).

## 5.9 Perfecting Appeals

Normally, review is not taken of specific rulings (e.g., rulings with respect to contentions) in the absence of a properly perfected appeal by the injured party. Washington Public Power Supply System (Nuclear Projects No. 1 & No. 4), ALAB-265, 1 NRC 374 n.1 (1975); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 848-849 (1974).

While the Commission does not require the same precision in the filings of laymen that is demanded of lawyers, any party wishing to challenge some particular Licensing Board action must at least identify the order in question, indicate that he is seeking review of it, and give some reason why he thinks it is erroneous. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978).

### 5.9.1 General Requirements for Petition for Review of an Initial Decision

The general requirements for petitions for review from an initial decision are set out in 10 CFR § 2.786. Section 2.786(b) provides that such a petition is to be filed within fifteen days after service of the initial decision.

## 5.10 Briefs on Appeal

### 5.10.1 Importance of Brief

The filing of a brief in support of a section 2.714a appeal is mandatory. The Commission upon taking review, pursuant to § 2.786, may order the filing of appropriate briefs. See 10 C.F.R. 2.786(d).

Failure to file a brief has resulted in dismissal of the entire appeal, even when the appellant was acting pro se. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 485 n.2 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240-41 (1991); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 66-67 (1992); see also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975). Commission appellate practice has long stressed the importance of a brief. A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 198 (1993).

Intervenors have a responsibility to structure their participation so that it is meaningful and alerts the agency to the intervenors' position and contentions. Public Service Elec. & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50, citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978). Even parties who participate in NRC licensing proceedings pro se have an obligation to familiarize themselves with proper briefing format and with the Commission's Rules of Practice. Salem, 14 NRC at 50 n.7. See Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 66 (1992).

When an intervenor is represented by counsel, there should be no need, and there is no requirement, to piece together or to restructure vague references in the intervenor's brief in order to make intervenor's arguments for it. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 51 (1981), aff'd sub nom., Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3rd Cir. 1982). Therefore, those aspects of an appeal not addressed by the supporting brief may be disregarded. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982), citing, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Unit 1 & 2), ALAB-693, 16 NRC 952 (1982); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957 (1974).

### 5.10.2 Time for Submittal of Brief

10 CFR § 2.714a(a) requires the filing of a notice of appeal and a supporting brief within 10 days after service of a Licensing Board order wholly denying a petition for leave to intervene. Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265 (1991).

If the Commission grants review pursuant to 10 C.F.R. § 2.786, it will issue an order asking for the filing of appropriate briefs. This order will typically set the schedule for filing dates and appropriate page limits for briefs. See 10 C.F.R. § 2.786(d).

The Commission may consider an untimely appeal if the appellant can show good cause for failure to file on time. Seabrook, supra, 34 NRC at 265-66.

The time limits imposed for filing briefs refer to the date upon which the appeal was actually filed and not to when the appeal was originally due to be filed prior to a time extension. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977).

It is not necessary for a party to bring to the adjudicator's attention the fact that its adversary has not met prescribed time limits. Nor as a general rule will any useful purpose be served by filing a motion seeking to have an appeal dismissed because the appellant's brief was a few days late; the mailing of a brief on a Sunday or Monday which was due for filing the prior Friday does not constitute substantial noncompliance which would warrant dismissal, absent unique circumstances. Wolf Creek, supra.

In the event of some late arising unforeseen development, a party may tender a document belatedly. As a rule, such a filing must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reasons for the lateness, but also why a motion for a time extension could not have been seasonably submitted, irrespective of the extent of the lateness. Wolf Creek, ALAB-424, supra. Apparently, however, the written explanation for the tardiness may be waived if, at a later date, the Board and parties are provided with an explanation which the Board finds to be satisfactory. Id. at 126.

If service of appellant's brief is made by mail, and the responsive brief is to be filed within a certain period after service of the appellant's brief, add five days to the time period for filing. 10 C.F.R. § 2.710. Commission 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; thus, when a party files the petition by both mail and electronic mail, the five day extension will apply. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-02-10, 55 NRC 251, 258 (2002).

#### 5.10.2.1 Time Extensions for Brief

Motions to extend the time for briefing are not favored. In any event, such motions should be filed in such a manner as to reach the Commission at least

one day before the period sought to be extended expires. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-117, 6 AEC 261 (1973); Boston Edison Co. (Pilgrim Nuclear Station), ALAB-74, 5 AEC 308 (1972). An extension of briefing time which results in the rescheduling of an already calendared oral argument will not be granted absent extraordinary circumstances. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-144, 6 AEC 628 (1973).

If unable to meet the deadline for filing a brief in support of its appeal of a Licensing Board's decision, a party is duty-bound to seek an extension of time sufficiently in advance of the deadline to enable a seasonable response to the application. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 10 NRC 554, 555 (1979).

### 5.10.2.2 Supplementary or Reply Briefs

A supplementary brief will not be accepted unless requested or accompanied by a motion for leave to file which sets forth reasons for the out-of-time filing. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-115, 6 AEC 257 (1973).

Material tendered by a party without leave to do so, after an appeal has been submitted for decision, constitutes improper supplemental argument. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 321-22 (1981).

10 CFR § 2.714a does not authorize an appellant to file a brief in reply to parties' briefs in opposition to the appeal. Rather, leave to file a reply brief must be obtained. Nuclear Engineering Co. (Sheffield, Ill. Low-Level Waste Disposal Site), ALAB-473, 7 NRC 737, 745 n.9 (1978).

A permitted reply to an answer should only reply to opposing briefs and not raise new matters. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 243 n.4 (1980).

### 5.10.3 Contents of Brief

Any brief which in form or content is not in substantial compliance with appropriate briefing format may be stricken either on motion of a party or on the Commission's own motion. For example, an appendix to a reply brief containing a lengthy legal argument will be stricken when the appendix is simply an attempt to exceed the page limitations. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3; Perry Nuclear Power Plant, Units 1 and 2), ALAB-430, 6 NRC 457 (1977).

An issue which is not addressed in an appellate brief is considered to be waived, even though the issue may have been raised before the Licensing Board. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001);

Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 n.18 (1986).

Although the Commission's Rules of Practice do not specifically require that a brief include a statement of the facts of the case, those facts relevant to the appeal should be set forth. The statement of facts set forth in the brief on appeal should include an exposition of that portion of the procedural history of the case related to the issue or issues presented by the appeal. Public Service Electric and Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769, 771 n.2 (1977).

The brief must contain sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issue raised on appeal. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397 (1976); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990). A brief which does not contain such information is tantamount to an abandonment of the issue. Id.; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381 n.88 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 496 n.30 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533-34 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 805 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n.42 (1987). See also Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1619 (1984). At a minimum, briefs must identify the particular error addressed and the precise portions of the record relied upon in support of the assertion of error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 338 n.4 (1983); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982) and Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986). This is particularly true where the Licensing Board rendered its rulings from the bench and did not issue a detailed written opinion. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 702-03 n.27 (1985).

A brief must clearly identify the errors of fact or law that are the subject of the appeal and specify the precise portion of the record relied on in support of the assertion of

error. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 793 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-543 n.58 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 809 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 464 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990); Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 424 (1980).

Claims of error that are without substance or are inadequately briefed will not be considered on appeal. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 481 (1982), citing, Salem, supra, 14 NRC at 49-50. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 280 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 132 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 499 (1991). Issues which are inadequately briefed are deemed to be waived. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10, 12 (1990). Bald allegations made on appeal of supposedly erroneous Licensing Board evidentiary rulings may be properly dismissed for inadequate briefing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985). See 10 CFR § 2.762(d).

The appellant bears the responsibility of clearly identifying the asserted errors in the decision on appeal and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

An appeal may be dismissed when inadequate briefs make its arguments impossible to resolve. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 787 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 413 (1976). See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986).

A brief that merely indicates reliance on previously filed proposed findings, without meaningful argument addressing the Licensing Board's disposition of issues, is of little value in appellate review. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 348 n.7 (1983), citing, Public Service Electric and Gas Co. (Salem Nuclear

Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 71 (1985), Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 547 n.74 (1986). See Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 (1991).

Lay representatives generally are not held to the same standard for appellate briefs that is expected of lawyers. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 n.7 (1981); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10 (1990). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). Nonetheless, NRC litigants appearing pro se or through lay representatives are in no way relieved by that status of any obligation to familiarize themselves with the Commission's rules. To the contrary, all individuals and organizations electing to become parties to NRC licensing proceedings can fairly be expected both to obtain access to a copy of the rules and refer to it as the occasion arises. Susquehanna, supra, 16 NRC at 956, citing, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 66 (1992). All parties appearing in NRC proceedings, whether represented by counsel or a lay representative, have an affirmative obligation to avoid any false coloring of the facts. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 n.6 (1986).

A party's brief must (1) specify the precise portion of the record relied upon in support of the assertion of error, and (2) relate to matters raised in the party's proposed findings of fact and conclusions of law. Arguments raised for the first time on appeal, absent a serious, substantive issue are not ordinarily entertained on appeal. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 955-56, 956 n.6 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 906-907 (1982).

All factual assertions in the brief must be supported by references to specific portions of the record. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 2), ALAB-159, 6 AEC 1001 (1973); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 211 (1986). All references to the record should appear in the appellate brief

itself; it is inappropriate to incorporate into the brief by reference a document purporting to furnish the requisite citations. Kansas Gas & Electric Company (Wolf Creek Generating Plant, Unit 1), ALAB-424, 6 NRC 122, 127 (1977).

Documents appended to an appellate brief will be stricken where they constitute an unauthorized attempt to supplement the record. However, if the documents were newly discovered evidence and tended to show that significant testimony in the record was false, there may be a sufficient basis to grant a motion to reopen the hearing. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3); (Perry Nuclear Power Plant, Units 1 & 2), ALAB-430, 6 NRC 451 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 n.51 (1985), citing, Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 36 (1981).

Personal attacks on opposing counsel are not to be made in appellate briefs, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 837-838 (1974), and briefs which carry out personal attacks in an abrasive manner upon Licensing Board members will be stricken. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-121, 6 AEC 319 (1973).

Established page limitations may not be exceeded without leave and may not be circumvented by use of "appendices" to the brief, Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-430, 6 NRC 457 (1977). A request for enlargement of the page limitation on a showing of good cause should be filed at least seven days before the date on which the brief is due. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-827, 23 NRC 9, 11 n.3 (1986).

A brief filed in support of an appeal under 10 CFR § 2.714a from a decision granting and/or denying in whole a petition for leave to intervene is not required to contain a table of cases and a table of authorities. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 54-55 (1992). The appellant's brief must contain a statement of the case with applicable procedural history. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-394, 5 NRC 769 (1977); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-388, 5 NRC 640 (1977). The Commission, at its discretion, may waive the requirement for a statement of the case. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 55 n.2 (1992), aff'd, Environmental and Resources Conservation Organization v. NRC, 996 F.2d 1224 (9th Cir. 1993) (Table).

### 5.10.3.1 Opposing Briefs

Briefs in opposition to the appeal should concentrate on the appellant's brief. See Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27, 52 n.39 (1976).

### 5.10.3.2 Amicus Curiae Briefs

Amicus Curiae briefs are limited to the matters already at issue in the proceeding. "[A]n amicus curiae necessarily takes the proceeding as it finds it. An amicus curiae can neither inject new issues into a proceeding nor alter the content of the record developed by the parties." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987) (footnote omitted); Louisiana Energy Services, L.P., (Claiborne Enrichment Center), CLI-97-4, 45 NRC 95, 96 (1997).

Our rules contemplate amicus curiae briefs only after the Commission grants a petition for review, and do not provide for amicus briefs supporting or opposing petitions for review. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-7, 45 NRC 437, 438-39 (1997).

## 5.11 Oral Argument

The Commission, in its discretion, may allow oral argument upon the request of a party made in a notice of appeal or brief, or upon its own initiative. 10 CFR §§ 2.763; 2.786(d). The Commission will deny a request for oral argument where it determines that, based on the written record, it understands the positions of the participants and has sufficient information upon which to base its decision. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992).

The Commission requires that a party seeking oral argument must explain how oral argument would assist it in reaching a decision. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 59 n.4 (1993) (citing, In re Joseph J. Macktal, CLI-89-12, 30 NRC 19, 23 n.1 (1989); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992)).

A late intervention petitioner may request oral argument on its petition. Comanche Peak, supra, 36 NRC at 69 n.4.

All parties are expected to be present or represented at oral argument unless specifically excused by the Board. Such attendance is one of the responsibilities of all parties when they participate in Commission adjudicatory proceedings. Point Beach, 15 NRC at 279.

### 5.11.1 Failure to Appear for Oral Argument

If for sufficient reason a party cannot attend an oral argument, it should request that the appeal be submitted on briefs. Any such request, however, must be adequately supported. A bare declaration of inadequate financial resources is clearly deficient. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982).

Failure to advise of an intent not to appear at oral argument already calendared is discourteous and unprofessional and may result in dismissal. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-337, 4 NRC 7 (1976).

### 5.11.2 Grounds for Postponement of Oral Argument

Postponement of an already calendared oral argument for conflict reasons will be granted only upon a motion setting out:

(1) the date the conflict developed;
(2) the efforts made to resolve it;
(3) the availability of alternate counsel;
(4) public and private interest considerations;
(5) the positions of the other parties;
(6) the proposed alternate date.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-165, 6 AEC 1145 (1973).

A party's inadequate resources to attend oral argument, properly substantiated, may justify dispensing with oral argument. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982).

### 5.11.3 Oral Argument by Nonparties

Under 10 CFR § 2.715(d), a person who is not a party to a proceeding may be permitted to present oral argument to the Commission. A motion to participate in the oral argument must be filed and non-party participation is at the discretion of the Commission.

## 5.12 Interlocutory Review

### 5.12.1 Interlocutory Review Disfavored

With the exception of an appeal by a petitioner from a total denial of its petition to intervene or an appeal by another party on the question whether the petition should have been wholly denied (10 CFR § 2.714a), there is no right to appeal any interlocutory ruling by a Licensing Board. 10 CFR § 2.730(f); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 597 (1983); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 280 (1987). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 235-36 (1991).

Interlocutory appellate review of Licensing Board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 n.7 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-

7, 47 NRC 307 (1998); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297 (2000), citing, Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25 (2000).

A Licensing Board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate. Rulings which do neither are interlocutory. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1100 (1984).

Thus, for example, a Licensing Board's rulings limiting contentions or discovery or requiring consolidation are interlocutory and are not immediately appealable, though such rulings may be reviewed later by deferring appeals on them until the end of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976). In the same vein see Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981). See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-906, 28 NRC 615, 618 (1988) (a Licensing Board denied a motion to add new bases to a previously admitted contention). Similarly, interlocutory appeals from Licensing Board rulings made during the course of a proceeding, such as the denial of a motion to dismiss the proceeding, are forbidden. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-433, 6 NRC 469 (1977).

The Commission avoids piecemeal interference in ongoing licensing board proceedings and typically denies petitions to review interlocutory board orders summarily, without engaging in extensive merits discussion. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002).

Commission practice generally disfavors interlocutary review, recognizing an exception in 10 C.F.R. § 2.786(g) where the disputed ruling threatens the aggrieved party with serious, immediate and irreparable harm where it will have a "pervasive or unusual" effect on the proceedings below. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224 (2002); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001), citing, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000); Sacramento Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).

The fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the longstanding articulated Commission policy generally disfavoring such review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) CLI-94-15, 40 NRC 319 (1994). See 10 CFR § 2.730(f). An exception to this rule will be made in compelling circumstances where, for example, there is an emergency situation requiring an immediate, final determination of the issue. Id. The practice of simultaneously seeking interlocutory appellate review of grievances by way of directed certification and Licensing Board reconsideration of the same rulings is disfavored. Houston Lighting and Power Co.

(Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998).

"The threat of future widespread harm to the general population of NRC Licensees is not a factor in interlocutory review, although it might encourage the Commission to review the final decision." Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001). See 10 C.F.R. § 2.786.

The Commission disapproves of the practice of simultaneously seeking reconsideration of a Presiding Officer's decision and filing an appeal of the same ruling because that approach would require both trial and appellate tribunals to rule on the same issues at the same time. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24 (1997), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981).

Lack of participation below will increase the movant's already heavy burden of demonstrating that such review is necessary. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 175-76 (1983).

In a licensing proceeding, it is the order granting or denying a license that is ordinarily a final order. NRC orders that are given "immediate effect" constitute an exception to the general rule. City of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998).

Incorrect interlocutory rulings may be reviewed, if necessary, on appeals from partial initial decisions or other final appealable orders. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001), citing Private Fuel Storage, CLI-00-2, 51 NRC at 80.

While the Commission does not ordinarily review interlocutory orders denying extentions of time, but it may do so in specific cases as an exercise of its general supervisory jurisdiction over agency adjudications. Hydro Resources, Inc., CLI-99-3, 49 NRC 25, 26 (1999).

Licensing board rulings denying waiver requests pursuant to 10 CFR § 2.758, which are interlocutory, are not considered final for the purposes of appeal. Louisiana Energy Services (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995).

### 5.12.2 Criteria for Interlocutory Review

Although interlocutory review is disfavored and generally is not allowed as of right under NRC rules of practice (see 10 CFR 2.730(f)), the criteria in section 2.786(g)(1)&(2) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). The criteria in section 2.786(g)(1)&(2) are not new. They are essentially a codification of the standards that governed review of interlocutory matters prior to the July 1991 revision to the NRC appellate procedures. See 56 Fed. Reg. 29,403 (June 27, 1991); Safety Light Corp.

(Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992), clarified Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993). Therefore, cases prior to promulgation of section 2.786(g) may provide useful guidance in this area. See e.g. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Pennsylvania Power & Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-593, 11 NRC 761 (1980); United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 474, 475 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-737, 18 NRC 168, 171 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 20-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-21, 28 NRC 170, 173-75 (1988); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-22, 48 NRC 215, 216-17 (1998). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), ALAB-929, 31 NRC 271, 278-79 (1990); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000).

Discretionary interlocutory review will be granted if the Licensing Board's action either (1) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. 10 C.F.R. § 2.786(1) & (2); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) CLI-94-15, 40 NRC 319 (1994); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Perry, supra, 15 NRC at 1110; Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-62, 16 NRC 565, 568 (1982), citing, Marble Hill, supra, 5 NRC at 1192; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-762, 19 NRC 565, 568 (1984); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 599 n.12 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 49-50 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 420 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 73 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 261 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 269 (1988);

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-896, 28 NRC 27, 31 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 437 (1989); Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 360-62 (1990); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-3, 33 NRC 76, 80 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 236 (1991); Hydro Resources, Inc., CLI-99-7, 49 NRC 230, 231 (1999); Hydro Resources, Inc., CLI-99-8, 49 NRC 311, 312 (1999); Hydro Resources, Inc., CLI-99-18, 49 NRC 411, 431 (1999); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000).

Where the applicant did not show that the intervenor's request for a hearing should have been denied in its entirety, remaining points of error would have to meet the Commission's standard for interlocutory review; that is, appellant must show that it will suffer serious immediate and irreparable harm or that the adverse ruling will have a pervasive and unusual effect on the hearing below. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 18 (2001).

Commission practice generally disfavors interlocutary review, recognizing an exception in 10 C.F.R. § 2.786(g) where the disputed ruling threatens the aggrieved party with serious, immediate and irreparable harm where it will have a "pervasive or unusual" effect on the proceedings below. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001), citing, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000); Sacramento Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).

The Commission encourages licensing boards and presiding officers to refer rulings to the Commission which present novel questions which could benefit from early resolution. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000) (citing Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1988)).

Satisfaction of one of the criteria in 10 CFR § 2.786(b)(4) is not mandatory in order to obtain interlocutory review. When reviewing interlocutory matters on the merits, the Commission may consider the criteria set forth in 10 CFR § 2.786(b)(4). However, it is the standards listed in 10 CFR § 2.786(g) that control the Commission's determination of whether to undertake such review. Oncology Services Corp., CLI-93-13, 37 NRC 419 (1993); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 (1998); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001).

Discovery rulings rarely meet the test for discretionary interlocutory review. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 381 (1984). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 74 (1987); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-318, 3 NRC 186 (1976). This is true even of orders rejecting objections to discovery on grounds of privilege. Consumers Power

Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-300, 2 NRC 752, 769 (1975). In this vein, the Appeal Board refused to review a discovery ruling referred to it by a Licensing Board where the Board below did not explain why it believed Appeal Board involvement was necessary, where the losing party had not indicated that it was unduly burdened by the ruling, and where the ruling was not novel. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-438, 6 NRC 638 (1977). The aggrieved party must make a strong showing that the impact of the discovery order upon that party or upon the public interest is indeed "unusual." Midland, supra.

Similarly, rulings on the admissibility of evidence rarely meet the standards for interlocutory review. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976); Power Authority of the State of New York (Green County Nuclear Power Plant), ALAB-439, 6 NRC 640 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84 (1981). In fact, the Appeal Board was generally disinclined to direct certification on rulings involving "garden-variety" evidentiary matters. See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-353, 4 NRC 381 (1976). In Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-393, 5 NRC 767, 768 (1977), the Appeal Board reiterated that it would not allow consideration of interlocutory evidentiary rulings, stating that, "it is simply not our role to monitor these matters on a day-today basis; were we to do so, 'we would have little time for anything else.'" (citations omitted). Interlocutory review is rarely appropriate where the question for which certification has been sought involves the scheduling of hearings or the timing and admissibility of evidence. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 475 (1982), citing, Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99-100 (1976).

The Commission has granted interlocutory review in situations where the question or order must be reviewed "now or not at all". Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 321 (1998). The Commission does not ordinarily review Board orders denying extension of time. However, the Commission may review such interlocutory orders pursuant to its general supervisory jurisdiction over agency adjudications. Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132, 134 (1998).

When considering whether to exercise "pendent" discretionary review over otherwise nonappealable issues, the Commission will favor review where the otherwise unappealable issues are "inextricably intertwined" with appealable issues, such that consideration of all issues is necessary to ensure meaningful review. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 19 (2001). When the Commission considers whether to exercise "pendent" discretionary review over otherwise nonappealable issues, factor weighing against review include a lack of an adequate record; the possibility that the issue could be altered or mooted by further proceedings below; and whether complex issues considered under pendent review

would predominate over relatively insignificant, but final and appealable, issues. Id. at 19-20.

Interlocutory review of a Licensing Board's ruling denying summary disposition of a part of a contention, claimed to be an unwarranted expansion of the scope of issues resulting in the necessity to try these issues and cause unnecessary expense and delay meets neither standard for interlocutory review. That case is no different than that involved any time a litigant must go to hearing. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 176 n.12 (1983).

Even though the criteria for discretionary interlocutory review have not been satisfied, the Commission may still accept a Licensing Board's referral of an interlocutory ruling where the ruling involves a question of law, has generic implications, and has not been addressed previously on appeal. Oncology Services Corporation, CLI-93-13, 37 NRC 419 (1993); see Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), ALAB-929, 31 NRC 271, 279 (1990). However, interlocutory review will not be granted unless the Licensing Board below had a reasonable opportunity to consider the question as to which review is sought. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727, 729 (1975). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613, 618-619, rev'd in part sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

Neither the presiding officer's inappropriate admission of an area of concern, nor the use of an inappropriate legal standard, meets the standard for interlocutory review in a Subpart L proceeding. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 18-19 (2001), citing Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981).. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 18-19 (2001).

When interlocutory review is granted of one Licensing Board order, it may also be conducted of a second Licensing Board order which is based on the first order. Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 362 (1990).

**5.12.2.1 Irreparable Harm**

To meet the first criterion in section § 2.786(g), petitioners must demonstrate that the ruling if left in place will result in irreparable impact which, as a practical matter, cannot be alleviated by Commission review at the end of the proceeding. The following cases illustrate the extraordinary circumstances that must be present to warrant review pursuant to the first criterion:

Immediate review may be appropriate in exceptional circumstances, when the potential difficulty of later unscrambling and remedying the effects of an improper disclosure of privileged material would likely result in an irreparable impact. Georgia Power Co., et. al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-

95-15, 42 NRC 181, 184 (1995) (Commission reviewed Board order to release notes claimed to be attorney-client work product); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 50, 51 (1986) (A Licensing Board's denial of an intervenor's motion to correct the official transcript of a prehearing conference was granted where there were doubts that the transcript could be corrected at the end of the hearing. Without a complete and accurate transcript, the intervenor would suffer serious and irreparable injury because its ability to challenge the Licensing Board's rulings through an appeal would be compromised).

For purposes of interlocutory review, irreparable harm does not qualify as immediate merely because it is likely to occur before completion of the hearing. Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998).

While it may not always be dispositive, one factor favoring review is that the question or order for which review is sought is one which "must be reviewed now or not at all." Georgia Power Co., et. al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994) (interlocutory Commission review warranted where Board ordered immediate release of an NRC Investigatory Report); see Oncology Services Corp., CLI--93-13, 37 NRC 419,420-21 (1993) (interlocutory Commission review warranted where Board imposed 120-day stay of a license-suspension proceeding); see also, Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 413 (1976), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981).

There is no irreparable harm arising from a party's continued involvement in a proceeding until the Licensing Board can resolve factual questions pertinent to the Commission's jurisdiction. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 62 (1994). Nor is there obvious irreparable harm from continuation of the proceeding. The mere commitment of resources to a hearing that may later turn out to have been unnecessary does not justify interlocutory review of a Licensing Board scheduling order. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-7 (1994); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987). A mere increase in the burden of litigation does not constitute serious and irreparable harm. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001). In the absence of a potential for truly exceptional delay or expense, the risk that a Licensing Board's interlocutory ruling may eventually be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed by that board and the parties to the proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984), citing, Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 600 (1985).

Mere generalized representations by counsel or unsubstantiated assertions regarding "immediate and serious irreparable impact" are insufficient to meet the stringent threshold for interlocutory review. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

### 5.12.2.2 Pervasive and Unusual Effect on the Proceeding

An interlocutory review is appropriate when the ruling "affects the basic structure of the proceeding by mandating duplicative or unnecessary litigating steps." Private Fuel Storage (Independent Spent Fuel Storage Facility), CLI-98-7, 47 307, 310 (1998).

Review of interlocutory rulings pursuant to the second criterion of § 2.786; i.e., the Board ruling affects the basic structure of the proceeding in a pervasive or unusual manner, is granted only in extraordinary circumstances. The following cases illustrate this point:

An Appeal Board conducted discretionary interlocutory review of a presiding officer's rulings issued during the early stages of a materials licensing proceeding where the Appeal Board determined that the presiding officer's rulings, which interpreted and implemented the informal hearing procedures in 10 CFR Part 2, Subpart L, had fundamentally altered the very shape of the proceeding. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 712-13 n.1 (1989), aff'd on other grounds, CLI-90-5, 31 NRC 337 (1990).

The Commission conducted discretionary interlocutory review of a decision by a Licensing Board and a presiding officer to consolidate a 10 CFR Part 2, Subpart G proceeding and a 10 CFR Part 2, Subpart L proceeding as a Subpart G proceeding. The consolidation order not only raised a novel and important jurisdictional question concerning the authority of the Licensing Board and the presiding officer, but it also affected the Subpart L proceeding in a pervasive and unusual manner by converting the proceeding into a more formal Subpart G proceeding. Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 85-86 (1992).

Although a definitive ruling by the Licensing Board that the Commission actually has jurisdiction might rise to the level of a pervasive or unusual effect upon the nature of the proceeding, a preliminary ruling that mere factual development is necessary does not rise to that level. The fact that an appealed ruling touches on a jurisdictional issue does not, in and of itself, mandate interlocutory review. Similarly, the mere issuance of a ruling that is important or novel does not, without more, change the basic structure of a proceeding, and thereby justify interlocutory review. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 63 (1994); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000).

A Licensing Board decision refusing to dismiss a party from a proceeding does not, without more, constitute a compelling circumstance justifying interlocutory

review. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994).

The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant an interlocutory review. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 262-63 (1988). See Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159 (1992).

The fact that an interlocutory ruling may be wrong does not per se justify interlocutory appellate review, unless it can be demonstrated that the error fundamentally alters the proceeding. Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n. 11 ( 1983), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and-2), ALAB-675, 15 NRC 1105, 1113-14 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001).

"A mere legal error is not enough to warrant interlocutory review because interlocutory errors are correctable on appeal from final Board decisions." Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001), citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998). A legal error, standing alone, does not alter the basic structure of an ongoing proceeding. Such errors can be raised on appeal after the final licensing board decision. In re. Dr. James E. Bauer (Order Prohibiting Involvement in NRC Licensed Activities), CLI-95-3, 41 NRC 245, 246 (1995).

Similarly, a mere conflict between Licensing Boards on a particular question does not mean that interlocutory review as to that question will automatically be granted. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-371, 5 NRC 409 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 484-485 (1975). Unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a "final" Licensing Board decision. Perry, supra, ALAB-675, 15 NRC at 1112-1113. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 263 (1988).

Interlocutory review is not favored on the question as to whether a contention should have been admitted into the proceeding. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994) (quoting Long Island Lighting Co. (Shoreham Nuclear Power Station, unit 1), ALAB-861, 25 NRC 129, 135; Project Management Corp. (Clinch River

Breeder Reactor Plant), ALAB-326, 3 NRC 406, reconsid. den., ALAB-330, 3 NRC 613, rev'd in part sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987));Perry, supra, 16 NRC at 1756, citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982); Private Fuel Storage, CLI-00-2, 51 NRC at 79-80; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001). A Board's rejection of an interested State's sole contention is not appropriate for directed certification when the issues presented by the State are also raised by the contentions of intervenors in the proceeding. Seabrook, supra, 23 NRC at 592-593. The admission by a Licensing Board of more late-filed than timely contentions does not, in and of itself, affect the basic structure of a licensing proceeding in a pervasive or unusual manner warranting interlocutory review. If the late-filed contentions have been admitted by the Board in accordance with 10 CFR § 2.714, it cannot be said that the Board's rulings have affected the case in a pervasive or unusual manner. Rather, the Board will have acted in furtherance of the Commission's own rules. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982). The basic structure of an ongoing proceeding is not changed by the simple admission of a contention which is based on a Licensing Board ruling that: (1) is important or novel; or (2) may conflict with case law, policy, or Commission regulations. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984) and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1112-13 (1982).

Despite the reluctance to grant review of Board orders admitting contentions, in exceptional circumstances limited review has been undertaken. In Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2),CLI-86-8, 23 NRC 241 (1986),the Commission reviewed, and reversed a Board order admitting a late filed contention. The Appeal Board had declined review of the same ruling, stating that the Board's admission of a contention did not meet the stringent standards for interlocutory review. ALAB-817, 22 NRC 470, 474 (1985). In Duke Power Co. (Catawba Nuclear Station, units 1 and 2), ALAB-687, 16 NRC 460 (1982), the Appeal Board accepted referral of several rulings associated with the Licensing Board's conditional admission of several contentions. The Appeal Board limited its review to two questions which it determined to have "generic implications": 1) whether the Rules of Practice sanctioned the admission of contentions that fall short of meeting Section 2.714(b) specificity requirements; and 2) if not, how should a Licensing Board approach late-filed contentions that could not have been earlier submitted with the requisite specificity. Catawba, ALAB-687, 16 NRC at 464-65.

Adverse evidentiary rulings may turn out to have little, if any evidentiary effect on a Licensing Board's ultimate substantive decision. Therefore, determinations regarding what evidence should be admitted rarely, if ever, have a pervasive or unusual effect on the structure of a proceeding so as to warrant interlocutory

intercession. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984).

### 5.12.3 Responses Opposing Interlocutory Review

Opposition to a petition seeking interlocutory review should include some discussion of petitioner's claim of Licensing Board error. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374 n.3 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

Failure of a party to address the standards for interlocutory review in responding to a motion seeking such review may be construed as a waiver of any argument regarding the propriety of such review. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 n.7 (1984). Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

### 5.12.4 Certification of Questions for Interlocutory Review and Referred Rulings

Although generally precluding interlocutory appeals, 10 CFR § 2.730(f), does allow a Licensing Board to refer a ruling to the Commission. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64 (1994). The Commission need not, however, accept the referral. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 n.6 (1983); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 475 (1985). The Commission does assign considerable weight to the board's view of whether the ruling merits immediate review because licensing boards are granted a great deal of discretion in managing the proceedings of cases before them. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001).

The Commission's 1981 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456, does not call for a marked relaxation of the standard that the discretionary review of interlocutory Licensing Board rulings authorized by 10 CFR §§ 2.730(f) and 2.718(l) should be undertaken only in the most compelling circumstances. Rather, it simply exhorts the Licensing Boards to put before the appellate tribunal legal or policy questions that, in their judgment, are "significant" and require prompt appellate resolution. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998). The fact that an evidentiary ruling involves a matter that may be novel or important does not alter the strict standards for directed certification. Metropolitan Edison Co., 20 NRC at 1583. The Commission itself may exercise its discretion to review a licensing board's interlocutory order if the Commission wants to address a novel or important issue. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000). Generally, the Commission has accepted "novel issues that would benefit from early review" where the board, rather than a party,

has found such review necessary and helpful. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 375 (2001), citing, Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000).

A Licensing Board's decision to admit a contention which will require the Staff to perform further statutory required review does not result in unusual delay or expense which justifies referral of the Board's decision for interlocutory review. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 257-258 n.19 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982), rev'd in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Authority to certify questions to the Commission should be exercised sparingly. Absent a compelling reason, certification will be declined. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-421, 6 NRC 25, 27 (1977); Consolidated Edison Co. of N.Y., Power Authority of the State of N.Y. (Indian Point, Unit 2; Indian Point, Unit 3), LBP-82-23, 15 NRC 647, 650 (1982).

Despite the general prohibition against interlocutory review, the regulations provide that a party may ask a Licensing Board to certify a question to the Commission without ruling on it. 10 CFR § 2.718(l). The regulations also allow a party to request that a Licensing Board refer a ruling on a motion to the Commission under 10 CFR § 2.730(f). Developments occurring subsequent to the filing of a motion for directed certification to the appellate tribunal may strip the question raised in the motion for certification of an essential ingredient and, therefore, constitute grounds for denial of the motion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977).

The Commission has the authority to consider a matter even if the party seeking interlocutory review has not satisfied the criteria for such review. Hydro Resources, Inc. (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 n.3 (1998).

The Boards' certification authority was not intended to be applied to a mixed question of law and fact in which the factual element was predominant. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

A party seeking certification under Section 2.718(l) must, at a minimum, establish that a referral under 10 CFR § 2.730(f) would have been proper -- i.e., that a failure to resolve the problem will cause the public interest to suffer or will result in unusual delay and expense. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976); Toledo Edison Co. (Davis Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 483 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1652-53 (1982). However, the added delay and expense occasioned by the admission

of a contention -- even if erroneous -- does not alone distinguish the case so as to warrant interlocutory review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982). The fact that applicants will be unable to recoup the time and financial expense needed to litigate late-filed contentions is a factor that is present when any contention is admitted and thus does not provide the type of unusual delay that warrants interlocutory Appeal Board review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1758 n.7 (1982), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982).

The case law standards governing review of interlocutory orders have been codified in 10 CFR § 2.786(g) which provides that the Commission may conduct discretionary interlocutory review of a certified question, 10 CFR § 2.718(l), or a referred ruling, 10 CFR § 2.730(f), if the petitioner shows that the certified question or referred ruling either (1) threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994). (See "Criteria for Interlocutory Review").

### 5.12.4.1 Effect of Subsequent Developments on Motion to Certify

Developments occurring subsequent to the filing of a request for interlocutory review may strip the question brought of an essential ingredient and, therefore, constitute grounds for denial of the motion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-419, 6 NRC 3, 6 (1977). See also, Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-93-18, 38 NRC 62 (1993).

When reviewing a motion for directed certification, an Appeal Board would not consider events which occurred subsequent to the issuance of the challenged Licensing Board ruling. A party which seeks to rely upon such events must first seek appropriate relief from the Licensing Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 271 (1988).

### 5.12.4.2 Effect of Directed Certification on Uncertified Issues

The pendency of interlocutory review does not automatically result in a stay of hearings on independent questions not intimately connected with the issue certified. See Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417 (1977).

## 5.13 Disqualification of a Commissioner

Determinations on the disqualification of a Commissioner reside exclusively in that Commissioner, and are not reviewable by the Commission. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-81-1, 13 NRC 1 (1981), clarified, CLI-81-23, 14 NRC 610 (1981); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-6, 11 NRC 411 (1980).

When a party requests the disqualification of more than one Commissioner, each Commissioner must decide whether to recuse himself from the proceeding, but the Commissioners may issue a joint opinion in response to the motion for disqualification. Joseph J. Macktal, CLI-89-18, 30 NRC 167, 169-70 (1989), denying reconsideration of CLI-89-14, 30 NRC 85 (1989).

It is Commission practice that the Commissioners who are subject to a recusal motion will decide that motion themselves, and may do so by issuing a joint decision. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 56-57 (1996).

A prohibited communication is not a concern if it does not reach the ultimate decision maker. Where a prohibited communication is not incorporated into advice to the Commission, never reaches the Commission, and has no impact on the Commission's decision, it provides no grounds for the recusal of Commissioners. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 57 (1996).

Commission guidance does not constitute factual prejudgment where the guidance is based on regulatory interpretations, policy judgments, and tentative observations about dose estimates that are derived from the public record. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 58 (1996).

Where there are no facts from which the Commission can reasonably conclude that a prohibited communication was made with any corrupt motive or was other than a simple mistake, and where a Report of the Office of the Inspector General confirms that an innocent mistake was made and that the Staff was not guilty of any actual wrongdoing, and where the mistake did not ultimately affect the proceeding, the Commission will not dismiss the Staff from the proceeding as a sanction for having made the prohibited communication. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 59 (1996).

In the absence of bias, an adjudicator who participated on appeal in a construction permit proceeding need not disqualify himself from participating as an adjudicator in the operating license proceeding for the same facility. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-11, 11 NRC 511, 512 (1980).

The expression of tentative conclusions upon the start of a proceeding does not disqualify the Commission from again considering the issue on a fuller record. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980).

## 5.14 Reconsideration by the Commission (Also see Section 4.5)

The Commission's ability to reconsider is inherent in the ability to decide in the first instance. The Commission has 60 days in which to reconsider an otherwise final decision, which is at the discretion of the Commission. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980). "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." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-1, 55 NRC 1, 2 (2002).

Petitions for reconsideration of Commission decisions denying review will not be entertained. 10 C.F.R. § 2.786(e). A petition for reconsideration after review may be filed. 10 C.F.R. § 2.786(e).

A movant seeking reconsideration of a final decision must do so on the basis of an elaboration upon, or refinement of, arguments previously advanced, generally on the basis of information not previously available. See Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-418, 6 NRC 1, 2 (1977). Babcock and Wilcox (Apollo Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 357 (1992). A reconsideration request is not an occasion for advancing an entirely new thesis or for simply reiterating arguments previously proffered and rejected. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-1, 55 NRC 1, 2 (2002); Summer, CLI-81-26, 14 NRC at 790; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-03, 28 NRC 1, 3-4 (1988). Babcock and Wilcox (Apollo Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 357 (1992).

Petitioners may be granted permission by the Commission to file a consolidated request for reconsideration if they have not had full opportunity to address the precise theory on which the Commission's first decision rests. Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 51 (2000) (Emphasis from original).

The Commission has granted reconsideration to clarify the meaning or intent of certain language in its earlier decision. The Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 390-91 (1995).

Reconsideration is at the discretion of the Commission. The Curators of the University of Missouri, CLI-95-17, 42 NRC 229, 234 n.6 (1995) ( quoting, Florida Power and Light Co. (St. Lucie Nuclear Power plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980)).

NRC rules contemplate petitions for reconsideration of a Commission decision on the merits, not petitions for reconsideration of a Commission decision to decline review of an issue. See 10 C.F.R. § 2.786(e). Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 5 (1997).

10 CFR § 2.771 provides that a party may file a petition for reconsideration of a final decision within 10 days after the date of that decision.

A motion to reconsider a prior decision will be denied where the arguments presented are not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead, is an entirely new thesis. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

Motions to reconsider an order must be grounded upon a concrete showing, through appropriate affidavits rather than counsel's rhetoric, of potential harm to the inspection and investigation functions relevant to a case. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25-26 (1983).

A majority vote of the Commission is necessary for reconsideration of a prior Commission decision. U.S. Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-8, 15 NRC 1095, 1096 (1982).

Where a party petitioning the Court of Appeals for review of a decision of the agency also petitions the agency to reconsider its decision, and the Federal court stays its review pending the agency's disposition of the motion to reconsider; the Hobbs Act does not preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

Although 10 C.F.R. Part 2, Subpart L requires the Commission to set aside wrongly issued licenses when the post-licensing hearing uncovers fatal defects, it does not require the Commission to set aside licenses when it uncovers defects which are promptly curable. Hydro Resources, Inc., CLI-00-15, 52 NRC 65 (2000).

## 5.15 Jurisdiction of NRC to Consider Matters While Judicial Review Is Pending

The NRC has jurisdiction to deal with supervening developments in a case which is pending before a court, at least where those developments do not bear directly on any question that will be considered by the court. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 NRC 235 (1976).

There has been no definitive ruling as to whether the NRC has jurisdiction to consider matters which do bear directly on questions pending before a court. The former Appeal Board considered it inappropriate to do so, at least where the court had not specifically requested it, based on considerations of comity between the court and the agency. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-350, 4 NRC 365 (1976); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 179 (1985), citing, 28 U.S.C. § 2347(c).

The NRC must act promptly and constructively in effectuating the decisions of the courts. Upon issuance of the mandate, the court's decision becomes fully effective on the Commission, and it must proceed to implement it. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 783-784 (1977). Neither the filing nor the

granting of a petition for Supreme Court certiorari operates as a stay, either with respect to the execution of the judgment below or of the mandate below by the lower courts. Id. at 781.

When the U.S. Court of Appeals has stayed its mandate pending final resolution of a petition for rehearing en banc on the validity of an NRC regulation, the regulation remains in effect, and the Board is bound by those rules until that mandate is issued. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).

Where a party petitioning the Court of Appeals for review of the decision of the agency also petitions the agency to reconsider its decision and the Federal court stays its review pending the agency's disposition of the motion to reconsider, the Hobbs Act does not preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

The pendency of a criminal investigation by the Department of Justice does not necessarily preclude other types of inquiry into the same matter by the NRC. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

The pendency of a Grand Jury proceeding does not legally bar parallel administrative action. Three Mile Island, supra, 18 NRC at 191 n.27.

**5.16 Procedure on Remand** (Also see Section 4.6)

**5.17 Mootness and Vacatur**

The Commission is not subject to the jurisdictional limitations placed upon Federal courts by the "case or controversy" provision in Article III of the Constitution. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 93 (1983), citing, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979). Generally, a case will be moot when the issues are no longer "live," or the parties lack a cognizable interest in the outcome. The mootness doctrine applies to all stages of review, not merely to the time when a petition is filed. Consequently, when effective relief cannot be granted because of subsequent events, an appeal is dismissed as moot. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993). A case may not be moot when the dispute is "capable of repetition, yet evading review," Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). The exception applies only to cases in which the challenged action was in its duration too short to be litigated, and there is a reasonable expectation that the same complaining party will be subject to the same action again. Comanche Peak, 37 NRC at 205.

The Commission is not bound by judicial practice and need not follow judicial standards of vacatur. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13, 14-15 (1995).

Therefore, there is no insuperable barrier to the Commission's rendition of an advisory opinion on issues which have been indisputably mooted by events occurring subsequent to a Licensing Board's decision. However, this course will not be embarked upon in the absence of the most compelling cause. Comanche Peak, 17 NRC at 93; Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 54 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284 (1988). Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993); (A case is moot when there is no reasonable expectation that the matter will recur and interim relief or intervening events have eradicated the effects of the allegedly unlawful action). The NRC is not strictly bound by the mootness doctrine, however, its adjudicatory tribunals have generally adhered to the mootness principle. Innovative Weaponry, Inc. (Albuquerque, New Mexico), LBP-95-8, 41 NRC 409, 410 (1995). Based on the mootness principle, the Board in Innovative Weaponry determined the issue of whether there was an adequate basis for the Staff's denial to be moot because the license was transferred. Id.

While unreviewed Board decisions do not create binding precedent, when the unreviewed rulings "involve complex questions and vigorously disputed interpretations of agency provisions," the Commission may choose as a policy matter to vacate them and thereby eliminate any future confusion and dispute over their meaning or effect. Louisiana Energy Services, L.P (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

The Commission's customary practice is to vacate board decisions that have not been reviewed at the time the case becomes moot. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-98-24, 48 NRC 267 (1998).

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## GENERAL MATTERS

# 6.0 GENERAL MATTERS

## 6.1 Amendments to Existing Licenses and/or Construction Permits

General requirements and guidance for the amendment of an existing license or construction permit for production and utilization facilities are set out in 10 CFR §§ 50.90, 50.91.

In passing upon an application for an amendment to an operating license or construction permit, "the Commission will be guided by the considerations which govern the issuance of initial licenses or construction permits to the extent applicable and appropriate." 10 CFR § 50.91. These considerations are broadly identified in 10 CFR § 50.40. In essence, Section 50.40 requires that the Commission be persuaded, inter alia, that the application will comply with all applicable regulations, that the health and safety of the public will not be endangered, and that any applicable requirements of 10 CFR Part 51 (governing environmental protection) have been satisfied. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 44 (1978).

For two years following the Three Mile Island accident, the Commission authorized the operation of a nuclear facility by issuing, first, a low-power license, and then, a full-power operating license. However, believing that it was unnecessary to issue two separate licenses, the Commission in recent years has "amended" an existing low-power license by dropping the low-power limitation and authorizing full-power operation. Such a "license amendment" in a previously uncontested licensing proceeding is not intended to create any new hearing rights under § 189a of the Atomic Energy Act of 1954 which requires an appropriate notice and opportunity for hearing on an amendment to an operating license. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), CLI-84-19, 20 NRC 1055, 10581059 (1984).

A Board must evaluate an application for a license amendment according to its terms. The Board may not speculate about future events which might possibly affect the application. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP--86-21, 23 NRC 849, 855, 859 (1986).

The Board expressed skepticism that the amendment proposed by Licensee "is a 'material alteration' in the sense intended by the regulations so as to require a construction permit." See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 281-82 (2000), citing 10 C.F.R. § 50.92(a); see also Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 391-92 (2001). Alterations of the type that require a construction permit are those that involve substantial changes that, in effect, transform the facility into something it previously was not or that introduce significant new issues relating to the nature and function of the facility. See Portland General Electric Co. (Trojan Nuclear Plant), LBP-77-69, 6 NRC 1179, 1183 (1977). To trigger the need for a construction permit, the change must "essentially [render] major portions of the original safety analysis for the facility inapplicable to the modified facility. See id.; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 391-92 (2001).

### 6.1.1 Staff Review of Proposed Amendments

(RESERVED)

### 6.1.2 Amendments to Research Reactor Licenses

(RESERVED)

### 6.1.3 Matters to be Considered in License Amendment Proceedings

License amendments can be made immediately effective solely at the discretion of NRC Staff, following a determination by Staff that there are no significant hazards considerations involved. Immediate effectiveness findings by the Staff are not subject to review by licensing boards. Gulf States Utilities Company, et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31 (1994), aff'd, CLI-94-10, 40 NRC 43 (1994).

#### 6.1.3.1 Specific Matters Considered In License Amendment Proceedings

While the balancing of costs and benefits of a project is usually done in the context of an environmental impact statement prepared because the project will have significant environmental impacts, at least one court has implied that a cost-benefit analysis may be necessary for certain federal actions which, of themselves, do not have a significant environmental impact. Specifically, the court opined that an operating license amendment derating reactor power significantly could upset the original cost-benefit balance and, therefore, require that the cost-benefit balance for the facility be reevaluated. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084-85 (D.C. Cir. 1974).

Neither the Staff nor the Licensing Board need concern itself with the matter of the ultimate disposal of spent fuel; i.e., with the possibility that the pool will become an indefinite or permanent repository for its contents, in the evaluation of a proposed expansion of the capacity of a spent fuel pool. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 51 (1978).

A license amendment that does not involve, or result in, environmental impacts other than those previously considered and evaluated in prior initial decisions for the facility in question does not require the preparation and issuance of either an environmental impact statement or an environmental impact appraisal and negative declaration pursuant to 10 CFR § 51.5(b) and (c). Portland General Electric Co. (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 744-45 (1978), aff'd, ALAB-534, 9 NRC 287 (1979).

An operating license amendment that does not modify any systems, structures, or components (SSCs) but which extends the license term to recapture time lost during construction represents a significant amendment, and not merely a ministerial administrative change, notwithstanding prior review during the operating license proceeding of such SSCs. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-35, 40 NRC 180, 188 (1994).

### 6.1.4 Hearing Requirements for License/Permit Amendments

The Atomic Energy Act of 1954, as amended, does not specifically require a mandatory hearing on the question as to whether an amendment to an existing license or permit should issue. At the same time, the Act and the regulations (10 CFR § 2.105(a)(3)) require that, where a proposed amendment involves "significant hazards considerations," the opportunity for a hearing on the amendment be provided prior to issuance of the amendment and that any hearing requested be held prior to issuance of the amendment. An opportunity for a hearing will also be provided on any other amendment as to which the Commission, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards determines that an opportunity for public hearing should be afforded. 10 CFR § 2.105(a)(6),(7).

Section 189a hearing rights are triggered despite Commission assertion that it did not "amend" the license when the Commission abruptly changed its policy so as to retroactively enlarge extant licensee's authority, and licensee's original license did not authorize licensee to implement major-component dismantling of type undertaken in project. Citizens Awareness Network v. NRC, 59 F.3d 284, 294 (1st Cir. 1995). The statute's phrase "modification of rules and regulations" encompasses substantive interpretative policy changes, and the Commission cannot effect such modifications without complying with the statute's notice and hearing provisions. Id. at 292.

In evaluating whether an NRC authorization represents a license amendment within the meaning of section 189a of the Atomic Energy Act, courts repeatedly have considered whether the NRC approval granted the licensee any greater operating authority or otherwise altered the original terms of a license. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).

Where an NRC approval does not permit the licensee to operate in any greater capacity than originally prescribed and all relevant regulations and license terms remain applicable, the authorization does not amend the license. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 327(1996).

A technical specification is a license condition. A license request to change that condition constitutes a request to amend the license and therefore creates adjudicatory hearing rights under Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 91 n.6, 93 (1993); General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 150 n.6 (1996).

Construction permit amendment/extension cases, unlike construction permit proceedings, are not subject to the mandatory hearing requirement. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1188 (1984).

An application for an exemption concerning the security plan under 10 C.F.R. § 73.5 does not constitute a license amendment. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 96 (2000).

A prior hearing is not required under Section 189a of the Atomic Energy Act, as amended, for Commission approval of a license amendment in situations where the NRC Staff makes a "no significant hazards consideration" finding. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622-623 (1981); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 123 (1986). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 11 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986).

The legislative history of Section 12 of Pub. L. 97-415 (1982), the "Sholly Amendment," modifying Section 189(a) of the Atomic Energy Act of 1954, supports the determination that Congress intended that hearings on license amendments be held, if properly requested, even after irreversible actions have been taken upon a finding of no significant hazards consideration. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-23, 19 NRC 1412, 1414-15 (1984). Thus a timely filed contention will not be considered moot, even if the contested action has been completed. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-19, 19 NRC 1076, 1084 (1984).

"The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration'.... '[A] contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.'" Kelley v. Selin, 42 F.3d 1501, 1511 (6th Cir. 1995), citing Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos., 498 U.S. 211, 228 (1991) (quoting Heckler v. Campbell, 461 U.S. 458, 467 (1983)).

An opportunity for a hearing pursuant to Section 189a of the AEA is not triggered by a rulemaking that is generic in nature, and involves no specific licensing decision. The rulemaking may specifically benefit a particular plant, but it does not trigger hearing rights if the rulemaking does not grant a specific plant a right to operate in a greater capacity than it had previously been allowed to operate. Kelley v. Selin, 42 F.3d 1501, 1515 (6th Cir. 1995).

The "Sholly" provisions have been extended to amendments to Part 52 combined construction permits and operating licenses issued pursuant to 10 CFR Part 52. A post-construction amendment to a combined license may be made immediately effective, prior to the completion of any required hearing, if the Commission determines that there are no significant hazards considerations. 10 CFR § 52.97(b)(2)(ii)1, 57 Fed. Reg. 60975, 60978 (Dec. 23, 1992).

Upholding the Commission's rule changes to Part 52, the court held that the Commission may rely on prior hearings and findings from the pre-construction and construction stage and significantly limit the scope of a 189a hearing when considering whether to authorize operation of a plant. Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992).

The Staff may issue an amendment to a materials license without providing prior notice of an opportunity for a hearing. Curators of the University of Missouri,

LBP-90-18, 31 NRC 559, 574 (1990),aff'd on other grounds, CLI-95-1, 41 NRC 71 (1995).

A Licensing Board granted a petition for a hearing in a license amendment application case where the petitioner established the threshold standing requirements. Energy Fuels Nuclear, Inc., LBP-94-33, 40 NRC 151, 156-57 (1994).

A Board may terminate a hearing on an application for an amendment to an operating license when the only intervenor withdraws from the hearing, and there are no longer any matters in controversy. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-39, 20 NRC 1031, 1032 (1984).

A hearing on an application for a facility license amendment may be dismissed when the parties have all agreed to a stipulation for the withdrawal of all the intervenors' admitted contentions and the Board has not raised any sua sponte issues. Pacific Gas and Electric Co. (Humboldt Bay Power Plant, Unit 3), LBP-88-4, 27 NRC 236, 238-39 (1988).

A hearing can be requested on the application for a license amendment to reflect a change in ownership of a facility. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 80 (1977).

A license amendment initiated by staff order may become immediately effective under 10 CFR § 2.204 (now § 2.202) without a prior hearing if the public health, safety or interest requires. Furthermore, there is no inherent contradiction between a finding that there is "no significant hazard" in a given case and a finding in the same case that latent conditions may potentially cause harm in the future thus justifying immediate effectiveness of an amendment permitting corrections. Nuclear Fuel Services Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940, 942 (1981).

For there to be any statutory right to a hearing on the granting of an exemption, such a grant must be part of a proceeding for the granting, suspending, revoking, or amending of any license or construction permit under the Atomic Energy Act. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982).

### 6.1.4.1 Notice of Hearing on License/Permit Amendments

(RESERVED)

### 6.1.4.2 Intervention on License/Permit Amendments

The requirements for intervention in license amendment proceedings are the same as the requirements for intervention in initial permit or license proceedings (see generally Section 2.9). The right to intervene is not limited to those persons who oppose the proposed amendment itself, but extends to those who raise related claims involving matters arising directly from the proposed amendment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-245, 8 AEC 873, 875 (1974).

Persons who would have standing to intervene in new construction permit hearings, which would be required if good cause could not be shown for the extension, have standing to intervene in construction extension proceedings to show that no good cause existed for extension and, consequently, new construction permit hearings would be required to complete construction. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), LBP-80-22, 12 NRC 191, 195 (1980).

The fact a member of a citizens' group lived twenty miles from a site was not sufficient to grant the group standing to intervene in a proceeding for an amendment to a materials license held by the site. U.S. Department of Army (Army Research Laboratory), LBP-00-21, 52 NRC 107 (2000).

### 6.1.4.3 Summary Disposition Procedures on License/Permit Amendments

Summary disposition procedures may be used in proceedings held upon requests for hearings on proposed amendments. Boston Edison Co. (Pilgrim Nuclear Station, Unit 1), ALAB-191, 7 AEC 417 (1974). In a construction permit amendment proceeding, summary disposition may be granted based on pleadings alone, or pleadings accompanied by affidavits or other documentary information, where there is no genuine issue as to any material fact that warrants a hearing and the moving party is entitled to a decision in its favor as a matter of law. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984), citing 10 CFR § 2.749(d).

### 6.1.4.4 Matters Considered In Hearings on License Amendments

In considering an amendment to transfer part ownership of a facility, a Licensing Board held that questions concerning the legality of transferring some ownership interest in advance of the Commission action on the amendment was outside its jurisdiction and should be pursued under the provisions of 10 CFR Part 2, Subpart B (dealing with enforcement) instead. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978). The same Licensing Board also ruled that issues to be considered in such a transfer of ownership proceeding do not include questions of the financial qualifications of the original applicant or the technical qualification of any of the applicants. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 392 (1978).

With regard to environmental considerations in a proceeding on an application for license amendment, a Licensing Board should not embark broadly upon a fresh assessment of the environmental issues which have already been thoroughly considered and which were decided in the initial decision. Rather, the Board's role in the environmental sphere will be limited to assuring itself that the ultimate NEPA conclusions reached in the initial decision are not significantly affected by such new developments. Georgia Power Co. (Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404, 415 (1975).

License amendments can be made immediately effective solely at the discretion of NRC staff under the so-called 'Sholly Amendment,' in advance of the holding

and completion of any required hearing, following a determination by staff that there are no significant hazards considerations involved. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 117 (2001); see AEA § 189, 42 U.S.C. 2239.

The staff is authorized to make a no significant hazards consideration finding if operation of the facility in accordance with the proposed amendment would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or
(2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or
(3) Involve a significant reduction in a margin of safety.

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 116 (2001).

Immediate effectiveness findings are not subject to review by licensing boards. Gulf States Utilities Co., et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, 1994, aff'd, CLI-94-10, 40 NRC 43 (1994). Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 393 (1978), citing, Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 41-5 (1975). See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 844 (1987), citing, 10 CFR § 50.58(b)(6), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 457 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 499-500 (1989). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90-91 (1990). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 116 (2001). Nor can a Licensing Board review the immediate effectiveness of a license amendment issued on the basis of a "no significant hazards consideration" after the Staff has completed all the steps required for the issuance of the amendment. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), LBP-98-24, 48 NRC 219, 222 (1998). However, the Board has authority to review such an amendment if the Staff fails to perform the environmental review required by 10 CFR § 51.25 prior to the issuance of the amendment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 153-56 (1988).

What may raise significant hazards consideration at one time may, at a later date, no longer present significant hazards consideration due to technological advances and further study. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001).

The Commission also has the inherent authority to exercise its discretionary supervisory authority to stay staff's actions or rescind a license amendment.

See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 119 (2001).

A license amendment that does not involve, or result in, environmental impacts other than those previously considered and evaluated in prior initial decisions for the facility in question does not require the preparation and issuance of either an environmental impact statement or environmental impact appraisal and negative declaration pursuant to 10 CFR § 51.5(b) and (c). Portland General Electric Company (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 744-45 (1978), aff'd, ALAB-534, 9 NRC 287 (1979). For example, the need for power is not a cognizable issue in a license amendment proceeding where it has been addressed in previous construction permit and operating license proceedings. Trojan, supra, 9 NRC at 289, cited in Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-14, 13 NRC 677, 698 n.49 (1981).

Where health and safety issues were evaluated during the operating license proceeding, a Licensing Board will not admit a contention which provides no new information or other basis for reevaluating the previous findings as a result of the proposed amendment. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 466 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

### 6.1.5 Primary Jurisdiction to Consider License Amendment in Special Hearing

Although the usual procedure for amending an existing license involves a licensee's applying for the proposed amendment pursuant to 10 CFR § 50.90, this is not the sole and exclusive means for obtaining an amendment. For example, where the Commission orders a special hearing on particular issues, the licensee may seek at hearing, and presiding officer has jurisdiction to issue, an amendment to the license as long as the modification sought bears directly on the questions addressed in the hearing. In such a situation, the licensee need not follow the usual procedure for filing an application for an amendment under 10 CFR 50.90. Consolidated Edison Co. of N.Y. (Indian Point Station, Units 1, 2 & 3), ALAB-357, 4 NRC 542 (1976), aff'd, CLI-77-2, 5 NRC 13 (1977). Moreover, the presiding officer's authority to modify license conditions in such an instance is not limited by the inadequacies of the materials submitted by the parties; the presiding officer may take such action as the public interest warrants. Id.

### 6.1.6 Facility Changes Without License Amendments

10 CFR § 50.59(a)(1) provides that changes may be made to a production or utilization facility without prior NRC approval where such changes do not involve an unreviewed safety question, as defined in Section 50.59(a)(2), or a change in technical specifications. The determination as to whether a proposed change requires prior NRC approval under Section 50.59 apparently rests with the licensee in the first instance. Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 (1994).

Where a hearing on a proposed license amendment was pending and the licensee embarked on "preparatory work" related to the proposed amendment without prior

authorization, the presiding Licensing Board denied an intervenor's request for a cease and desist order with regard to such work on the grounds that there was no showing that such work posed any immediate danger to the public health and safety or violated NEPA and that such work was done entirely at the licensee's risk. Portland General Electric Co. (Trojan Nuclear Plant), LBP-77-69, 6 NRC 1179, 1184 (1977). Subsequently, the Appeal Board indicated that the intervenor' complaint in this regard might more appropriately have been directed, in the first instance, to the Staff under 10 CFR § 2.206, rather than to the Licensing Board. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-451, 6 NRC 889, 891 n.3 (1977).

A low-level waste facility can accept special nuclear material (SNM) for disposal only under an NRC license that it holds, not under a state license under which the facility has accepted reactor materials and components removed from a nuclear power plant site. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100-01 (1994).

## 6.2 Amendments to Construction Permit Applications

Three years after the Licensing Board sanctioned a limited work authorization (LWA) and before the applicant had proceeded with any construction activity, applicant indicated it wanted to amend its construction permit application to focus only on site suitability issues. The Appeal Board "vacate[d] without prejudice" the decisions of the Licensing Board sanctioning the LWA, and remanded the case for proceedings deemed appropriate by the Licensing Board upon formal receipt of an early site approval application. Delmarva Power & Light Co. (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5 (1979).

## 6.3 Antitrust Considerations

Section 105(c)(6) of the Atomic Energy Act of 1954 indicates that nothing in the Act was intended to relieve any person from complying with the federal antitrust laws. This section does not authorize the NRC to institute antitrust proceedings against licensees, but does permit the Commission to impose conditions in a license as needed to ensure that activities under the license will not contribute to the creation or maintenance of an anticompetitive situation. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), LBP-77-7, 5 NRC 452 (1977). Note that reactors licensed as research and development facilities under Section 104b of the Atomic Energy Act prior to the 1970 antitrust amendments are excluded from antitrust review. Florida Power & Light Co. (St. Lucie Plant, Unit 1; Turkey Point Plant, Units 3 & 4), ALAB-428, 6 NRC 221, 225 (1977); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331 (1976).

The standard to be employed by the NRC is whether there is a "reasonable probability" that a situation inconsistent with the antitrust laws and the policies underlying those laws would be created or maintained by the unconditioned licensing of the facility. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-77-24, 5 NRC 804 (1977). The Commission's statutory obligation, pursuant to Section 105c, is not limited to investigation of the effects of construction and operation of the facility to be licensed, but rather includes an evaluation of the relationship of the specific nuclear facility to the applicant's total system or power pool. Id. This threshold determination as to whether a situation inconsistent with the antitrust laws could arise from issuance of the proposed license does not involve balancing public interest factors such as public benefits from the activity in question, public convenience and necessity, or the desirability of competition.

Only after the Commission determines that an anticompetitive situation exists or is likely to develop under a proposed license are such other factors considered. In exceptional cases, the NRC may issue the license, despite the possibility of an anticompetitive situation, if it determines that, on balance, issuance of the license would be in the public interest. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 632-633 (1977).

Under Section 105c of the Atomic Energy Act of 1954, a hearing on whether authorizing construction of a nuclear power facility "would create or maintain a situation inconsistent with the antitrust laws" is called for if the Attorney General so recommends or an interested party requests one and files a timely petition to intervene. When an antitrust hearing is convened, a permit to construct the project may not be awarded without the parties' consent until the proceedings are completed. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 10 (1977).

One of the policies reflected in Section 105c of the Atomic Energy Act is that a government-developed monopoly -- like nuclear power electricity generation -- should not be used to contravene the policies of the antitrust laws. Section 105c is a mechanism to allow smaller utilities, municipals and cooperatives access to the licensing process to pursue their interests in the event that larger utility applicants might use a government license to create or maintain an anticompetitive market position. Florida Power & Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

When the Attorney General recommends an antitrust hearing on a license for a commercial nuclear facility, the NRC is required to conduct one. This is the clear implication of Section 105c(5) of the Atomic Energy Act. Where such a hearing is held, the Attorney General or his designee may participate as a party in connection with the subject matter of his advice. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-78-5, 7 NRC 397, 398 (1978); Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) and Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-560, 10 NRC 265, 272 (1979). However, where the Licensing Board's jurisdiction over an antitrust proceeding does not rest upon Section 105c(5), the Justice Department must comply with the standards for intervention, including the standards governing untimely intervention petitions. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) and Cleveland Electric Illuminating Co. and Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 253-54 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992).

In dealing with antitrust issues, the NRC's role is something more than that of a neutral forum for economic disputes between private parties. If an antitrust hearing is convened, it should encompass all significant antitrust implications of the license, not merely the complaints of private intervenors. If no one performs this function, the NRC Staff should assure that a complete picture is presented to Licensing Boards. Florida Power & Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 949 (1978).

The antitrust review undertaken by the Commission in licensing the construction of a nuclear power plant is, by statute, to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws...." Section 105c(5) of the Atomic Energy Act of 1954, 42 U.S.C. 2135c(5). This means that the licensed activities must play some active role in creating or maintaining the anticompetitive situation.

Put another way, the nuclear power plant must be an actor, an influence, on the anticompetitive scene. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-665, 15 NRC 22, 32 (1982).

Where a license is found to create or maintain a situation inconsistent with the antitrust laws, the Commission may impose corrective conditions on the license rather than withhold it. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-13, 7 NRC 583, 597 (1978).

In making a determination under AEA section 105c about the antitrust implications of a licensing action, the Commission must act to ensure that two results do not obtain: Activities under the license must not (1) "maintain" a "situation inconsistent with the antitrust laws" or (2) "create" such a situation. In making its ultimate determination about whether an applicant's activities under the license will result in a "situation inconsistent with the antitrust laws," the term "maintain" permits the Commission to look at the applicant's past and present competitive performance in the relevant market, whereas the word "create" envisions that the Commission's assessment will be a forward-looking, predictive analysis concerning the competitive environment in which the facility will operate. See Alabama Power Co. v. NRC, 692 F.2d 1362, 1367-68 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983). Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 288 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Only the NRC is empowered to make the initial determination under Section 105(c) whether activities under the license would create or maintain a situation inconsistent with the antitrust laws, and if so what license conditions should be required as a remedy. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 574 (1979).

In specifying which federal antitrust laws are implicated in an NRC antitrust review, AEA section 105 references all the major provisions governing antitrust regulation, including the Sherman, Clayton and Federal Trade Commission Acts. It is a basic tenet that "the antitrust laws seek to prevent conduct which weakens or destroys competition". See Davis-Besse, ALAB-560, 10 NRC 265, 279 & n.34 (1979)(principal purpose of Sherman, Clayton and Federal Trade Commission Acts is preservation of and encouragement of competition.) Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 290 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

In order to conduct a Section 105c proceeding, it is not necessary to establish a violation of the antitrust laws. Any violation of the antitrust laws also meets the less rigorous standard of Section 105c which is inconsistent with the antitrust laws. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 570 (1979). The Commission has a broader authority that encompasses those instances in which there is a "reasonable probability" that those laws "or the policies clearly underlying those laws" will be infringed. Alabama Power Co., 692 F. 2d at 1368. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 290 n. 54 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

A threshold showing of lower cost nuclear power is not required as an indispensable prerequisite of retaining antitrust conditions. City of Cleveland v. NRC, 68 F.3d 1361, 1369 (D.C. Cir. 1995).

NRC statutory responsibilities under Section 105(c) cannot be impaired or limited by a State agency. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP--79-27, 10 NRC 563, 577 (1979).

The legislative history and language of the Public Utilities Regulatory Policies Act of 1978 clearly establish that the act was not intended to divest NRC of its antitrust jurisdiction. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 577 (1979).

Once the U.S. Attorney General has withdrawn from a proceeding and permission has been granted to the remaining intervenors to withdraw, the Board no longer has jurisdiction to entertain an antitrust proceeding under the provisions of the Atomic Energy Act. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), LBP-82-21, 15 NRC 639, 640-641 (1982).

### 6.3.A Application of Antitrust Laws; Market Power

One of the cardinal precepts of antitrust regulation is that a commercial entity that is dominant in the relevant market (even if its dominance is lawfully gained) is accountable for the manner in which it exercises the degree of market power that dominance affords. See Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973). See also A. Neal, The Antitrust Laws of the United States, 126 (2d ed. 1970). Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 32 NRC 269, 290 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

"Market power" is generally defined as the "power of a firm to affect the price which will prevail on the market in which the firm trades.[cites omitted] If a firm possesses market power such that it has a substantial power to exclude competitors by reducing price, then it is considered to have "monopoly power." If an entity with market dominance utilizes its market power with the purpose of destroying competitors or to otherwise foreclose competition or gain a competitive advantage, then its conduct will violate the antitrust laws, specifically section 2 of the Sherman Act. See, e.g. Eastman Kodak Co. v. Image Technical Services, Inc., 119 L.Ed. 265, 294 (1992); Otter Tail Power Co., 410 U.S. at 377. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al.,LBP-92-32, 36 NRC 269, 291 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

AEA § 105c directs that the focus of the Commission's consideration during an antitrust review must be whether, considering a variety of factors, a nuclear utility has market dominance and, if so, given its past (and predicted) competitive behavior, whether it can and will use that market power in its activities relating to the operation of its licensed facility to affect adversely the competitive situation in the relevant market. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 298-99 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Under general antitrust principles, what is required relative to a particular competitive situation is an analysis of the existence and use of market power among competing firms to determine whether anticompetitive conditions exist. This assessment, in turn, is based upon a number of different factors that have been recognized as providing some indicia of a firm's competitive potency in the relevant market, including firm

size, market concentration, barriers to entry, pricing policy, profitability, and past competitive conduct. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 291 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Nothing in AEA § 105c, or in the pertinent antitrust laws and cases supports the proposition that traditional antitrust market power analysis is inapplicable in the first instance when the assessment of the competitive impact of a particular asset (i.e., a nuclear facility) is involved. Consistent with the antitrust laws referenced in AEA § 105c, what ultimately is at issue under that provision is not a competitor's comparative cost of doing business, but rather its possession and use of market power. And if a commercial entity's market dominance gives it the power to affect competition, how it uses that power -- not merely its cost of doing business -- remains the locus for any antitrust analysis under section 105c. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 292 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

### 6.3.B Application of Antitrust Laws; Remedial Authority

During an antitrust review under AEA section 105c, if it can be demonstrated that market power has or would be misused, then with cause to believe that the applicant's "activities under the license would create or maintain a situation inconsistent with the antitrust laws" the Commission can intervene to take remedial measures. On the other hand, if the Commission reaches a judgment that an otherwise dominant utility has not and will not abuse its market power, i.e., that its "activities under the license" will not "create or maintain a situation inconsistent with the antitrust laws," then the Commission need not intercede.Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32,, 36 NRC 269, 295 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

In reaching a judgment under AEA section 105c about a utility's "activities under the license," the Commission is permitted to undertake a "broad inquiry" into an applicant's conduct. See Alabama Power Co. 692 F.2d at 1368. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-92-32, 36 NRC 269, 295 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

### 6.3.1 Consideration of Antitrust Matters After the Construction Permit Stage

The NRC antitrust responsibility does not extend over the full life of a licensed facility but is limited to two procedural stages -- the construction permit stage and the operating license stage. This limitation on NRC jurisdiction extends to the Director of Nuclear Reactor Regulation as well as to the rest of the NRC. Florida Power & Light Co. (St. Lucie Plant, Unit 1; Turkey Point Plant, Units 3 & 4), ALAB-428, 6 NRC 221, 226-227 (1977). For reactors which have undergone antitrust review in connection with a construction permit application pursuant to Section 105c of the Atomic Energy Act, Section 105c(2) governs the question of antitrust review at the operating license stage. Antitrust issues may only be pursued at this stage if a finding is made that the licensee's activities have significantly changed subsequent to the construction permit review. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1310 (1977). Where a construction permit antitrust proceeding is under way, the antitrust provisions of the Atomic Energy Act effectively preclude the

Commission from instituting a second antitrust hearing in conjunction with an operating license application for the plant. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-661, 14 NRC 1117, 1122 (1-981). Where, subsequent to issuance of a construction permit and to termination of the jurisdiction of the Licensing Board which considered the application, new contractual arrangements give rise to antitrust contentions, such contentions cannot be resolved by the original Licensing Board. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582 (1977). The Commission's regulations indicate that the new antitrust concerns should be raised at the operating license stage. The Commission Staff could also initiate show cause proceedings requiring the licensee to demonstrate why antitrust conditions should not be imposed in an amendment to the construction permit. Id. Where the petitioner who raises the antitrust contentions is a co-licensee, 10 CFR § 50.90 permits the petitioner to seek an amendment to the construction permit which would impose antitrust considerations. Id.

The NRC may facilitate operating license stage antitrust review by waiving the requirements of 10 CFR § 50.30(d) and § 50.34(b) (which require operating license applications to be accompanied by the filing of an FSAR). This permits operating license antitrust review at a much earlier stage prior to completion of the FSAR. South Texas, CLI-77-13, supra, 5 NRC at 1319.

Section 105 of the Atomic Energy Act and its implementing regulations contemplate that mandatory antitrust review be conducted early in the construction permit process. Florida Power & Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Antitrust review might be conducted out-of-time if significant doubts were cast on the adequacy of the initial antitrust review. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 945 (1978).

Despite the fact that further antitrust review following issuance of a construction permit will usually await the operating license stage of review, a construction permit amendment may give rise to an additional antitrust review prior to the OL stage. An application for a construction permit amendment that would add new co-owners to a plant is within the scope of the phrase in Section 105c(1) of the Atomic Energy Act requiring antitrust review of "any license application." As such, it triggers an opportunity for intervention based on the antitrust aspects of adding new coowners. To hold otherwise would subvert Congressional intent by insulating applicants coming in by way of amendment from antitrust investigation. Moreover, because a joint venture might raise antitrust problems that would not exist if the joint applicants were considered individually, the Licensing Board has jurisdiction to consider intervention petitions and antitrust issues filed in connection with a new application for joint ownership. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-13, 7 NRC 583, 588 (1978).

A narrower, second antitrust review is to occur at the operating license stage, if and only if, "The Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission..." in connection with the construction permit for the facility. South Carolina Electric and

Gas Company (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 823 (1980).

The ultimate issue in the operating license stage antitrust review is the same as for the construction permit review: would the contemplated license create a situation inconsistent with the antitrust laws or the policies underlying those laws. South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 824 (1980).

To trigger antitrust review at the operating license stage, the significant changes specified by Section 105c of the Atomic Energy Act must (1) have occurred since the previous antitrust review of the licensee; (2) be reasonably attributable to the licensee; and (3) have antitrust implications that would warrant Commission remedy. This requires an examination of (a) whether an antitrust review would be likely to conclude that the situation as changed has negative antitrust implications and (b) whether the Commission has available remedies. Summer, supra, 11 NRC at 824-825.

Under Section 105c(2) of the Atomic Energy Act, a second formal antitrust review at the operating stage of a reactor licensing proceeding is the exception, not the rule. A petition for determination of significant changes is characterized as an informal adjudicatory process and is not governed by the Commission's Rules of Practice for formal procedures (10 CFR Part 2, Subpart G). Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 792 (1981).

In determining whether significant changes have occurred which require referral of the matter to the Attorney General, the Commission must find: (1) that there is a factual basis for the determination; and (2) that the alleged changes are reasonably apparent. Summer, supra.

Although the NRC regulations do not specify a period during which requests for a significant change determination will be timely, the relevant question in determining timeliness is whether the request has followed sufficiently promptly the operating license application. Central Electric Power Cooperative, supra, at 829.

### 6.3.1.1 Limitations on Antitrust Review after Issuance of Operating License

Congress did not invest the NRC with ongoing antitrust responsibility during the period subsequent to issuance of an operating license and the NRC's authority in this area terminates at that point. Houston Lighting & Power Co. (South Texas Projects, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1317 (1977). Congress did not envision for the NRC a broad, ongoing antitrust enforcement role but, rather, established specific procedures (and incentives) intended to tie antitrust review to the two-step licensing process. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 945 (1978). However, a Licensing Board has determined that, pursuant to its general authority to amend a facility license at the request of the licensee, Atomic Energy Act 189a and 10 CFR § 50.90, it had jurisdiction to consider the licensees' request to suspend the antitrust conditions in their operating licenses. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., LBP-91-38, 34 NRC 229, 239-44 (1991), aff'd in part and appeal denied, CLI-92-11, 36 NRC 47 (1992), subsequent history, LBP-92-

32, 36 NRC 269, 295 (1992), aff'd, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995).

Under license renewal provisions of the Atomic Energy Act, an antitrust review is not required for applications for renewal of nuclear plant commercial licenses or research and development nuclear plant licenses. The NRC acted permissibly in limiting its antitrust review duties to situations in which it issued new operating licenses. American Public Power Assoc. v. NRC, 990 F.2d 1310, 1312-13 (D.C. Cir. 1993).

The Commission has concluded, upon a close analysis of the AEC, that its antitrust reviews of post-operating license transfer applications cannot be squared with the terms or intent of the Act and that the Commission therefore lacks authority to conduct them. But even if the Commission possesses some general residual authority to continue to undertake such antitrust reviews, it is certainly true that the Act nowhere requires them, and the Commission thinks it sensible from a legal and policy perspective to no longer conduct them. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 460 (1999). In the Wolf Creek Case, the Commission concluded that the competitive and regulatory landscape has dramatically changed since 1970 in favor of those electric utilities who are the intended beneficiaries of the section 105 antitrust reviews, especially in connection with acquisitions of nuclear power facilities and access to transmission services. The Commission concludes that the duplication of other antitrust reviews makes no sense and only impedes nationwide efforts to streamline the federal government. The Commission subsequently codified its Wolf Creek decision by rulemaking, Antitrust Review Authority: Clarification, 65 Fed. Reg. 44649 (July 19, 2000).

NRC Antitrust review of post-operating license transfers is unnecessary from both a legal and policy perspective. GPU Nuclear, Inc., et. al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000) (responding to fear that corporations "may be stretched too thin in their ability to operate a multitude of nuclear reactors").

The fact that a particular license transfer may have antitrust implications does not remove it from the NEPA categorical exclusion. In any event, because the Atomic Energy Act does not require, and arguably, does not even allow, the Commission to conduct antitrust evaluations of license transfer application, any "failure" of the Commission to conduct such an evaluation cannot constitute a federal action warranting a NEPA review. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266 (2000) at 30, n.55, quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167-68 (2000).

The AEA does not require, and arguably does not allow, the Commission to conduct antitrust evaluations of license transfer applications. As a result, failure by the NRC to conduct an antitrust evaluation of a license transfer application does not constitute a Federal action warranting a NEPA review. Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168 (2000). See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1) CLI-99-19, 49 NRC 441 (1999); Final Rule, "Antitrust Review Authority: Clarification," 65 Fed. Reg. 44,649 (July 19, 2000).

The Commission no longer conducts antitrust reviews in license transfer proceedings. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 318 (2000), citing, Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168, 174 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649 (July 19, 2000).

### 6.3.2 Intervention in Antitrust Proceedings

The Commission's regulations make clear that an antitrust intervention petition: (1) must first describe a situation inconsistent with the antitrust laws; (2) would be deficient if it consists of a description of a situation inconsistent with the antitrust laws, however well pleaded, accompanied by a mere paraphrase of the statutory language alleging that the situation described therein would be created or maintained by the activities under the license; and (3) must identify the specific relief sought and whether, how and the extent to which the request fails to be satisfied by the license conditions proposed by the Attorney General. The most critical requirement of an antitrust intervention petition is an explanation of how the activities under the license would create or maintain an anticompetitive situation. Florida Power and Light Co. (St. Lucie Plant, Unit 2), ALAB-665, 15 NRC 22, 29 (1982), citing Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 574575 (1975).

Although Section 105 of the Atomic Energy Act encourages petitioners to voice their antitrust claims early in the licensing process, reasonable late requests for antitrust review are not precluded so long as they are made concurrent with licensing. Licensing Boards must have discretion to consider individual claims in a way which does justice to all of the policies which underlie Section 105c and the strength of particular claims justifying late intervention. Florida Power & Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

The criteria of 10 CFR § 2.714 for late petitions are as appropriate for evaluation of late antitrust petitions as in health, safety and environmental licensing, but the Section 2.714 criteria should be more stringently applied to late antitrust petitions, particularly in assessing the good cause factor. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Late requests for antitrust review hearings may be entertained in the period between the filing of an application for a construction permit -- the time when the advice of the Attorney General is sought -- and its issuance. However, as the time for issuance of the construction permit draws closer, Licensing Boards should scrutinize more closely and carefully the petitioner's claims of good cause. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Where an antitrust petition is so late that relief will divert from the licensee needed and difficult-to-replace power, the Licensing Board may shape any relief granted to meet this problem. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 948 (1978).

Where a late petition for intervention is involved, the special factors set forth within 10 CFR § 2.714(a)(1) must be balanced and applied before petitions may be granted; the test becomes increasingly vigorous as time passes. Of particular significance is the availability of other remedies for the late petitioner where remedies are available before the Federal Energy Regulating Commission and petitioner has not shown that the remedy is insufficient. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), LBP-81-28, 14 NRC 333, 336, 338 (1981).

### 6.3.3 Discovery in Antitrust Proceedings

The Noerr-Pennington doctrine will operate to immunize those legitimately petitioning the government, or exercising other First Amendment rights, from liability under the antitrust laws, even where the challenged activities were conducted for purposes condemned by the antitrust laws. Florida Power & Light Co. (St. Lucie Plant, Unit 2), LBP-79-4, 9 NRC 164, 174 (1979).

Material on applicant's activities designed to influence legislation and requested through discovery is relevant and may reasonably be calculated to lead to the discovery of admissible evidence, and therefore is not immune from discovery. The Noerr-Pennington cases, on which applicant had based its argument, go to the substantive protection of the First Amendment and do not immunize litigants from discovery. Appropriate discovery into applicant's legislative activities must be permitted, and the information sought to be discovered may well be directly admissible as evidence. Florida Power & Light Co. (St. Lucie Plant, Unit 2), LBP-79-4, 9 NRC 164, 175 (1979).

#### 6.3.3.1 Discovery Cutoff Dates for Antitrust Proceedings

The imposition of the cutoff date for discovery is for the purpose of making a preliminary ruling about relevancy for discovery. The cutoff date is only a date after which, in the dimension of time, relevancy may be assumed for discovery purposes. Requests for information from before the cutoff date must show that the information requested is relevant in time to the situation to be created or maintained by a licensed activity. If the information sought is relevant, and not otherwise barred, it may be discovered, no matter how old, upon a reasonable showing. This is entirely consistent with 10 CFR § 2.740(b) and Rule 26(b) which are in turn consistent with the Manual for Complex Litigation, Part 1, § 4.30. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 169-70 (1979).

In antitrust proceedings, the relevant period for discovery must be determined by the circumstances of the alleged situation inconsistent with the antitrust laws, not the planning of the nuclear facility. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 168 (1979).

The standard for allowing discovery requests predating a set cutoff date is that there be a reasonable possibility of relevancy; it is not necessary to show relevancy plus good cause. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 172 (1979).

## 6.4 Attorney Conduct

### 6.4.1 Practice Before Commission

10 CFR § 2.713 contains general provisions with respect to representation by counsel in an adjudicatory proceeding, standards of conduct and suspension of attorneys.

Counsel appearing before all NRC adjudicatory tribunals "have a manifest and iron-clad obligation of candor." This obligation includes the duty to call to the tribunal's attention facts of record which cast a different light upon the substance of arguments being advanced by counsel. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 532 (1978).

A lawyer citing legal authority to an adjudicatory board in support of a position, with knowledge of other applicable authority adverse to that position, has a clear professional obligation to inform the board of the existence of such adverse authority. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174 n.21 (1983), citing Rule 3.3(a)(3) of the ABA Model Rules of Professional Conduct (1983).

Canon 7 of the ABA Code of Professional Responsibility, which exhorts lawyers to represent their clients "zealously within the bounds of the law," and its Associated Ethical Considerations and Disciplinary Rules provide the standards by which attorneys should abide in the preparation of testimony for NRC proceedings. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 916, 918 (1982).

In judging the propriety of a lawyer's participation in the preparation of testimony of a witness, the key factor is not who originated the words that comprise the testimony, but whether the witness can truthfully attest that the statement is complete and accurate to the best of his or her knowledge. Midland, supra, 16 NRC at 918.

Counsel have an obligation to keep adjudicatory boards informed of the material facts which are relevant to issues pending before them. University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1401 (1984), citing Consumers Power Co. (Midland Plant, Units 1 & 2), 16 NRC 897, 910 (1982); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 & 3), ALAB-677, 15 NRC 1387 (1982); Consumers Power Co. (Midland Plant, Units 1& 2), ALAB-458, 7 NRC 155, 172 n.64 (1978).

A party's obligation to disclose material information extends to, and is often the responsibility of, counsel, especially in litigation involving highly complex technology where many decisions regarding materiality of information can only be made jointly by a party and its counsel. University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1405 (1984).

Counsel's obligations to disclose all relevant and material factual information to the Licensing Board under the Atomic Energy Act are not substantially different from those laid out by the ABA's Model Rules of Professional Conduct. In discharging his obligations, counsel may verify the accuracy of factual information with his client or verify the accuracy of the factual information himself. UCLA, 19 NRC at 1406-07.

The Commission's Rules of Practice require parties and their representatives to conduct themselves with honor, dignity, and decorum as they should before a court of law. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 916 (1982), citing 10 CFR 2.713(a). See Hydro Resources, Inc., LBP-98-4, 47 NRC 17 (1998). A letter from an intervenor's counsel to an applicant's counsel which is reasonably perceived as a threat to seek criminal sanctions against the applicant's employees or to seek disciplinary action by the Bar against the applicant's attorneys in order to compel the applicant to negotiate the cancellation of its facility does not meet this standard. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 668-670 (1986).

Counsel's derogatory description of the NRC Staff constitutes intemperate even disrespectful, rhetoric and is wholly inappropriate in legal pleadings. Curators of the University of Missouri, CLI-95-17, 42 NRC 229, 232-33 (1995).

The Commission generally follows the American Bar Association's Code of Professional Responsibility in judging lawyer conduct in NRC proceedings. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 916 (1982), citing, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 838 (1974).

Gamesmanship and "sporting conduct" between or among lawyers and parties is not condoned in Nuclear Regulatory Commission proceedings. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 919 (1982).

Attorneys practicing before Licensing and Appeal Boards are to conduct themselves in a dignified and professional manner and are not to engage in name calling with respect to opposing counsel. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835 (1974). In this vein, Licensing Boards have a duty to regulate the course of hearings and the conduct of participants in the interest of insuring a fair, impartial, expeditious and orderly adjudicatory process, 10 CFR § 2.718(e); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-417, 5 NRC 1442, 1445-46 (1977), and the Commission has the authority to disqualify an attorney or an entire law firm for unprofessional conduct, whatever its form. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-332, 3 NRC 785 (1976).

The Code of Professional Responsibility considerably restricts the comments that counsel representing a party in an administrative hearing may make to the public. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 744, 750 (1980).

Parties should not impugn one another's integrity without first submitting supporting evidence. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-5A, 15 NRC 216 (1982).

### 6.4.2 Disciplinary Matters re Attorneys

The Commission has the authority to disqualify an attorney or an entire law firm for unprofessional conduct, whatever its form. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-332, 3 NRC 785 (1976). 10 CFR § 2.713(c) lists various acts

or omissions by an attorney which would justify his suspension from further participation in a proceeding. That Section also sets forth the procedure to be followed by the presiding officer in issuing an order barring the attorney from participation.

A Licensing Board may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall be guilty of disorderly, disruptive, or contemptuous conduct. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-87, 16 NRC 1195, 1201 (1982).

An intervenor's generalized allegations of prejudice resulting from the submission of an alleged ex parte communication by applicant's counsel to a Board are insufficient to support a motion to disqualify counsel. The intervenor must demonstrate how specific Board rulings have been prejudiced by the submission of the ex parte communication. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 504-05 (1986).

Petitions which raise questions about the ethics and reputation of another member of the Bar should only be filed after careful research and deliberation. Moreover, although ill feeling understandably results from any petition for disciplinary action, retaliation in kind should not be the routine response. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-36, 16 NRC 1512, 1514 n.1 (1982).

A party's lack of resources does not excuse its baseless and undocumented charges against the integrity and professional responsibility of counsel for an opposing party. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 828 (1985).

The Commission has no interest in general matters of attorney discipline and chooses to focus instead on the means necessary to keep-its judicatory proceedings orderly and to avoid unnecessary delays. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-36, 16 NRC 1512, 1514 n.1 (1982)., citing 45 Fed. Reg. 3594 (1980).

While the Commission has inherent supervisory power over all agency personnel and proceedings, it is not necessarily appropriate to bring any and all matters to the Commission in the first instance. Under 10 CFR § 2.713, where a complaint relates directly to a specified attorney's actions in a proceeding before a Licensing Board, that complaint should be brought to the Board in the first instance if correction is necessary for the integrity of the proceedings. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-36, 16 NRC 1512, 1514 n.1 (1982).

### 6.4.2.1 Jurisdiction of Special Board re Attorney Discipline

The Special Board appointed to consider the disqualification issue has the ultimate responsibility as to that decision. The Licensing Board before which the disqualification question was initially raised should determine only whether

the allegations of misconduct state a case for disqualification and should refer the case to the Special Board if they do. After the Special Board's decision, the Licensing Board merely carries out the ministerial duty of entering an order in accordance with the Special Board's decision. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-332, 3 NRC 785 (1976).

### 6.4.2.2 Procedures In Special Disqualification Hearings re Attorney Conduct

The attorney or law firm accused of misconduct is entitled to a full hearing on the matter. The Commission's discovery rules are applicable to the proceeding and all parties have the right to present evidence and cross-examine witnesses. The burden of proof is on the party moving for disqualification and the Special Board's decision must be based on a preponderance of the evidence. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-332, 3 NRC 785 (1976).

In general, the doctrine of collateral estoppel applies to disqualification proceedings. An earlier judicial decision would be entitled to collateral estoppel effect unless giving it effect would intrude upon the Commission's ability to ensure the orderly and proper prosecution of its internal proceedings. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977). As to costs incurred from an attorney discipline proceeding, there is no basis on which NRC can reimburse a private attorney for out-of-pocket expenses in connection with the termination, and settlement of a special proceeding brought to investigate misconduct charges against a private attorney and NRC Staff attorneys. Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-79-3, 9 NRC 107, 109 (1979).

### 6.4.2.3 Conflict of Interest

Disqualification of an attorney or law firm is appropriate where the attorney formerly represented a party whose interests were adverse to his present client in a related matter. The aggrieved former client need not show that specific confidences were breached but only that there is a substantial relationship between the issues in the pending action and those in the prior representation. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-332, 3 NRC 785 (1976).

A perceived bias in an attorney's view of a proceeding is distinguishable from a situation where there is an attorney conflict of interest of a type recognized in law to compromise counsel's ability to represent his client, e.g., that he had previously represented another party in the proceeding, or had a financial interest in common with another party, or the like. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-36, 16 NRC 1512, 1515 (1982).

An attorney for a party in an NRC proceeding should discontinue his or her representation of the client when it becomes apparent that the attorney will be called to testify as a necessary witness in the proceeding. However, an attorney will not be disqualified when it is shown that the client would suffer substantial hardship because of the distinctive value of the attorney. A party

may waive the possible disqualification of its attorney if the opposing parties are not thereby prejudiced. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1717-20 (1985), citing DR 5-101(B)(4), DR 5-102(A) and (B) of the Code of Professional Responsibility, and Model Rule 3.7(a)(3) of the ABA Model Rules of Professional Conduct

## 6.5 Communications Between Staff/Applicant/Other Parties/Adjudicatory Bodies

During the course of an ongoing adjudication, Commission regulations restrict communications between the Commission adjudicatory employees and certain employees within the NRC who are participating in the proceeding or any person outside the NRC, with respect to information relevant to the merits of an adjudicatory proceeding. Commission adjudicatory employees include the Commissioners, their immediate staff, and other employees advising the Commission on adjudicatory matters, the Licensing Board and their immediate staffs. See 10 C.F.R. §§ 2.780, 2.781. Employees "participating in a proceeding" include those engaged in the performance of any investigative or litigating function in the proceeding or in a factually related proceeding. See 10 C.F.R. § 2.781(a). Communications between Commission adjudicatory employees and other NRC employees are subject to the "separation of functions" restrictions in 10 C.F.R. § 2.781. Communications between Commission adjudicatory employees and any person outside the NRC are subject to the ex parte restrictions in 10 C.F.R. § 2.780.

Although the separation of functions and ex parte contact restrictions are subject to different regulations, caselaw discussing prohibited communications in the context of one situation may be equally applicable to the other. Thus, depending on the issue, it may be helpful or necessary to review caselaw arising in both areas.

### 6.5.1 Ex Parte Communications Rule

10 CFR § 2.780 sets forth the applicable rules with respect to ex parte (off-the-record) communications involving NRC personnel who exercise quasi-judicial functions with respect to the issuance, denial, amendment, transfer, renewal, modification, suspension or revocation of a license or permit. In general, the regulation prohibits ex parte communications with Commissioners, members of their immediate staffs, NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions, and Licensing Board members and their immediate staffs.

The ex parte rule proscribes litigants' discussing, off-the record, matters in litigation with members of the adjudicatory board. It does not apply to discussions between and among the parties, between the NRC Staff and the applicant or between the Staff, applicant, other litigants and third parties (including state officials and Federal agencies) not involved in the proceeding. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 269 (1978). The NRC Staff does not advise the Commission or the Boards. The Staff is a separate and distinct entity that participates as a party in a proceeding and may confer with the other parties. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 883 n.161 (1984).

The ex parte rule relates only to discussions of any substantive matter at issue in a proceeding on the record. It does not apply to discussions of procedural matters,

such as extensions of time for filing of affidavits. Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 336 (1982). See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-5, 17 NRC 331, 332 (1983), citing, 10 CFR § 2.780(a).

Nothing in the Commission's ex parte rule pursuant to 10 CFR § 2.780 precludes conversations among parties, none of whom is a decisionmaker in the licensing proceeding. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 144 (1982). See also Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 378 (1983).

Generic discussions of general health and safety problems and responsibilities of the Commission not arising from or directly related to matters in adjudication are not ex parte. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-3, 17 NRC 72, 74 (1983), citing 10 CFR 2.780(d).

Regarding a prohibition on ex parte contacts, the ex parte rule is not properly invoked where in an enforcement matter the licensee is complying with Staff's order and has not sought a hearing, nor is a petition for an enforcement action sufficient to invoke the provisions of 10 CFR § 2.780. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-83-4, 17 NRC 75, 76 (1983).

The Staff's communication of the results of its reviews, through public filings served on all parties and the adjudicatory boards, does not constitute an ex parte communication. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 197 n.39 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

In determining whether the submission of an ex parte communication has so tainted the decisionmaking process as to require vacating a Board's decision, the Commission has evaluated the following factors: the gravity of the ex parte communication; whether the contacts could have influenced the agency's decision; whether the party making the contacts benefited from the Board's final decision; whether the contents of the communication were known to the other parties to the proceeding; and whether vacating the Board's decision would serve a useful purpose. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 506 (1986), citing Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547, 564-565 (D.C. Cir. 1982).

### 6.5.2 "Separation of Functions" Rules

Communications between NRC employees advising the Commission on adjudicatory matters and NRC employees participating in adjudicatory proceedings on behalf of the staff are subject to the restrictions in 10 C.F.R. § 2.781(a). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 56-57 (1996). A separation of functions violation is "not a concern if it does not reach the ultimate decision maker." Id. at 57 (quoting Press Broadcasting Co., Inc v. FCC, 59 F.3d 1365, 1369 (D.C. Cir. 1995).

The Commission retains the power, pursuant to 10 CFR § 2.206(c), to consult with the NRC Staff on a formal or informal basis regarding the institution of enforcement proceedings. See Yankee Atomic Electric Co. (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 6 (1991).

### 6.5.3 Telephone Conference Calls

A conference call between an adjudicatory board and some but not all of the parties should be avoided except in the case of the most dire necessity. Such calls must be avoided even where no substantive matters are to be discussed and the rule precluding ex parte communications is, therefore, not technically violated. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 NRC 94 (1976).

In general, where substantive matters are to be considered in a prehearing conference call, all parties must be on the line unless that representation has been waived. Promptly after any prehearing conference carried on via telephone during which rulings governing the conduct of future proceedings have been made, Licensing Boards must draft and enter written orders confirming those rulings. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809 (1976). See 10 CFR § 2.752(c).

Where a party informs an adjudicatory board that it is not interested in a matter to be discussed in a conference call between the board and the other litigants, that party cannot later complain that it was not consulted or included in the conference call. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 269 n.63 (1978).

### 6.5.4 Staff-Applicant Communications

#### 6.5.4.1 Staff Review of Application

A prospective applicant may confer informally with the Staff prior to filing its application. 10 CFR §§ 2.101(a)(1), 2.102(a).

The Staff may continue to confer privately with the applicant even after a hearing has been noticed. While a Licensing Board has supervisory authority over Staff actions that are part of the hearing process, it has no jurisdiction to supervise the Staff's review process and, as such, cannot order the Staff and applicant to hold their private discussions in the vicinity of the site or to provide transcripts of such discussions. Northeast Nuclear Energy Co. (Montague Nuclear Power Station, Units 1 & 2), LBP-75-19, 1 NRC 436 (1975). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-5, 37 NRC 168, 170 (1993).

With certain exceptions, all meetings conducted by the NRC technical Staff as part of its review of a particular domestic license or permit application, including applications for amendments to a license or permit, are to be open to attendance by all parties or petitioners for leave to intervene in the case. See Staff Meetings Open to the Public: Final Policy Statement, 65 Fed. Reg. 56964 (Sept. 20, 2000). The policy has its origins in a statement of staff policy published as

Domestic License Applications, Open Meetings and Statement of NRC Staff Policy, 43 Fed. Reg. 28058 (June 28, 1978).

In the absence of a demonstration that meetings were deliberately being scheduled with a view to limiting the ability of intervenors' representatives to attend, the imposition of hard and fast rules on scheduling and meeting location would needlessly impair the Staff's ability to obtain information. The Staff should regard the intervenors' opportunity to attend as one of the factors to be taken into account in making its decisions on the location of such meetings. Fairness demands that all parties be informed of the scheduling of such meetings at the same time. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2); Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-82-41, 16 NRC 1721, 1722-23 (1982).

### 6.5.4.2 Staff-Applicant Correspondence

All Staff-applicant correspondence is required to be served on all parties to a proceeding and such service must be continued through the entire judicial review process, at least with respect to those parties participating in the review and those issues which are the subject of the review. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-184, 7 AEC 229, 237 n.9 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 183 (1974). Note that this requirement of service on all parties of documents exchanged between applicant and Staff in the review process does not arise from 10 CFR § 2.701(b) which separately requires that all documents offered for filing in adjudications be served on all parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2112 (1982). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 152-53 (1993).

## 6.5.5 Notice of Relevant Significant Developments

### 6.5.5.1 Duty to Inform Adjudicatory Board of Significant Developments

The NRC Staff has an obligation to lay all relevant materials before the Board to enable it to adequately dispose of the issues before it. Consolidated Edison Co. (Indian Point Station, Units 1, 2 & 3), CLI-77-2, 5 NRC 13 (1977); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 n.18 (1983), citing Indian Point, supra, 5 NRC at 15. See generally Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 680 (1975). Moreover, the Staff is obligated to make every effort promptly to report newly discovered important information or significant developments related to a proceeding to the presiding Licensing Board and the parties. The Staff's obligation to report applies to materials licensing proceedings in which the Staff has "a continuing duty to keep the hearing file up to date", 10 CFR § 2.1231(c). Curators of the University of Missouri, LBP-90-34, 32 NRC 253, 254-55 (1990).

This duty to report arises immediately upon the Staff's discovery of the information, and the Staff is not to delay in reporting until it has completed its own evaluation of the matter. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 491 n.11 (1976). This same obligation extends to all parties, each of whom has an affirmative duty to keep Boards advised of significant changes and developments relevant to the proceeding. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404, 408 (1975); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625-626 (1973); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1357 (1984); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 623-625 (1986). See Curators of the University of Missouri, LBP-90-34, 32 NRC 253, 255-57 (1990). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-5, 37 NRC 168, 170 (1993).

Parties in Commission proceedings have an absolute obligation to alert adjudicatory bodies in a timely fashion of material changes in evidence regarding: (1) new information that is relevant and material to the matter being adjudicated; (2) modifications and rescissions of important evidentiary submissions; and (3) outdated or incorrect information on which the Board may rely. Similarly, internal Staff procedures must ensure that Staff counsel be fully appraised of new developments. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1388, 1394 (1982), citing Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 406 n.26 (1976); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 411 (1975); and Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973); Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-752, 18 NRC 1318, 1320 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 656 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884 n.163 (1984).

However, the Commission has discussed the conflict between the Staff's duty to disclose information to the boards and other parties, and the need to protect such information. The Commission noted that, pursuant to its Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984), the Staff or the Office of Investigations could provide to a board, or a board could request, for ex parte in camera presentation, information concerning an inspector or investigation when the information is material and relevant to any issue in controversy in the proceeding. The Commission held that the Appeal Board did not have the authority to request information from the Office of Investigations for use in reviewing a motion to reopen where the motion to reopen concerned previously uncontested issues and not "issues in controversy in a proceeding." Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-829, 23 NRC 55, 58 & n.1 (1986).

All parties, including the Staff, are obliged to bring any significant new information to the boards' attention. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 197 n.39 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1394 (1982); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1210 n.11 (1983). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 152-53 n.46 (1993).

Parties and counsel must adhere to the highest standards in disclosing all relevant factual information to the Licensing Board. Material facts must be affirmatively disclosed. If counsel have any doubt whether they have a duty to disclose certain facts, they must disclose. An externality such as a threatened lawsuit does not relieve a party of its duty to disclose relevant information and its other duties to the Board. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1778, 1795 (1981); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1210 n.11 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1092 n.8 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 624 n.9 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986).

If a licensee or applicant has a reasonable doubt concerning the materiality of information in relation to its Board notification obligation or duties under Section 186 of the Atomic Energy Act, 42 U.S.C. § 2236a, the information should be disclosed for the Board to decide its true worth. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984), citing Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 n.15 (1973) and Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 914 (1982), review declined, CLI-83-2, 17 NRC 69 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-6, 21 NRC 447, 461 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560 (1986).

Before submitting information to the Board pursuant to its notification obligations, a licensee or applicant is entitled to a reasonable period of time for internal review of the documents under consideration. However, an obvious exception exists for information that could have an immediate effect on matters currently being pursued at hearing, or that disclose possible serious safety or environmental problems requiring immediate attention. An applicant or licensee is obliged to report the latter to the NRC Staff without delay in accordance with numerous regulatory requirements. See, e.g., 10 CFR § 50.72.Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1359 n.8 (1984).

The routine submittal of informational copies of technical materials to a Board is not sufficient to fulfill a party's obligation to notify the Board of material changes in significant matters relevant to the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1539 n.23 (1984). If a Board notification is to serve its intended purpose, it must

contain an exposition adequate to allow a ready appreciation of (1) the precise nature of the addressed issue and (2) the extent to which the issue might have a bearing upon the particular facility before the Board. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1114 n.59 (1983), citing Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 710 (1979); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1092 n.8 (1984).

The untimely provision of significant information is an important measure of a licensee's character, particularly if it is found to constitute a material false statement. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 198 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An applicant's failure to notify a board of significant information may reflect a deficiency in character or competence if such failure is a deliberate breach of a clearly defined duty, a pattern of conduct to that effect, or an indication of bad faith. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 625-626 (1986).

## 6.6 Decommissioning

Prior to 1996, hearings in decommissioning proceedings were held relatively early in the process and the issues litigated related to whether the agency should approve the licensee's decommissioning plan. The hearings were held pursuant to the formal hearing requirements in 10 CFR Part 2, Subpart G. This is no longer the case. The only predictable staff action during decommissioning that will trigger the opportunity for a hearing will be on whether to approve the licensee's termination plan, which will be submitted at the end of the project, not at the beginning. It is contemplated that a termination plan will be much simpler than the decommissioning plan because it will not include a dismantlement plan and may be as simple as a final site survey plan. Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278, 39,280 (July 19, 1996). If all fuel has been permanently removed from the reactor in accordance with 10 C.F.R. § 50.82(a)(1), any hearing on the termination plan will be subject to the more informal hearing requirements in Subpart L. 10 C.F.R. § 2.1201(a)(3).

An opportunity for a hearing may be available earlier in the process for any activities requiring an amendment to the license, or if the staff takes enforcement action against a licensee during the decommissioning process. Pursuant to 10 C.F.R. § 2.1201(a)(3), once fuel has been permanently removed from the Part 50 facility to an authorized facility, any amendment proceeding would be subject to Subpart L procedures. It is conceivable that pre-1996 caselaw will remain useful to some extent and is included in the following section.

There is no question that the NRC has subject matter jurisdiction over the decommissioning of licensed facilities and the public's protection against dangers to health, life or property from the operation of licensed nuclear facilities. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 365 (1994). The NRC, like all other federal administrative agencies, is a statutory creature whose powers are controlled by legislative grants of authority. Id. at 361.

Outside the realm of the Commission's jurisdiction are decisions concerning a ratepayer-funded Decommissioning Trust Fund. GPU Nuclear, Inc., et. al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210-11 (2000) (holding that the disposition of any money remaining in the Trust Fund after completion of decommissioning is beyond scope of proceeding).

Section 50.82(e) of 10 C.F.R. expressly requires that decommissioning be performed in accordance with the regulations, including the ALARA rule in 10 C.F.R. § 20.1101. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 250-51 (1996).

After decommissioning, the fact that a very small portion of a site may not be releasable does not preclude the release of the overwhelming remainder of the site. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 252 (1996).

Under 10 C.F.R. § 20.1403, a site may be suitable for restricted decommissioning even though it includes a long- as well as short-lived radioactive contaminants. Sequoyah Fuels Corporation (Gore, OK, Site Decommissioning) LBP-99-46, 50 NRC 386, 396-97 (1999).

### 6.6.1 Decommissioning Plan

To obtain a hearing on the adequacy of the decommissioning plan, petitioners must show some specific, tangible link between the alleged errors in the plan and the health and safety impacts they invoke. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 258 (1996).

#### 6.6.1.1 Decommissioning Funding

The Commission's regulations regarding decommissioning funding are intended to minimize administrative effort and provide reasonable assurance that funds will be available to carry out decommissioning in a manner that protects public health and safety. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 143 (2001), (citing Final Rule: "General Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,030 (June 27, 1988)). "The generic formulas set out in 10 C.F.R. § 50.75(c) fulfill the dual purpose of the rule. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 144 (2001).

A litigable contention asserting that a reactor decommissioning plan does not comply with the funding requirements of 10 C.F.R. § 50.82(b)(4) and (c), must show not only that one or more of a plan's cost estimate provisions are in error, "but that there is not reasonable assurance that the amount will be paid." CLI-96-1, 43 at 9. A petitioner must establish that some reasonable ground exists for concluding that the licensee will not have sufficient funds to cover decommissioning costs for the facility. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, (1996).

The Commission does not have statutory authority to determine the recipient of excess decommissioning funds. Power Authority of the State of New York, et.

al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 305 (2000).

Decommissioning trusts are reserved for decommissioning as defined in 10 C.F.R. § 50.2. Thus, offsite remediation is not an accepted expense. However, some licensees use the decommissioning trust to accumulate funds for both "decommissioning" as NRC defines it and decommissioning in the broader sense that includes interim spent fuel management, nonradioactive structure demolition, and site remediation to greenfield status. The Commission has accepted this approach as long as the NRC-defined "decommissioning" funds are clearly earmarked. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 307-308 (2000).

NRC regulations regarding decommissioning funding do not require the inclusion of costs related to nonradioactive structures or materials beyond those necessary to terminate an NRC license. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 145 (2001).

In addition, once the funds are in the decommissioning trust, withdrawals are limited by 10 C.F.R. § 50.82, so that "non-decommissioning" funds (as defined by the NRC) could be spent after the NRC-defined "decommissioning" work had been finished or committed. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 308 (2000) n.52.

NRC regulations do not require a license transfer application to provide an estimate of the actual decommissioning and site cleanup costs. Instead the Commission's decommissioning funding regulation under 10 C.F.R. § 50.75(c) generically establishes the amount of decommissioning funds that must be set aside. A petitioner cannot challenge the regulation in a license transfer adjudication. The NRC's decommissioning funding rule reflects a deliberate decision not to require site-specific estimates in setting decommissioning funding levels. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 308 (2000), citing Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, reconsid. denied, CLI-00-14 52 NRC 37, 59 (2000).

The use of site-specific estimates were expressly rejected by the Commission in its decommissioning rulemaking, although the Commission did recognize that site-specific cost estimates may be prepared for rate regulators. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 144 (2001), citing Final Rule: "Financial Assurances Requirements for Decommissioning Nuclear Power Reactors," 63 Fed. Reg. 50,465, 50,468-69 (Sept. 22, 1998); Final Rule: "General Design Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,030 (June 27, 1988).

The argument that decommissioning technology is still is in an experimental stage is considered a collateral attack on 10 C.F.R. § 50.75(c) establishing the amount that must be set aside, and is thus invalid. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 309 (2000), quoting, Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167 n.9 (2000); and citing (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, reconsid. denied, CLI-00-14 52 NRC 37, 59 (2000).

An applicant's claimed inability to pay for decommissioning as desired by the intervenor does not mean the intervenor's alleged injuries are not redressable, so as to defeat the intervenor's standing to contest the applicant's proposed decommissioning plan. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 14-15 (2001).

A contention challenging the reasonableness of a decommissioning plan's cost estimate is not litigable if reasonable assurance of decommissioning costs is not in serious doubt and if the only available relief would be a formalistic redraft of the plan with a new estimate. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 257 (1996).

Decisions concerning a ratepayer funded Decommissioning Trust Fund are outside the realm of the Commission's jurisdiction. GPU Nuclear, Inc., et. al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210-11 (2000).

The standard for determining that the funds for decommissioning the plant will be forthcoming is whether there is "reasonable assurance" of adequate funding, not whether that assurance is "ironclad." Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 261-62 (1996).

Criterion 9 (of Part 40, Appendix A) should be interpreted as requiring a plan for decommissioning, including cost estimates, to be submitted prior to issuance of the materials license. Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 238-39 (2000).

## 6.7 Early Site Review Procedures

Part 2 of the Commission's regulations has been amended to provide for adjudicatory early site reviews. See 10 CFR § 2.101(a-1), §§ 2.600-2.606. The early site review procedures, which differ from those set forth in Subpart A of 10 CFR Part 52 and Appendix Q to 10 CFR Part 52 (formerly, 10 CFR Part 50), allow for the early issuance of a partial initial decision on site suitability matters.

Early site review regulations provide for a detailed review of site suitability matters by the Staff, an adjudicatory hearing directed toward the site suitability issues proposed by the applicant, and the issuance by a Licensing Board of an early partial decision on site suitability issues. A partial decision on site suitability is not a sufficient basis for the issuance of a construction permit or for a limited work authorization. Neither of these steps

can be taken without further action, which includes the full review required by Section 102(2) of the National Environmental Policy Act of 1969, as amended (NEPA), and by 10 CFR Part 51, which implements NEPA. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223 (1979).

The early partial decision on site suitability does not authorize the applicant to do anything; it does provide applicant with information of value to applicant in its decision to either abandon the site or proceed with plans for the design, construction, and operation of a specific nuclear power plant at that site. Implementation of any such plans is dependent upon further review by the Staff and approval by a Licensing Board. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223 (1979).

The Commission, in its discretion, will determine whether formal or informal hearing procedures will be used to conduct a Part 52 post-construction hearing on a combined construction permit and operating license. 10 CFR § 52.103(d), 57 Fed. Reg. 60975, 60978 (Dec. 23, 1992). See Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992).

### 6.7.1 Scope of Early Site Review

The early site review is not a "major Federal action significantly affecting the human environment" such as would require a full NEPA review of the entire proposed project. Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18, 25 (1980).

The scope of the early site review is properly limited to the issues specified in the notice of hearing subject to the limits of NEPA, Section 102(2)(c), 42 U.S.C § 4332(2)(c). Carroll County Site, supra, 12 NRC at 26.

## 6.8 Endangered Species Act

### 6.8.1 Required Findings re Endangered Species Act

Under Section 7 of the Endangered Species Act, Federal agencies, in consultation with the Department of Interior, are to take such action as necessary to insure that actions authorized by them do not "jeopardize the continued existence of such endangered species." Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 360 (1978). The Federal agency is to obtain input from the Department of Interior and then make its decision. A Licensing Board may not approve relevant action until Interior has been consulted. Approval by the Board which is conditioned on later approval by the Department of Interior does not fulfill the requirements of the Endangered Species Act. "To give advance approval to whatever Interior might decide is to abdicate the Commission's duty under the Act to make its own fully informed decision." ALAB-463, 7 NRC at 363-364.

A Licensing Board's finding with regard to the Endangered Species Act aspects of a construction permit application should not be restricted to a consideration of the particular points raised by contentions. Once informed that an endangered species lives in the vicinity of the proposed plant, the Licensing Board is obligated to examine all possible adverse effects upon the species which might result from construction or operation of the plant and to make findings with respect to them. ALAB-463,, 7 NRC

at 361. In this vein, releases from the plant which will not produce significant adverse effects on endangered species clearly "will not jeopardize their continued existence." The Act does not require a finding that there will not be any adverse effects. "Insignificant effects are not proscribed by the Statute." ALAB-463,, 7 NRC at 360. Likewise, if there are no significant adverse effects on an endangered species, there will be no "harm" to the species under Section 9 of the Act. ALAB-463, at 366-367, n.114.

### 6.8.2 Degree of Proof Needed re Endangered Species Act

The finding that the proposed action will not jeopardize the continued existence of an endangered species must be established by a preponderance of the evidence rather than by clear and convincing proof. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 360 (1978).

## 6.9 Financial Qualifications

Section 182(a) of the Atomic Energy Act of 1954 does not impose any financial qualifications requirement on license applicants; it merely authorizes the Commission to impose such financial requirements as it may deem appropriate. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 8, 9 (1978). The relevant implementing regulation is 10 CFR 50.33(f) which is amplified by Appendix C to 10 CFR Part 50. Id. Appendix C of 10 C.F.R. Part 50 is not designed to apply to a 10 C.F.R. Part 72 proceeding in toto, although there may be some parallels in appropriate circumstances. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 114 (2000).

The "reasonable assurance" requirement set forth in the regulation was adopted to assure that financial conditions did not compromise the applicant's clear self-interest in safety. It contemplates actual inquiry into the applicant's financial qualifications. It is not enough that the applicant is a regulated public utility. A "reasonable assurance" means that the applicant must have a reasonable financing plan in light of relevant circumstances. However, given the history of the present rule and the relatively modest implementing requirements in Appendix C, it does not mean a demonstration of near certainty that an applicant will never be pressed for funds during the course of construction. Seabrook, supra, 7 NRC at Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 18 (1978). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 18 & n.39 (1988), citing Coalition for the Environment v. NRC, 795 F.2d 168 (D.C. Cir. 1986).

Non-utility applicants for operating licenses are required by the NRC's financial qualifications rule to demonstrate adequate financial qualifications before operating a facility. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 129 (2001). A board is not authorized to grant exemptions from this rule or to acquiesce in arguments that would result in the rule's circumvention. Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995).

Safety considerations are the heart of the financial qualifications rule. The Board reasoned in this regard that insufficient funding can cause licensees to cut corners on operating or maintenance expenses. Moreover, the Commission has recognized that a license in

financially straitened circumstances would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape. Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995); GPU Nuclear, Inc., et. al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000).

Following judicial review of an earlier rule (see New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984), on September 12, 1984, the Commission issued amendments to 10 CFR § 50.33(f) which:

1) reinstated financial qualifications review for electric utilities which apply for facility construction permits; and
2) eliminated financial qualifications review for electric utilities which apply for operating licenses, if the utility is a regulated public utility or is authorized to set its own rates.

See 49 Fed. Reg. 35747 (September 12, 1984), as corrected, 49 Fed. Reg. 36631 (Sept. 19, 1984); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 NRC 845, 847 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84 & n.126 (1985).

Commission regulations recognize that underfunding can affect plant safety. Under 10 CFR § 50.33(f)(2), applicants -- with the exception of electric utilities -- seeking to operate a facility must demonstrate that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. Behind the financial qualifications rule is a safety rationale. Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994).

In its statement of considerations accompanying the 1984 promulgation of the revised financial qualification review requirements, the Commission discussed the special circumstances which might justify a waiver, pursuant to 10 CFR § 2.758(b), of the exemption from financial qualifications review for an electric utility operating license applicant. 49 Fed. Reg. 35747, 35751 (September 12, 1984). Among the possible special circumstances for which a waiver may be appropriate are: (1) a showing that the local public utility commission will not allow the electric utility to recover the costs of operating the facility through its rates; and (2) a showing of a nexus between the safe operation of a facility and the electric utility's financial condition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 17, 21-22 (1988). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 302-03 (1989), aff'd in part and rev'd in part, ALAB-920, 30 NRC 121, 133-35 (1989). The 1984 financial qualifications rulemaking proceeding did not limit the special circumstances that could serve as grounds for waiver under 10 CFR § 2.758. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 596 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989).

Section 50.33(f), the Commission's financial qualification exemption applies only to regulated electric utilities. Gulf States Utilities Company, et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31 (1994), aff'd, CLI-94-10, 40 NRC 43 (1994).

If a licensee has a service agreement with an "electrical utility" as defined in 10 CFR § 50.33(f), in which the utility offers reasonable assurances as to the payment of the licensee's costs, then this satisfies the financial qualifications of 10 CFR § 50.33(f) for the licensing of utilization and production facilities and the financial qualifications of 10 CFR

§ 72 for the licensing of ISFSIs. Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 50-52 (2000).

The financial requirements for an independent spent fuel storage installation under 10 CFR Part 72 require nonspecific financial assurances, which are not the same as the more exacting financial requirements for a reactor license under 10 CFR Part 50. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 30-31 (2000).

The special circumstances which may justify a waiver under 10 CFR 2.758 are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived. Also, the special circumstances must be such as to undercut the rationale for the rule sought to be waived. Seabrook, CLI-88-10, supra, 28 NRC at 596-97, reconsid. denied, CLI-89-3, 29 NRC 234 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 300, 301 (1989), aff'd in part and rev'd in part, ALAB-920, 30 NRC 121, 133 (1989). An anti-CWIP (construction work in progress) law which prohibits a public utility from recovering plant construction costs through rate increases until the plant is in commercial operation is not a special circumstance which justifies a waiver of the exemption from financial qualifications review for public utility operating license applicants. The potential delay in recovering such costs was considered by the Commission during rulemaking and was found not to undercut the rationale of the rule that ratemakers would authorize sufficient rates to assure adequate funding for safe full power operation of the plant. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 240-41 (1989).

A waiver petition under 10 CFR § 2.758 should not be certified unless the petition indicates that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. Seabrook, CLI-88-10, supra, 28 NRC at 597, reconsid. denied, CLI-89-3, 29 NRC 234 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 133-35 (1989).

In order to obtain a waiver, pursuant to 10 CFR § 2.758(b), of the financial qualifications review exemption in a low-power operating license proceeding, a petitioner must establish that the electric utility has insufficient funds to cover the costs of safe low-power operation of its facility. Seabrook, supra, 28 NRC at 18-19.

Unusual and compelling circumstances are needed to warrant a waiver of the financial qualifications rule. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 57 (1983). Implicit in the "compelling circumstances" standard is the need to show the existence of at least a "significant" safety issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 239 (1989).

A waiver of the 10 CFR Part 72 financial qualifications standards is not an infringement on an intervenor's right to litigate material issues bearing on a licensing decision. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 117 (2000).

Matters involving decommissioning funding are considered under the Commission's decommissioning rule, issued on June 27, 1988, and not as a part of the financial qualifications review under 10 CFR § 50.33(f). The decommissioning rule requires an applicant to provide reasonable assurance that, at the time of termination of operations, it will have available adequate funds for the decommissioning of its facility in a safe and timely manner. 53 Fed. Reg. 24,018, 24,037 (June 27, 1988). The Commission applied the decommissioning rule to the unusual circumstances in the Seabrook operating license proceeding, and directed the applicant to provide, before low-power operation could be authorized, reasonable assurance that adequate funding for decommissioning will be available in the event that low-power operation has occurred and a full-power license is not granted. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-7, 28 NRC 271, 272-73 (1988). In a subsequent decision, the Commission held that the decommissioning rule is directed to the safe and timely decommissioning of a reactor after a lengthy period of full-power operation, and thus is not directly applicable to the hypothetical situation addressed in CLI-88-7, supra -- the denial of a full-power operating license following low power operation. However, due to the unusual circumstances in the Seabrook operating license proceeding, the Commission in CLI-88-7, supra, did apply the safety concern underlying the decommissioning rule requiring the availability of adequate funds for safe and timely decommissioning. The Commission did not require the applicants to provide a final decommissioning plan containing precise and detailed information. Given the hypothetical situation, the applicants were required to provide only reasonable estimates of decommissioning costs and a reasonable assurance of availability of funding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 584-86 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989), second motion for reconsideration denied, CLI-89-7, 29 NRC 395 (1989).

Decommissioning funding costs exclude the cost of removal and disposal of spent fuel (10 CFR § 50.75(c)n.1), but do not clearly exclude costs of interim onsite storage of spent fuel. The cost of casks to store spent fuel in an onsite Independent Spent Fuel Storage Installation do not appear to be excluded. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 218 (1993).

Outside of the reactor context, it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable financial assurance, such as license conditions and other commitments. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000) (citing Louisiana Energy Services, L.P. (Clairborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997)). In a license-transfer proceeding, our financial qualifications rule is satisfied if the applicant provides a cost and revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs. GPU Nuclear, Inc., (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206-08 (2000), cited in Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 176 (2000).

Pursuant to 10 C.F.R. § 50.33(f)(2), applicants for a license transfer "shall submit estimates for total annual operating costs for each of the first five years of operation of the facility." The Commission has interpreted this rule as requiring "data for the first five 12-month periods after the proposed transfer. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131 (2001). If the submissions are deemed insufficient, this alone is not grounds for rejecting the application. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations,

Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131 (2001); citing Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 95-96 (1995), reconsideration denied, CLI-95-8, 41 NRC 386, 395 (1995). If the missing data concerning financial qualifications can easily be submitted for consideration at the adjudicatory hearing, the Presiding Officer need not reject the application. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131 (2001).

The requirement that a party provide reasonable financial assurance does not require an ironclad guarantee of future business success. The mere casting of a doubt on some aspect of proposed funding plans is not in itself sufficient to defeat a finding of reasonable assurance. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 31 (2000) (citing Louisiana Energy Services, L.P., (Claiborne Enrichment Center), CLI-97-15, 46 NRC 297 (1997); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999)).

The adequacy of a corporate parent's supplemental commitment is not material to NRC license transfer proceedings. The NRC does not need to examine site-specific conditions in calculating the costs of decommissioning. Our decommissioning funding regulation, 10 CFR § 50.75(c), generically establishes the amount of decommissioning funds that must be set aside. Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-166 (2000).

Sections 30.35(a) and 70.25(a) of the Commission's regulations generally require a materials license applicant to submit a decommissioning funding plan if the amount of unsealed byproduct material or unsealed special nuclear material to be licensed exceeds certain levels. However, section 30.35(c)(2) and 70.25(c)(2) provide specific exceptions to the requirements of sections 30.35(a) and 70.25(a) for any holder of a license issued on or before July 27, 1990. Such a licensee has a choice of either (1) filing a decommissioning plan on or before July 27, 1990, or (2) filing a Certification of Financial Assurance on or before that date and then filing a decommissioning funding plan in its next license renewal application. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 165 (1995).

A financial assurance plan should not be left for later resolution or a second round of hearings close to the time of operation. Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 240 (2000).

## 6.10 Generic Issues

A generic issue may be defined as one which is applicable to the industry as a whole or to all reactors or facilities or to all reactors or facilities of a certain type. Current regulations do not deal specifically with generic issues or the manner in which they are to be addressed.

### 6.10.1 Consideration of Generic Issues in Licensing Proceedings

As a general rule, a true generic issue should not be considered in individual licensing proceedings but should be handled in rulemaking. See, e.g., Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-128, 6 AEC 399, 400, 401 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 55-56 (1973). The Commission had indicated at least that generic safety

questions should be resolved in rulemaking proceedings whenever possible. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814-815, clarified, CLI-74-43, 8 AEC 826 (1974). An appellate court has indicated that generic proceedings "are a more efficient forum in which to develop issues without needless repetition and potential for delay." Natural Resources Defense Council v. NRC, 547 F.2d 633 (D.C. Cir. 1976), rev'd and remanded, 435 U.S. 519 (1978), on remand, 685 F.2d 459 (D.C. Cir. 1982), rev'd, 462 U.S. 87 (1983). To the same effect, see Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977). Nevertheless, it appears that generic issues may properly be considered in individual adjudicatory proceedings in certain circumstances.

For example, an Appeal Board has held that Licensing Boards should not accept, in individual licensing cases, any contentions which are or are about to become the subject of general rulemaking but apparently may accept so-called "generic issues" which are not (or are not about to become) the subjects of rulemaking. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-8, 23 NRC 182, 185-86 (1986). Moreover, if an issue is already the subject of regulations, the publication of new proposed rules does not necessarily suspend the effectiveness of the existing rules. Contentions under these circumstances need not be dismissed unless the Commission has specifically directed that they be dismissed during pendency of the rulemaking procedure.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-1A, 15 NRC 43, 45 (1982); South Texas, supra, 23 NRC at 186. The basic criterion is safety and whether there is a substantial safety reason for litigating the generic issue as the rulemaking progresses. In some cases, such litigation probably should be allowed if it appears that the facility in question may be licensed to operate before the rulemaking can be completed. In such a case, litigation may be necessary as a predicate for required safety findings. In other cases, however, it may become apparent that the rulemaking will be completed well before the facility can be licensed to operate. In that kind of case there would normally be no safety justification for litigating the generic issues, and strong resource management reasons not to litigate. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1809 (1982).

In an operating license proceeding, where a hearing is to be held to consider other issues, Licensing Boards are enjoined, in the absence of issues raised by a party, to determine whether the Staff's resolution of various generic safety issues applicable to the reactor in question is "'at least plausible and...if proven to be of substance ...adequate to justify operation.'" Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 311 (1979). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-5, 23 NRC 89, 90 (1986).

A Licensing Board must refrain from scrutinizing the substance of particular explanations in the Safety Evaluation Report (SER) justifying operation of a plant prior to the resolution of an unresolved generic safety issue. The Board should only look to see whether the generic issue has been taken into account in a manner that is at least plausible and that, if proven to be of substance, would be adequate to justify

operation. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1559 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978).

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the hearing encompasses distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527, 530-31 (1979).

A Licensing Board does not have to apply the same degree of scrutiny to uncontested generic unresolved safety issues as is applied to issues subject to the adversarial process. A Licensing Board is required to examine the Staff's presentation in the SER on such uncontested issues to determine whether a basis is provided to permit operation of the facility pending resolution of those issues. A Licensing Board need not make formal findings of fact on these matters as if they were contested issues, but it is required to determine that the relevant generic unresolved safety issues do not raise a "serious safety, environmental, or common defense and security matter" such as to require exercise of the Board's authority under 10 CFR § 2.760a to raise and decide such issues sua sponte. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 465 (1983), citing, Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1110-13 (1983).

## 6.10.2 Effect of Unresolved Generic Issues

### 6.10.2.1 Effect of Unresolved Generic Issues in Construction Permit Proceedings

The existence of an unresolved generic safety question does not necessarily require withholding of construction permits since the Commission has available to it the provisions of 10 CFR § 50.109 for backfitting and the procedures of 10 CFR Part 2, Subpart B for imposing new requirements or conditions. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975).

While unresolved generic issues might not preclude issuance of a construction permit, those generic issues applicable to the facility in question must be considered and information must be presented on whether (1) the problem has already been resolved for the reactor under study, (2) there is a reasonable basis for concluding that a satisfactory solution will be obtained before the reactor is put into operation, or (3) the problem will have no safety implications until after several years of reactor operation, and if there is no resolution by then, alternate means will be available to assure that continued operation, if permitted, will not pose an undue risk. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 775 (1977). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-8219, 15 NRC 601, 614 (1982).

### 6.10.2.2 Effect of Unresolved Generic Issues in Operating License Proceedings

An unresolved safety issue cannot be disregarded in individual licensing proceedings merely because the issue also has generic applicability; rather, for an applicant to succeed, there must be some explanation why construction or operation can proceed although an overall solution has not been found.

Where issuance of an operating license is involved, the justification for allowing operation may be more difficult to come by than would be the case where a construction permit is involved. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 248 (1978).

Explanations of why an operating license should be issued despite the existence of unresolved generic safety issues should appear in the Safety Evaluation Report. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 249 (1978).

Where generic unresolved safety issues are involved in an operating license proceeding, for an application to succeed there must be some explanation why the operation can proceed even though an overall solution has not been found. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 472 (1983), aff'd, ALAB-788, 20 NRC 1102, 1135 n.187 (1984). A plant will be allowed to operate pending resolution of the unresolved issues when there is reasonable assurance that the facility can be operated without undue risk to the health and safety of the public. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 472 (1983), aff'd, ALAB-788, 20 NRC 1102, 1135 n.187 (1984).

## 6.11 Power Reactor License Renewal Proceeding

The NRC will conduct a formal hearing, if requested, on an application to renew a nuclear power reactor operating license. 10 CFR § 54.27, 56 Fed. Reg. 64943, 64960-61 (Dec. 13, 1991). However, a formal "on-the-record" hearing in accordance with the APA is not required for reactor license renewal proceedings under section 189 of the Atomic Energy Act. See Baltimore Gas and Electric Co., (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 342 (1998). The hearing will be limited to consideration of issues concerning (1) age-related degradation unique to license renewal and (2) compliance with National Environmental Policy Act requirements. 10 CFR § 54.29(a),(b). The Commission may, at its discretion, admit an issue for resolution in the formal renewal hearing if the intervenor can demonstrate that the issue raises a concern relating to adequate protection which would occur only during the renewal period. 10 CFR § 54.29(c), 2.758(b)(2).

The "proximity presumption" used in reactor construction and operating license proceedings should also apply to reactor license renewal proceedings. For construction permit and operating license proceedings, the NRC recognizes a presumption that persons who live, work or otherwise have contact within the area around the reactor have standing to intervene if they live within close proximity of the facility (e.g. 50 miles). Reactor license extension cases should be treated similarly because they allow operation of a reactor over an additional period of time during which the reactor can be subject to some of the same equipment failure and personnel error as during operations over the original period of the

license. Duke Energy Corp. (Oconee Nuclear Station, Units 1,2, and 3), LBP-98-33, 48 NRC 381, 385 n.1 (1998).

The Commission's license renewal environmental regulations are based on NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996). License renewal regulations only require the agency to prepare a supplement to the GEIS for each license renewal action. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 152-53 (2001).

For issues listed in Subpart A, Appendix B of 10 CFR Part 51 as Category 1 issues, the Commission resolved the issues generically for all plants and those issues are not subject to further evaluation in any license renewal proceeding. See 61 Fed. Reg. 28, 467 (1996). Consequently, the Commission's license renewal regulations also limit the information that the Applicant need include in its environmental report, see 10 CFR 51.71(d), and the matters the agency need consider in draft and final supplemental environmental impact statements to the GEIS. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11 (2001); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 154 (2001).

10 CFR Part 51, Subpart A, Appendix B, Category 2 issues are site specific and must be addressed by the applicant in its environmental report and by the NRC in its draft and final supplemental environmental impact statements for the facility. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 153 (2001);Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17), 54 NRC 3, 11 (2001).

The scope of the draft and final supplemental environmental impact statement is limited to the matters that 10 CFR 51.33(c) requires the applicant to provide in its environmental report. These requirements do not include severe accident risks, but only "severe accident mitigation alternatives (SAMA)." 10 CFR 51.53(c)(3)(ii)(L). The Commission, therefore, has left consideration of SAMAs as the only Category 2 issue with respect to severe accidents. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 160-161 (2001).

Probabilistic risk assessments are not required for the renewal of an operating license. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159-160 (2001).

The impacts associated with spent fuel and high-level waste disposal, low-level waste disposal, mixed waste storage, and onsite spent fuel storage are all Category 1 issues that are not subject to further evaluation in a license renewal proceeding. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 161 (2001).

Offsite radiological impacts are classified as a Category 1 issue in 10 CFR 51, Subpart A, Appendix B and, therefore, are excluded from consideration in this renewal proceeding. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 162 (2001).

Although 10 CFR 51, Subpart A, Appendix B Category 2 issues may be considered during the license renewal process, all the Category 2 groundwater conflict issues deal with the

issue of withdrawal of groundwater by the Applicant when there are competing groundwater uses. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 164 (2001).

Issues involving the current licensing basis for the facility are not within the scope of review of license renewal. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 165 (2001); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8-9 (2001).

With respect to technical issues, the renewal regulations, 10 CFR Part 54, are footed on the principle that, with the exception of the detrimental affects of aging and a few other issues related to safety only during the period of extended operations, the agency's existing regulatory processes are sufficient to ensure that the licensing bases of operating plants provide an acceptable level of safety to protect the public health and safety. 60 Fed. Reg. 22,464; Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7-8 (2001); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 152 (2001).

The scope of a safety review for license renewal is limited to (1) managing the effects of aging of certain systems, structures, and components; (2) review of time-limited aging evaluations; and (3) any matters for which the Commission itself has waived the application of these rules. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 152 (2001).

The scope of Commission review determines the scope of admissible contentions in a renewal hearing absent a Commission finding under 10 CFR 2.758. 60 Fed. Reg. 22,461, 22,482 n.2; Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 152 (2001).

Under 10 C.F.R. §§ 54.21(a) and (c), and 54.4, the scope of a proceeding on an operating license renewal is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Unit 3 & 4), CLI-00-23, 52 NRC 327, 329 (2000).

The Commission determined that it would be unnecessary and wasteful to require a full reassessment of issues that were thoroughly reviewed when the facility was first licensed and which are routinely monitored and assessed by agency oversight and mandated licensee programs. License renewal review focuses on "those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs." Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001).

The aging of materials is important during the period of extended operation, since certain components may have been designed upon an assumed service life of forty years. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001). Part 54 requires license renewal applicants to demonstrate how they will manage the effects of aging during period of extended operation. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001). Before the NRC will grant a license renewal application, the applicant must

reassess safety reviews or analyses made during the original license period that were based upon a presumed service life not exceeding the original license term. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001). The reassessment must "(1) show that the earlier analysis will remain valid for the extended operation period; (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." Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001). (citations omitted).

Review of environmental issues in a licensing renewal proceeding is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Unit 3 & 4), CLI-00-23, 52 NRC 327, 329 (2000).

## 6.12 Masters in NRC Proceedings

For a discussion of the role of a "master" in NRC proceedings, see Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975) and Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-290, 2 NRC 401 (1975). In ALAB-300, the Appeal Board ruled that parties to an NRC proceeding may voluntarily agree among themselves to have a master of their own choosing make certain discovery rulings by which they will abide. In effect, the master's rulings were like stipulations among the parties. The question as to whether the Licensing and Appeal Boards retained jurisdiction to review the master's discovery rulings was not raised in this case. Consequently, the Appeal Board did not reach a decision as to that issue. Davis-Besse, supra, 2 NRC at 768.

More recently, 10 CFR Part 2 has been amended to provide for the use of special assistants to Licensing Boards. Specifically, special assistants may be appointed to take evidence and prepare a record. With the consent of all parties, the special assistant may take evidence, and prepare a report that becomes a part of the record, subject to appeal to the Licensing Board. 10 CFR § 2.722.

It is within the discretion of the Special Master to hold information confidential if to do so would increase the likelihood of a fair and impartial hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 894 (1981).

A Special Master's conclusions are considered as informed advice to the Licensing Board; however, the Board must independently arrive at its own factual conclusions. Where judgment is material to a particular conclusion, the Board must rely on its own collegial consensus. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 289 (1982). Pursuant to 10 CFR § 2.722(a)(3), the regulations under which a Special Master may be appointed in NRC proceedings specify that Special Masters' reports are advisory only. The Board alone is authorized by statute, regulation and the notice of hearing to render the initial decision in proceedings. The decision must be rendered upon the Board's own understanding of the reliable, probative and substantial evidence of the record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 288 (1982).

Where the Special Master's conclusions are materially affected by a witness' demeanor, the Licensing Board must give especially careful consideration to whether or not other more objective witness credibility standards are consistent with the Special Master's

conclusions. However, the Licensing Board may afford weight to the Special Master's reported direct observations of a witness' demeanor. Three Mile Island, supra, 16 NRC at 289.

## 6.13 [Reserved]

## 6.14 Materials Licenses

Notwithstanding the absence of a hearing on an application for a materials license, the Commission's regulations require the Staff to make a number of findings concerning the applicant and its ability to protect the public health and safety before the issuance of a materials license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984). See 10 CFR §§ 70.23, 70.31. Cf. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981) (analogous to the regulatory scheme for the issuance of operating licenses under 10 CFR § 50.57), aff'd sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982).

The production, processing and sale of uranium and uranium ore are controlled by the Atomic Energy Act of 1954, as amended. Homestake Mining Co. v. Mid-Continent Exploration Co., 282 F.2d 787, 791 (10th Cir. 1960). Natural uranium and ores bearing it in sufficient concentration constitute "source material" and, when enriched for fabrication into nuclear fuel, become "special nuclear material" within the meaning of the Act. (42 U.S.C. § 2014(z) and (aa), 2071, 2091.) Both are expressly subject to Commission regulation (42 U.S.C. § 2073, 2093). 10 CFR Parts 40 and 70 specifically provide for the domestic licensing of source and special nuclear material respectively.

In the special case of uranium enrichment facilities, section 193 of the AEA "prescribes a one-step process, including a single adjudicatory hearing, that considers both construction and operation." Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 215-216 (2002); see 10 C.F.R. §§ 70.23a, 70.31(e).

The AEA is silent concerning any particular hearing or review requirements for the construction and operation of mixed oxide (MOX) fuel fabrication facilities. Thus, the Commission is free to establish a process to consider construction and operation of MOX facilities. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility) CLI-02-7, 55 NRC 205, 214-215 (2002). The key regulations governing a plutonium processing and fuel fabrication facility, 10 C.F.R. §§ 70.23(a)(7), 70.23(a)(8), and 70.23(b), contemplate two approvals, construction and operation. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility) CLI-02-7, 55 NRC 205, 216 (2002). In the construction authorization phase, the NRC is examining issues related only to construction and the review is aimed at the findings required by 10 C.F.R. § 70.23(b) for construction approval. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility) CLI-02-7, 55 NRC 205, 217 (2002).

A Part 40 license applicant need not provide as part of the application process the names of the individuals who will fill positions within it organization in order to demonstrate the technical qualifications of the applicant's personnel. A commitment to hire qualified personnel prior to operations suffices. Hydro Resources, Inc., CLI-00-12, 52 NRC 1, 4 (2000).

In this regard, the NRC has granted a general license to acquire title to nuclear fuel without first obtaining a specific license. A general license is a license under the Atomic Energy Act that is granted by rule and may be used by anyone who meets the term of the rule, "without the filing of applications with the Commission or the issuance of licensing documents to particular persons." 10 CFR § 70.18. NRC rules establish many general licenses, including a general license for NRC licenses to transport licensed nuclear material in NRC-approved containers. 10 CFR § 71.12. State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 293-94 (1993).

"The fundamental purpose of the financial qualifications provision of...section [182a of the AEA] is the protection of public health and safety and the common defense and security." 33 Fed. Reg. 9704 (July 4, 1968). Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 303 (1997). The shorter, more flexible language of Part 70, as compared to Part 50, allows a less rigid, more individualized approach to determine whether an applicant has demonstrated that it is financially qualified to construct and operate an NRC-licensed facility. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 298 (1997).

Thus, persons may obtain title and own uranium fuel and are free to contract to receive title to such fuel without an NRC license or specific NRC regulatory control. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-507, 8 NRC 551, 554-55 (1978). It is only when a person seeks to reduce its contractual ownership to actual possession that regulatory requirements on possession and use must be met and a specific materials license must be obtained. Sterling, supra, 8 NRC at 555.

There would be no point to the NRC's general licensing scheme if a licensee's mere use of a general license triggered individual licensing proceedings. State of New Jersey, supra, 38 NRC at 294.

### 6.14.1 Materials Licensing Proceedings - Subpart L

In the case of materials licenses, the Commission has the legal latitude under Section 189a of the Atomic Energy Act to use informal procedures (instead of the formal trial-type hearing specified in Section 554 of the A.P.A.) to fully apprise it of the concerns of a party challenging the licensing action and to provide an adequate record for determining their validity. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 253 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Rockwell International (Energy Systems Group Special Nuclear Materials License No. SNM-21), CLI-83-15, 17 NRC 1001, 1002 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 651 (1984). See Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-14, 47 NRC 376 (1988). The informal hearing procedures applicable to materials licensing proceedings are specified in 10 CFR Part 2, Subpart L, originally adopted at 54 Fed. Reg. 8269 (Feb. 28, 1989). However, the consistent agency practice is for Licensing Boards, already presiding at operating license hearings, to act on requests to raise Part 70 issues involving the same facility. Limerick, supra, ALAB-765, 19 NRC at 651-52; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984).

A request to use other procedures in a Subpart L proceeding should involve consideration of whether, given the particular circumstances involved in the proceeding, permitting the use of additional, trial-type procedures such as oral cross-examination would add appreciably to the factfinding process. See Sequoyah Fuels Corp. (Sequoyah UF to UF Facility), CLI-86-17, 24 NRC 489, 497 (1986); Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 423 (1997).

A presiding officer determines areas of concern. During the proceeding, proof may be submitted to supplement the application. Hence, the Presiding Officer's determination does not depend solely on whether an application is complete or orderly. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-14, 47 NRC 376 (1998).

Irradiator licensing under Part 36 is a form of materials licensing; 10 CFR Part 2, Subpart L applies when hearings are requested. Graystar, Inc., CLI-00-10, 51 NRC 295, 296 (2000).

### 6.14.2 Intervention In Materials Proceedings

In the absence of a valid petition to intervene, there is no authority to hold a hearing. Rockwell International Corp. (Energy Systems Group Special Nuclear Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777-78 (1983). A petition to intervene in a materials licensing proceeding must: (1) establish the petitioner's standing or interest in the proceeding; (2) provide a brief statement of how the petitioner's interest plausibly may be affected by the outcome of the proceeding; and (3) a concise statement of the petitioner's areas of concern sufficient to establish that the issues sought to be raised are germane to the proceeding. Combustion Engineering Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 143, 145-146, 147-148 (1989), citing, 10 CFR § 2.1205(d); Umetco Minerals Corp., LBP-92-20, 36 NRC 112, 115 (1992); Umetco Minerals Corp., LBP-94-7, 39 NRC 112, 113 (1994). See Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-25, 30 NRC 187, 189 (1989).

Petitioners may not obtain participation in the agency's proceedings on behalf of persons they are not authorized to represent. Umetco Minerals Corp., LBP-94-18, 39 NRC 369, 370 (1994); Advanced Medical Systems, Inc. (Source Material License, Cleveland, Ohio), LBP-95-3, 41 NRC 195, 196-97 (1995).

Petitions for intervention in materials proceedings submitted by Native American may be treated somewhat differently than for other petitioners. The NRC has for years recognized a unique relationship with Native American peoples and considered this special status in adjudicative decisions, and while that status is not of itself sufficient foundation for ignoring the Commission's rules, every precaution should be taken to ensure that Native Americans are not excluded from the proceeding simply because of ignorance of the ingredients of a legally complete petition to intervene. Hydro Resources, Inc. (12750 Merit Drive, Suite 1210 LB12, Dallas, Texas 75251), LBP-95-2, 41 NRC 38, 40 (1995), citing Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 10 (1979).

The fact that a member of a citizens' group lived twenty miles from a site was not sufficient to grant the group standing to intervene in a proceeding for an amendment

to a materials license held by the site. U.S. Department of the Army (Army Research Laboratory), LBP-00-21, 52 NRC 107 (2000).

With respect to standing, the "fifty-mile" presumption utilized for commercial power reactors does not apply in materials licensing actions. However, "[a] presumption of standing based on geographic proximity may be applied in cases involving nonpower reactors where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 116 (1995), citing Sequoyah Fuels Corp. (Gore, OK site), CLI-94-12, 40 NRC 64, 75 n.22 (1994); Armed Forces Radiobiology Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982); Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43 n.1 45 (1990); cf. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2142-43 n.7 (1992)). "Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking account the nature of the proposed action and the significance of the radioactive source." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 116-117 (1995) (citations omitted).

A petitioner may raise only substantive concerns about the licensing activity and not procedural concerns about the adequacy of the hearing process. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 51 (1990).

At the intervention petition stage of a materials proceeding petitioners need only identify the areas of concern they wish to raise; they need only provide minimal information to ensure that the areas of concern are germane to the proceeding. Statement of Considerations, Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8269, 8272 (Feb. 28, 1989). Curators of University of Missouri, CLI-95-1, 41 NRC 71, 165 (1995). See also Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 47 (1990); Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 568 (1990); Sequoyah Fuels Corp., LBP-91-5, 33 NRC 163, 166-67 (1991); Sequoyah Fuels Corp., LBP-94-39, 40 NRC 314 (1994), aff'd, CLI-94-12, 40 NRC 64 (1994); Babcock & Wilcox Co. (Parks Township, Pa.), LBP-94-12, 39 NRC 215, 217 (1994); Atlas Corp. (Moab, Utah, Facility), LBP-97-9, 45 NRC 414, 422-23 (1997); International Uranium (USA) Corp. (Receipt of Material from Tonawanda, NY), LBP-98-20, 48 NRC 137, 142 (1998).

Persons with standing to intervene have a right to the commencement of a hearing even if they have no genuine dispute with an applicant for a license. However, once the hearing is ordered it is the Intervenors' responsibility to place their concerns into controversy if they want those concerns examined in the hearing. The presiding officer has no authority to examine or decide matters not put into controversy by the parties. 10 CFR § 2.1251(d). Babcock & Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pa.), LBP-95-1, 41 NRC 1, 3 (1995).

### 6.14.3 Written Presentations in Materials Proceedings

After the Hearing File is made available, Intervenors may file a written presentation and may also present in writing, under oath or affirmation, arguments, evidence and documentary data further explaining their concerns. They must describe any defect or omissions in the application; however, the applicant or licensee seeking the license

from the NRC, has the burden of proof with respect to the controversies placed into issue by the Intervenors. Babcock & Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, PA), LBP-95-1, 41 NRC 1, 3 (1995).

Section 2.1233 of Subpart L provides for written presentations. It does not by its terms restrict the Intervenors' written presentation to stating concerns falling within the area of concerns raised in the initial request. However, the overall scheme of Subpart L clearly anticipates that specific concerns set out in the written presentation must fall within the scope of the areas of concerns advanced by a petitioner in the request for hearing and accepted as issues in the hearing by the presiding officer. Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, PA), LBP-95-1, 41 NRC 1, 5 (1995).

Subpart L does not accord intervenors the right to speak last regarding the issues in a materials license proceeding. Section 2.1233(a) expressly accords the Presiding Officer the discretion both to determine the sequence in which the parties present their arguments, documentary data, informational materials, and other supporting written evidence, and to offer individual parties the opportunity to provide further data, material and evidence in response to the Presiding Officer's questions. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 117 (1995). Section 7(c) and the Administrative Procedure Act does not apply to informal hearings conducted pursuant to Subpart L. Instead, the intervenors are entitled only to some sort of procedures for notice, comment, and statement of reasons for the agency action. CLI-95-1 at 119. Parties to a Subpart L proceeding have no right to require a formal hearing. Rather, the Commission alone has the authority to require such a hearing. 10 CFR § 2.1209(k). The Commission will generally exercise this authority only in situations where the Presiding Officer requests permission to conduct a formal adjudication using the rules of Subpart G. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 119 (1995).

In promulgating Subpart L, the Commission contemplated that the Presiding Officer would base his decision on a written record. Consequently, the Commission accorded the Presiding Officer with wide discretion to decide whether oral presentations are necessary to create an adequate record. 10 CFR § 2.1235(a). Curators of University of Missouri, CLI-95-1, 41 NRC 71, 120 (1995). Parties have no fundamental right to cross-examination, even in a formal Subpart G proceeding. The Commission has made clear that, in a Subpart L proceeding, the responsibility for the examination of all witnesses rests with the Presiding Officer, not with the parties. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 120 (1995); Advanced Medical Systems, Inc. (1020 London Rd., Cleveland Ohio), LBP-98-32, 48 NRC 374, 379 (1988).

The Commission's regulations and practice do not preclude an applicant from submitting post-application affidavits into the record of a materials licensing proceeding. Such affidavits fall within the types of documents that the Presiding Officer has the discretion to allow into the record pursuant to section 2.1233(d). The Commission practice of permitting the licensee to file such supplemental supporting evidence in a Subpart G proceeding applies equally well to a Subpart L proceeding. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 114 (1995). Affidavits submitted during a hearing are explanatory material offered to aid in the understanding of the underlying applications; they do not constitute amendments to the

applications. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 114, n. 48 (1995).

The Presiding Officer in a Subpart L proceeding has broad discretion to determine the point at which the intervenors have been accorded sufficient opportunity to respond to all issues of importance raised by the licensee. If the Presiding Officer needs information to compile an adequate record, he may obtain it by posing questions pursuant to section 2.1233(a). Curators of University of Missouri, CLI-95-1, 41 NRC 71, 116-17 (1995). The Commission's intent in promulgating Subpart L was to decrease the cost and delay for the parties and the Commission and to empower presiding officers to manage and control the parties' written submissions. CLI-95-1, 41 NRC at 117, n. 54.

### 6.14.4 Time for Filing Intervention Petitions- Materials Proceedings

A petition to intervene in a materials licensing proceeding must be filed within 30 days after the petitioner receives actual notice of a pending application or an agency action granting an application; or one hundred and eighty (180) days after agency action granting an application. 10 CFR § 2.1205(c)(2)(I). Umetco Minerals Corp., LBP-94-7, 39 NRC 112, 113 (1994); Atlas Corp. (Moab, UT), LBP-98-18, 48 NRC 78, 79 (1998); International Uranium (USA) Corp. (Receipt of Material from Tonawanda, NY), LBP-98-20, 48 NRC 137, 139 (1998). Actual notice does not require notice of the legal right to challenge the application or of the period of time within which a challenge must be filed. Nuclear Metals, Inc., LBP-91-27, 33 NRC 548, 549-550 (1991). A petitioner still may be admitted to the proceeding if the Commission or presiding officer determines that the delay in filing the petition is excusable. 10 CFR § 2.1205(k)(1)(I). The existence of negotiations between the applicant and the petitioner to resolve the issues does not excuse the petitioner's failure to file a timely petition. Nuclear Metals, Inc., LBP-91-27, 33 NRC 548, 550-51 (1991).

A delay in filing a request for a hearing may not be excused because petitioner chose to work with the NRC to protect his interests. Atlas Corp. (Moab, UT), LBP-98-18, 48 NRC 78, 79 (1998).

Once the deadline has passed for the filing of an intervention petition in a materials licensing proceeding, 10 CFR § 2.1205(c), the petitioner may amend or supplement a timely filed petition only at the discretion of the presiding officer, 10 CFR § 2.1209. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 152 (1992). However, before untimely requests for hearing may be granted, the presiding officer must find that the intervenors have established that any delay was excusable and that granting the untimely request will not injure or prejudice other parties. 10 CFR § 2.1205(k)(1). Babcock & Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, PA), LBP-95-1, 41 NRC 1, 5 (1995).

If a presiding officer denies a petition to intervene, the action is appealable within ten days of service of the order. 10 C.F.R. § 2.1205(o). Commission rules, as set forth in 10 C.F.R. 2.710, add five days to filing deadlines when service is by mail. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-02-13, 55 NRC 269, 272 (2002).

### 6.14.5 Stays of Material Licensing Proceedings

A motion for a stay in a materials licensing proceeding must comply with the requirements of 10 CFR § 2.1263 which incorporate the four stay criteria of 10 CFR 2.788. Umetco Minerals Corp., LBP-92-20, 36 NRC 112, 115-116 (1992). The movant has the burden of persuasion on the four stay criteria. 10 CFR § 2.1237(b). Umetco, supra, 36 NRC at 116. (See 5.7.1).

Although a hearing petition regarding a materials license amendment request generally can be filed as soon as an amendment application is submitted to the agency, a request for a stay the amendment proceeding is not appropriate until the Staff has taken action to grant the amendment request and to make the approved licensing action effective. See 10 CFR § 2.1263; Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 359 (1992), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991).

Section 2.1263 specifies that a stay request must be submitted promptly, at the later of either (1) the time a hearing or intervention petition is to be filed, or (2) ten (10) days from the Staff's grant of the requested licensing action. The first time limit generally applies if a Staff licensing action is taken more than 10 days before a hearing or intervention petitions due to be filed. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 225, 261-262 (1992); Fansteel, Inc. (Muskogee, OK Facility), LBP-99-47, 50 NRC 409 (1999).

According to 10 C.F.R. § 2.21263, "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 or petition to intervene is filed or within 10 days of the staff's action, whichever is later." However, in circumstances where NRC staff does not provide formal notice of its action, the 10 day period does not begin to run until the date upon which the petitioners either acquire actual knowledge of that action or have reasonable cause to make inquiry regarding the action. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 230 (2002).

The application of the time limits in 10 CFR § 2.1263 for filing a stay request presumes that a hearing petitioner or intervenor has some kind of reasonably prompt notice, either actual or constructive, that a contested request for licensing action has been approved and made effective. Compare 10 CFR § 2.1205(c)(2). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 225, 262 (1992).

A license may be granted containing a condition, such as a requirement for subsequent testing, before material may be imported under the license. The condition does not create a fresh opportunity for filing a request for a stay. Timeliness depends on when the amendment was issued, and not on the fulfillment of subsequent conditions. International Uranium (USA) Corp. (Receipt of Material from Tonawanda, NY), LBP-98-19, 48 NRC 83, 84-85 (1998).

In accordance with 10 C.F.R. § 2.1263, consideration of stay applications are governed by 10 C.F.R. § 2.788. Those criteria are derived from the decision in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

The Virginia Petroleum Jobbers criteria for granting a stay have been incorporated into the regulations at 10 CFR § 2.788(e). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 130 (1982); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100 (1994) (the Commission will decline a grant of petitioner's request to halt decommissioning activities where petitioner failed to meet the four traditional criteria for injunctive relief); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998). Since that section merely codifies longstanding agency practice which parallels that of the courts, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978), prior agency case law delineating the application of the Virginia Petroleum Jobbers criteria presumably remains applicable.

Under the Virginia Petroleum Jobbers test, four factors are examined:

(1) has the movant made a strong showing that it is likely to prevail upon the merits of its appeal;
(2) has the movant shown that, without the requested relief, it will be irreparably injured;
(3) would the issuance of a stay substantially harm other parties interested in the proceeding;
(4) where does the public interest lie?

While no one of these criteria is dispositive. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 232 (2002), see 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). The Commission has stated that the most important of these criterion is whether there is irreparable harm. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-9, 55 NRC 227, 232 (2002), see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990).

A presiding officer's determination to permit a hearing petition concerning a licensing action to be supplemented does not automatically extend the time for filing a stay request regarding that action. A litigant that wishes to extend the time for making a filing must do so by making an explicit request. See 10 CFR §§ 2.711, 2.1203(d). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 262 (1992). [See also section 2.9.3.8.1 regarding informal proceedings and petitions to intervene therein.]

The standard for obtaining a stay, which is set forth in 10 CFR § 2.788 and is incorporated into the Subpart L Rules of Practice section by § 2.1263, specifies that the movants must demonstrate (1) a strong showing that they are likely to prevail on the merits; (2) that unless a stay is granted they will be irreparably injured; (3) that the granting of the stay will not harm other parties; and (4) where the public interest lies. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 262-253 (1992).

In addressing the stay criteria in a Subpart L proceeding, a litigant must come forth with more than general or conclusory assertions in order to demonstrate its

entitlement to relief. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 263 (1992), citing United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983).

### 6.14.6 Reopening the Record - Materials Proceedings

It is appropriate to use the standards for set forth in 10 C.F.R. § 2.734 to determine whether to reopen a closed record in a materials proceeding. See Radiology Ultrasound Nuclear Consultants, P.A. (Strontium-90 Applicator), LBP-88-3, 27 NRC 220, 222-23 (1988) (In accordance with direction from the Commission on remand, the presiding officer considered whether applicant's tardy responses to questions posed by the presiding officer during the informal hearing satisfied the formal substantive criteria specified in 10 CFR 2.734 for reopening the record).

Where a litigant in a licensing proceeding attempts to introduce new factual or expert evidence in an untimely fashion, the record will be reopened only when the new evidence raises an exceptionally grave issue calling into question the safety of the licensed activity. Hydro Resources, Inc., CLI-00-12, 52 NRC 1, 5 (2000), citing 10 C.F.R. § 2.734(a) and Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76-79 (1988).

### 6.14.7 Scope of Materials Proceedings/Authority of Presiding Officer

A nonadjudicatory request for relief under 10 CFR § 2.206 generally is not a matter within the province of a presiding officer in a Subpart L adjudicatory proceeding. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC. 355, 359, n. 11 (1992).

A 10 CFR Part 70 materials license is an "order" which under 10 CFR § 2.717(b) may be "modified" by a Licensing Board delegated authority to consider a 10 CFR Part 50 operating license. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 228 (1979).

There is no reason to believe that the granting of a Special Nuclear Material (SNM) license should be deferred until after the applicant shows its compliance with local laws. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

### 6.14.8 Amendments to Material Licenses

An amendment to a Part 70 application gives rise to the same rights and duties as the original application. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984). The Commission does not require that proposed safety procedures to protect health and minimize danger to life or property be included in a materials license amendment application if they have already been submitted to the Commission in previous applications associated with the same NRC license. Sections 70.21(a)(3) and 30.32(a) of the Commission's regulations expressly permit an applicant to incorporate by reference any information contained in previous applications, statements or reports filed with the Commission. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 99 (1995).

A separate environmental impact statement is not required for a Special Nuclear Material (SNM) license to receive fuel at a new facility. When an environmental impact statement has been done for an operating license application, including the delivery of fuel, there is no need for each component to be analyzed separately on the assumption that a plant may never be licensed to operate. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983). Although the Commission's regulations do not require the licensee to submit emergency procedures as part of an amendment application, the Commission is free to consider a licensee's general emergency procedures when resolving risk issues. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 398 (1995).

### 6.14.9 Materials License - Renewal

Pursuant to the former 10 CFR § 40.42(e), a source material license may remain automatically in effect beyond its expiration date to allow a licensee to continue decommissioning and security activities authorized under the license. Section 40.42(e) has been superseded by a new automatic license extension provision, 10 CFR § 40.42(c) which became effective August 1994. Sequoyah Fuels Corp. (Source Material License, Gore, Oklahoma site), CLI-95-2, 41 NRC 179, 183, n.10, 187 (1995).

The automatic license extension provision under 10 CFR § 40.42(c) may extend a license regardless of the nature of the source material remaining on site. The "necessary" provision (which appears in both the former section 40.42(e) and the new section 40.42(c)) simply means that the limited regulatory license extension comes into play only when decommissioning cannot be completed prior to the license's expiration date. Sequoyah Fuels Corp. (Source Material License, Gore, Oklahoma site), CLI-95-2, 41 NRC 179, 187-88 (1995).

The automatic license extension provision grants the licensee no sweeping powers, but permits only limited activities related to decommissioning and to control of entry to restricted areas. Such activities also must have been approved under the licensee's license. To implement an activity not previously authorized by its license, and thus not previously subject to challenge, the licensee must first obtain a license amendment. Sequoyah Fuels Corp. (Source Material License, Gore, Oklahoma site), CLI-95-2, 41 NRC 179, 191 (1995).

Licensees need only submit the final radiological survey showing that the site or area is suitable for release in accordance with NRC regulations after decommissioning has been completed. Sequoyah Fuels Corp. (Source Material License, Gore, Oklahoma site), CLI-95-2, 41 NRC 179, 189 (1995).

Pursuant to 10 CFR § 2.1205(a), any person whose interest may be affected by a proceeding for the renewal of a license may file a request for hearing. In a request for hearing filed by other than an applicant, the requestor must describe in detail (1) the interest of the requestor in the proceeding; (2) how that interest may be affected by the results of the hearing, including the reasons the requestor should be permitted a hearing; (3) the requestor's areas of concern about the licensing activity that is the subject of the proceeding; and (4) the circumstances establishing that the request for a hearing is timely. Advanced Medical Systems, Inc. (Source Material License,

Cleveland, Ohio), LBP-95-3, 41 NRC 195, 196 (1995); Advanced Medical Systems, Inc. (1020 London Rd., Cleveland Ohio), LBP-98-32, 48 NRC 374, 376 (1988).

### 6.14.10 Commission Review - Materials Proceedings

Final orders on motions pertaining to Part 70 materials licenses issued during an operating license hearing are appealable upon issuance. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 876 (1984), aff'd, ALAB-765, 19 NRC 645, 648 n.1 (1984). In a Subpart L proceeding, a petitioner's appeal of a licensing board's final order is subject to dismissal if the petitioner fails to file a Statement of Appeal within the time period specified in 10 CFR § 2.1205(n) or within an extended time period permitted by Commission order. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), CLI-93-9, 37 NRC 190, 191 (1993).

### 6.14.11 Termination of Material License

A materials licensee may not unilaterally terminate its license where continuing health and safety concerns remain. A license to receive, process, and transport radioactive waste to authorized land burial sites imposes a continuing obligation on the licensee to monitor and maintain the burial sites. The requirement of State ownership of land burial sites is intended to provide for the ultimate, long term maintenance of the sites, not to shift the licensee's continuing responsibility for the waste material to the States. U.S. Ecology, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), LBP-87-5, 25 NRC 98, 110-11 (1987), vacated, ALAB-866, 25 NRC 897 (1987).

## 6.15 Motions in NRC Proceedings

Provisions with regard to motions in general in NRC proceedings are set forth in 10 CFR § 2.730. Motion practice before the Commission involves only a motion and an answer; movants who do not seek leave to file a reply are expressly denied the right to do so. 10 CFR § 2.730(c). Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71 (1981).

A moving party has no right of reply to answers in NRC proceedings except as permitted by the presiding officer. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-72, 16 NRC 968, 971 (1982), citing, 10 CFR § 2.730; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991). Further, parties who do not seek leave to file a reply are expressly denied the opportunity to do so. Sequoyah Fuels Corp. LBP-94-39, 40 NRC 314 (1994).

Commission Rules of Practice make no provision for motions for orders of dismissal for failing to state a legal claim. However, the Federal Rules of Civil Procedure do in Rule 12(b)(6), and Licensing Boards occasionally look to federal cases interpreting that rule for guidance. In the consideration of such dismissal motions, which are not generally viewed favorably by the courts, all factual allegations of the complaint are to be considered true and to be read in a light most favorable to the nonmoving party. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 365 (1994).

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to petitions as are filed. The cardinal rule of fairness is that each side must be heard. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

Prior to entertaining any suggestions that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response, because they cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them. Contentions and challenges to contentions in NRC licensing proceedings are analogous to complaints and motions to dismiss in Federal court. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

### 6.15.1 Form of Motion

The requirements with regard to the form and content of motions are set forth in 10 CFR § 2.730(b).

The Appeal Board expects the caption of every filing in which immediate affirmative relief is requested to reference that fact explicitly by adverting to the relief sought and including the word "motion." The movant will not be heard to assert that it has been prejudiced by the Board's failure to take timely action on the motion in the absence of such a reference. Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-457, 7 NRC 70, 71 (1978).

### 6.15.2 Responses to Motions

#### 6.15.2.1 Time for Filing Responses to Motions

Unless specific time limits for responses to motions are expressly set out in specific regulations or are established by the presiding adjudicatory board, the time within which responses to motions must be filed is set forth in 10 CFR § 2.730.

If a document requiring a response within a certain time after service is served incompletely (e.g., only part of the document is mailed), 10 CFR § 2.712 would indicate that the time for response does not begin to run since implicit in that rule is that documents mailed are complete, otherwise service is not effective. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 649 n.7 (1974) (dictum).

### 6.15.3 Licensing Board Actions on Motions

Although an intervenor may have failed, without good cause, to timely respond to an applicant's motion to terminate the proceeding, a Board may grant the intervenor an opportunity to respond to the applicant's supplement to the motion to terminate. Public Service Co. of Indiana and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-16, 23 NRC 789, 790 (1986).

If a, Licensing Board decides to defer indefinitely a ruling on a motion of some importance, "considerations of simple fairness require that all parties be told of that

fact." Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-417, 5 NRC 1442, 1444 (1977).

When an applicant for an operating license files a motion for authority to conduct low-power testing in a proceeding where the evidentiary record is closed but the Licensing Board has not yet issued an initial decision finally disposing of all contested issues, the Board is obligated to issue a decision on all outstanding issues (i.e., contentions previously litigated) relevant to low-power testing before authorizing such testing. See 10 CFR § 50.57(c). Such a motion, however, does not automatically present an opportunity to file new contentions specifically aimed at low-power testing or any other phase of the operating license application. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 801 n.72 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 553 (1986), aff'd, ALAB-854, 24 NRC 783 (1986).

## 6.16 NEPA Considerations

NEPA expanded the Commission's regulatory jurisdiction beyond that conferred by the Atomic Energy Act or the Energy Reorganization Act. Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936 (1974). NEPA requires the Commission to consider environmental factors in granting, denying or conditioning a construction permit. It does not give the Commission the power to order an applicant to construct a plant at an alternate site or to order a different utility to construct a facility. Nevertheless, the fact that the Commission is not empowered to implement alternatives does not absolve it from its duty to consider them. Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

By its terms, NEPA imposes procedural rather than substantive constraints upon an agency's decisionmaking process: The statute requires only that an agency undertake an appropriate assessment of the environmental impacts of its action without mandating that the agency reach any particular result concerning that action. See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 93 (1993); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 341-42 (1996); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 44 (2001).

NEPA requirements apply to license amendment proceedings as well as to construction permit and operating license proceedings. In license amendment proceedings, however, a Licensing Board should not embark broadly upon a fresh assessment of the environmental issues which have already been thoroughly considered and which were decided in the initial decision. Rather, the Board's role in the environmental sphere will be limited to assuring itself that the ultimate NEPA conclusions reached in the initial decision are not significantly affected by such new developments. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 393 (1978), citing, Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 415 (1975).

NEPA does not mandate that environmental issues considered in-the construction permit proceedings be considered again in the operating license hearing, absent new information. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1459 (1982). With regard to license amendments, it has been held that the grant of a license amendment to increase the storage capacity of a spent fuel pool is not a major Commission action significantly affecting the quality of the human environment, and therefore, no EIS is required. Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), LBP-80-27, 12 NRC 435, 456 (1980); Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 264-268 (1979).

Under NEPA, when several proposals for actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), LBP-99-46, 50 NRC 386 (1999). Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), LBP-99-46, 50 NRC 386 (1999). 6 at 57, citing, Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976). The term "synergistic" refers to the joint action of different parts - or sites - which, acting together, enhance the effects of one or more individual sites. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), LBP-99-46, 50 NRC 386 (1999).

After examining an agency action to determine its impact on the environment, the Council on Environmental Quality's regulations, 40 C.F.R. §§ 1500 et seq, suggest several basic options if it determines that a project will have potential adverse environmental consequences. Disapproval of a project may be warranted where the adverse impacts are too severe. However, an agency may decide that aspects of the project may be modified in order to reduce the adverse impacts to an acceptable level. An agency could then proceed to license the project, after a determination that the overall benefits of the project exceed environmental and other costs, and that there are no obviously superior alternatives of which the agency is aware. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171, 191 (2002).

"[T]he Commission is under a dual obligation: to pursue the objectives of the Atomic Energy Act and those of the National Environmental Policy Act. 'The two statutes and the regulations promulgated under each must be viewed in pari materia.'" Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), ALAB-506, 8 NRC 533, 539 (1978). (emphasis in original) In fulfilling its obligations under NEPA, the NRC may impose upon applicants and licensees conditions designed to minimize the adverse environmental effects of licensed activities. Such conditions may be imposed even on other Federal agencies, such as TVA, which seek NRC licenses, despite the language of Section 271 of the Atomic Energy Act (42 U.S.C. 2018) which states, in part, that nothing in the act "shall be construed to affect the authority of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power through the use of nuclear facilities licensed by the Commission...." Phipps Bend, 8 NRC at 541-544. Unless it was explicitly made exclusive, the authority of other Federal, state or local agencies or government corporations to consider the environmental consequences of a proposed project does not preempt the NRC's authority to condition its permits and licenses pursuant to NEPA. For example, TVA's jurisdiction over environmental matters is not exclusive where TVA seeks a license from a Federal agency, such as NRC, which also has full NEPA responsibilities. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), LBP-77-14, 5 NRC 494 (1977).

Pursuant to the Nuclear Waste Policy Act of 1982, the Department of Energy (DOE) has primary responsibility for evaluating the environmental impacts related to the development and operation of geologic repositories for high-level radioactive waste. In any proceeding for the issuance of a license for such a repository, the NRC will review and, to the extent practicable, adopt the environmental impact statement (EIS) submitted by DOE with its license application. The NRC will not adopt the EIS if: 1) the action which the NRC proposes to take is different from the action described in the DOE license application, and the difference may significantly affect the quality of the human environment; or 2) significant and substantial new information or new considerations render the EIS inadequate. 10 CFR § 51.109(c). To the extent that the NRC adopts the EIS prepared by DOE, it has fulfilled all of its NEPA responsibilities. 10 CFR § 51.109(d); 54 Fed. Reg. 27864, 27871 (July 3, 1989).

NEPA directs all Federal agencies to comply with its requirements "to the fullest extent possible." (42 U.S.C. § 4332.) The leading authorities teach that an agency is excused from those NEPA duties only "when a clear and unavoidable conflict in statutory authority exists." Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 NRC 533, 545 (1978).

NEPA cannot logically impose requirements more stringent than those contained in the safety provisions of the Atomic Energy Act. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696 n.10 (1985), citing, Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 39 (1979).

While the authority of other Federal or local agencies to consider the environmental effects of a project does not preempt the NRC's authority with regard to NEPA, the NRC, in conducting its NEPA analysis, may give considerable weight to action taken by another competent and responsible government authority in enforcing an environmental statute. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-28, 8 NRC 281, 282 (1978).

NRC regulations pertaining to environmental assessments do not require consultation with other agencies. They only require a "list of agencies and persons consulted, and identification of sources used." 10 CFR § 51.30(a)(2). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 245 (1993).

The NRC cannot delegate to a local group the responsibility under NEPA to prepare an environmental assessment (EA). The EA must be prepared by the NRC, not a local agency, although in preparing an EA the Staff may take into account site uses proposed by a local agency. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-96-21, 44 NRC 134, 136 (1996).

In contrast to safety questions, the environmental review at the operating license stage need not duplicate the construction permit review, 10 CFR § 51.21. To raise an issue in an operating license hearing concerning environmental matters which were considered at the construction permit stage, there needs to be a showing either that the issue had not previously been adequately considered or that significant new information has developed after the construction permit review. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 465 (1979).

Consideration by the NRC in its environmental review is not required for the parts of the water supply system which will be used only by a local government agency, however, cumulative impacts from the jointly utilized parts of the system will be considered. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1473, 1475 (1982).

Insofar as environmental matters are concerned, under the National Environmental Policy Act (NEPA) there is no legal basis for refusing an operating license merely because some environmental uncertainties may exist. Where environmental effects are remote and speculative, agencies are not precluded from proceeding with a project even though all uncertainties are not removed. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), citing, State of Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978), vacated in part sub nom. Western Oil and Gas Ass'n v. Alaska, 439 U.S. 922 (1982); NRDC v. Morton, 458 F.2d 827, 835, 837-838 (D.C. Cir. 1972).

Environmental uncertainties raised by intervenors in NRC proceedings do not result in a per se denial of the license, but rather are subject to a rule of reason. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982). If intervenors fail to show a deficiency in the staff's Cultural Resources Management Plan, then NEPA claims are without merit. Hydro Resources, Inc., LBP-99-9, 49 NRC 136, 144 (1999).

The Commission's regulations categorically exclude from NEPA review all amendments for the use of radioactive materials for research and development. The purpose of an environmental report is to inform the Staff's preparation of an Environmental Assessment (EA) and, where appropriate, an Environmental Impact Statement (EIS). Where the Staff is categorically excused from preparing an EA or EIS, a licensee need not submit an environmental report. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 396 (1995).

The fact that a particular license transfer may have antitrust implications does not remove it from the NEPA categorical exclusion. In any event, because the Atomic Energy Act does not require, and arguably, does not even allow, the Commission to conduct antitrust evaluations of license transfer application, any "failure" of the Commission to conduct such an evaluation cannot constitute a federal action warranting a NEPA review. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, n.55 (2000), quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167-68 (2000); Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168 (2000). See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1) CLI-99-19, 49 NRC 441 (1999); Final Rule, Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649 (July 19, 2000).

The Commission may reject a petitioner's request for an EIS on the ground that the scope of the proceeding does not include the new owners' operation of the plant - but includes only the transfer of their operating licenses. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point Unit 3), CLI-00-22, 52 NRC 266, 309 (2000).

Termination of an operating license application gives rise to a need, pursuant to 10 C.F.R. § 51.21, for an EA to consider the impacts of the termination. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-96-21, 44 NRC 134, 136 (1996).

Because a construction permit termination would appear to have impacts that encompass operating license termination impacts, one EA would appear to suffice for both actions. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-96-21, 44 NRC 134, 136 (1996).

### 6.16.1 Environmental Impact Statements (EIS)

The activities for which environmental statements need be prepared and the procedures for preparation are covered generally in 10 CFR Part 51. For a discussion of the scope of an NRC/NEPA review when the project addressed by that review is also covered by a broader overall programmatic EIS prepared by another Federal agency, see USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

Neither the Atomic Energy Act, NEPA, nor the Commission's regulations require that there be a hearing on an environmental impact statement. Public hearings are held on an EIS only if the Commission finds such hearings are required in the public interest. 10 CFR § 2.104. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 625 (1981), citing Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519 (1978).

It is premature to entertain a contention calling for issuance of an Environmental Impact Statement where the Staff has not yet issued an Environmental Assessment determining that no EIS is required. Pacific Gas and Electric Company (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-9, 37 NRC 433 (1993).

Under the plain terms of NEPA, the environmental assessment of a particular proposed Federal action coming within the statutory reach may be confined to that action together with, inter alia, its unavoidable consequences. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48 (1978).

The environmental review mandated by NEPA is subject to a rule of reason and as such need not include all theoretically possible environmental effects arising out of an action, but may be limited to effects which are shown to have some likelihood of occurring. This conclusion draws direct support from the judicial interpretation of the statutory command imposing the obligation to make reasonable forecasts of the future. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48, 49 (1978).

An agency can fulfill its NEPA responsibilities in the preparation of an EIS if it:

1) reasonably defines the purpose of the proposed Federal action. The agency should consider Congressional intent and views as expressed by statute as well as the needs and goals of the applicants seeking agency approval;
2) eliminates those alternatives that would not achieve the purpose as defined by the agency; and

3) discusses in reasonable detail the reasonable alternatives which would achieve the purpose of the proposed action.

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195198 (D.C. Cir. 1991).

Underlying scientific data and inferences drawn from NEPA through the exercise of expert scientific evaluation may be adopted by the NRC from the NEPA review done by another Federal agency. The NRC must exercise independent judgment with respect to conclusions about environmental impacts based on interpretation of such basic facts. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1467-1468 (1982), citing Federal Trade Commission v. Texaco, 555 F.2d 862, 881 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 868 n.65 (1984). However, to the extent possible, the NRC will adopt the environmental impact statement prepared by the Department of Energy to evaluate the environmental impact related to the development and operation of a geologic repository for high-level radioactive waste. 10 CFR § 51.109, 54 Fed. Reg. 27864, 27870-71 (July 3, 1989).

NEPA requires that a Federal agency make a "good faith" effort to predict reasonably foreseeable environmental impacts and that the agency apply a "rule of reason" after taking a "hard look" at potential environmental impacts. But an agency need not have complete information on all issues before proceeding. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 141 (1978).

An adequate final environmental impact statement for a nuclear facility necessarily includes the lesser impacts attendant to low power testing of the facility and removes the need for a separate EIS focusing on questions such as the costs and benefits of low power testing. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

### 6.16.1.1 Need to Prepare an EIS

Federal agencies are required to prepare an environmental impact statement for every major Federal action significantly affecting the quality of the human environment. NEPA 102(2)(C); 42 U.S.C 4332(2)(C). An agency's decision not to exercise its statutory authority does not constitute a major Federal action. Cross-Sound Ferry Services, Inc. v. ICC, 934 F.2d 327, 334 (D.C. Cir. 1991), citing Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1245-46 (D.C. Cir. 1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 70 (1991), reconsid. denied, CLI-91-8, 33 NRC 461 (1991).

The purpose of an applicant's environmental report is to inform the Staff's preparation of an Environmental Assessment (EA) and, where appropriate, an Environmental Impact Statement (EIS). Where the Staff is categorically excused from preparing an EA or EIS, an applicant need not submit an environmental report. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 396 (1995).

An agency's refusal to prepare an environmental impact statement is not by itself a final agency action which requires the preparation of an environmental impact

statement. Public Citizen v. Office of the U.S. Trade Representative, 970 F.2d 916, 918-919 (D.C. Cir. 1992), citing Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991). An agency is not required to prepare an environmental impact statement where it is only contemplating a particular course of action, but has not actually taken any final action. Public Citizen, supra, 970 F.2d at 920.

License transfers fall within a categorical exclusion for which EISs are not required, and the fact that a particular license transfer may have implications does not remove it from the categorical exclusion. Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167-168 (2000). See also 10 CFR § 51.22(c)(21).

The granting of conditional approval of a power authority's plan for barge shipments of irradiated fuel does not constitute a "major federal action" by an agency and, thus, NEPA does not require that agency to perform an environmental assessment or environmental impact statement. New Jersey v. Long Island Power Authority, 30 F.3d 403, 415 (3d Cir. 1994).

Where a nonfederal party voluntarily informs a federal agency of its intended activities to ensure compliance with law and regulation, and to facilitate the agency's monitoring of activities for safety purposes, the agency's review of the plan does not constitute a "major federal action" requiring an environmental impact statement pursuant to NEPA. New Jersey, supra, New Jersey v. Long Island Power Authority, 30 F.3d 403, 416 (3d Cir. 1994). .

An agency cannot skirt NEPA or other statutory commands by essentially exempting a licensee from regulatory compliance, and then simply labelling its decision "mere oversight" rather than a major federal action. To do so is manifestly arbitrary and capricious. Citizens Awareness Network v. NRC, 59 F.3d 284, 293 (1st Cir. 1995).

Although the determination as to whether to prepare an environmental impact statement falls initially upon the Staff, that determination may be made an issue in an adjudicatory proceeding. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 120 (1979).

In the final analysis, the significance of the impact of the project -- in large part an evidentiary matter -- will determine whether a statement must be issued. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 120 (1979).

In the case of licensing nuclear power plants, adverse impacts include the impacts of the nuclear fuel cycle. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1076 (1982), citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 539 (1978).

The test of whether benefits of a proposed action outweigh its costs is distinct from the primary question of whether an environmental impact statement is needed because the action is a major Federal action significantly affecting the environment. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405 (1980).

The Commission has consistently taken the position that individual fuel exports are not "major Federal actions." Westinghouse Electric Corp. (Exports to Philippines), CLI-80-15, 11 NRC 672 (1980).

The fact that risks of other actions or no action are greater than those of the proposed action does not show that risks of the proposed action are not significant so as to require an EIS. Where conflict in the scientific community makes determination of significance of environmental impact problematical, the preferable course is to prepare an environmental impact statement. Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80,4, 11 NRC 405 (1980).

For an analysis of when an environmental assessment rather than an EIS is appropriate, see Commonwealth Edison Co. (Zion Station, Units 1 & 2), LBP-80-7, 11 NRC 245, 249-50 (1980).

The NRC Staff is not required to prepare a complete environmental impact statement if, after performing an initial environmental assessment, it determines that the proposed action will have no significant environmental impact. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-790, 20 NRC 1450, 1452 n.5 (1984); Curators of University of Missouri, CLI-95-1, 41 NRC 71, 124 (1995).

In a situation where an Environmental Impact Statement (EIS) is neither required nor categorically excluded, a contention seeking an EIS, filed prior to the Staff's issuance of an Environmental Assessment (EA), is premature. After Staff issuance of an EA, a late-filed contention may be submitted (assuming the EA does not call for an EIS). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 36 (1993).

An operating license amendment to recapture the construction period and allow for operation for 40 full years is not an action which requires the preparation of an environmental impact statement or an environmental report. A construction period recapture amendment only requires the Staff to prepare an environmental assessment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 97 (1990).

A separate environmental impact statement is not required for a Special Nuclear Material (SNM) license. When an environmental impact statement has been done for an operating license application, including the delivery of fuel, there is no need for each component to be analyzed separately on the assumption that a plant may never be licensed to operate. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

Not every change requires a supplemental EIS; only those changes that cause effects that are significantly different from those already studied. The new circumstance must reveal a seriously different picture of the environmental impact of the proposed project. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 52 (2001).

A supplemental Environmental Impact Statement (EIS) or an Environmental Impact Appraisal (EIA) does not have to be prepared prior to the granting of authorization for

issuance of a low-power license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 634 (1983).

The issuance of a possession-only license need not be preceded by the submission of any particular environmental information or accompanied by any NEPA review related to decommissioning. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-1, 33 NRC 1, 6-7 (1991).

When the environmental effects of full-term, full-power operation have already been evaluated in an EIS, a licensing action for limited operation under a 10 CFR § 50.57(c) license that would result in lesser impacts need not be accompanied by an additional impact statement or an impact appraisal. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226 (1981), and ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). The Commission authorized the issuance of a low power operating license for Limerick Unit 2, even though, pursuant to a federal court order, Limerick Ecology Action v. NRC, 869 F.2d 719 (3rd Cir. 1989), there was an ongoing Licensing Board proceeding to consider certain severe accident mitigation design alternatives. Since the existing EIS was valid except for the failure to consider the design alternatives, and low power operation presents a much lower risk of a severe accident than does full power operation, the Commission found that the existing EIS was sufficient to support the issuance of a low power license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-89-10, 30 NRC 1, 5-6 (1989), reconsid. denied and stay denied, CLI-89-15, 30 NRC 96, 101-102 (1989).

It is well-established NEPA law that separate environmental statements are not required for intermediate, implementing steps such as the issuance of a low-power license where an EIS has been prepared for the entire proposed action and there have been no significant changed circumstances. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1326 (1984), on certification from ALAB-769, 19 NRC 995 (1984). See Environmental Defense Fund, Inc. v. Andrus, 619 F.2d 1368, 1377 (1980).

The principle stated in the Shoreham and Diablo Canyon cases, supra, is applicable even where an applicant may begin low power operation and it is uncertain whether the applicant will ever receive a full-power license. In Shoreham, the fact that recent court decisions in effect supported the refusal by the State and local governments to participate in the development of emergency plans was determined not to be a significant change of circumstances which would require the preparation of a supplemental environmental impact statement to assess the costs and benefits of low-power operation. Long Island, Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1589 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 258-59 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 418-19 (1989).

The NRC Staff is not required to prepare an environmental impact statement to evaluate the "resumed operation" of a facility or other alternatives to a licensee's decision not to operate its facility. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207-208 (1990), reconsid. denied, CLI-91-2, 33 NRC 61 (1991), reconsid. denied, CLI-91-8, 33 NRC 461, 470 (1991);

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 390 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-30, 34 NRC 23, 26, 27 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 135 (1992). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-9135, 34 NRC 163, 169 (1991).

A contention attempting to raise an issue of the lack of long-term spent fuel storage is barred as a matter of law from operating license and operating license amendment proceedings. 10 CFR §§ 51.23(1), 51.53(a). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993).

Environmental review of the storage of spent fuel in reactor facility storage pools for at least 30 years beyond the expiration of reactor operating licenses is not required based upon the Commission's generic determination that such storage will not result in significant environmental impacts. Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 580 (1988), citing 10 CFR § 51.23.

An environmental impact statement need not be prepared with respect to the expansion of the capacity of a spent fuel pool if the environmental impact appraisal prepared for the project had an adequate basis for concluding that the expansion of a spent fuel pool would not cause any significant environmental impact. Consumers Power Co. (Big Rock Point Plant), LBP-82-78, 16 NRC 1107 (1982).

When a licensee seeks to withdraw an application to expand its existing low-level waste burial site, the granting of the request to withdraw does not amount to a major Federal action requiring a NEPA review. This is true even though, absent an expansion, the site will not have the capacity to accept additional low-level waste. Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 161-163 (1980).

It must at least be determined that there is significant new information before the need for a supplemental environmental statement can arise. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 49 (1983), citing Warm Spring Task Force v. Gribble, 621 F.2d 1017, 1023-36 (9th Cir. 1981).

A supplemental environmental statement need not necessarily be prepared and circulated even if there is new information. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 49-50 (1983), citing California v. Watt, 683 F.2d 1253, 1268 (9th Cir. 1982). See 40 CFR § 1502.9(c); Hydro Resources, Inc., CLI-99-22, 50 NRC 3, 14 (1999).

The proponent of the need for an evidentiary hearing bears the burden of establishing that need, but the staff bears the ultimate burden to demonstrate its compliance with NEPA in its determination that an EIS is not necessary on a proposed license amendment. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 249 (2001).

Once an intervenor crosses the admissibility threshold relative to its environmental contention, the ultimate burden in a subpart K proceeding then rests with the

proponent of the NEPA document -- the staff (and the applicant to the degree it becomes a proponent of the staff's EIS-related action) -- to establish the validity of that determination on the question whether there is an EIS preparation trigger. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 249 (2001).

The standard for issuing a Supplemental Environmental Impact Statement is set forth in 10 C.F.R. § 51.92: There must be either substantial changes in the proposed action that are relevant to environmental concerns, or significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 269 (1996); Hydro Resources, Inc., CLI-99-22, 50 NRC 3, 14 (1999).

The Supreme Court has found that a cumulative Environmental Impact Statement must be prepared only when "several proposals for actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency." Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002), citing Kleppe v. Sierra Club, 427 U.S. 390 (1976). The Court further stated agencies need not consider "possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." The Commission reads post-Kleppe rulings to indicate 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. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002).

### 6.16.1.2 Scope of EIS

The scope of the environmental statement or appraisal must be at least as broad as the scope of the action being taken. Duke Power Co. (Oconee/ McGuire), LBP-80-28, 12 NRC 459, 473 (1980).

An agency may authorize an individual, sufficiently distinct portion of an agency plan without awaiting the completion of a comprehensive environmental impact statement on the plan so long as the environmental treatment under NEPA of the individual portion is adequate and approval of the individual portion does not commit the agency to approval of other portions of the plan. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 265 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Peshlakai v. Duncan, 476 F. Supp. 1247, 1260 (D.D.C. 1979); Conservation Law Foundation v. GSA, 427 F. Supp. 1369, 1374 (D.R.I. 1977).

In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), the U.S. Supreme Court embraced the doctrine that environmental impact statements need not discuss the environmental effects of alternatives which are "deemed only remote and speculative possibilities." The same has been held with respect to remote and speculative environmental impacts of the proposed project itself. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Houston Lighting and

Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75 (1981); Public Service Electric & Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38 (1979); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-705, 16 NRC 1733, 1744 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), quoting NRDC v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696-97 & n.12 (1985); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 293-94 (1987). Moot or farfetched alternatives need not be considered under NEPA. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Natural Resources Defense Council v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).

The scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-685 (1981), citing Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981).

An environmental review of the decommissioning of a nuclear facility supplements the operating license environmental review, and is only required to examine any new information or significant environmental change associated with the decommissioning of the facility or the storage of spent fuel. 10 CFR § 51.53(b). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 134 (1992).

When major Federal actions are involved, if related activities taken abroad have a significant effect within the U.S., those effects are within NEPA's ambit. However, remote and speculative possibilities need not be considered under NEPA. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-562, 10 NRC 437, 446 (1979).

The Atomic Safety and Licensing Board found that an intervener's assertions regarding sabotage risk did not provide a litigable basis for a NEPA contention. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 97 (2000).

### 6.16.2 Role of EIS

A NEPA analysis of the Government's proposed licensing of private activities is necessarily more narrow than a NEPA analysis of proposed activities which the Government will conduct itself. The former analysis should consider issues which could preclude issuance of the license or which could be affected by license conditions. Kleppe v. Sierra Club, 427 U.S. 390 (1976). It should focus on the proposal submitted by the private party rather than on broader concepts. It must

consider other alternatives, however, even if the agency itself is not empowered to order that those alternatives be undertaken. Were there no distinction in NEPA standards between those for approval of private actions and those for Federal actions, NEPA would, in effect, become directly applicable to private parties. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

The impact statement does not simply "accompany" an agency recommendation for action in the sense of having some independent significance in isolation from the deliberative process. Rather, the impact statement is an integral part of the Commission's decision. It forms as much a vital part of the NRC's decisional record as anything else, such that for reactor licensing, for example, the agency's decision would be fundamentally flawed without it. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 275 (1980). The principal goals of an EIS are twofold: to compel agencies to take a hard look at the environmental consequences of a proposed project, and to permit the public a role in the agency's decision making process. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998).

Where an applicant has submitted a specific proposal, the statutory language of NEPA's Section 102(2)(C) only requires that an environmental impact statement be prepared in conjunction with that specific proposal, providing the Staff with a "specific action of the known dimensions" to evaluate. A single approval of a plan does not commit the agency to subsequent approvals; should contemplated actions later reach the stage of actual proposals, the environmental effects of the existing project can be considered when preparing the comprehensive statement on the cumulative impact of the proposals. Offshore Power Systems (Floating Nuclear Power Plants), LBP-79-15, 9 NRC 653, 658-660 (1979).

### 6.16.3 Circumstances Requiring Redrafting of Final Environmental Statement (FES)

In certain instances, an FES may be so defective as to require redrafting, recirculation for comment and reissuance in final form. Possible defects which could render an FES inadequate are numerous and are set out in a long series of NEPA cases in the Federal Courts. See, e.g., Brooks v. Volpe, 350 F. Supp. 269 (W.D. Wash. 1972) (FES inadequate when it suffers from a serious lack of detail and relies on conclusions and assumptions without reference to supporting objective data); Essex City Preservation Assn'n. v. Campbell, 536 F.2d 956, 961 (1st Cir. 1976) (new FES required when there is significant new information or a significant change in circumstances upon which original FES was based); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (existence of unexamined but viable alternative could render FES inadequate). A new FES may be necessary when the current situation departs markedly from the positions espoused or information reflected in the FES. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 256 (1985).

In an adjudicatory hearing, to the extent that any environmental findings by the Presiding Officer (or the Commission) differ from those in the FEIS, the FEIS is deemed modified by the decision. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 53 (2001).

Even though an FES may be inadequate in certain respects, ultimate NEPA judgments with respect to any facility are to be made on the basis of the entire record before the adjudicatory tribunal. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163 (1975). Previous regulations explicitly recognized that evidence presented at a hearing may cause a Licensing Board to arrive at conclusions different from those in an FES, in which event the FES is simply deemed amended pro tanto. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1571 n.20 (1982). Since findings and conclusions of the licensing tribunal are deemed to amend the FES where different therefrom, amendment and recirculation of the FES is not always necessary, particularly where the hearing will provide the public ventilation that recirculation of an amended FES would otherwise provide.Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163 (1975). Defects in an FES can be cured by the receipt of additional evidence subsequent to issuance of the FES. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-3-36, 18 NRC 45, 47 (1983). See Ecology Action v. AEC, 492 F.2d 998, 1000-02 (2nd Cir. 1974); Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), ALAB-660, 14 NRC 987, 1013-14 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 195-97 (1975).

Such modification of the FES by Staff testimony or the Licensing Board's decision does not normally require recirculation of the FES. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 372 (1975), unless the modifications are truly substantial. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 553 (1984); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 252, 256 (1985).

Two Courts of Appeals have approved the Commission's rule that the FES is deemed modified by subsequent adjudicatory tribunal decisions. Citizens for Safe Power v. NRC, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975); Ecology Action v. AEC, 492 F.2d 998, 1001-02 (2nd Cir. 1974); Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 29 n.43 (1978). See also New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 94 (1st Cir. 1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985), citing 10 CFR § 51.102 (1985).

If the changes contained in an errata document for an FES do not reveal an obvious need for a modification of plant design or a change in the outcome of the cost-benefit analysis, the document need not be circulated or issued as a supplemental FES. Nor is it necessary to issue a supplemental FES when timely comments on the DES have not been adequately considered. The Licensing Board may merely effect the required amendment of the FES through its initial decision. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 47 (1983).

The NRC Staff is not required to respond to comments identified in an intervenor's dismissed contention concerning the adequacy of the final environmental statement (FES), where the Staff has prepared and circulated for public comment a supplemental final environmental statement (SFES) which addresses and evaluates the matters raised by the comments on the FES. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 698 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991).

Similarly, there is no need for a supplemental impact statement and its circulation for public comment where the changes in the proposed action which would be evaluated in such a supplement mitigate the environmental impacts, although circulation of a supplement may well be appropriate or necessary where the change has significant aggravating environmental impacts. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 28-29 (1978).

NEPA does not require the staff of a Federal agency conducting a NEPA review to consider the record, as developed in collateral State proceedings, concerning the environmental effects of the proposed Federal action. Failure to review the State records prior to issuing an FES, therefore, is not grounds for requiring preparation and circulation of a supplemental FES. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977).

A proposed shift in ownership of a plant with no modification to the physical structure of the facility does not by itself cast doubt on the benefit to be derived from the plant such as to require redrafting and recirculating the EIS. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 184 (1978).

The Staff's environmental evaluation is not deficient merely because it contains only a limited discussion of facility decommissioning alternatives. There is little value in considering at the operating license stage what method of decommissioning will be most desirable many years in the future in light of the knowledge which will have been accumulated by that time. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 178 n.32 (1974).

For a more recent case discussing recirculation of an FES, see Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786 (1979).

### 6.16.3.1 Effect of Failure to Comment on Draft Environmental Statement (DES)

Where an intervenor received and took advantage of an opportunity to review and comment on a DES and where his comments did not involve the Staff's alternate site analysis and did not bring sufficient attention to that analysis to stimulate the Commission's consideration of it, the intervenor will not be permitted to raise and litigate, at a late stage in the hearings, the issue as to whether the Staff's alternate site analysis was adequate, although he may attack the conclusions reached in the FES. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-366, 5 NRC 39, 66-67 (1977), aff'd as modified, CLI-77-8, 5 NRC 503 (1977).

Since the public is afforded early opportunity to participate in the NEPA review process, imposition of a greater burden for justification for changes initiated by

untimely comments is appropriate. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 539 (1977).

Comments on a DES which fail to meet the standards of CEQ Guidelines (40 CFR § 1500.9(e)) on responsibilities of commenting entities to assist the Staff need not be reviewed by the Staff. Thus, where comments which suggest that the Staff consider collateral State proceedings on the environmental effects of a proposed reactor do not specify the parts of the collateral proceedings which should be considered and the parts of the DES which should be revised, the Staff need not review the collateral proceedings. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), LBP-77-21, 5 NRC 684 (1977).

### 6.16.3.2 Stays Pending Remand for Inadequate EIS

Where judicial review disclosed inadequacies in an agency's environmental impact statement prepared in good faith, a stay of the underlying activity pending remand does not follow automatically. Whether the project need be stayed essentially must be decided on the basis of (1) a traditional balancing of the equities, and (2) a consideration of any likely prejudice to further decisions that might be called for by the remand. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 784-785 (1977).

## 6.16.4 Alternatives

NEPA requires an agency to consider alternatives to its own proposed action which may significantly affect the quality of the human environment. An agency should not consider alternatives to the applicant's stated goals. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C. Cir. 1991).

Perhaps the most important environmentally related task the Staff has under NEPA is to determine whether an application should be turned down because there is some other site at which the plant ought to be located. No other environmental question is both so significant in terms of the ultimate outcome and so dependent upon facts particular to the application under scrutiny. Consequently, the Appeal Board expects the Staff to take unusual care in performing its analysis and in disclosing the results of its work to the public. Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541, 543, 544 (1977).

"In the context of the environmental impact statement drafting process, when a reasonable alternative has been identified it must be objectively considered by the evaluating agency so as not to fall victim to 'the sort of tendentious decisionmaking that NEPA seeks to avoid.'" Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-34, 54 NRC 293, 302 (2001), citing I-291 Why? Association v. Burns, 372 F. Supp. 223, 253 (D. Conn. 1974), aff'd 517 F.2d 1077 (2d Cir. 1975).

A hard look for a superior alternative is a condition precedent to a licensing determination that an applicant's proposal is acceptable under NEPA. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 513 (1978). When NEPA requires an EIS, the Commission is obliged to take a harder look at alternatives than if the proposed action were inconsequential. Florida Power

and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-660, 14 NRC 987, 1005-1006 (1981), citing Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979). In fact the NEPA mandate that alternatives to the proposed licensing action be explored and evaluated does not come into play where the proposed action will neither (1) entail more than negligible environmental impacts, nor (2) involve the commitment of available resources respecting which there are unresolved conflicts. Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 265-266 (1979).

NEPA was not intended merely to give the appearance of weighing alternatives that are in fact foreclosed. Pending completion of sufficient comparison between an applicant's proposed site and others, in situations where substantial work has already taken place, the Commission can preserve the opportunity for a real choice among alternatives only by suspending outstanding construction permits. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 958-959 (1978).

Despite the importance of alternate site considerations, where all parties have proceeded since the inception of the proceeding on the basis that there was no need to examine alternate sites beyond those referred to in the FES, a party cannot insist at the "eleventh hour" that still other sites be considered in the absence of a compelling showing that the newly suggested sites possess attributes which establish them to have greater potential as alternatives than the sites already selected as alternatives. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-495, 8 NRC 304, 306 (1978).

A party seeking consideration at an advanced stage of a proceeding of a site other than the alternate sites already explored in the proceeding must at least provide information regarding the salient characteristics of the newly suggested sites and the reasons why these characteristics show that the new sites might prove better than those already under investigation. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-499, 8 NRC 319, 321 (1978).

The fact that a possible alternative is beyond the Commission's power to implement does not absolve the Commission of any duty to consider it, but that duty is subject to a "rule of reason". Factors to be considered include distance from site to load center, institutional and legal obstacles and the like. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 486 (1978).

Under NEPA, there is no need for Boards to consider economically better alternatives, which are not shown to also be environmentally preferable. No study of alternatives is needed under NEPA unless the action significantly affects the environment (§ 102(2)(c)) or involves an unresolved conflict in the use of resources (§ 102(2)(e)). Where an action will have little environmental effect, an alternative could not be materially advantageous. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 456-458 (1980); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-85-34, 22 NRC 481, 491 (1985).

Pursuant to NEPA 102(2)(E), the Staff must analyze possible alternatives, even if it believes that such alternatives need not be considered because the proposed action

does not significantly affect the environment. A Board is to make the determination, on the basis of all the evidence presented during the hearing, whether other alternatives must be considered. "Some factual basis (usually in the form of the Staff's environmental analysis) is necessary to determine whether a proposal 'involves unresolved conflicts concerning alternative uses of available resources' - the statutory standard of Section 102(2)(E)." Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-85-34, 22 NRC 481, 491 (1985), quoting Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 332 (1981). See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 449-50 (1988), reconsidered, LBP-89-6, 29 NRC 127, 134-35 (1989), rev'd on other grounds, ALAB-919, 30 NRC 29 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

NEPA does not require the NRC to choose the environmentally preferred site. NEPA is primarily procedural, requiring the NRC to take a hard look at environmental consequences and alternatives. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), CLI-80-23, 11 NRC 731, 736 (1980).

The application of the Commission's "obviously superior" standard for alternative sites (see 6.15.4.1 infra) does not affect the Staff's obligation to take the hard look. The NRC's "obviously superior" standard is a reasonable exercise of discretion to insist on a high degree of assurance that the extreme action of denying an application is appropriate in view of inherent uncertainties in benefit-cost analysis. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), CLI-80-23, 11 NRC 731, 735 (1980).

Whether or not the parties to a particular licensing proceeding may agree that none of the alternatives (in Seabrook, alternative sites) to the proposal under consideration is preferable, based on a NEPA cost-benefit balance, it remains the Commission's obligation to satisfy itself, that is so. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-557, 10 NRC 153, 155 (1979).

The scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. The consideration of alternatives in such a case does not include alternatives to the continued operation of the plant, even though the amendment might be necessary to continued reactor operation. Florida Power and Light Co. (Turkey Point Nuclear Generating, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-85 (1981), citing Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981).

Issues concerning alternative energy sources in general may no longer be considered in operating license proceedings. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982). In general, the NRC's environmental evaluation in an operating license proceeding will not consider need for power, alternative energy sources, or alternative sites. 10 CFR §§ 51.95, 51.106.

The FEIS must include a statement on the alternatives to the proposed action. See 42 U.S.C. § 4332(2)(C)(iii). Generally this includes a discussion of the agency alternative of "no action" (see 40 C.F.R. § 1502.14(d)), which is most easily viewed as

maintaining the status quo. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 97 (1998); Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 54 (2001).

With regard to the proposed alternatives in an EIS, there need not be much discussion for the "no action" alternative. It is most simply viewed as maintaining the status quo. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 54 (2001).

Agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action. When the purpose of the action is to accomplish one thing, it makes no sense to consider alternative ways by which another thing might be achieved. When reviewing a discrete license application filed by a private applicant, a federal agency may appropriately accords substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project. The agency thus may take into account the economic goals of the project's sponsor. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 55 (2001).

### 6.16.4.1 Obviously Superior Standard for Site Selection

The standard for approving a site is acceptability, not optimality. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977). Due to the more extensive environmental studies made of the proposed site in comparison to alternate sites, more of the environmental costs of the selected site are usually discovered. Upon more extensive analysis of alternate sites, additional cost will probably be discovered. Moreover, a Licensing Board can do no more than accept or reject the application for the proposed site; it cannot ensure that the applicant will apply for a construction permit at the alternate site. For these reasons, a Licensing Board should not reject a proposed site unless an alternate site is "obviously superior" to the proposed site. CLI-77-8, 5 NRC at 526. Standards of acceptability, instead of optimality, apply to approval of plant designs as well. CLI-77-8, 5 NRC at 526. In view of all of this, an applicant's selection of a site may be rejected on the grounds that a preferable alternative exists only if the alternative is "obviously superior." Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541 (1977). For a further discussion of the "obviously superior" standard with regard to alternatives, see Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 67, 78 (1977).

The Commission's obviously superior standard for alternate sites has been upheld by the Court of Appeals for the First Circuit. The Court held that, given the necessary imprecision of the cost-benefit analysis and the fact that the proposed site will have been subjected to closer scrutiny than any alternative, NEPA does not require that the single best site for environmental purposes be chosen. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95 (1st Cir. 1978).

A Licensing Board determination that none of the potential alternative sites surpasses a proposed site in terms of providing new generation for areas most in need of new capacity cannot of itself serve to justify a generic rejection of all those alternative sites on institutional, legal, or economic grounds. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 491 (1978).

To establish that no suggested alternative sites are "obviously superior" to the proposed site, there must be either (1) an adequate evidentiary showing that the alternative sites should be generically rejected or (2) sufficient evidence for informed comparisons between the proposed site and individual alternatives. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978).

It is not enough for rejection of all alternative sites to show that a proposed site is a rational selection from the standpoint solely of system reliability and stability. For the comparison to rest on this limited factor, it would also have to be shown that the alternative sites suffer so badly on this factor that no need existed to compare the sites from other standpoints. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 497 (1978).

For application of the "obviously superior" standard, see Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393-399 (1978), particularly at 8 NRC 397 where the Appeal Board equates "obviously" to "clearly and substantially."

### 6.16.4.2 Standards for Conducting Cost-Benefit Analysis Related to Alternatives

If, under NEPA, the Commission finds that environmentally preferable alternatives exist, then it must undertake a cost-benefit balancing to determine whether such alternatives should be implemented. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units No. 3 and 4), ALAB-660, 14 NRC 987, 1004 (1981), citing Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (1978).

Neither the NRC Staff nor a Licensing Board is limited to reviewing only those alternate sites unilaterally selected by the applicant. To do so would permit decisions to be based upon "sham" alternatives elected to be identified by an applicant and would often result in consideration of something less than the full range of reasonable alternatives that NEPA contemplates. The adequacy of the alternate site analysis performed by the Staff remains a proper subject of inquiry by the Licensing Board, notwithstanding the fact that none of the alternatives selected by the applicant proves to be "obviously superior" to the proposed site. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 & 2), LBP-77-60, 6 NRC 647, 659 (1977). Nevertheless, the NEPA evaluation of alternatives is subject to a "rule of reason" and application of that rule "may well justify exclusion or but limited treatment" of a suggested alternative. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 100 (1977), citing CLI-77-8. 5 NRC 503, 540 (1977).

In Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977), the Commission set forth standards for determining whether, in connection with conducting a second cost-benefit analysis to consider alternate sites, the Licensing Board should account for nontransferable investments made at the previously approved site. Where the earlier environmental analysis of the proposed site had been soundly made, the projected costs of construction at the alternate site should take into account nontransferable investments in the proposed site. Where

the earlier analysis lacked integrity, prior expenditures in the proposed site should be disregarded. CLI-77-8, 5 NRC at 533-536.

Population is one -- but only one -- factor to be considered in evaluating alternative sites. All other things being equal, it is better to place a plant farther from population concentrations. The population factor alone, however, usually cannot justify dismissing alternative sites which meet the Commission's regulations. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 510 (1978).

In alternative site considerations, the presence of an existing reactor at a particular site where the proposed reactor might be built is significant, but not dispositive. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 394-395 (1978).

In assessing the environmental harm associated with land clearance necessary to build a nuclear facility, one must look at what is being removed -- not just how many acres are involved. Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 395 (1978).

In considering the economic costs of building a facility at an alternative site, the costs of replacement power which might be required by reason of the substitution at a late date of an alternate site for the proposed site may be considered. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 394 (1978). However, where no alternative site is "obviously superior" from an environmental standpoint, there is no need to consider this "delay cost" factor. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 533-536 (1977); Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 398 (1978) Indeed, unless an alternative site is shown to be environmentally superior, comparisons of economic costs are irrelevant. Rochester Gas & Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 395 n.25 (1978).

### 6.16.5 Need for Facility

NEPA does not foreclose reliance, in resolution of "need-of-power" issues, on the judgment of local regulatory bodies that are charged with the responsibility to analyze future electrical demand growth, at least where the forecasts are not facially defective, are explained on a detailed record, and a principal participant in the local proceeding has been made available for examination in the NRC proceeding. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-490, 8 NRC 234, 241 (1978).

The general rule applicable to cases involving differences or changes in demand forecasts is not whether the utility will need additional generating capacity but when. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 691 (1980).

The standard for judging the "need-for-power" is whether a forecast of demand is reasonable and additional or replacement generating capacity is needed to meet that

demand. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-490, 8 NRC 234, 237 (1978).

For purposes of NEPA, need-for-power and alternative energy source issues are not to be considered in operating license proceedings for nuclear power plants. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527-528 (1982); Carolina Power & Light Co. & North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544-546 (1986).

In general, the NRC's environmental evaluation in an operating license proceeding will not consider need for power, alternative energy sources, or alternative sites. 10 CFR §§ 51.95, 51.106.

### 6.16.6 Cost-Benefit Analysis Under NEPA

The NEPA cost-benefit analysis considers the costs and benefits to society as a whole. Rather than isolate the costs or benefits to a particular group, overall benefits are weighed against overall costs. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 391 (1978); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

A cost-benefit analysis should include the consideration and balancing of qualitative as well as quantitative impacts. Those factors which cannot reasonably be quantified should be considered in qualitative terms. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1329-1330 (1984), citing, Statement of Considerations for 10 CFR Part 51, 49 Fed. Reg. 9363 (March 12, 1984); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

In weighing the costs and benefits of a facility, adjudicatory boards must consider the time and resources that have already been invested if the facility has been partially completed. Money and time already spent are irrelevant only where the NEPA comparison is between completing the proposed facility on the one hand and abandoning that facility on the other. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-392, 5 NRC 759 (1977). In comparing the costs of completion of a facility at the proposed site to the costs of building the facility at an alternate site, the Commission may consider the fact that costs have already been incurred at the proposed site. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95-96 (1st Cir. 1978).

Unless a proposed nuclear unit has environmental disadvantages when compared to alternatives, differences in financial cost are of little concern. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 161 (1978); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1993 (1982), citing Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978). Only after an environmentally superior alternative has been identified do economic considerations become relevant. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982).

A reasonably foreseeable, nonspeculative, substantial reduction in benefits should trigger the need, under NEPA, to reevaluate the cost-benefit balance of a proposed action before further irreversible environmental costs are incurred. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 630-31 (1983).

The NRC considers need-for-power and alternative energy sources (e.g., a coal plant) as part of its NEPA cost benefit analysis at the construction permit stage for a nuclear power reactor. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971, 972 (1983). See Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), 1 NRC 347, 352-72 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 522 (1977). In the operating license environmental analysis, however, need-for-power and alternative energy sources are not considered and contentions which directly implicate need-for-power projections and comparisons to coal are barred by the regulations; correlatively, such comparative cost savings may not be counted as a benefit in the Staff's NEPA cost-benefit analysis. Shearon Harris, supra, 17 NRC at 974.

Even if the cost-benefit balance for a plant is favorable, measures may be ordered to minimize particular impacts. Such measures may be ordered without awaiting the ultimate outcome of the cost-benefit balance. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413, 419 (1983).

While the balancing of costs and benefits of a project is usually done in the context of an environmental impact statement prepared because the project will have significant environmental impacts, at least one court has implied that a cost-benefit analysis may be necessary for certain Federal actions which, of themselves, do not have a significant environmental impact. Specifically, the court opined that an operating license amendment derating reactor power significantly could upset the original cost-benefit balance and, therefore, require that the cost-benefit balance for the facility be reevaluated. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084-85 (D.C. Cir. 1974).

In assessing how economic benefits are portrayed, a key consideration of several courts has been whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of the project's adverse environmental effects. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998)

Sunk costs are as a matter of law not appropriately considered in an operating license cost-benefit balance. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 586-87 (1982), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 534 (1977); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-95, 16 NRC 1401, 1404-1405 (1982).

An adequate final environmental impact statement for a nuclear facility necessarily includes the lesser impacts attendant to low power testing of the facility and removes the need for a separate focusing on questions such as the costs and benefits of low power testing. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units

1 and 2), ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

### 6.16.6.1 Consideration of Specific Costs Under NEPA

When water quality decisions have been made by the EPA pursuant to the Federal Water Pollution Control Act Amendments of 1972 and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA's considered decisions at face value and simply to factor them into the NEPA cost-benefit analysis. Carolina Power & Light Co. (H.B. Robinson, Unit No. 2), ALAB-569, 10 NRC 557, 561-62 (1979).

The environmental and economic costs of decommissioning necessarily comprise a portion of the cost-benefit analysis which the Commission must make. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 313 (1979).

Alternative methods of decommissioning do not have to be discussed. All that need be shown is that the estimated costs do not tip the balance against the plant and that there is reasonable assurance that an applicant can pay for them. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 314 (1979).

#### 6.16.6.1.1 Cost of Withdrawing Farmland from Production

(Also see Section 3.7.3.5.1)

#### 6.16.6.1.2 Socioeconomic Costs as Affected by Increased Employment and Taxes from Proposed Facility

Increased employment and tax revenue cannot be included on the benefit side in striking the ultimate NEPA cost-benefit balance for a particular plant. But the presence of such factors can certainly be taken into account in weighing the potential extent of the socioeconomic impact which the plant might have upon local communities. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 509 n.58 (1978).

## 6.16.7 Consideration of Class 9/"Remote and Speculative" Accidents in an Environmental Impact Statement

The ECCS Final Acceptance Criteria as set forth in 10 CFR § 50.46 and Appendix K to 10 CFR Part 50 assume that ECCS will operate during an accident. On the other hand, Class 9 accidents postulate the failure of the ECCS. Thus, on its face, consideration of Class 9 accidents would appear to be a challenge to the Commission's regulations. However, the Commission has squarely held that the regulations do not preclude the use of inconsistent assumptions about ECCS failure for other purposes. Thus, the prohibition of challenges to the regulations in adjudicatory proceedings does not preclude the consideration of Class 9 accidents and a failure of ECCS related thereto in environmental impact statements and proceedings thereon. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but not land based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

In proceedings instituted prior to June, 1980, serious (Class 9) accidents need be considered only upon a showing of "special circumstances." Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 529 (1982); 45 Fed. Reg. 40101 (June 13, 1980). The subsequent Commission requirement that NEPA analysis include consideration of Class 9 accidents (45 Fed. Reg. 40101) cannot be equated with a health and safety requirement. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-82106, 16 NRC 1649, 1664 (1982). The fact that a nuclear power plant is located near an earthquake fault and in an area of known seismic activity does not constitute a special circumstance. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 826-828 (1984), aff'g in part, LBP-82-70, 16 NRC 756 (1982) (full power license for Unit 1). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795-796 (1983).

Absent new and significant safety information, Licensing Boards may not act on proposals concerning Class 9 accidents in operating reactors. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 870 (1986), citing 50 Fed. Reg. 32144, 32144-45 (Aug. 8, 1985). Licensing Boards may not admit contentions which seek safety measures to mitigate or control the consequences of Class 9 accidents in operating reactors. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 846-47 (1987), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 30-31 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 443-45, 446 (1988), reconsidered, LBP-89-6, 29 NRC 127, 132-35 (1989), rev'd, ALAB-919, 30 NRC 29, 45-47 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). See also Public Service Co. of New Hampshire (Seabrook Station, Units and 2), LBP-89-3, 29 NRC 51, 54 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989). However, pursuant to their NEPA responsibilities, Licensing Boards may consider the risks of such accidents. Vermont Yankee, supra, LBP-87-17, 25 NRC at 854-55, aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 31 n.28 (1987), reconsid. denied, ALAB-876, 26 NRC 277, 285 (1987). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-89-6, 29 NRC 127, 132-35 (1989)(citing Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988) and the NRC's Severe Accident Policy Statement, 50 Fed. Reg. 32138 (Aug. 8, 1985)), rev'd, ALAB-919, 30 NRC 29 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990).

In Diablo Canyon and Vermont Yankee the licensees applied for license amendments which would permit the expansion of each facility's spent fuel pool storage capacity. The intervenors submitted contentions, based on hypothetical accident scenarios, and requested the preparation of environmental impact statements. The Appeal Board

rejected the contentions after determining that the hypothetical accident scenarios were based on remote and speculative events, and thus were Class 9 or beyond design-basis accidents which could not provide a proper basis for admission of the contentions. The Appeal Board has made it clear that: (1) NEPA does not require the preparation of an environmental impact statement on the basis of an assertion of a hypothetical accident that is a Class 9 or beyond design-basis accident, citing San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986), cert. denied, 479 U.S. 923 (1986); and (2) the NEPA Policy Statement, 45 Fed. Reg. 40101 (June 13, 1980), which describes the circumstances under which the Commission will consider, as a matter of discretion, the environmental impacts of beyond design-basis accidents, does not apply to license amendment proceedings. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 283-85 (1987); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 293-94 (1987); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 458-460 (1987), aff'g, LBP-87-24, 26 NRC 159 (1987), remanded on other grounds sub nom. Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 443-45, 446 (1988), reconsidered, LBP-89-6, 29 NRC 127, 132-35 (1989), rev'd, ALAB-919, 30 NRC 29, 47-51 (1989), vacated in part and remanded, CLI-90-4, 31 NRC 333 (1990), request for clarification, ALAB-938, 32 NRC 154 (1990), clarified, CLI-90-7, 32 NRC 129 (1990). See also Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-IOA, 27 NRC 452, 458-59 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

NRC staff can make a determination without a full PRA analysis about whether a postulated accident sequence is 'remote and speculative' (so as not to require an analysis of its impact in an EIS) based on existing materials available to it, probabilistic and otherwise, supplemented by additional information it might obtain from the applicant in an environmental report or through requests for additional information (RAI's). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 252 (2001).

The Atomic Safety and Licensing Board interprets the Commission's intent to be firmly directed to deciding what is "remote and speculative" by examining the probabilities inherent in a proposed accident scenario. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 97 (2000).

### 6.16.8 Power of NRC Under NEPA

The Licensing Board is not obliged under NEPA to consider all issues which are currently the subject of litigation in other forums and which may some day have an impact on the amount of effluent available. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-45, 15 NRC 1527, 1528, 1530 (1982).

The Commission is not required by NEPA to hold formal hearings on site preparation activities because NEPA did not alter the scope of the Commission's jurisdiction under the Atomic Energy Act. United States Department of Energy et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982), citing Gage v. United States Atomic Energy Commission, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1972); 39

Fed. Reg. 14506, 14507 (Apr. 24, 1979). "While NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues." Kelley v. Selin, 42 F.3d 1501, 1511 (6th Cir. 1995), citing Union of Concerned Scientists v. NRC, 920 F.2d 50, 56 (D.C. Cir. 1990).

The National Environmental Policy Act (NEPA) requires that the Commission prepare an environmental impact statement only for major actions significantly affecting the environment. United States Department of Energy et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982).

A Federal agency may consider separately under NEPA the different segments of a proposed Federal action under certain circumstances. Where approval of the segment under consideration will not result in any irreversible or irretrievable commitments to remaining segments of the proposed action, the agency may address the activities of that segment separately. United States Department of Energy et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982).

An agency will consider the following factors to determine if it should confine its environmental analysis under NEPA to the portion of the plan for which approval is being sought: (1) whether the proposed portion has substantial independent utility; (2) whether approval of the proposed portion either forecloses the agency from later withholding approval of subsequent portions of the overall plan or forecloses alternatives to subsequent portions of the plan; and (3) if the proposed portion is part of a larger plan, whether that plan has become sufficiently definite such that there is high probability that the entire plan will be carried out in the near future. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-43, 22 NRC 805, 810 (1985), citing Swain v. Brinegar, 542 F.2d 364, 369 (7th Cir. 1976) (en banc). Applying these criteria, the Board determined that it was not required to assess the environmental impacts of possible future construction and operation of transmission lines pursuant to an overall grid system long-range plan when considering a presently proposed part of the transmission system (operation of the Braidwood nuclear facility). Braidwood, LBP-85-43, 22 NRC at 810-12.

The NRC Staff may, if it desires, perform a more complete review than the minimum legally required. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-72, 16 NRC 968, 972 (1982).

In some limited cases, NRC Staff review of a Licensee's preliminary environmental document may satisfy the requirement for an Environmental Assessment. Portland General Electric Co. (Trojan Nuclear Power Station), CLI-95-13, 42 NRC 125 (1995).

Compliance with the National Historic Preservation Act does not preclude the need to comply with NEPA with regard to impacts on historic and cultural aspects of the environment. Therefore, noise impacts on proposed historic districts must be evaluated and, if necessary, mitigation measures undertaken. Philadelphia Electric Co. (Limerick Generating Station, Units 1& 2), LBP-83-11, 17 NRC 413, 435 (1983).

### 6.16.8.1 Powers In General

Commensurate with the Commission's obligation to comply with NEPA in licensing nuclear facilities is an implicit power to impose permit and license conditions indicated by the NEPA analysis.

The Commission may prescribe such regulations, orders and conditions as it deems necessary under any activity authorized pursuant to the Atomic Energy Act of 1954, as amended, and NEPA requires the Commission to exercise comparable regulatory authority in the environmental area. Wisconsin Electric Power Co. (Point Beach, Unit 2), ALAB-82, 5 AEC 350, 352 (1972).

Where necessary to assure that NEPA is complied with and its policies protected, Licensing Boards can and must ignore stipulations among the parties to that effect. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Unit 3), CLI-75-14, 2 NRC 835 (1975). Beyond this, Licensing Boards have independent responsibilities to enforce NEPA and may raise environmental issues sua sponte. Tennessee Valley Authority (Hartsville Nuclear Power Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977).

In addressing the question as to the degree to which NEPA allows the NRC to preempt State and local regulation with respect to nuclear facilities, the Appeal Board held that the Federal doctrine of preemption invalidates local zoning decisions that substantially obstruct or delay the effectuation of an NRC license condition imposed by the Commission pursuant to NEPA. Consolidated Edison Co. (Indian Point Station, Unit 2), ALAB-399, 5 NRC 1156, 1169-70 (1977). However, the Appeal Board also indicated that, where a question is presented as to whether State or local regulations relating to alteration of a nuclear power plant are preempted under NEPA, the NRC should refrain from ruling on that question until regulatory action has been taken by the State or local agency involved. ALAB-399 at 1170. To the same effect in this regard is Consolidated Edison Co. (Indian Point Station, Unit 2), ALAB-453, 7 NRC 31, 35 (1978), wherein the Appeal Board reiterated that Federal tribunals should refrain from ruling on questions of Federal preemption of State law where a State statute has not yet been definitively interpreted by the State courts or where an actual conflict between Federal and State authority has not ripened.

A State or political subdivision thereof may not substantially obstruct or delay conditions imposed upon a plant's operating license by the NRC pursuant to its NEPA responsibilities, as such actions would be preempted by Federal law. However, a State may refuse to authorize construction of a nuclear power plant on environmental or other grounds and may prevent or halt operation of an already built plant for some valid reason under State law. Consolidated Edison Co. (Indian Point Station, Unit 2), ALAB-453, 7 NRC 31, 34-35 (1978).

When another agency has yet to resolve a major issue pertaining to a particular nuclear facility, NRC may allow construction to continue at that facility only if NRC's NEPA analysis encompasses all likely outcomes of the other agency's review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 957 (1978).

A Licensing Board may rule on the adequacy of the FES once it is introduced into evidence and may modify it if necessary. A Licensing Board's authority to issue directions to the NRC Staff regarding the performance of its independent responsibilities to prepare a draft environmental statement is limited. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 909 (1980).

Neither NEPA nor the Atomic Energy Act applies to activities occurring in foreign countries and subject to their sovereign control. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-562, 10 NRC 437, 445-46 (1979).

### 6.16.8.2 Transmission Line Routing

Consistent with its interpretation of the Commission's NEPA authority (see Wisconsin Electric Power Co. (Point Beach, Unit 2), ALAB-82, 5 AEC 350 (1972)), the Appeal Board has held that the NRC has the authority under NEPA to impose conditions (i.e., require particular routes) on transmission lines, at least to the extent that the lines are directly attributable to the proposed nuclear facility. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-247, 8 AEC 936, 939 (1974). In addition, the Commission has legal authority to review the offsite environmental impacts of transmission lines and to order changes in transmission routes selected by an applicant. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 83 (1977).

### 6.16.8.3 Pre-LWA Activities/Offsite Activities

NEPA and the Commission's implementing regulations proscribe environmentally significant construction activities associated with a nuclear plant, including activities beyond the site boundary, without prior Commission approval. A "site," in the context of the Commission's NEPA responsibilities, includes land where the proposed plant is to be located and its necessary accouterments, including transmission lines and access ways. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977). 10 CFR § 50.10(c), which broadly prohibits any substantial action which would affect the environment of the site prior to Commission approval, can clearly be interpreted to bar, for example, road and railway construction leading to the site, at least where substantial clearing and grading is involved. In those situations where the Commission does approve offsite activities (e.g., through an LWA or a CP), conditions may be imposed to minimize adverse impacts.

### 6.16.8.4 Relationship to EPA with Regard to Cooling Systems

The NRC may accept and use without independent inquiry EPA's determination of the magnitude of the marine environmental impacts from a cooling system in striking an overall cost benefit balance for the facility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 23-24 (1978). For a discussion of the statutory framework governing the relationship between NRC and EPA in this area, see CLI-78-1, 7 NRC at 23-26. That relationship may be described thusly: EPA determines what cooling system a nuclear power facility may use and NRC factors the impacts resulting from use of that system into the NEPA cost-benefit analysis. CLI-78-1, 7 NRC at 26.

The NRC's acceptance and use, without independent inquiry, of EPA's determination as to the aquatic impacts of the Seabrook Station was upheld in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 98 (1st Cir. 1978), aff'g Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, (1978).

The Commission may rely on final decisions of the Environmental Protection Agency prior to completion of judicial review of such decisions. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-17, 8 NRC 179, 180 (1978).

Although an adverse environmental impact on water quality resulting from a cooling system discharge is an important input in the NEPA cost-benefit balance, a Licensing Board cannot require alteration of a facility's cooling system if that system has been approved by EPA. Carolina Power & Light Co. (H. B. Robinson, Unit 2), LBP-78-22, 7 NRC 1052, 1063-64 (1978).

NRC need not re-litigate issue of environmental impacts caused by a particular cooling system when it is bound to accept that cooling system authorized by EPA. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-72, 16 NRC 968, 970 (1982), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 24 (1978).

### 6.16.8.5 NRC Power Under NEPA re the Federal Water Pollution Control Act

Section 511(c)(2) of the FWPCA does not change a licensing agency's obligation to weigh degradation of water quality in its NEPA cost-benefit balance, but the substantive regulation of water pollution is in EPA's hands. Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1& 2), ALAB-515, 8 NRC 702, 712-13 (1978).

Section 511(c)(2) of the FWPCA requires that the Commission and the Appeal Board accept EPA's determinations on effluent limitations. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3), ALAB-532, 9 NRC 279, 282 (1979).

Section 511(c)(2) of the Clean Water Act does not preclude NRC from considering noise impacts of the cooling water system on the surrounding environment. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-83-11, 17 NRC 413, 419 (1983).

When water quality decisions have been made by the EPA pursuant to the Federal Water Pollution Control Act Amendments of 1972 and these decisions are raised in NRC licensing proceedings, the NRC is bound to take EPA's considered decisions at face value and simply to factor them into the NEPA cost-benefit analysis. Carolina Power & Light Co. (H.B. Robinson, Unit 2), ALAB-569, 10 NRC 557, 561-62 (1979).

### 6.16.8.6 Environmental Justice

The NRC integrates environmental justice considerations into its NEPA review process. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 64 (2001), citing, Louisiana Energy Services, L.P., (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100-10 (1998).

The purpose of Executive Order 12898, 3 C.F.R. 859 (1995) is to "underscore certain provision[s] of existing law that can help ensure that all communities and persons across the nation live in a safe and healthful environment." It does not create any new legal rights or remedies. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35-36 (1998).

An agency inquiry into a license applicant's supposed discriminatory motives or acts would be far removed from NEPA's core interest in protecting the physical environment. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998)

In examining issues of environmental justice, licensing boards should focus on disparate environmental impacts on disadvantaged groups that might be created by the proposed facility. The licensing boards should not attempt to become involved in racial discrimination litigation, examining purported racial discrimination, deliberate or coincidental, that might have been involved in the facility's siting. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171, 182 (2002).

Disparate impact" analysis is the principal tool for advancing environmental justice under NEPA. Disparate impacts may be caused by "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 an economic benefits - is felt by different populations." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171, 190 (2002). The NRC's goal is to identify and adequately weigh or mitigate effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities. Louisana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998). The Commission has focused on addressing any disproportionately high and adverse effects in these communities. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 64 (2001).

Petitioners may not file for a hearing using Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (1994) when the case concerns itself with an amendment for a site that has already been licensed. International Uranium Corp. (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 8 (1997).

### 6.16.9 Spent Fuel Pool Proceedings

A spent fuel capacity expansion proceeding is subject to the hybrid hearing process outlined in 10 C.F.R. Part 2, Subpart K, to the degree that any party wishes to invoke those procedures. Any party that wishes to invoke this process must do so within 10 days of an order granting a hearing request. See 10 C.F.R. § 2.1109(a)(1). If invoked, the process would consist of the following: a 90-day discovery period followed by the simultaneous written submission of relevant facts, data, and arguments and an oral argument on the issue whether an evidentiary proceeding is required for any of the contentions; and finally a decision by the presiding officer that

both designates disputed issues of fact for an evidentiary hearing and resolves any other issues. See 10 C.F.R. §§ 2.1111, 2.1113(a), 2.1115(a)-(b). Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 39 (1999).

A Licensing Board is not required to consider in a spent fuel pool expansion case the environmental effects of all other spent fuel pool capacity expansions. Because pending or past licensing actions affecting the capacity of other spent fuel pools could neither enlarge the magnitude nor alter the nature of the environmental effects directly attributable to the expansion in question, there is no occasion to take into account any such pending or past actions in determining the expansion application at bar. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 267-68 (1979).

The attempt, in a licensing proceeding for an individual pool capacity expansion, to challenge the absence of an acceptable generic long-term resolution of the waste management question was precluded in Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41 (1978), remanded sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979), restating the Commission's policy that for the purposes of licensing actions, the availability of offsite spent fuel repositories in the relatively near term should be presumed. Trojan, supra. See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 853-54 (1987) (Licensing Board rejected a contention which sought to examine the possibilities or effects of long-term or open ended storage), aff'd in part and rev'd in Part, ALAB-869, 26 NRC 13 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987).

The Licensing Board need not consider alternatives to pool capacity expansion in a proposed expansion proceeding, where the environmental effects of the proposed action are negligible. The NEPA mandate that alternatives to the proposed licensing action be explored and evaluated does not come into play where the proposed action will neither (1) entail more than negligible environmental impacts nor (2) involve the commitment of available resources respecting which there are unresolved conflicts. Trojan, supra, 9 NRC at 265-266; Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981). See Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-LOA, 27 NRC 452, 459 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

The Atomic Safety and Licensing Board found that an intervener's assertions regarding sabotage risk to an expanded spent fuel pool did not provide a litigable basis for a NEPA contention. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 97 (2000).

In a license amendment proceeding to expand a spent fuel pool, the environmental review for such amendment need not consider the effects of continued plant operation where the environmental status quo will remain unchanged. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 326 (1981), citing, Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980).

After analyzing the regulatory history, it was confirmed that 10 CFR § 50.68(b)(2), (4), (7) contemplate the use of enrichment, burnup and soluble boron as criticality control

measures. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 260 (2000).

There is no requirement under 10 CFR 50.68(b)(4) that K-effective must be kept at or below .95 under all conditions, including the scenario involving a fresh fuel assembly misplacement concurrent with the loss of soluble boron. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 269 (2000).

In a spent fuel pool proceeding, compliance with 10 CFR § 50.55a affords compliance with Appendix B of Part 50. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 272 (2000).

### 6.16.10 Certificate of Compliance/Gaseous Diffusion Plant

No environmental assessment or environmental impact statement is required for the issuance, amendment, modification, or renewal of a certificate of compliance for gaseous diffusion enrichment facilities, pursuant to 10 C.F.R. § 51.22(c)(19). Although NRC regulations do not require a general review of the environmental impacts associated with the issuance of certificates of compliance, an environmental assessment of the impacts of compliance plan approval is required. U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 238-39 (1996).

## 6.17 NRC Staff

### 6.17.1 Staff Role in Licensing Proceedings

The NRC Staff generally has the final word in all safety matters, not placed into controversy by parties, at the operating license stage. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 143 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 n.31 (1981).

The NRC Staff has a continuing responsibility to assure that all regulatory requirements are met by an applicant and continue to be met throughout the operating life of a nuclear power plant. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 143, 143 n.23 (1982).

The NRC Staff has the primary responsibility for reviewing all safety and environmental issues prior to the award of any operating license. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1369 (1982).

An operating license may not be issued until the NRC makes the findings specified in 10 CFR § 50.57. It is the Staff's duty to ensure the existence of an adequate basis for each of that section's determinations. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1420 n.36 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-896 (1981).

The fact that an application for an operating license is uncontested does not mean that an operating license automatically issues. An operating license may not issue unless and until the NRC Staff makes the findings specified in 10 CFR 50.57, including the ultimate finding that such issuance will not be inimical to the health and safety of the public. Washington Public Power Supply System (WPPSS Nuclear Project 2), ALAB-722, 17 NRC 546, 553 n.8 (1983), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981). The same procedure applies under 10 CFR § 70.23, 70.31 in the case of an application for a materials license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 48 (1984).

In a contested operating license proceeding, a Licensing Board may authorize the Director of Nuclear Reactor Regulation to issue a license for fuel loading and precriticality testing in order to avoid delaying these activities pending a decision on the issuance of a full power license. If the Board determines that any of the admitted contentions is relevant to fuel loading and precriticality testing, the Board must resolve the contention and make the related findings pursuant to 10 CFR § 50.57(a) for the issuance of a license. The Director is still responsible for making the other § 50.57(a) findings. If there are no relevant contentions, the Board may authorize the Director to make all the § 50.57(a) findings. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-31, 24 NRC 451, 453-54 (1986), citing, 10 CFR § 50.57(c). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 553, 555-56 (1986), aff'd, ALAB-854, 24 NRC 783, 790 (1986) (a Licensing Board is required to make findings concerning the adequacy of onsite emergency preparedness, pursuant to 10 CFR § 50.47(d), only as to matters which are in controversy); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-892, 27 NRC 485, 49093 (1988) (to authorize low-power operation pursuant to 10 CFR § 50.57(c), a board need only resolve those matters in controversy involving low-power, as opposed to full power, operation); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-88-20, 28 NRC 161, 166-67 (1988), aff'd, ALAB-904, 28 NRC 509, 511 (1988).

One of a number of Licensing Boards in the Shoreham operating license proceeding, having dismissed the government intervenors from the proceeding, found that the applicant's motion for 25% power operation was unopposed. Pursuant to 10 CFR § 50.57(c), the Board authorized the Director of Nuclear Reactor Regulation to make the required findings under 10 CFR § 50.57(a) and to issue a 25% power license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-8830, 28 NRC 644, 648-49 (1988). The Appeal Board found that the Licensing Board's decision did not give due regard to the rights of the government intervenors. Although the government intervenors had been dismissed by the Shoreham OL-3 Licensing Board, they still retained full party status before the Shoreham OL-5 Licensing Board. The Appeal Board believed that 10 CFR § 50.57(c) gave the government intervenors the opportunity to be heard on the 25% power request to the extent that any of its contentions which might be admitted by the Shoreham OL-5 Board were relevant. The Appeal Board certified the case to the Commission on the basis of a novel question of procedure, 10 CFR § 2.785(d), involving the interpretation and application of 10 CFR § 50.57(c). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-908, 28 NRC 626, 633-35 (1988). The Commission directed certification of the appeals to the Commission for decision and agreed with the Licensing Board, dismissed the intervenors and ordered the staff to review any

unresolved contentions, make the necessary § 50.57 findings, and wait for a Commission vote to authorize operation above 5% power. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211 (1989).

The NRC Staff may not deny an application without giving the reasons for the denial, and indicating how the application failed to comply with statutory and regulatory requirements. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 250 (1985), citing SEC v. Chenery Corp., 318 U.S. 80, 94 (1943), Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1168-69 (1984), 5 U.S.C. 555(e), 10 CFR § 2.103(b).

In general, the Staff does not occupy a favored position at hearing. It is, in fact, just another party to the proceeding. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 532 (1973). The Staff's views are in no way binding upon the Board and they cannot be accepted without being subjected to the same scrutiny as those of other parties. Consolidated Edison Co. (Indian Point Nuclear Generating Station, Units 2 & 3), ALAB-304, 3 NRC 1, 6 (1976); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1) et al., CLI-92-6, 35 NRC 86, 88-89 (1992). In the same vein, the Staff must abide by the Commission's regulations just as an applicant or intervenor must do. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431, 435 (1974); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-801, 21 NRC 479, 484 (1985). On the other hand, in certain situations, as where the Staff prepares a study at the express direction of the Commission, the Staff is an arm of the Commission and the primary instrumentality through which the NRC carries out its regulatory responsibilities and its submissions are entitled to greater consideration. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-76-17, 4 NRC 451 (1976).

In a construction permit proceeding, the NRC Staff has a duty to produce the necessary evidence of the adequacy of the review of unresolved generic safety issues. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 806 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

After an order authorizing the issuance of a construction permit has become final agency action, and prior to the commencement of any adjudicatory proceeding on any operating license application, the exclusive regulatory power with regard to the facility lies with the Staff. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977). Under such circumstances an adjudicatory board has no authority with regard to the facility or the Staff's regulation of it. In the same vein, after a full-term, full power operating license has issued and the order authorizing it has become final agency action, no further jurisdiction over the license lies with any adjudicatory board. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-451, 6 NRC 889, 891 n.3 (1977); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

Prior to issuing an operating license, the Director of Nuclear Reactor Regulation must find that Commission regulations, including those implementing NEPA, have been satisfied and that the activities authorized by the license can be conducted without

endangering the health and safety of the public. Pennsylvania Power & Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 n.7 (1982), citing 10 CFR § 50.40(d); 10 CFR § 50.57; Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 44 (1978), remanded on other grounds sub nom., Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979).

Licensing Boards lack the power to direct the Staff in the performance of its independent responsibilities and, under the Commission's regulatory scheme, Boards cannot direct the Staff to suspend review of an application, preparation of an environmental impact statement or work, studies or analyses being conducted or planned as part of the Staff's evaluation of an application. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 278-79 (1978).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no role or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 & 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing New England Power Co. (NEP Units 1 & 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-785, 20 NRC 848, 865 n.52 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985), citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

Although the establishment of a local public document room is an independent Staff function, the presiding officer in an informal proceeding has directed the Staff to establish such a room in order to comply with the requirements of proposed regulations which had been made applicable to the proceeding. However, the presiding officer acknowledged that he lacked the authority to specify the details of the room's operation. Alfred J. Morabito (Senior Operator's License), LBP-88-5, 27 NRC 241, 243-44 & n.1 (1988).

Although the Licensing Boards and the NRC Staff have independent responsibilities, they are "partners" in implementation of the Commission's policy that decisionmaking should be "both sound and timely," and thus they must coordinate their operations in order to achieve this goal. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 203 (1978).

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor thus is free to challenge directly an unresolved generic safety issue by filing a proper contention but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83 32, 18 NRC 1309 (1983); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56

(1985). See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 186 (1989); Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 108-109 (1991), clarified, LBP-91-34, 34 NRC 159 (1991). Furthermore, although the Commission expects its Staff to thoroughly consider all its licensing decisions, the issue for decision in adjudications is not whether the Staff performed its duty well, but instead whether the license application raises health and safety concerns. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 396 (1995).

The general rule that the applicant carries the burden of proof in licensing proceedings does not apply with regard to alternate site considerations. For alternate sites, the burden of proof is on the Staff and the applicant's evidence in this regard cannot substitute for an inadequate analysis by the Staff. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 794 (1978). The Staff plays a key role in assessing an applicant's qualifications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 34 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Staff is assumed to be fair and capable of judging a matter on its merits. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989), remanded on other grounds, Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991).

When conducting its review of the issues, the Staff should acknowledge differences of opinion among Staff members and give full consideration to views which differ from the official Staff position. Such discussion can often contribute to a more effective treatment and resolution of the issues. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 580-582 n.6 (1985).

An early appraisal of an applicant's capability does not foreclose the Staff from later altering its conclusions. Such an early appraisal would aid the public and the Commission in seeing whether a hearing is warranted. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 33-34 (1980), reconsidered, ALAB-581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

### 6.17.1.1 Staff Demands on Applicant or Licensee

While the Commission, through the Regulatory Staff, has a continuing duty and responsibility under the Atomic Energy Act of 1954 to assure that applicants and licensees comply with the applicable requirements, Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 627 (1973), the Staff may not require an applicant to do more than the regulations require without a hearing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Power Station), ALAB-191, 7 AEC 431, 445, 447 n.32 (1974). The Staff can require a general licensee to comply with public health and safety conditions which are more stringent than the Commission's regulatory requirements applicable to general licensees. Wrangler Laboratories, et al., ALAB-951, 33 NRC 505, 516-18 (1991). Because the

law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but not land based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

The scope of the NRC regulatory authority does not extend to all questions of fire safety at licensed facilities; instead, the scope of agency regulatory authority with respect to fire protection is limited to the hazards associated with nuclear materials. Thus, while the agency's radiological protection responsibility requires it to consider questions of fire safety, this does not convert the agency into the direct enforcer of local codes, Occupational Safety and Health Administration regulations, or national standards on fire, occupational, and building safety that it has not incorporated into its regulatory scheme. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 388 (2000), citing Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 393 (1995); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 159 (1995).

Only statutes, regulations, orders, and license conditions can impose requirements on applicants and licenses. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 390 (2000), citing Curators of the University of Missouri, CLI-95-1, 41 NRC at 41, 98.

### 6.17.1.2 Staff Witnesses

Except in extraordinary circumstances, a Licensing Board may not compel the Staff to furnish a particular named individual to testify - i.e., the Staff may select its own witnesses. 10 CFR § 2.720(h)(2)(i). However, once a certain individual has appeared as a Staff witness, he may be recalled and compelled to testify further. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 391 (1974). A Board may require Staff witnesses to update their previous testimony on a relevant issue in light of new analyses and information which have been developed on the same subject. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1094-1095 n.13 (1984).

The Commission's rules provide that the Executive Director for Operations generally determines which Staff witnesses shall present testimony. An adjudicatory board may nevertheless order other NRC personnel to appear upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-715, 17 NRC 102, 104-05 (1983), citing 10 CFR § 2.720(h)(2)(i); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-802, 21 NRC 490, 500-501 (1985) (mere disagreement among NRC Staff members is not an exceptional circumstance); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986). See Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-112 (1992). See generally Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980).

### 6.17.1.3 Post Hearing Resolution of Outstanding Matters by the Staff

As a general proposition, issues should be dealt with in the hearings and not left over for later, and possibly more informal, resolution. The post hearing approach should be employed sparingly and only in clear cases, for example, where minor procedural deficiencies are involved. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103 (1983), citing Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951 n.8, 952 (1974); accord, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 736-37 (1975); Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-84-2, 19 NRC 36, 210 (1984), rev'd on other grounds, ALAB-793, 20 NRC 1591, 1627 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 494 (1986).

On the other hand, with respect to emergency planning, the Licensing Board may accept predictive findings and post hearing verification of the formulation and implementation of emergency plans. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-84-2, 19 NRC 36, 212, 251-52, citing Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-808, 21 NRC 1595, 1600, 1601 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 494-95 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-32, 30 NRC 375, 569, 594 (1989), rev'd in part on other grounds and remanded, ALAB-937, 32 NRC 135 (1990), aff'd in part and rev'd in part on other grounds, ALAB-941, 32 NRC 337 (1990), and aff'd, ALAB-947, 33 NRC 299, 318, 346, 347, 348-349, 361--362 (1991).

Completion of the minor details of emergency plans are a proper subject for post hearing resolution by the NRC Staff. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61-62 (1984), citing Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076 (1983)

A Licensing Board may refer minor matters which in no way pertain to the basic findings necessary for issuance of a license to the Staff for post hearing resolution. Such referral should be used sparingly, however. Consolidated Edison Co. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984). Since delegation of open matters to the Staff is a practice frowned upon by the Commission and the Appeal Board, a Licensing Board properly decided to delay issuing a construction permit until it had reviewed a loan guarantee from Rural Electrification Administration rather than delegating that responsibility to the Staff for post hearing resolution. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978).

A Licensing Board has delegated to the Staff responsibility for reviewing and approving changes to a licensee's plan for the design and operation of an on-site waste burial project. The Board believed that such a delegation was appropriate

where the Board had developed a full and complete hearing record, resolved every litigated issue, and reviewed the project plan which the licensee had developed, at the Board's request, to summarize and consolidate its testimony during the hearing concerning the project. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-87-11, 25 NRC 287, 298 (1987).

The mere pendency of confirmatory Staff analyses regarding litigated issues does not automatically foreclose Board resolution of those issues. The question is whether the Board has adequate information, prior to the completion of the Staff analyses, on which to base its decision. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1171 (1984).

In order to conduct an expeditious hearing, without having to wait for the completion of confirmatory tests by a licensee and analysis of the test results by the Staff, a Licensing Board may decide to conduct a hearing on all matters ripe for adjudication and to grant an intervenor an opportunity to request an additional hearing limited to matters, within the scope of the admitted contentions, which arise subsequent to the closing of the record. The intervenor must be given timely access to all pertinent information developed by the licensee and the Staff after the close of the hearing with respect to the confirmatory tests. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560-61 (1986), citing Commonwealth Edison Co. (Zion Station, Units 1 & 2), LBP-73-35, 6 AEC 861, 865 (1973), aff'd, ALAB-226, 8 AEC 381, 400 (1974). Although the intervenor will not be required to meet the usual standards for reopening a record, the intervenor must indicate in the motion to reopen that the new test data and analyses are so significant as to change the result of the prior hearing. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-17, 23 NRC 792, 797 (1986).

The Licensing Board must determine that the analyses remaining to be performed will merely confirm earlier Staff findings regarding the adequacy of the plant. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-85-32, 22 NRC 434, 436 & n.2, 440 (1985), citing Consolidated Edison Co. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951 (1974), which cites, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), CLI-73-4, 6 AEC 6 (1973) (the mechanism of post hearing findings is not to be used to provide a reasonable assurance that a facility can be operated without endangering the health and safety of the public); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814 (1983) (post hearing procedures may be used for confirmatory tests); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-811, 21 NRC 1622 (1985) (once a method of evaluation had been used to confirm that one of two virtually identical units had met the standard of a reasonable assurance of safety, it was acceptable to exclude from hearings the use of the same evaluation method to confirm the adequacy of the second unit). Staff analyses which are more than merely confirmatory because a further evaluation is necessary to demonstrate compliance with regulatory requirements in light of negative findings of the Licensing Board regarding certain equipment and that relate to contested issues should be retained with the Board's jurisdiction until a satisfactory evaluation is produced. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1& 2), ALAB-841, 24 NRC 64, 79-80 (1986).

At the same time, it is entirely appropriate for the Staff to resolve matters not at issue in an operating license or amendment proceeding. In such proceedings, once a Licensing Board has resolved any contested issues and any issues which it raises sua sponte, the decision as to all other matters which need be considered prior to issuance of an operating license is the responsibility of the Staff alone. Consolidated Edison Co. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 209 n.7 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-854, 24 NRC 783, 790-91 (1986). The Licensing Board is neither required nor expected to pass upon all items which the Staff must consider before the operating license is issued. Consolidated Edison Co. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976).

### 6.17.2 Status of Staff Regulatory Guides

(See Section 6.21.3)

### 6.17.3 Status of Staff Position and Working Papers

Staff position papers have no legal significance for any regulatory purpose and are entitled to less weight than an adopted regulatory guide. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244 (1974). Similarly, an NRC Staff working paper or draft report neither adopted nor sanctioned by the Commission itself has no legal significance for any NRC regulatory purpose. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397 (1976); Consolidated Edison Co. (Indian Point, Unit 2), ALAB-209, 7 AEC 971, 973 (1974). But see Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 857-60 (1987) (the Licensing Board admitted contentions that questioned the sufficiency of an applicant's responses to an NRC Staff guidance document which provided guidelines for Staff review of spent fuel pool modification applications), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 34 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987).

Nonconformance with regulatory guides or Staff positions does not mean that General Design Criteria are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency & Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

### 6.17.4 Status of Standard Review Plan

Where the applicant used criteria "required" by the Staff's Standard Review Plan (NUREG-75/087, § 2.2.3) in determining the probability of occurrence of a postulated accident, it is not legitimate for the Staff to base its position on a denigration of the process which the Staff itself had promulgated. Public Service Electric & Gas (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 29 (1979).

### 6.17.5 Conduct of NRC Employees

(RESERVED)

## 6.18 Orders of Licensing Boards and Presiding Officers

### 6.18.1 Compliance with Board Orders

Compliance with orders of an NRC adjudicatory board is mandatory unless such compliance is excused for good cause. Thus, a party may not disregard a board's direction to file a memorandum without seeking leave of the board after setting forth good cause for requesting such relief. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 190-91 (1978). Similarly, a party seeking to be excused from participation in a prehearing conference ordered by the board should present its justification in a request presented before the date of the conference. ALAB-488, 8 NRC at 191. A Licensing Board may deny an intervention petition as a sanction for the petitioner's failure to comply with a Board order to appear at a prehearing conference. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-91-13, 33 NRC 259, 262-63 (1991).

A Licensing Board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 CFR § 2.718, a Licensing Board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. Furthermore, pursuant to 10 CFR § 2.707, the refusal of a party to comply with a Board order relating to its appearance at a proceeding constitutes a default for which a Licensing Board may make such orders in regard to the failure as are just. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

A party may not simply refuse to comply with a direct Board order, even if it believes the Board decision to have been based upon an erroneous interpretation of the law. A Licensing Board is to be accorded the same respect as a court of law. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1930 & n.5 (1982). See 10 CFR § 2.713(a).

When parties, for whatever reason, fail to respond or otherwise comply with Board requests, the Board has the authority to take appropriate action in accordance with its power and duty to maintain order, to avoid delay, and to regulate the course of the hearing and the conduct of the participants. Washington Public Power Supply System (Washington Nuclear Project No. 1), LBP-00-18, 52 NRC 9, 13 (2000) (citing Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-00-5, 51 NRC 64, 67 (2000) and Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982)).

When an issue is admitted into a proceeding in an order of the Board, it becomes part of the law of that case. Parties may use the prior history of a case to interpret ambiguities in a Board order, but no party may challenge the precedential authority of a Board's decision other than in a timely motion for reconsideration. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-18, 17 NRC 501, 504 (1983).

Under 10 C.F.R. § 2.707, Licensing Boards have broad discretion to sanction willful, prejudicial, and bad-faith behavior. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 7 (2001), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423 (1988), review denied, CLI-88-11, 28 NRC 603 (1988).

## 6.19 Precedent and Adherence to Past Agency Practice

Application of the "law of the case" doctrine is a matter of discretion. When an administrative tribunal finds that its declared law is wrong and would work an injustice, it may apply a different rule of law in the interests of settling the case before it correctly. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 260 (1978).

An Appeal Board does not give stare decisis effect to affirmation of Licensing Board conclusions on legal issues not brought to it by way of an appeal. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

A Licensing Board is required to give stare decisis effect only to an issue of law which was heard and decided in a prior proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 358-59 & n.112 (1989), citing EEOC v. Trabucco, 791 F.2d 1, 4 (1st Cir. 1986), and 1B Moore's Federal Practice ¶ 0.402[2], at 30.

A determination of fact in an adjudicatory proceeding which is necessarily grounded wholly in a non-adversary presentation is not entitled to be accorded generic effect, even if the determination relates to a seemingly generic matter rather than to some specific aspect of the facility in question. Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 3 & 5), ALAB-485, 7 NRC 986, 988 (1978).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but not land-based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

## 6.20 Pre-Permit Activities

NEPA and the Commission's implementing regulations proscribe environmentally significant construction activities associated with a nuclear plant, including activities beyond the site boundary, without prior Commission approval. A "site" in this context includes land where the proposed plant is to be located and its necessary accouterments, including transmission lines and access ways. 10 CFR § 50.10(c), which broadly prohibits any substantial action which would adversely affect the environment of the site prior to Commission approval, can clearly be interpreted to bar, for example, road and railway construction leading to the site, at least where substantial clearing and grading is involved. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977). The Commission may authorize certain site-related work prior to issuance of a construction permit pursuant to 10 CFR § 50.10(c)& (e).

Commission regulations provide means for an applicant to obtain prelicensing authorization to engage in certain specified construction activities. These include obtaining an exemption from licensing requirements under 10 CFR § 50.12, pleading special circumstances under 10 CFR § 2.758, and demonstrating that proposed activities will have only de minimis or "trivial" environmental effects. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293 (1976); Washington Public Power Supply System (Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). In those situations where the Commission does approve offsite (through an LWA or CP) or pre-permit (through an LWA) activities, conditions may be imposed to minimize adverse impacts. Kansas Gas & Electric Co., CLI-77-1, 5 NRC 1 (1977).

The limited work authorization procedure under 10 CFR § 50.10(e)(1) and (2) and the 10 CFR § 50.12(b) exemption procedure are independent avenues for applicants to begin site preparation in advance of receiving a construction permit. United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 423 (1982).

A request for an exemption from any Commission regulation in 10 CFR Part 50, including the general prohibition on commencement of construction in 10 CFR § 50.10(c), may be granted under 10 CFR § 50.12(a). United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 418 (1982).

The Commission may apply 10 CFR § 50.12 to a first of a kind project. There is no indication in 10 CFR § 50.12 that exemptions for conduct of site preparation activities are to be confined to typical, commercial light water nuclear power reactors. Commission practice has been to consider each exemption request on a case-by-case basis under the applicable criteria in the regulations. There is no indication in the regulations or past practice that an exemption can be granted only if an LWA-1 can also be granted or only if justified to meet electrical energy needs. United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 419 (1982).

In determining whether to grant an exemption pursuant to 10 CFR § 50.12 to allow pre-permit activities the Commission considers the totality of the circumstances and evaluates the exigency of the circumstances in that overall determination. Exigent circumstances have been found where: (1) further delay would deny the public currently needed benefits that would have been provided by timely completion of the facility but were delayed due to external factors, and would also result in additional otherwise avoidable costs; and (2) no alternative relief has been granted (in part) or is imminent. The Commission will weigh the exigent circumstances offered to justify an exemption against the adverse environmental impacts associated with the proposed activities. Where the environmental impacts of the proposed activities are insignificant, but the potential adverse consequences of delay may be severe and an exemption will litigate the effects of that delay, the case is strong for granting an exemption that will preserve the option of realizing those benefits in spite of uncertainties in the need for prompt action. United States Department of Energy et al. (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4-6 (1983), citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-74-22, 7 AEC 938 (1974); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-76-20, NRC 476 (1976); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 & 5), CLI-77-11, 5 NRC 719 (1977).

Use of the exemption authority under 10 CFR § 50.12 has been made available by the Commission only in the presence of exceptional circumstances. A finding of exceptional

circumstances is a discretionary administrative finding which governs the availability of an exemption. A reasoned exercise of such discretion should take into account the equities of each situation. These equities include the stage of the facility's life, any financial or economic hardships, any internal inconsistencies in the regulation, the applicants good-faith effort to comply with the regulation from which the exemption is sought, the public interest in adherence to the Commission's regulations, and the safety significance of the issues involved. These equities do not, however, apply to the requisite findings on public health and safety and common defense and security. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1156 n.3 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1376-1377 (1984). The costs of unusually heavy and protracted litigation may be considered in evaluating financial or economic hardships as an equity in assessing the propriety of an exemption. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1378-1379 (1984).

The public interest criterion for granting an exemption from 10 CFR § 50.10 under 10 CFR § 50.12(b) is a stringent one: exemptions of this sort are to be granted sparingly and only in extraordinary circumstances. United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 426 (1982), citing Washington Public Power Supply System (WPPSS Nuclear Power Projects Nos. 3 & 5), CLI-77-11, 5 NRC 719 (1977).

### 6.20.1 Pre-LWA Activity

Unlike authorization of activities under an LWA, pre-LWA activities may be authorized prior to issuance of a partial initial decision on environmental issues. Washington Public Power Supply System (Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). Permission to commence activities preparatory to construction in advance of an LWA can be sought by three different methods. One method is to seek a determination by the Licensing Board that the proposed activities are not barred by 10 CFR § 50.10(c) because their impacts are de minimis (the so-called "trivial impact" standard) or minor and fully redressible.

This is the preferred method when the issues involved are essentially factual. The second method is to proceed in accordance with 10 CFR § 2.758(b) under which a waiver or exemption may be obtained from the Commission if the Board certifies the issue presented in accordance with 10 CFR § 2.758(d). This method should be used when an interpretation or application of a regulation to particular facts is called into question. The third method is to seek an exemption from the Commission under 10 CFR § 50.12. The Commission has stated that this method is extraordinary and emphasized that it should be used sparingly. Washington Public Power Supply System (WPPSS Nuclear Projects 3 & 5), CLI-77-11, 5 NRC 719, 723 (1977).

10 CFR § 50.10(c) permits only that pre-LWA activity with so trivial an impact that it can be safely said that no conceivable harm would have been done to any of the interests sought to be protected by NEPA should the application for the facility ultimately be denied. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 1 NRC 6 (1976), aff'd in part, CLI-77-1, 5 NRC 1 (1977). For purposes of authorization of pre-LWA activity under 10 CFR § 50.10(c), redressibility is a factor to be considered. Where the potential damage from the pre-LWA activity is fully redressible and the applicant is willing to commit to restoration

of the site, a Licensing Board can permit the applicant to proceed accordingly. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977).

The governing standard with regard to pre-LWA activity is "trivial impact," not zero impact; the fact that certain activities would entail the removal of some trees which could not be replaced within a short span of time does not necessarily mean that such activities cannot be conducted prior to issuance of an LWA. Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 & 2), ALAB-446, 6 NRC 870 (1977), reversing in part LBP-77-61, 6 NRC 674 (1977).

The proscriptions in the Wild and Scenic River Act against any form of assistance by a Federal agency in the construction of a water resource project which might have a direct and adverse impact on a river designated under the Act precludes the granting by a Licensing Board of pre-LWA authority for constructing a proposed sewer line to service a proposed nuclear plant where the nuclear plant itself is considered to be a "water resource project." Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 & 2), LBP-77-61, 6 NRC 674, 678 (1977), rev'd in part, ALAB-446, 6 NRC 870 (1977).

### 6.20.2 Limited Work Authorization

Under 10 CFR § 50.10(e), the Commission may authorize certain site-related pre-permit work which is more substantial than that permitted under 10 CFR § 50.10(c). Prior to granting such "limited work authorization" (LWA), the presiding officer in the proceeding must have made certain environmental findings and, in some instances, health and safety findings. See 10 CFR § 50.10(e)(1)-(3). Notice to all parties of the proposed action is necessary. Carolina Power & Light Co. (Shearon-Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-184, 7 AEC 229 (1974).

A limited work authorization allows preliminary construction work to be undertaken at the applicant's risk, pending completion of later hearings covering radiological health and safety issues. United States Department of Energy et al. (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 473 n.1 (1982), citing 10 CFR § 50.10(e)(1); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 778 (1979).

The cost-benefit analysis which must be performed prior to issuance of an LWA requires a determination as to whether construction of certain site-related facilities should be permitted prior to issuance of a construction permit but subsequent to a determination resulting from a cost-benefit analysis that the plant should be built. The cost-benefit analysis relevant to issuance of an LWA has been handled generically under 10 CFR § 51.52(b). Thus, the cost-benefit balance required for an LWA need not be specifically performed for each LWA. Rather, once a Licensing Board has made all the findings on environmental and site suitability matters required by Section 51.52(b) and (c), the cost-benefit balancing implicit in those regulations has automatically been satisfied. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572, 579-80 (1977).

Applicants are not required to have every permit in hand before a Limited Work Authorization can be granted. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 123, 129 (1978).

The Board may conduct a separate hearing and issue a partial decision on issues pursuant to NEPA, general site suitability issues specified by 10 CFR § 50.10(e), and certain other possible issues for a limited work authorization. United States Department of Energy et al. (Clinch River Breeder Reactor Plant), LBP-83-8, 17 NRC 158, 161 (1983), vacated as moot, ALAB-755, 18 NRC 1337 (1983).

Although the LWA and construction permit aspects of the case are simply separate phases of the same proceeding, Licensing Boards have the authority to regulate the course of the proceeding and limit an intervenor's participation to issues in which it is interested. United States Department of Energy et al. (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 492 (1984), citing 10 CFR § 2.718, 2.714(f),(g) (formerly 10 CFR § 2.714(e),(f)).

### 6.20.2.1 LWA Status Pending Remand Proceedings

It has been held that, where a partial initial decision on a construction permit is remanded by an Appeal Board to the Licensing Board for further consideration, an outstanding LWA may remain in effect pending resolution of the CP issues provided that little consequential environmental damage will occur in the interim. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830 (1976). On appeal of this decision, however, the Court of Appeals stayed the effectiveness of the LWA pending alternate site consideration by the Licensing Board on the grounds that it is anomalous to allow construction to take place at one site while the Board is holding further hearings on other sites. Hodder v. NRC, 589 F.2d 1115 (D.C. Cir. 1978).

## 6.21 Regulations

The proper test of the validity of a regulation is whether its normal and fair interpretation will deny persons their statutory rights. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983), citing American Trucking Association v. United States, 627 F.2d 1313, 1318-19 (D.C. Cir. 1980).

### 6.21.1 Compliance with Regulations

All participants in NRC adjudicatory proceedings, whether lawyers or laymen, have an obligation to familiarize themselves with the NRC Rules of Practice. The fact that a party may be a newcomer to NRC proceedings will not excuse that party's non-compliance with the rules. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 467 n.24 (1985), citing Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980); see which quotes, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, 12 NRC 172, 173 n.1 (1980).

Applicants and licensees must, of course, comply with the Commission's regulations, but the Staff may not compel an applicant or licensee to do more than the regulations

require without a hearing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431, 445, 447 n.32 (1974).

The power to grant exemptions from the regulations has not been delegated to Licensing Boards and such Boards, therefore, lack the authority to grant exemptions. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977).

### 6.21.2 Commission Policy Statements

A Commission policy statement is binding upon the Commission's adjudicatory boards. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1732 n.9 (1982), citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 51 (1978), remanded on other grounds sub nom. Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 695 (1985), citing Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 82-83 (1974).

### 6.21.3 Regulatory Guides and Other Guidance Documents

Staff regulatory guides are not regulations and do not have the force of regulations. When challenged by an applicant or licensee, they are to be regarded merely as the views of one party, although they are entitled to considerable prima facie weight. See Section 6.16.2 and cases cited therein. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 and n.10 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 129899 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); Umetco Minerals Corp. LBP-93-7, 37 NRC 267 (1993); Porter County Chapter of the Izaak Walton League of America v. AEC, 633 F.2d 1011 (7th Cir. 1976); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 439, rev'd on other grounds., CLI-74-40, 8 AEC 809 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-217, 8 AEC 61, 68 (1974); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 28 n.76 (1974); Consolidated Edison Co. (Indian Point, Unit 2), ALAB-188, 7 AEC 323, 333 n.42, rev'd in part on other grounds, CLI-74-23, 7 AEC 947 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 174 n.27 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 737 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 260-61 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 463-64 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 214 (1993). Nevertheless, regulatory guides are entitled to considerable prima facie weight. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974), clarified as to other matters, CLI-74-43, 8 AEC 826 (1974).

Guidance documents, such as NUREGS or the Standard Review Plan, do not have the force of legally binding regulations. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001). Where the NRC has developed guidance documents assisting in compliance with applicable regulations, they are entitled to special weight. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001).

A regulatory guide, however, only presents the Staff's view of how to comply with the regulatory requirements. Such a guide is advisory, not obligatory and, as the guide itself states at the bottom of the first page: "Regulatory Guides are not substitutes for regulations, and compliance with them is not required." Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-96-7, 43 NRC 142 (1996).

In the absence of other evidence, adherence to regulatory guidance may be sufficient to demonstrate compliance with regulatory requirements. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); see Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406-407 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983). Generally speaking, however, such guidance is treated simply as evidence of legitimate means for complying with regulatory requirements, and the Staff is required to demonstrate the validity of its guidance if it is called into question during the course of litigation. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); see Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 737 (1985).

Interpretation from NRC guidance documents and history "may not conflict with the plain meaning of the wording used in [a] regulation," which in the end "of course must prevail." See Long Island Lighting Co. (Shoreham Nuclear Station, Unit 1), ALAB-900, 28 NRC 275, 288-90 (1988), review declined, CLI-88-11, 28 NRC 603 (1988); Graystar, Inc., LBP-01-7, 53 NRC 168, 187 (2001).

Nonconformance with regulatory guides or Staff positions does not mean that the General Design Criteria (G.D.C.) are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

A licensee is free either to rely on NUREGs and Regulatory Guides or to take alternative approaches to meet its legal requirements (as long as those approaches have the approval of the Commission or NRC Staff). Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 398 (1995). Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

While it is clear that regulatory guides are not regulations, are not entitled to be treated as such, need not be followed by applicants, and do not purport to represent the only satisfactory method of meeting a specific regulatory requirement, they do provide guidance as to acceptable modes of conforming to specific regulatory requirements. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161, 1169 (1984). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 280-81 (1991). Indeed, the Commission itself has indicated that conformance with regulatory guides is likely to result in compliance with specific regulatory requirements, though nonconformance with such guides does not mean noncompliance with the regulations. Petition for Emergency & Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978). See also Wrangler Laboratories et al., LBP-89-39, 30 NRC 746, 756-57, 759 (1989), rev'd and remanded on other grounds, ALAB-951, 33 NRC 505 (1991).

When determining issues of public health and safety, the Commission has discretion to use the best technical guidance available, including any pertinent NUREGs and Regulatory Guides, as long as they are germane to the issues then pending before the Commission. However, the Commission's decision to look to such documents for technical guidance in no way contradicts the Commission's ruling that NUREGs and Regulatory Guides are advisory by nature and do not themselves impose legal requirements on either the Commission or its licensees. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 397 (1995).

In Curators, the fact that the emergency planning regulations had not yet gone into effect when the University filed its applications did not preclude the Commission from seeking technical guidance from a NUREG that provided the scientific foundation for those regulations. CLI-95-8 at 397-98.

Licensees can be required to show they have taken steps to provide equivalent or better measures than called for in regulatory guides if they do not, in fact, comply with the specific requirements set forth in the guides. Consolidated Edison Co. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-82-105, 16 NRC 1629, 1631 (1982).

The criteria described in NUREG-0654 regarding emergency plans, referenced in NRC regulations, were intended to serve solely as regulatory guidance, not regulatory requirements. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 710 (1985); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 367-68 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 487 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 238 (1986); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 544-45 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988).

In absence of other evidence, adherence to NUREG-0654 may be sufficient to demonstrate compliance with the regulatory requirements of 10 CFR § 50.47(b). However, such adherence is not required, because regulatory guides are not intended to serve as substitutes for regulations. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161 (1984).

### 6.21.4 Challenges to Regulations

In Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), Commission Mem. & Order, 2 CCH At. Eng. L. Rep. 11,578.02 (1969), the Commission recognized the general principle that regulations are not subject to amendment in individual adjudicatory proceedings. Under that ruling, now supplanted by 10 CFR § 2.758, challenges to the regulations would be permitted in only three limited situations:

(1) where the regulation was claimed to be outside the Commission's authority;
(2) where it was claimed that the regulation was not promulgated in accordance with applicable procedural requirements;
(3) in the case of radiological safety standards, where it was claimed that particular standards were not within the broad discretion given to the Commission by the Atomic Energy Act to establish.

The Commission directed Licensing Boards to certify the question of the validity of any challenge to it prior to rendering any initial decision. Thus, the Commission adheres to the fundamental principle of administrative law that its rules are not subject to collateral attack in adjudicatory proceedings. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

No challenge of any kind is permitted, in an adjudicatory proceeding, as to a regulation that is the subject of ongoing rulemaking. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319 (1972); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-57, 4 AEC 946 (1972). In such a situation, the appropriate forum for deciding a challenge is the rulemaking proceeding itself. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-352, 4 NRC 371 (1976).

The assertion of a claim in an adjudicatory proceeding that a regulation is invalid is barred as a matter of law as an attack upon a regulation of the Commission. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977); Metropolitan Edison Co. (Three Mile Island Nuclear Station,

Unit 2), ALAB-456, 7 NRC 63, 65 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-25, 24 NRC 141, 144 (1986); American Nuclear Corp. (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 709-710 (1986); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-4, 31 NRC 54, 71 (1990), aff'd, ALAB-950, 33 NRC 492, 502-503 (1991). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-875, 26 NRC 251, 256 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-8, 29 NRC 399, 416-17 (1989). Consequently, under current regulations, there can be no challenge of any kind by discovery, proof, argument, or other means except in accord with 10 CFR § 2.758. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 204 (1975); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-82-92, 16 NRC 1376, 1385, aff'd, ALAB-704, 16 NRC 1725 (1982); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 804 n.82 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1104 n.44 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-86-24, 24 NRC 132, 136, 138 (1986).

Under 10 CFR 2.758, the regulation must be challenged by way of a petition requesting a waiver or exception to the regulation on the sole ground of "special circumstances" (i.e., because of special circumstances with respect to the subject matter of the particular proceeding, application of the regulation would not serve the purposes for which the regulation was adopted. 10 CFR § 2.758(b)); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-25, 24 NRC 141, 145 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 595 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). Pursuant to 10 CFR § 2.1239(b), the same standard is applicable to the waiver of a regulation in a materials licensing proceeding conducted under the Subpart L informal adjudicatory procedures. Curators of the University of Missouri, LBP-90-23, 32 NRC 7, 9 (1990). Special circumstances are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived. Also, the special circumstances must be such as to undercut the rationale for the rule sought to be waived. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 596-97 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). The petition must be accompanied by an affidavit. Other parties to the proceeding may respond to the petition. If the petition and responses, considered together, do not make a prima facie showing that application of the regulation would not serve the purpose intended, the Licensing Board may not go any further. If a prima facie showing is made, then the issue is to be directly certified to the Commission (not to the Appeal Board - 10 CFR § 2.758(d)) for determination. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 804 n.82 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Georgia Power Co. (Vogtle Nuclear Plant, Units 1 & 2), LBP-84-35, 20 NRC 887, 890 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-85-33, 22 NRC 442, 445 (1985); Public Service Co. of New Hampshire

(Seabrook Station, Units 1 & 2), ALAB-875, 26 NRC 251, 256 (1987). A waiver petition should not be certified unless the petition indicates that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573, 597 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). In the alternative, any party who asserts that a regulation is invalid may always petition for rulemaking under 10 CFR Part 2, Subpart H ( §§2.800-2.807).

The provisions of 10 CFR § 2.758 do not entitle a petitioner for a waiver or exception to a regulation to file replies to the responses of other parties to the petition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-87-12, 25 NRC 324, 326 (1987).

An attack on a Commission regulation is prohibited unless the petitioner can make a prima facie showing of special circumstances such that applying the regulation would not serve the purpose for which it was adopted. The prima facie showing must be made by affidavit. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), LBP-83-52A, 18 NRC 265, 270 (1983), citing 10 CFR § 2.758. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324, 326 (1987).

To make a prima facie showing under 10 CFR § 2.758 for waiving a regulation, a stronger showing than lack of reasonable assurance has to be made. Evidence would have to be presented demonstrating that the facility under review is so different from other projects that the rule would not serve the purposes for which it was adopted. Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), LBP-83-49, 18 NRC 239, 240 (1983).

Another Licensing Board has applied a "legally sufficient" standard for the prima facie showing. According to the Board, the question is whether the petition with its accompanying affidavits as weighed against the responses of the parties presents legally sufficient evidence to justify the waiver or exception from the regulation. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-87-12, 25 NRC 324, 328 (1987). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 22 (1988).

A request for an exception, based upon claims of costly delays resulting from compliance with a regulation, rather than claims that application of the regulation would not serve the purposes for which the regulation was adopted, is properly filed pursuant to 10 CFR § 50.12 rather than 10 CFR § 2.758. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-85-33, 22 NRC 442, 444-45 (1985).

A request for an exception is properly filed pursuant to 10 CFR § 50.12, and not 10 CFR § 2.758, when the exception: (1) is not directly related to a contention being litigated in the proceeding; and (2) does not involve safety, environmental, or common defense and security issues serious enough for the Board to raise on its own initiative. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-85-33, 22 NRC 442, 445-46 (1985).

An Appeal Board has determined that it has the authority to consider a motion for interlocutory review of a Licensing Board's scheduling order involving a Section 2.758 petition. The Board found that the only express limitation on its normal appellate jurisdiction is the requirement, pursuant to footnote 7 of Section 2.758, of directed certification to the Commission of a Licensing Board's determination that a prima facie showing has been established. The Board determined that, except in that specific situation, it could exercise its normal appellate authority, including its authority to consider interlocutory Licensing Board rulings through directed certification. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 67 (1987).

The ECCS Final Acceptance Criteria as set forth in 10 CFR § 50.45 and Appendix K to 10 CFR Part 50 assume that ECCS will operate during an accident. On the other hand, Class 9 accidents postulate the failure of ECCS. Thus, on its face, consideration of Class 9 accidents would appear to be a challenge to the Commission's regulations. However, the Commission has squarely held that the regulations do not preclude the use of inconsistent assumptions about ECCS failure for other purposes. Thus, the prohibition of challenges to the regulations in adjudicatory proceedings does not preclude the consideration of Class 9 accidents and a failure of ECCS related thereto in environmental impact statements and proceedings thereon. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978).

### 6.21.5 Agency's Interpretation of its Own Regulations

"[I]n the absence of any specific definition in a rule, we look first to the meaning of the language of the provision in question. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-25, 54 NRC 177, 184 (2001).

The wording of a regulation generally takes precedence over any contradictory suggestion in its administrative history. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC 725, 745 (1989), aff'd, ALAB-949, 33 NRC 484, 489-90 (1991); Wrangler Laboratories et al., LBP-89-39, 30 NRC 746, 756 (1989), rev'd and remanded, ALAB-951, 33 NRC 505, 513-16 (1991).

Where NRC interprets its own regulations and where those regulations have long been construed in a given way, the doctrine of stare decisis will govern absent compelling reasons for a different interpretation; the regulations may be modified, if appropriate, through rulemaking procedures. New England Power Co. (NEP Units 1 & 2), Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2) ALAB-390, 5 NRC 733, 741-42 (1977).

Agency practice, of course, is one indicator of how an agency interprets its regulations. See Power Reactor Development Co. v. International Union, 367 U.S. 396, 408 (1961). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 129 (1996); Sequoyah Fuels Corp. (Gore, OK, Site Decommissioning), CLI-01-2, 53 NRC 2, 13 (2001); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); Sequoyah Fuels Corp. (Gore, OK, Site Decommissioning), CLI-01-2, 53 NRC 2, 14 (2001).

In interpreting a statute or regulation, the usual inference is that different language is intended to mean different things. This inference might be negated, however, by a showing that the purpose or history behind the language demonstrates that no difference was intended. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994); aff'd, CLI-94-12, 40 NRC 64 (1994).

If the plain language analysis does not resolve ambiguities, it may be appropriate to inquire into guidance documents, provided they do not conflict with the plain meaning of the words used in the regulation. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-25, 54 NRC 177, 184 (2001).

Language in a Statement of Consideration for a regulation, having been endorsed by the Commission in its own Statement of Consideration, is entitled to "special weight" under relevant case law. See 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); Graystar Inc., LBP-01-7, 53 NRC 168, 187 (2001).

Interpretation of a regulation begins with the language and structure of the provision itself. See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299 (1997). Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 361 (2001).

### 6.21.6 General Design Criteria

The general design criteria (GDC) set out in 10 C.F.R. Part 50, Appendix A, are "cast in broad, general terms and constitute the minimum requirements for the principal design criteria of water-cooled nuclear power plants. There are a variety of methods for demonstrating compliance with GDC." Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 360-61 (2001) citing Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

General Design Criteria include little implementing detail. The general design criteria are "only a regulatory beginning and not the end product." Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 360 (2001), quoting Nader v. NRC, 513 F.2d 1045, 1052 (D.C. Cir. 1975).

GDC 62 instructs NRC licensees in general terms to prevent criticality "by physical systems or processes." GDC 62 contains no restrictive provisions against reliance on "administrative" measures (i.e. human intervention). In the context of regulations pertaining to nuclear power facilities, a "physical process" is a method of doing something, producing something, or accomplishing a specific result using the forces and operations of physics. Similarly, a "physical system" is an organized or established procedure or method based on the forces and operations of physics. Neither term excludes human intervention to set physical forces in motion or to monitor them. GDC 62 is not incompatible with "administrative" implementation of physical properties. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 361 (2001).

GDC 62's use of the term "physical" simply reinforces an obvious point: effective criticality prevention requires protective physical measures. The regulatory term

excludes, at the most, marginal (and implausible) criticality prevention schemes lacking any physical component, such as, perhaps, mere observation without accompanying physical mechanisms. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 364 (2001).

General design criteria do not purport to prescribe "precise tests or methodologies." See Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978). Intervenors nonetheless would have us construe GDC 62 to distinguish between "one-time" and "ongoing" administrative controls and to allow only "one-time" controls. Nothing in the text of GDC 62 suggests that, when promulgating the rule, the Commission envisioned anything like Intervenors' complex approach, and we decline to adopt it today. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 364 (2001).

10 C.F.R. 50.68 expressly provides for the use of enrichment, burnup, and soluble boron as criticality control measures. Both the regulation and its history demonstrate that the Commission endorses the use of physical controls with significant procedural aspects for criticality control. The Commission was mindful of GDC 62 when it approved the use of administrative controls in 10 C.F.R. 50.68. The Statement of Considerations refers specifically to GDC 62 as reinforcing the prevention of criticality in fuel storage and handling "through physical systems, processes, and safe geometrical configuration." See Criticality Accident Requirements, 62 Fed. Reg. 63825, 63826 (Dec. 3, 1997). Northeast Nuclear Energy Co.v (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 366 (2001).

As the latest expression of the rulemakers' intent, the more recent regulation prevails if there is a perceived conflict with an earlier regulation. See 2B Sutherland, Statutory Construction § 51.02 (1992). The specific provisions of 10 C.F.R. § 50.62 provide strong evidence for our current reading of the more general strictures of GDC 62. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 367 (2001).

In 1982, the Nuclear Waste Policy Act ("NWPA") was enacted by Congress, recognizing that accumulation of spent nuclear fuel is a national problem and that federal efforts to devise a permanent solution to problems of civilian radioactive waste disposal have not been adequate. See 42 U.S.C. § 10131(a)(2)-(3). The NWPA established federal responsibility and a definite federal policy for the disposal of spent fuel. See 42 U.S.C. § 10131(b)(2). Further, the act declared as one of its purposes the addition of new spent nuclear fuel storage capacity at civilian reactor sites. See 42 U.S.C. § 10151(b)(1). The NWPA directed nuclear power plant operators to exercise their "primary responsibility" for interim storage of spent fuel "by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely matter where practical." See 42 U.S.C. § 10151(a)(1). Under the NWPA, the Commission was to promulgate rules for an expedited hearing process on applications "to expand the spent nuclear fuel storage capacity at the site of civilian nuclear power reactor[s] through the use of high-density fuel storage racks." See 42 U.S.C. § 10154. The Licensing Board's understanding of GDC 62 is compatible with the NWPA, while Intervenors' viewpoint cannot be reconciled with Congressional policy on nuclear waste storage. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 367-68 (2001).

The phrase "physical systems or processes" in GDC 62 comprehends the administrative and procedural measures necessary to implement or maintain such physical systems or processes. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 369 (2001).

### 6.21.7 Reporting Requirements

By using the words "initiation of any nuclear plant shutdown required by the plant's Technical Specifications," the regulation definitionally limits the reporting requirement to a single 1-hour report per technical specification shutdown. Michel A. Phillipon (Denial of Senior Reactor Operator's License), LBP-99-44, 50 NRC 347, 368 (1999) interpreting 10 C.F.R. § 50.72(b)(1)(i)(A).

Although subsequent events involving the plant's technical specifications may occur during the shutdown process, those later events do not "initiate" the shutdown and 10 C.F.R. § 50.72(b)(1)(i)(A) does not require a 1-hour report to NRC for them. Michel A. Phillippon (Denial of Senior Reactor Operator's License), LBP-99-44, 50 NRC 347, 369 (1999).

## 6.22 Rulemaking

Rulemaking procedures are covered, in general, in 10 CFR § 2.800-2.807, which govern the issuance, amendment and repeal of regulations and public participation therein. It is well established that an agency's decision to use rulemaking or adjudication in dealing with a problem is a matter of discretion. Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778, 800 (1981), citing NAACP v. FPC, 425 U.S. 662, 668 (1976); Oncology Services Corp., LBP-94-2, 39 NRC 11 (1994).

The Commission has authority to determine whether a particular issue shall be decided through rulemaking, through adjudicatory consideration, or by both means. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-118, 16 NRC 2034, 2038 (1982), citing F.P.C. v. Texaco, Inc., 377 U.S. 33, 42-44 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 202 (1955). In the exercise of that authority, the Commission may preclude or limit the adjudicatory consideration of an issue during the pendency of a rulemaking. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-118, 16 NRC 2034, 2038 (1982).

When a matter is involved in rulemaking, the Commission may elect to require an issue which is part of that rulemaking to be heard as part of that rulemaking. Where it does not impose such a requirement, an issue is not barred from being considered in adjudication being conducted at that time. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 584-585 (1982); LBP-82-118, 16 NRC 2034, 2037 (1982).

A contention that seeks to litigate a matter that is the subject of an agency rulemaking is not admissible. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-01, 51 NRC 1, 5 (2000); See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179, reconsideration granted in part and denied in part on other grounds, LBP-98-10, 47 NRC 288, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998).

It is, of course, a well-recognized proposition that the choice to use rulemaking rather than adjudication is a matter within the agency's discretion. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-01, 51 NRC 1, 5 (2000).

### 6.22.1 Rulemaking Distinguished from General Policy Statements

While notice and comment procedures are required for rulemaking, such procedures are not required for issuance of a policy statement by the Commission since policy statements are not rules. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163 (1976).

### 6.22.2 Generic Issues and Rulemaking

The Commission has indicated that, as a rule, generic safety questions should be resolved in rulemaking rather than adjudicatory proceedings. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814-15, clarified, CLI-74-43, 8 AEC 826 (1974). In this vein, it has been held that the Commission's use of rulemaking to set ECCS standards is not a violation of due process. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974).

It is within the agency's authority to settle factual issues of a generic nature by means of rulemaking. Minnesota v. NRC, 602 F.2d 412, 416-17 (D.C. Cir. 1979) and Ecology Action v. AEC, 492 F.2d 998, 1002 (2d Cir. 1974), cited in Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778, 802 (1981). An agency's previous use of a case-by-case problem resolution method does not act as a bar to a later effort to resolve generic issues by rulemaking. Pacific Coast European Conference v. United States, 350 F.2d 197, 205-06 (9th Cir.), cert. denied, 382 U.S. 958 (1965), cited in Fire Protection, supra, and the fact that standards addressing generic concerns adopted pursuant to such a rulemaking proceeding affect only a few, or one, licensee(s) does not make the use of rulemaking improper. Hercules, Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1978), cited in Fire Protection, supra, Waiver of a Commission rule is not appropriate for a generic issue. The proper approach when a problem affects nuclear reactors generally is to petition the Commission to promulgate an amendment to its rules under 10 CFR § 2.802. If the issue is sufficiently urgent, petitioner may request suspension of the licensing proceeding while the rulemaking is pending. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-57, 14 NRC 1037, 1038-39 (1981).

## 6.23 Research Reactors

10 CFR § 50.22 constitutes the Commission's determination that if more than 50% of the use of a reactor is for commercial purposes, that reactor must be licensed under 103 of the Atomic Energy Act rather than 104. Section 104 licenses are granted for research and education, while Section 103 licenses are issued for industrial or commercial purposes. The Regents of the University of California (UCLA Research Reactor), LBP-83-24, 17 NRC 666, 670 (1983).

In amending the Atomic Energy Act, Congress intended to "grandfather" research and development nuclear plant licenses and to exempt such licenses from seeking new

licenses under the Act's section governing commercial licenses. American Public Power Ass'n v. NRC, 990 F.2d 1309, 1313 (D.C. Cir. 1993).

The Atomic Energy Act does not require antitrust review for applications for renewal of research and development nuclear plant licenses. American Public Power Ass'n v. NRC, 990 F.2d 1309, 1314 (D.C. Cir. 1993).

## 6.24 Disclosure of Information to the Public

10 CFR § 2.790 deals generally with NRC practice and procedure in making NRC records available to the public. The requirements governing the availability of some official records, governed by 10 C.F.R. § 2.790, were amended. 68 Fed. Reg. 18,836 (April 17, 2003). 10 CFR Part 9 specifically establishes procedures for implementation of the Freedom of Information Act (10 CFR § 9.3 to 9.16) and Privacy Act (10 CFR § 9.50, 9.51).

Under 10 CFR § 2.790, hearing boards are delegated the authority and obligation to determine whether proposals of confidentiality filed pursuant to Section 2.790(b)(1) should be granted pursuant to the standards set forth in subsections (b)(2) through (c) of that Section. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units,1 & 2), LBP-81-62, 14 NRC 1747, 1755-56 (1981). Pursuant to 10 CFR § 2.718, Boards may issue a wide variety of procedural orders that are neither expressly authorized nor prohibited by the rules. They may permit intervenors to contend that allegedly proprietary submissions should be released to the public. They may also authorize discovery or an evidentiary hearing that is not relevant to the contentions but is relevant to an important pending procedural issue, such as the trustworthiness of a party to receive allegedly proprietary material. However, discovery and hearings not related to contentions are of limited availability. They may be granted, on motion, if it can be shown that the procedure sought would serve a sufficiently important purpose to justify the associated delay and cost. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-2, 15 NRC 48 (1982).

Section 10(b) of the Federal Advisory Committee Act, 5 U.S.C. App. 10(b), generally requires an agency to make available for public inspection and copying all materials which were made available to or prepared for or by an advisory committee. The materials must be made available to the public before or on the date of the advisory committee meeting for which they were prepared. A Freedom of Information Act (FOIA) request for disclosure of the materials is required only for those materials which an agency reasonably withholds pursuant to a FOIA exemption, 5 U.S.C. § 552(b). Food Chemical News v. HHS, 980 F.2d 1468, 1471-72 (D.C. Cir. 1992).

Under Chrysler Corp. v. Brown, 441 U.S. 281, 60 L.Ed.2d 208, 99 S. Ct. 1705 (1979), neither the Privacy Act nor the Freedom of Information Act gives a private individual the right to prevent disclosure of names of individuals where the Licensing Board elects to disclose. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 891 (1981).

In Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-33, 15 NRC 887, 891-892 (1982), the Board ruled that the names and addresses of temporary employees who have worked on a tube-sleeving project are relevant to intervenor's quest for information about quality assurance in a tube-sleeving demonstration project. Since applicants have not given any specific reason to fear that intervenors will harass these

individuals, their names should be disclosed so that intervenors may seek their voluntary cooperation in providing information to them.

In the Seabrook offsite emergency planning proceeding, the Licensing Board extended a protective order to withhold from public disclosure the identity of individuals and organizations who had agreed to supply services and facilities which would be needed to implement the applicant's offsite emergency plan. The Board noted the emotionally charged atmosphere surrounding the Seabrook facility, and, in particular, the possibility that opponents of the licensing of Seabrook would invade the applicant's commercial interests and the suppliers' right to privacy through harassment and intimidation of witnesses in an attempt to improperly influence the licensing process. Public Service Co. of New Hampshire (Seabrook Station, Units 1& 2), LBP-88-8, 27 NRC 293, 295 (1988).

### 6.24.1 Freedom of Information Act Disclosure

Under FOIA, a Commission decision to withhold a document from the public must be by majority vote. Public Service Co. of Oklahoma (Black Fox Station, Units 1& 2), CLI-80-35, 12 NRC 409, 412 (1980).

While FOIA does not establish new government privileges against discovery, the Commission has elected to incorporate the exemptions of the FOIA into its own discovery rules. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

Section 2.790 of the Rules of Practice is the NRC's promulgation in obedience to the Freedom of Information Act. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

Section 2.744 of the Rules of Practice provides that a presiding officer may order production of any record exempt under Section 2.790 if its "disclosure is necessary to a proper decision and the document is not reasonably obtainable from another source." This balancing test weighs the need for a proper decision against the interest in privacy. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 892 (1981).

The presiding officer in an informal hearing lacks the authority to review the Staff's procedures or determinations involving FOIA requests for NRC documents. However, the presiding officer may compel the production of certain of the requested documents if they are determined to be necessary for the development of an adequate record in the proceeding. Alfred J. Morabito (Senior Operator's License), LBP-87-28, 26 NRC 297, 299 (1987).

Although 10 CFR § 2.744 by its terms refers only to the production of NRC documents, it also sets the framework for providing protection for NRC Staff testimony where disclosure would have the potential to threaten the public health and safety. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 99 (1983). Nondisclosure of commercial or financial information pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4), may be appropriate if an agency can demonstrate that public disclosure of the information would harm an identifiable agency interest in efficient program operations or in the effective execution of its statutory responsibilities. The mere assertion that disclosure of confidential

information provided to the NRC by a private organization will create friction in the relationship between the NRC and the private organization does not satisfy this standard. Critical Mass Energy Project v. NRC, 931 F.2d 939, 943-945 (D.C. Cir. 1991), vacated and reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991). Also, commercial or financial information may be withheld if disclosure of the information likely would impair the agency's ability to obtain necessary information in the future. To meet this standard, an agency may show that nondisclosure is required to maintain the qualitative value of the information. Critical Mass, 931 F.2d at 945-947, citing National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), vacated and reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991). On rehearing, the Court of Appeals reaffirmed the National Parks test for determining the confidentiality of commercial or financial information under FOIA Exemption 4. Such information is confidential if disclosure of the information is likely to 1) impair the government's ability to obtain necessary information in the future, or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks, 498 F.2d at 770. However, the court restricted the National Parks test to information which a person is compelled to provide the government. Information which is voluntarily provided to the government is confidential under Exemption 4 if it is of a kind that customarily would not be released to the public by the provider. Critical Mass Energy Project v. NRC, 975 F.2d 871, 876-877, 879-880 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993).

The Commission, in adopting the standards of Exemption 5, and the "necessary to a proper decision" as its document privilege standard under 10 CFR § 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 123 (1980).

The Government is no less entitled to normal privilege than is any other party in civil litigation. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 127 (1980).

Any documents in final form memorializing the Director's decision not to issue a notice of violation imposing civil penalties does not fall within Exemption 5. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 129 (1980).

A person who has submitted an FOIA request to an agency must exhaust all administrative remedies before filing a lawsuit seeking production of the documents. An agency has 10 working days to respond to the request. 5 U.S.C. § 552(a)(6)(A). If the agency has not responded within this 10-day period, then the requester has constructively exhausted the administrative remedies and may file a lawsuit. 5 U.S.C. § 552(a)(6)(C). However, if the agency responds after the 10-day period, but before the requester has filed suit, then the requester must exhaust all the administrative remedies. Oglesby v. United States Dep't of the Army, 920 F.2d 57, 63-65 (D.C. Cir. (1990).

An agency must conduct a good faith search for the requested records, using methods which reasonably can be expected to produce the information requested. Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990).

### 6.24.2 Privacy Act Disclosure

(RESERVED)

### 6.24.3 Disclosure of Proprietary Information

10 CFR § 2.790, which deals generally with public inspection of NRC official records, provides exemptions from public inspection in appropriate circumstances. Specifically, Section 2.790(a) establishes that the NRC need not disclose information, including correspondence to and from the NRC regarding issuance, denial, and amendment of a license or permit, where such information involves trade secrets and commercial or financial information obtained from a person as privileged or confidential.

Under 10 CFR § 2.790(b), any person may seek to have a document withheld, in whole or in part, from public disclosure on the grounds that it contains trade secrets or is otherwise proprietary. To do so, he must file an application for withholding accompanied by an affidavit identifying the parts to be withheld and containing a statement of the reasons for withholding. As a basis for withholding, the affidavit must specifically address the factors listed in Section 2.790(b)(4). If the NRC determines that the information is proprietary based on the application, it must then determine whether the right of the public to be fully appraised of the information outweighs the demonstrated concern for protection of the information.

A party is not required to submit an application and affidavit, pursuant to 10 CFR § 2.790(b)(1), for withholding a security plan from public disclosure, since 10 CFR § 2.790(d) deems security plans to be commercial or financial information exempt from public disclosure. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 1112 (1992).

For an affidavit to be exempt from the Board's general authority to rule on proposals concerning the withholding of information from the public, that affidavit must meet the regulatory requirement that it have "appropriate markings." When the plain language of the regulation requires "appropriate markings," an alleged tradition by which Staff has accepted the proprietary nature of affidavits when only a portion of the affidavits is proprietary is not relevant to the correct interpretation of the regulation. In addition, legal argument may not appropriately be withheld from the public merely because it is inserted in an affidavit, a portion of which may contain some proprietary information. Affidavits supporting the proprietary nature of other documents can be withheld from the public only if they have "appropriate markings." An entire affidavit may not be withheld because a portion is proprietary. The Board may review an initial Staff determination concerning the proprietary nature of a document to determine whether the review has addressed the regulatory criteria for withholding.

A party may not withhold legal arguments from the public by inserting those arguments into an affidavit that contains some proprietary information. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-5A, 15 NRC 216 (1982).

If the Commission believes that an order contains proprietary information which may be harmful to the party/parties if released to the public, the Commission may withhold the order from public release. After the party/parties have an opportunity to review the

order and advise the Commission of any confidential information, the Commission will release the order with the appropriate redactions. Power Authority of the State of New York and Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 3 LLC, and Entergy Nuclear Operations, Inc. (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-16, 54 NRC 1, 1-2 (2001).

The Commission's requirements regarding the availability of official documents, governed by 10 C.F.R. § 2.790, were modified by an amendment, in part providing that those who submit documents supposedly containing proprietary or other confidential information to mark the portions of the document containing such information. 68 Fed. Reg. 18,836 (April 17, 2003).

### 6.24.3.1 Protecting Information Where Disclosure Is Sought In an Adjudicatory Proceeding

To justify the withholding of information in an adjudicatory proceeding where full disclosure of such information is sought, the person seeking to withhold the information must demonstrate that:

(1) the information is of a type customarily held in confidence by its originator;
(2) the information has, in fact, been held in confidence;
(3) the information is not found in public sources;
(4) there is a rational basis for holding the information in confidence.

Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976).

The Government enjoys a privilege to withhold from disclosure the identity of persons furnishing information about violations of law to officers charged with enforcing the law. Rovario v. United States, 353 U.S. 53, 59 (1957), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981). This applies not only in criminal but also civil cases, In re United States, 565 F.2d 19, 21 (1977), cert. denied sub nom., Bell v. Socialist Workers Party, 436 U.S. 962 (1978), and in Commission proceedings as well, Northern States Power Co. (Monticello Plant, Unit 1), ALAB-16, 4 AEC 435, affirmed by the Commission, 4 AEC 440 (1970); 10 CFR § 2.744(d), § 2.790(a)(7); and is embodied in FOIA, 5 U.S.C. § 552(b)(7)(D). The privilege is not absolute; where an informer's identity is (1) relevant and helpful to the defense of an accused, or (2) essential to a fair determination of a cause (Rovario, supra); it must yield. However, the Appeal Board reversed a Licensing Board's order to the Staff to reveal the names of confidential informants (subject to a protective order) to intervenors as an abuse of discretion, where the Appeal Board found that the burden to obtain the names of such informants is not met by intervenor's speculation that identification might be of some assistance to them. To require disclosure in such a case would contravene NRC policy in that it might jeopardize the likelihood of receiving similar future reports. South Texas, supra.

For a detailed listing of the factors to be considered by a Licensing Board in determining whether certain documents should be classed as proprietary and withheld from disclosure in an adjudicatory proceeding, see Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, Appendix at 518

(1973) and (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-42, 15 NRC 1307 (1982). If a Licensing Board or an intervenor with a pertinent contention wishes to review data claimed by an applicant to be proprietary, it has a right to do so, albeit under a protective order if necessary. 10 CFR § 2.790(b)(6); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-435, 6 NRC 541, 544 n.12 (1977); Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 292 (2000).

Portions of a hearing may have to be closed to the public when issues involving proprietary information are being addressed. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 292 (2000).

Where a party to a hearing objects to the disclosure of information on the basis that it is proprietary in nature and makes out a prima facie case to that effect, it is proper for an adjudicatory board to issue a protective order and conduct further proceedings in camera. If, upon consideration, the Board determined that the material was not proprietary, it would order the material released for the public record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-15 (1985). See also Commonwealth Edison Co. (Zion Nuclear Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974).

Following issuance of a protective order enabling an intervenor to obtain useful information, a Board can defer ruling on objections concerning the public's right to know until after the merits of the case are considered. If an intervenor has difficulties due to failure to participate in in camera sessions, these cannot affect the Board's ruling on the merits. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017 (1981).

When relevant parties, by reason of a protective order, have access to information claimed to be proprietary and considerable effort would be involved in parsing the various parties' pleadings to identify and then resolve the question of what information has protected status, the resolution of disputes over the nature of the protected information is best left until after the conclusion of a merits resolution relative to the issues of the litigation. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 135 (2000).

Where a demonstration has been made that the rights of association of a member of an intervenor group in the area have been threatened through threats of compulsory legal process to defend contentions, the employment situation in the area is dependent on the nuclear industry, and there is no detriment to applicant's interests by not having the identity of individual members of petitioner organization publicly disclosed, the Licensing Board will issue a protective order to prevent the public disclosure of the names of members of the organizational petitioner. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 485-486 (1983).

### 6.24.3.2 Security Plan Information Under 10 CFR § 2.790(d)

Plant security plans are "deemed to be commercial or financial information" pursuant to 10 CFR § 2.790(d). Long Island Lighting Co. (Shoreham Nuclear Power Station,

Unit 1), LBP-82-80, 16 NRC 1121, 1124 (1982). Since 10 CFR § 2.790(d) deems security plans to be commercial or financial information exempt from public disclosure, a party is not required to submit an application and affidavit, pursuant to 10 CFR § 2.790(b)(1), for withholding a security plan from public disclosure. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11-12 (1992).

A security plan, whether in the possession of the NRC Staff or a private party, is to be protected from public disclosure. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11 (1992).

In making physical security plan information available to intervenors, Licensing Boards are to follow certain guidelines. Security plans are sensitive and are subject to discovery in Commission adjudicatory proceedings only under certain conditions: (1) the party seeking discovery must demonstrate that the plan or a portion of it is relevant to its contentions; (2) the release of the plan must (in most circumstances) be subject to a protective order; and (3) no witness may review the plan (or any portion of it) without it first being demonstrated that he possesses the technical competence to evaluate it. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980).

Intervenors in Commission proceedings may raise contentions relating to the adequacy of the applicant's proposed physical security arrangements. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-80, 16 NRC 1121, 1124 (1982).

Commission regulations, 10 CFR § 2.790, contemplate that sensitive information may be turned over to intervenors in NRC proceedings under appropriate protective orders. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-80, 16 NRC 1121, 1124 (1982); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11 (1992), citing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1403, 1404 (1977).

Release of a security plan to qualified intervenors must be under a protective order and the individuals who review the security plan itself should execute an affidavit of nondisclosure. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775, 778 (1980)..

Protective orders may not constitutionally preclude public dissemination of information which is obtained outside the hearing process. A person subject to a protective order, however, is prohibited from using protected information gained through the hearing process to corroborate the accuracy or inaccuracy of outside information. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775, 778 (1980).

## 6.25 Enforcement Proceedings

### 6.25.1 NRC Enforcement Authority

Previous judicial interpretation makes it clear that the Commission's procedures for initiating formal enforcement powers under section 161b, 161i(3), and 186a of the Atomic Energy Act are wide ranging, perhaps uniquely so. Oncology Services Corp., LBP-94-2, 39 NRC 11 (1994), citing Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968).

As is evident from the Commission's enforcement policy statement, regulatory requirements -- including license conditions -- have varying degrees of public health and safety significance. Consequently, as part of the enforcement process, the relative importance of each purported violation is evaluated, which includes taking a measure of its technical and regulatory significance, as well as considering whether the violation is repetitive or willful. Although, in contrast to civil penalty actions, there generally is no specification of a "severity level" for the violations identified in an enforcement order imposing a license termination, suspension, or modification, this evaluative process nonetheless is utilized to determine the type and severity of the corrective action taken in the enforcement order. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 33-34 (1994).

Under Atomic Energy Act provisions such as subsections (b) and (i) of section 161, 42 U.S.C. § 2201(b), (i), the agency's authority to protect the public health and safety is uniquely wide-ranging. That, however, is not the same as saying that it is unlimited. In exercising that authority, including its prerogative to bring enforcement actions, the agency is subject to some restraints. See, e.g., Hurley Medical Center (Flint, MI), ALJ-87-2, 25 NRC 219, 236-37 & n.5 (1987) (NRC Staff cannot apply a comparative-performance standard in civil penalty proceedings absent fair notice to licensees about the parameters of that standard). One of those constraints is the requirement of constitutional due process. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 29-30 (1994).

The scope of the NRC regulatory authority does not extend to all questions of fire safety at licensed facilities; instead, the scope of agency regulatory authority with respect to fire protection is limited to the hazards associated with nuclear materials. Thus, while the agency's radiological protection responsibility requires it to consider questions of fire safety, this does not convert the agency into the direct enforcer of local codes, Occupational Safety and Health Administration regulations, or national standards on fire, occupational, and building safety that it has not incorporated into its regulatory scheme. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 388 (2000), citing Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 393 (1995); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 159 (1995).

Only statutes, regulations, orders, and license conditions can impose requirements on applicants and licenses. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 390 (2000), citing Curators of the University of Missouri, CLI-95-1, 41 NRC at 41, 98.

The Commission is empowered to impose sanctions for violations of its license and regulations and to take remedial action to protect public health and safety. Within the limits of the agency's statutory authority, the choice of sanction is quintessentially a matter of the Commission's sound discretion. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 312-313 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

A violation of a regulation does not of itself require that a license be suspended. Both the Atomic Energy Act and NRC regulations support the conclusion that the choice of remedy for regulatory violations is within the sound judgment of the Commission and not foreordained. See 42 U.S.C. §§ 2236, 2280, 2282; 10 CFR § 50.100. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 405 (1978).

Where the Staff in an enforcement settlement does not insist on strict compliance with a particular Commission regulation, it is neither waiving the regulation at issue nor amending it, but is instead merely exercising discretion to allow an alternative means of meeting the regulation's goals. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site), CLI-97-13, 46 NRC 195, 221 (1997).

### 6.25.2 Enforcement Procedures

On August 15, 1991, the Commission completed final rulemaking which revised the Commission's procedures for initiating formal enforcement action. 56 Fed. Reg. 40664 (Aug. 15, 1991). Pursuant to 10 CFR § 2.204(a), the Commission will issue a demand for information to a licensee or other person subject to the jurisdiction of the Commission in order to determine whether to initiate an enforcement action. A licensee must respond to the demand for information; a person other than a licensee may respond to the demand or explain the reasons why the demand should not have been issued. 10 CFR § 2.204(b). Since the demand for information only requires the submission of information, and does not by its own terms modify, suspend, or revoke a license, or take other enforcement action, there is no right to a hearing. If the Commission decides to initiate enforcement action, it will serve on the licensee or other person subject to the jurisdiction of the Commission, an order specifying the alleged violations and informing the licensee or other person of the right to demand a hearing on the order. 10 CFR § 2.202(a). The Commission has deleted the term "order to show cause" from Section 2.202.

While a show cause order with immediate suspension of a license or permit may be issued without prior written notice where the public health, interest or safety is involved, the Commission cannot permanently revoke a license without prior notice and an opportunity for a hearing guaranteed by 10 CFR § 2.202. Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7 (1974).

The designated staff officials, subject to requirements that they give licensees written notice of specific violations in deciding whether penalties are warranted, may prefer charges, may demand the payment of penalties, and may agree to compromise penalty cases without formal litigation. Additionally, such officials may consult with their Staff privately about the course to be taken. Radiation Technology, Inc., ALAB-567, 10 NRC 533, 537 (1979).

Once a notice of opportunity for hearing has been published and a request for a hearing has been submitted, the decision as to whether a hearing is to be held no longer rests with the Staff but instead is transferred to the Commission or an adjudicatory tribunal designated to preside in the proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980).

In Geo-Tech Associates (Geo-Tech Laboratories), CLI-92-14, 36 NRC 221 (1992), the Commission directed the presiding Officer to consider the hearing request under the criteria for late filing in 10 CFR 2.714(a)(1) in the absence of regulations governing late-filed and deficient hearing requests on enforcement orders.

An agency may dispense with an evidentiary hearing in an enforcement proceeding in resolving a controversy if no dispute remains as to a material issue of fact. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 299-300 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

Where a Board attaches license conditions in an enforcement proceeding, such action does not convert the enforcement proceeding into a license amendment proceeding. Once the Commission establishes a formal adjudicatory hearing in an enforcement case, it need not grant separate hearings on any license conditions that are imposed as a direct consequence of that enforcement hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1148 (1985).

The procedures for modifying, suspending or revoking a license are set forth in Subpart B to 10 CFR. See All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30, 36-38 (1990), citing Atomic Energy Act 186(a), 42 U.S.C. § 2236(a).

There is no statutory requirement under Section 189a of the Atomic Energy Act of 1954 for the Commission to offer a hearing on an order lifting a license suspension. 42 U.S.C. § 2239(a). It is within the discretionary powers of the Commission to offer a formal hearing prior to lifting a license suspension. The Commission's decision depends upon the specific circumstances of the case and a decision to grant a hearing in a particular instance (such as the restart of Three Mile Island, Unit 1) does not establish a general agency requirement for hearings on the lifting of license suspensions. The Commission has generally denied such requests for hearings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Unit 1), CLI-85-10, 21 NRC 1569, 1575 n.7 (1985). See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953 (1984), aff'd, San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986).

### 6.25.2.1 Due Process

The Commission's decision that cause existed to start a proceeding by issuing an immediately effective show cause order does not disqualify the Commission from later considering the merits of the matter. No prejudgment is involved, and no due process issue is created. Nuclear Engineering Co., Inc. (Sheffield, Illinois LowLevel Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

A party responding to an agency enforcement complaint has been accorded due process so long as the charges against it are understandable and it is afforded a full and fair opportunity to meet those charges. See Citizens State Bank v. FDIC, 751 F.2d 209, 213 (8th Cir. 1984). Put somewhat differently, "'[p]leadings in administrative proceedings are not judged by standards applied to an indictment at common law,' but are treated more like civil pleadings where the concern is with notice . . . ." Id. (quoting Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 262 (D.C. Cir. 1979)). Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 30 (1994).

The ability of the responsible staff official to proceed against a licensee by issuing an order imposing civil penalties is not a denial of due process because the licensee was not able to cross-examine the official to determine that he had not been improperly influenced by his staff. The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536-538 (1979).

### 6.25.2.2 Intervention

One cannot seek to intervene in an enforcement proceeding to have NRC impose a stricter penalty than the NRC seeks. Issues in enforcement proceedings are only those set out in the order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980). One who seeks the imposition of stricter requirements should file a petition pursuant to 10 CFR § 2.206. Sequoyah Fuels Corp. (UFh Production Facility), CLI-86-19, 24 NRC 508, 513-514 (1986), citing Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1982).

One may only intervene in an enforcement action upon a showing of injury from the contemplated action set out in the show cause order. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994); aff'd, CLI-94-12, 40 NRC 64 (1994). One who seeks a stricter penalty than the NRC proposes has no standing to intervene because it is not injured by the lesser penalty. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).

The requirements for standing in an enforcement proceeding are no stricter than those in the usual licensing proceeding. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 374 (1980); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994).

The agency has broad discretion in establishing and applying rules for public participation in enforcement proceedings. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 440-41 (1980). Intervention by interested persons who support an enforcement action does not diminish the agency's discretion in initiating enforcement proceedings because the Commission need not hold a hearing on whether another path should have been taken. The Commission may lawfully limit a hearing to consideration of the remedy or sanction proposed in the order. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 70 (1994).

The Commission has authority to define the scope of public participation in its proceedings beyond that which is required by statute. Consistent with this authority the Commission permits participation by those who can show that they have a cognizable interest that may be adversely affected if the proceeding has one outcome rather than another, including those who favor an enforcement action. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site), CLI-94-12, 40 NRC 64, 69 (1994).

The Commission has broad discretion to allow intervention where it is not a matter of right. Such intervention will not be granted where conditions have already been imposed on a licensee, and no useful purpose will be served by that intervention. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

### 6.25.3 Petitions for Enforcement Action Under 10 CFR 2.206

Although the 10 CFR § 2.206 forum may be technically available for a petitioner that wishes to assert operational problems, it is not the exclusive forum. Where operational issues are relevant to a recapture proceeding, they may also be raised in that proceeding. Moreover, the hearing rights available through a section 2.206 petition are scarcely equivalent to, and not an adequate substitute for, hearing rights available in a licensing proceeding. See Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-77 (1983). The decision of the Staff to take or not take enforcement action pursuant to section 2.206 is purely discretionary -- it is not subject to review by the Commission (except on its own motion) or by courts, even for abuse of discretion. 10 CFR § 2.206(c)(1) and (2); Heckler v. Cheney, 470 U.S. 821 (1985). The Commission has agreed that petitions utilizing 10 CFR 2.206 to address matters under 10 C.F.R. Part 52 are reviewable -- unlike actions taken under section 2.206 in other contexts. Such reviewability in that context was one of the primary ingredients in the judicial approval of Part 52. Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992). The Court there noted that "the use to which a § 2.206 petition is put -- not its form -- governs its reviewability." 969 F.2d at 1178. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 18 (1993).

Under 10 CFR § 2.206, members of the public may request the NRC Staff to issue an enforcement order. Consolidated Edison Co. (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 (1994). Under 10 CFR § 2.206, any person at any time may request the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, or Director, Office of Inspection and Enforcement, as appropriate, to issue an order under 10 CFR § 2.202 et seq. for suspension, revocation or modification of an operating license or a construction permit

However, the Commission's long standing policy discourages the use of section 2.206 procedures as an avenue for deciding matters that are already under consideration in a pending adjudication. Georgia Power Co., et al. (Hatch Nuclear Plant, Units 1 & 2; Vogtle Electric Generating Plant, Units 1 & 2), CLI-95-5, 41 NRC 321, 322 (1995). The staff's final determination of common issues should take into account the Licensing Board's findings.

Although petitions for enforcement action are filed with the NRC Staff, the Commission retains the power to rule directly on enforcement petitions. 10 CFR § 2.206(c). The Commission will elect to exercise this power only when the issues raised in the petition are of sufficient public importance. Yankee Atomic Electric Co. (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 6 (1991).

The Director of Nuclear Reactor Regulation, upon receipt of a request to initiate an enforcement proceeding, is required to make an inquiry appropriate to the facts asserted. Provided he does not abuse his discretion, he is free to rely on a variety of sources of information, including Staff analyses of generic issues, documents issued by other agencies and the comments of the licensee on the factual allegations. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432, 433 (1978).

In reaching a determination on a petition for enforcement action, the Director need not accord presumptive validity to every assertion of fact, irrespective of the degree of substantiation. Nor is the Director required to convene an adjudicatory proceeding to determine whether an adjudicatory proceeding is warranted. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432 (1978).

The Administrative Procedure Act, 5 U.S.C.§§ 551 et seq., particularly Section 554, and the Commission's regulations, particularly 10 CFR § 2.719, deal specifically with on-the-record adjudication; thus, the Staff's participation in a construction permit proceeding does not render it incapable of impartial regulatory action in a subsequent show cause or suspension proceeding where no adjudication has begun. Moreover, in terms of policy, any view which questions the Staff's capabilities in such a situation is contradicted by the structure of nuclear regulation established by the Atomic Energy Act and the experience implementing that statute. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 431, 432 (1978).

New matters which cannot be raised before a Board because of a lack of jurisdiction may be raised in a petition under 10 CFR § 2.206. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-579, 11 NRC 223, 226 (1980); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1217 n.39 (1983); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-782, 20 NRC 838, 840 (1984). Where petitioner's case has no discernible relationship to any other pending proceeding involving the same facility, the procedure set out in 10 CFR § 2.206 must be regarded as the exclusive remedy. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 570 (1980).

After the Commission has awarded an operating license, the appropriate means by which to challenge the issuance of the license or to seek the suspension of the license is to file a petition, 10 CFR § 2.206, requesting that the Commission initiate enforcement action pursuant to 10 CFR § 2.202. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 67, 77-78 (1992).

In every case, a petitioner that for some reason cannot gain admittance to a construction permit or operating license hearing, but wishes to raise health, safety, or environmental concerns before the NRC, may file a request with the staff under 10 CFR § 2.206 asking the staff to institute a proceeding to address those concerns. The

staff must analyze the technical, legal, and factual basis for the relief requested and respond either by undertaking some regulatory activity, or if it believes no proceeding or other action is necessary, by advising the requestor in writing of reasons explaining that determination. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767, 1768 (1982). See Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1& 2), CLI-82-29, 16 NRC 1221, 1228-1229 (1982). See also Porter County Chapter of the Izaak Walton League of America, Inc. v. NRC, 606 F.2d 1363, 1369-1370 (D.C. Cir. 1979); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 552-53 (1983).

Under 10 CFR § 2.206, one may petition the NRC for stricter enforcement actions than the agency contemplates. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

The mechanism for requesting an enforcement order is a petition filed pursuant to 10 CFR § 2.206. See, e.g., Consolidated Edison Co. (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983). Note that such a petition may not be used to seek relitigation of an issue that has already been decided or to avoid an existing forum in which the issue is being or is about to be litigated. Consolidated Edison Co. (Indian Point, Units 1, 2 & 3), CLI-75-8, 2 NRC 173, 177 (1975); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-6, 13 NRC 443, 446 (1981); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 & 2) and (Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 563 (1985); Georgia Power Co., et al. (Hatch Nuclear Plant, Units 1 & 2; Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-15, 38 NRC 1, 2-3 (1993), clarified CLI-95-5, 41 NRC 321 (1995). This general rule is not intended to bar petitioners from seeking immediate enforcement action from the NRC Staff in circumstances in which the presiding officer in a proceeding is not empowered to grant such relief. Georgia Power Company, et al. (Hatch Nuclear Plant, Units 1 and 2; Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-15, 38 NRC 1, 2 (1993).

Nonparties to a proceeding are also prohibited from using 10 CFR § 2.206 as a means to reopen issues which were previously adjudicated. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 & 2) and (Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 564 (1985). See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429 (1979), aff'd, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

The Director of Nuclear Reactor Regulation properly has discretion to differentiate between those petitions which indicate that substantial issues have been raised warranting institution of a proceeding and those which serve merely to demonstrate that in hindsight, even the most thorough and reasonable of forecasts will prove to fall short of absolute prescience. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978), aff'd, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

Under 10 CFR § 2.202, the NRC Staff is empowered to issue an order when it believes that modification or suspension of a license, or other such enforcement action, is warranted. Under 10 CFR § 2.206, members of the public may request the

NRC Staff to issue such an order. Consolidated Edison Co. (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-18, 17 NRC 1006, 1009 (1983).

A Director does not abuse his or her discretion by refusing to take enforcement action based on mere speculation that financial pressures might in some unspecified way undermine the safety of a facility's operation. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157, 160 (1983).

The Director may, in his discretion, consolidate the essentially indistinguishable requests of petitioners if those petitioners are unable to demonstrate prejudice as a result of the consolidation. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978), aff'd, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979)..

If the Intervenors disagree with conclusions reached at a meeting between Staff and licensee regarding whether the licensee had complied with the Commission's licensing conditions, the Intervenors may seek further agency action by filing a petition with the Commission pursuant to 10 C.F.R. §2.206. The Staff response to such a petition would be subject to the ultimate oversight of the Commission. Curators of the University of Missouri, CLI-95-17, 42 NRC 229 (1995).

### 6.25.3.1 Commission Review of Director's Decisions Under 10 CFR 2.206

The Commission retains plenary authority to review Director's decisions. 10 C.F.R. § 2.206(c)(1). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 126 (1996).

10 CFR § 2.206 provides that the Commission may, on its own motion, review the decision of the Director not to issue a show cause order to determine if the Director has abused his discretion. 10 CFR § 2.206(c)(1). No other petition or request for Commission review will be entertained. 10 CFR § 2.206(c)(2).

While there is no specific provision for Commission review of a decision to issue a show cause order, the regulation does acknowledge that the review power set forth in Section 2.206 does not limit the Commission's supervisory power over delegated Staff actions. 10 CFR § 2.206(c)(1). Thus, it is clear that the Commission may conduct any review of a decision with regard to requests for show cause orders that it deems necessary. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323 (1994).

Prior to the amendment of Section 2.206, that regulation was silent as to Commission review. At that time, the Commission indicated that its review of a decision of the Director would be directed toward whether the Director abused his authority and, in particular, would include a consideration of the following:

(1) does the statement of reasons for issuing the order permit a rational understanding of the basis for the decision:
(2) did the Director correctly comprehend the applicable law, regulations and policy;
(3) were all necessary factors included and irrelevant factors excluded:
(4) were appropriate inquiries made as to the facts asserted;

(5) is the decision basically untenable on the basis of the facts known to the Director.

Consolidated Edison Co. (Indian Point, Units 1, 2 & 3), CLI-75-8, 2 NRC 173 (1975). See also Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 676 n.1 (1979).

Under the Indian Point standards, the Director's decision will not be disturbed unless it is clearly unwarranted or an abuse of discretion. Licenses Authorized to Possess or Transport Strategic Quantities of Special Nuclear Material, CLI-77-3, 5 NRC 16 (1977). Although the Indian Point review is essentially a deferral to the Staff's judgment on facts relating to a potential enforcement action, it is not an abdication of the Commission's responsibilities since the Commission will decide any policy matters involved. CLI-77-3, 5 NRC at 20 n.6.

If the Commission takes no action to reverse or modify a Director's decision within twenty-five (25) days of issuance of the decision, it becomes final agency action 10 C.F.R. § 2.206(c)(1). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 128 (1996).

NRC regulations specifically provide that the Commission will not entertain appeals from the Director's decisions, see 10 C.F.R. § 2.206(c)(2) (1995); however, the Commission may undertake sua sponte review of each denial of a 2.206 petition to ensure that the Director has not abused his discretion. See 10 C.F.R. § 2.206(c)(1) (1995). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 127 (1996).

The question of whether the federal courts have jurisdiction to review the Director's denial of a § 2.206 petition has not been directly addressed by the Supreme Court. See Lorion v. NRC, 470 U.S. 729 (1985). However, two federal appeals courts have determined that the Director's denial is unreviewable. Safe Energy Coalition v. NRC, 866 F.2d 1473, 1476, 1477-78 (D.C. Cir. 1989); Arnow v. NRC, 868 F.2d 223, 230, 231 (7th Cir. 1989), cert. denied, 110 S.Ct. 61 (1989); Massachusetts Public Interest Research Group v. NRC, 852 F.2d 9, 14-18 (1st Cir. 1988). The courts relied upon: (1) the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), which precludes judicial review when agency action is committed to agency discretion by law, and (2) the Supreme Court's interpretation of § 701(a)(2) in Heckler v. Chaney, 470 U.S. 821 (1985), decided the same day as Lorion v. NRC, 470 U.S. 729 (1985), wherein the Court held that an agency's refusal to undertake enforcement action upon request is presumptively unreviewable by the courts. That presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Upon review of the Atomic Energy Act, NRC regulations, and NRC case law, the courts did not find any provisions which would rebut the presumption of unreviewability. Also note Ohio v. NRC, 868 F.2d 810, 818-19 (6th Cir. 1989), in which the court avoided the jurisdictional issue, and instead dismissed the petition for review on its merits.

Boards normally lacks jurisdiction to entertain motions seeking review only of actions of the Director of Nuclear Reactor Regulation; the Commission itself is the forum for such review. See 10 CFR § 2.206(c). Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-466, 7 NRC 457 (1978).

Safety questions not properly raised in an adjudication may nonetheless be suitable for NRC consideration under its public petitioning process, 10 C.F.R. § 2.206, 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, 311 (2000); International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265-266 (1998). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 n.4 (2001).

### 6.25.4 Grounds for Enforcement Orders

Under 10 C.F.R. § 30.10(c)(2), an intentional act that a person knows causes a violation of a licensee procedure is considered "deliberate misconduct" actionable under section 30.10(a)(1). As a consequence, an assertion that a person who created a document containing false information did not intend to mislead the agency (or did not actually mislead the agency) appears irrelevant. Instead, the focus is on whether the person's action was a knowing violation of a licensee procedure that could have resulted in a regulatory violation by the submission to the agency of materially incomplete or inaccurate information. See 56 Fed. Reg. 40,664, 40,670 (1991) (stating that "[f]or situations that do not actually result in a violation by a licensee, anyone with the requisite knowledge who engages in deliberate misconduct as defined in the rule has the requisite intent to act in a manner that falls within the NRC's area of regulatory concern. The fact that the action may have been intercepted or corrected prior to the occurrence of an actual violation has no bearing on whether, from a health and safety standpoint, that person should be involved in nuclear activities."). Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 224 (1996).

The institution of a proceeding to modify, suspend, or revoke a license need not be predicated upon alleged license violations, but rather may be based upon any "facts deemed to be sufficient grounds for the proposed action." 10 CFR § 2.202. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 570-71 (1980).

The Commission need not withhold enforcement action until it is ready to proceed with like action against all others committing similar violations. The Commission may act against one firm practicing an industry wide violation. A rigid uniformity of sanctions is not required, and a sanction is not rendered invalid simply because it is more severe than that issued in other cases. Enforcement actions inherently involve the exercise of informed judgment on a case-by-case basis, and the ordering of enforcement priorities is left to the agency's sound discretion. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

The Staff will not be precluded, as a matter of law, from relying on allegations as the basis for an enforcement order if there is a "sufficient nexus" between the allegations and the regulated activities that formed the focus of the Staff's order. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 331 (1994), citing Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 31 (1994).

In assessing whether the bases assigned support an order in terms of both the type and duration of the enforcement action, a relevant factor may be the public health and safety significance, including the medical appropriateness, of the specified bases. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 329 (1994).

A person may not be convicted of a conspiracy to conceal facts from the NRC unless he had a duty to reveal those facts or that he entered into an agreement to conceal facts from the NRC. Kenneth G. Pierce, LBP-95-4, 41 NRC 203, 218, n.50 (1995).

The standard to be applied in determining whether to issue an order is whether substantial health or safety issues have been raised. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978); Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 334 (1994). See also Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-95-7, 41 NRC 323 (1995).

Allegations about financial difficulties at an operating facility are not by themselves a sufficient basis for action to restrict operations. On the other hand, allegations that defects in safety practices have in fact occurred or are imminent would form a possible basis for enforcement action, whether or not the root cause of the fault was financial. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157, 159-60 (1983).

When there is no claim of a lack of understanding regarding the nature of the charges in an NRC Staff enforcement order, the fact that the validity of the Staff's assertions have not been litigated is no reason to preclude the Staff from utilizing those charges as a basis for the order. The adjudicatory proceeding instituted pursuant to 10 CFR § 2.202 affords those who are adversely affected by the order with an opportunity to contest each of the charges that make up the Staff's enforcement determination, an opportunity intended to protect their due process rights. The "unlitigated" nature of the Staff's allegations in an enforcement order thus is not a constitutional due process deficiency that bars Staff reliance on those allegations as a component of the enforcement order. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 30 (1994).

The involvement of a licensee's management in a violation has no bearing on whether the violation may have occurred; if a licensee's employee was acting on the licensee's behalf and committed acts that violated the terms of the license or the Commission's regulations, the licensee is accountable for the violations, and appropriate enforcement action may be taken. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

A license or construction permit may be modified, suspended or revoked for

(1) any material false statement in an application or other statement of fact required of the applicant;
(2) conditions revealed by the application, statement of fact, inspection or other means which would warrant the Commission to refuse to grant a license in the first instance;

(3) failure to construct or operate a facility in accordance with the terms of the construction permit or operating license; or
(4) violation of, or failure to observe, any terms and provisions of the Atomic Energy Act, the regulations, a permit, a license, or an order of the Commission.
See 10 CFR § 50.100.

Where information is presented which demonstrates an undue risk to public health and safety, the NRC will take prompt remedial action including shutdown of operating facilities. Such actions may be taken with immediate effect notwithstanding the Administrative Procedure Act requirements of notice and opportunity to achieve compliance. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 404, 405 (1978).

Refusal by a licensee and contractor to permit a lawful staff investigation deemed necessary to assure public health and safety is serious enough to warrant the drastic remedy of permit suspension pending submission to investigation, since the refusal interferes with the Commission's duty to assure public health and safety. Union Electric Co. (Callaway Plant, Unit 1 & 2), LBP-78-31, 8 NRC 366, 378 (1978), aff'd ALAB-527, 9 NRC 126 (1979).

If a safety problem is revealed at any time during low-power operation of a facility or as a result of the merits review of a party's appeal of the decision to authorize low-power operation, the low-power license can be suspended. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 1), CLI-81-30, 14 NRC 950 (1981).

The Commission is authorized to consider a licensee's character and integrity in deciding whether to continue or revoke a license. Piping Specialists, Inc., et al (Kansas City, MO), LBP-92-25, 36 NRC 156, 153 (1992), citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1207 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

The enforcement policy provides that suspensions ordinarily are not ordered where the failure to comply with requirements was "not willful and adequate corrective action has been taken." Piping Specialists, Inc., et al (Kansas City, MO), LBP-92-25, 36 NRC 156 (1992).

### 6.25.5 Immediately Effective Orders

The validity of an immediately effective order is judged on the basis of information available to the Director at the time it was issued at the start of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). See Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 542-43 n.5, 556-57 (1990).

Issuance of an order requiring interim action is not the determination of the merits of a controversy. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 6 (1980).

Although a licensee usually should be afforded a prior opportunity to be heard before the Commission suspends a license or takes other enforcement action, extraordinary circumstances may warrant summary action prior to hearing. The Commission's regulations regarding summary enforcement action are consistent with section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c) and due process principles. Due process does not require that emergency action be taken only where there is no possibility of error; due process requires only that an opportunity for hearing be granted at a meaningful time and in a manner appropriate for the case. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 299-300 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table). The Commission is empowered to make a shutdown order immediately effective where such action is required by the public health, safety, or public interest. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1123-24 n.2 (1985). See 10 CFR § 2.202(a)(5), implementing 5 U.S.C. 558(c).

The Commission is obligated under the law to lift the effectiveness of an immediately effective shutdown order once the concerns which brought about the order have been adequately resolved. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1124 (1985). See, e.g., Pan American Airways v. C.A.B., 684 F.2d 31 (D.C. Cir. 1982); Northwest Airlines v. C.A.B., 539 F.2d 846 (D.C. Cir. 1976); Air Line Pilots Ass'n v. C.A.B., 458 F.2d 846 (D.C. Cir. 1972), cert. denied, 420 U.S. 972 (1975). This holds true even where Licensing and Appeal Boards' deliberations and decisions as to resumption of operations are pending, provided the issues before the Board do not implicate the public health and safety. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1149 (1985).

The Director may issue an immediately effective order without prior written notice if (1) the public health, safety or interest so requires, or (2) the licensee's violations are willful. In civil proceedings, action taken by a licensee in the belief that it was legal does not preclude a finding of willfulness. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677-78 (1979).

Latent conditions which may cause harm in the future are a sufficient basis for issuing an immediately effective show cause order where the consequences might not be subject to correction in the future. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677 (1979), citing Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7, 10-12 (1974).

Purported violations of agency regulations support an immediately effective order even where no adverse public health consequences are threatened. Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 677-78 (1979).

An immediately effective suspension order was found justified where the alleged violations involved significant license conditions and procedures that were intended to ensure safe handling and maintenance of devices containing a radioactive source that could deliver a substantial or even lethal radiation dose. The staff could reasonably conclude that license suspension was required to remove the possible threat of adverse safety consequences to patients and workers from maintenance and service

on teletherapy units by untrained licensee employees. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 314 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

In deciding whether an immediately effective order is necessary to protect public health and safety, the staff is required to make a prudent, prospective judgment at the time that the order is issued about the potential consequences of the apparent regulatory violations. A reasonable threat of harm requiring prompt remedial action, not the occurrence of the threatened harm itself, is all that is required to justify immediate action. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

Where the contested issues focused on the adequacy of the evidence in the Staff's knowledge when it initiated the license suspension, the licensing board did not err in limiting its consideration to the evidence amassed by the Staff before the order was issued. Nor is the staff barred from relying on additional evidence gathered after an immediately effective order is issued to defend the continued effectiveness of that order; however, the staff may not issue the order based merely on the hope that it will thereafter find the necessary quantum of evidence to sustain the order's immediate effectiveness. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

### 6.25.5.1 Review of Immediate Effectiveness of Enforcement Order

On May 12, 1992, the Commission issued a final rule concerning challenges to the immediate effectiveness of orders. 57 Fed. Reg. 20194 (May 12, 1992) (See Digest § 6.25.10). Pursuant to 10 CFR § 2.202(c)(2)(i), the subject of an immediately effective order may, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the order. The NRC Staff must respond within five days after receiving the motion. The Commission declined to specify a time limit for the presiding officer's review of the motion and, instead, strongly emphasized that a presiding officer should decide the motion as expeditiously as possible. 57 Fed. Reg. at 20197. The presiding officer will apply an adequate evidence test to evaluate the set aside motion. Adequate evidence exists "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. at 20196. The adequate evidence test does not apply to the determination of the merits of the immediately effective order. The presiding officer should rule on the merits of the immediately effective order as expeditiously as possible, although the presiding officer may delay the hearing for good cause. 10 CFR § 2.202(c)(2)(ii).

When the character and veracity of the source for a Staff allegation are in doubt, a presiding officer will be unable to credit the source's information as sufficiently reliable to provide "adequate evidence" for that allegation absent sufficient independent corroborating information. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 219-21 (1996).

Pursuant to 10 CFR § 2.202(c)(2)(i) a person to whom the Commission has issued an immediately effective enforcement order may move to set aside the immediate effectiveness of the order on the ground that "the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error." St. Joseph Radiology Associates, Inc. and Joseph L. Fisher, M.D., LBP-92-34, 36 NRC 317 (1992); see also United Evaluation Services, Inc. (Beachwood, New Jersey), LBP-02-13, 55 NRC 351, 354 (2002).

The movant challenging a Staff determination to make an enforcement order immediately effective bears the burden of going forward to demonstrate that the order, and the Staff's determination that it is necessary to make the order immediately effective, are not supported by "adequate evidence" within the meaning 10 C.F.R. § 2.202(c)(2)(i), but the Staff has the ultimate burden of persuasion on whether this standard has been met. See 55 Fed. Reg. 27,645, 27646 (1990). See also St Joseph Radiology Associates, Inc., LBP-92-34, 36 NRC 317, 321-22 (1992). Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 215-16 (1996); Aharon Ben-Haim, Ph.D., LBP-97-15, 46 NRC 60, 61 (1997).

Under 10 C.F.R. § 2.202(c)(2)(i), to support an immediate effectiveness determination for an enforcement order, besides 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 or that the public health, safety, or interest requires immediate effectiveness. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 227 (1996).

Pursuant to 10 CFR § 2.202(c)(2)(i), a set-aside motion must state with particularity the reasons why the enforcement order is not based upon adequate evidence and the motion must be accompanied by affidavits or other evidence relied upon by the movant. St. Joseph Radiology Associates, Inc., LBP-92-34, 36 NRC 317, 321-22 (1992); United Evaluation Services, Inc. (Beachwood, New Jersey), LBP-02-13, 55 NRC 351, 354 (2002).

In order to set aside the immediate effectiveness of an enforcement order, a party served with an enforcement order must file a timely written answer, under oath, that admits or denies each Staff allegation or charge in the enforcement order and sets forth the facts and legal arguments on which the party relies in claiming that the order should not have been issued. Failure to comply with the requirements of 10 CFR 2.202(b) may result in dismissal of the proceeding. St. Joseph Radiology Associates, Inc. and Joseph L. Fisher, M.D., LBP-93-14, 38 NRC 18 (1993).

A Licensing Board will uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness. The adequate evidence test is met when the "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. 20194, 20196 (May 12, 1992). St. Joseph Radiology Associates, Inc. and Joseph L. Fisher, M.D., LBP-93-14, 38 NRC 18 (1993). United Evaluation Services, Inc. (Beachwood, New Jersey), LBP-02-13, 55 NRC 351, 354

(2002). The Commission likened the adequate evidence standard to probable cause, which is described as "less than must be shown in trial, but . . . more than uncorroborated suspicion or accusation." United Evaluation Services, Inc. (Beachwood, New Jersey), LBP-02-13, 55 NRC 351, 354 (2002), citing, Horne Brothers, Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972).

In determining whether the Director abused his discretion in issuing an immediately effective order, a Licensing Board will evaluate the reasonableness of the Director's decision in light of the facts available to the Director at the time he issued his decision. Advanced Medical Systems (One Factory Row, Geneva, Ohio 44041), LBP-90-17, 31 NRC 540, 556-57 (1990), aff'd, CLI-94-6, 39 NRC 285 (1994), aff'd, 61 F.3d 903 (6th Cir. 1995) (Table).

The standard by which the immediate effectiveness of an order is judged may differ from the standard ultimately applied after a full adjudication on the merits of an enforcement order. The review of an order's immediate effectiveness permits such orders to be based on preliminary investigation or other emerging information that is reasonably reliable and that indicates the need for immediate action under the criteria in 10 CFR § 2.202. In accordance with the Commission's rulemaking on the procedures for review of the immediate effectiveness of enforcement orders, the basic test is "adequate evidence," a test similar to the one used for probable cause for an arrest, warrant, or preliminary hearing. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table); Aharon Ben-Haim, Ph.D., LBP-97-15, 46 NRC 60, 63 (1997).

The "adequate evidence" test is intended to strike a balance between the interest of the Commission in protecting the public health, safety, or interest and an affected party's interest in protection against arbitrary enforcement action. The test is intended only as a preliminary procedural safeguard against the ordering of immediately effective action based on clear error, unreliable evidence, or unfounded allegations. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

In considering whether there is probable cause for an arrest, courts have held that information supplied by an identified ordinary citizen witness may be presumed reliable. See, e.g., McKinney v. George, 556 F. Supp. 645, 648 (N.D. Ill. 1983)(citing cases), aff.d, 726 F.2d 1183 (7th Cir. 1984). In determining whether there is "adequate evidence" within the meaning of 10 C.F.R. §2.202(c)(2)(i) to support the immediate effectiveness of an enforcement order, applying this presumption to a witness who is corroborating a family member's allegations may be inappropriate because that relationship creates a possible bias that also brings the corroborating witness' reliability into substantial question. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 221 (1996).

Absent a showing that provides some reasonable cause to believe that, because of bias or mistake, an agency inspector cannot be considered a credible observer, inspector's direct personal observations should be credited in considering whether allegations based on those observations are supported by "adequate evidence" within the meaning of 10 C.F.R. § 2.202(c)(2)(i). This is based on the accepted

presumption that a government officer can be expected faithfully to execute his or her official duties. Eastern Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 225 (1996) (citing United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)).

Claims of a movant under 10 CFR § 2.202(c)(2)(i) may properly suggest the existence of factual disputes, but they may not be sufficient to demonstrate lack of probable cause for a Staff immediately effective order. Aharon Ben-Haim, Ph.D., LBP-97-15, 46 NRC 60, 64 (1997).

### 6.25.6 Issues In Enforcement Proceedings

The agency alone has power to develop enforcement policy and allocate resources in a way that it believes is best calculated to reach statutory ends. NRC can develop policy that has licensees consent to, rather than contest, enforcement proceedings. A Director may set forth and limit the questions to be considered in an enforcement proceeding. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441 (1980).

In an enforcement proceeding, once the licensee has voluntarily complied with the Staff's enforcement order requiring cleanup and decontamination of the licensee's byproduct materials facility, the controverted issue upon which a proceeding may be based -- whether the order was justified -- has become moot. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), LBP-92-36, 36 NRC 366, 368 (1992), review denied, CLI-93-8, 37 NRC 181 (1993).

To justify further inquiry into a claim of discriminatory enforcement, the licensee must show both that other similarly situated licensees were treated differently and that no rational reason existed for the different treatment. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

The Commission may limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), aff'd sub nom. Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir 1983); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441-442 (1980); Sequoyah Fuels Corp. (UF6 Production Facility), CLI-86-19, 24 NRC 508, 512 n.2 (1986).

In a proceeding regarding an NRC Staff enforcement order, consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 CFR § 2.714(d)(2)(ii), if it can be established that there is no set of facts that would entitle a party to relief relative to a proposed issue, then dismissal of that issue is appropriate. See Oncology Services Corp., LBP-94-2, 39 NRC 11, 23 n.8 (1994); Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 33 (1994).

When violation of ambiguous plant procedures is alleged by NRC staff in an enforcement proceeding, it is appropriate to receive evidence from plant operators to determine how those procedures were interpreted by them. It is also appropriate to interpret the procedures in light of company actions in cases of alleged violations of the same procedures, as reflected in official records. It is not appropriate to sustain

an enforcement action in which the operator did not act willfully because he reasonably believed he had complied with plant procedures. Kenneth G. Pierce, LBP-95-4, 41 NRC 203, 212 (1995).

When a person is charged with improperly stating under oath that he had failed to remember facts about a meeting or conversation, it is important to examine precisely what that person was doing at the time and how strong others' memories are before concluding that he had lied. Kenneth G. Pierce, LBP-95-4, 41 NRC 203, 221-24 (1995).

Licensing Boards have no jurisdiction to enforce license conditions unless they are the subject of an enforcement action initiated pursuant to 10 CFR § 2.202. Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31 (1994); aff'd, CLI-94-10, 40 NRC 43 (1994).

A decision under section 2.206 on a request for a show cause order is no more than the decision of an NRC staff Director and thus does not constitute an adjudicatory order under section 189b of the Atomic Energy Act and cannot serve as the basis of a valid contention in an enforcement proceeding. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-9, 37 NRC 433 (1993).

No further consideration need be given to the potential willful nature of license violations where an order's immediate effectiveness was not sustained on the basis of willfulness and where the licensee suffers no other collateral effects of the order. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

In Geo-Tech Associates (Geo-Tech Laboratories), CLI-92-14, 36 NRC 221 (1992), the Commission provided guidance on any hearing held on the issue of an order revoking materials license for failure to pay the annual license fee required by 10 CFR Part 171. A hearing request on enforcement sanctions for failure to pay license fees will be limited in scope to the issue of whether the Licensee's fee was properly assessed, (i.e., was Licensee placed in the proper category; was Licensee charged the proper fee for that category; was Licensee granted a partial or total exemption from the fee by the NRC staff?) and challenges to the fee schedule or its underlying methodology are not properly challenged in this type of proceeding, since they were established by rulemaking which an adjudicatory proceeding cannot amend.

### 6.25.7 Burden of Proof

The Atomic Energy Act intends the party seeking to build or operate a nuclear reactor to bear the burden of proof in any Commission proceeding bearing on its application to do so, including a show cause proceeding on a construction permit. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 571 (1980).

The burden of proof in a show cause proceeding with respect to a construction permit is on the permit holder. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-283, 2 NRC 11 (1975). As to safety matters this is so until the award of a full-term operating license. Dairyland Power Cooperative (La Crosse Boiling Water

Reactor), LBP-81-7, 13 NRC 257, 264-65 (1981). However, the burden of going forward with evidence "sufficient to require reasonable minds to inquire further" is on the person who sought the show cause order. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-315, 3 NRC 101, 110-11 (1976).

The Commission has never adopted the "clear and convincing" evidence standard as the evidentiary yardstick in reaching the ultimate merits of an enforcement proceeding, nor is it required to so under the Atomic Energy Act or the Administrative Procedure Act. NRC administrative proceedings have generally relied upon the "preponderance of the evidence" standard in reaching the ultimate conclusions after a hearing to resolve the proceeding. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table).

### 6.25.8 Licensing Board Review of Proposed Sanctions

In making a determination about whether a license suspension or modification order should be sustained, a presiding officer must undertake an evaluative process that may involve assessing, among other things, whether the bases assigned in the order support it both in terms of the type and duration of the enforcement action. As the Commission noted, "the choice of sanction is quintessentially a matter of the agency's sound discretion." Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 312 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995)(Table) (footnote omitted). In this regard, a presiding officer's review of an NRC Staff enforcement action would be limited to whether the Staff's choice of sanction constituted an abuse of discretion. And, just as with the NRC Staff's initial determination about imposition of the enforcement order, a relevant factor may be the public health and safety significance of the bases specified in the order. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 34 n.5 (1994).

A Licensing Board may terminate an enforcement proceeding when the licensee withdraws its challenge to the revocation of its license. The Board should not vacate for mootness any prior decisions in the proceeding when no appeals of those prior decisions are extant. Wrangler Laboratories et al., LBP-91-37, 34 NRC 196, 197 (1991).

One or more of the bases put forth by the NRC Staff as support for an enforcement order may be subject to dismissal if it is established they lack a sufficient nexus to the regulated activities that are the focus of the Staff's enforcement action. Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 31 (1994).

A Staff action to relax or rescind the conditions in an enforcement order that is the subject of an ongoing adjudication would be subject to review by the presiding officer with input from all parties to the proceeding. Sequoyah Fuels Corporation and General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994); aff'd, CLI-94-12, 40 NRC 64 (1994).

Review of a show cause order is limited to whether the Director of Nuclear Reactor Regulation abused his discretion. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

It is not likely that, after a lengthy evidentiary hearing, a Board would agree with the Director of NMSS in every detail. Nor is that necessary in order to sustain the Director's decision. Atlantic Research Corp. (Alexandria, Virginia), ALAB-594, 11 NRC 841, 848-49 (1980)(the adjudicatory hearing in a civil penalty proceeding is essentially a trial de novo, subject only to the principle that the Board may not assess a greater penalty than the Staff). Piping Specialists, Inc., (Kansas City MO), LBP-92-25, 36 NRC 156 (1992).

### 6.25.9 Stay of Enforcement Proceedings

Claiming a constitutional deprivation arising from a delayed adjudication generally requires some showing of prejudice. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 330 (1994), citing Oncology Services Corp., CLI-93-17, 38 NRC 44, 50-51 (1993).

The pendency of a related criminal investigation can provide an appropriate basis for postponing litigation on a Staff enforcement order. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 330-31 (1994).

The presiding officer may delay an enforcement proceeding for good cause. 10 CFR § 2.202(c)(2)(ii). In determining whether good cause exists, the presiding officer must consider both the public interest as well as the interests of the person subject to the immediately effective order. The factors to be considered in balancing the competing interests include (1) length of delay, (2) reason for the delay, (3) risk of erroneous deprivation, (4) assertion of one's right to prompt resolution of the controversy, (5) prejudice to the licensee, including harm to the licensee's interests and harm to the licensee's ability to mount an adequate defense. Oncology Service Corp., CLI-93-17, 38 NRC 44, 50-51 (1993); followed by Licensing Board in 3rd request for stay by NRC staff in Oncology proceeding, LBP-93-20, 38 NRC 130 (1993).

The determination of whether the length of delay in an enforcement proceeding is excessive depends on the facts of the particular case and the nature of the proceeding. The risk of erroneous deprivation is reduced if the licensee is given an opportunity to request that the presiding officer set aside the immediate effectiveness of the suspension order by challenging whether the suspension order, including the need for immediate effectiveness, is based on adequate evidence. Oncology Service Corp., CLI-93-17, 38 NRC 44, 57 (1993); followed by Licensing Board in 3rd request for stay by NRC staff in Oncology proceeding, LBP-93-20, 38 NRC 130 (1993).

Staff's showing of possible interference with an investigation being conducted by the NRC Office of Investigations and a strong interest in protecting the integrity of the investigation in conjunction with a demonstration that the risk of erroneous deprivation has been reduced weighs heavily in the Staff's favor. However, a licensee's vigorous opposition to a stay and its insistence on a prompt adjudicatory hearing are entitled to strong weight, irrespective of whether the licensee failed to challenge the basis for the immediate effectiveness of the Staff's suspension order. Oncology Service Corp., CLI-93-17, 38 NRC 44, 58 (1993). Nevertheless, without a particularized showing of harm to the licensee's interests, licensee's vigorous opposition to a stay does not tip the scale in favor of the licensee when balancing the competing interests. CLI-93-17 at 59-60. The Commission's decision was followed by the Licensing Board in ruling on

a third NRC staff request for a stay in the Oncology proceeding, LBP-93-20, 38 NRC 130 (1993).

Although it is not unusual for an adjudicatory proceeding and an investigation on the same general subject matter to proceed simultaneously, the Commission has been willing to stay parallel proceeding if a party shows substantial prejudice, e.g., where discovery in an adjudicatory proceeding would compromise an investigation. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-9, 41 NRC 404, 405 (1995).

### 6.25.10 Civil Penalty Proceedings

Section 234 of the Atomic Energy Act directs the Commission to afford an opportunity for a hearing to a licensee to whom a notice has been given of an alleged violation. Pittsburgh-Des Moines Steel Co., ALJ-78-3, 8 NRC 649, 653 (1978).

The Commission established detailed procedures and considerations to be undertaken in the assessment of civil penalties by: (1) notice of proposed rulemaking (36 Fed. Reg. 19122, Aug. 26, 1971), and (2) amendment of the Rules of Practice to include the factors which will determine the assessment of civil penalties. (35 Fed. Reg. 16894, Dec. 17, 1970). These two actions fulfill the legal requirements for standards utilized in civil penalty proceedings. Radiation Technology, Inc., ALJ-78-4, 8 NRC 655, 663 (1978), aff'd, ALAB-567, 10 NRC 533 (1979). See also Pittsburgh-Des Moines Steel Company, ALJ-78-3, 8 NRC 649, 653 (1978).

Under Section 234 of the Atomic Energy Act, 42 U.S.C. § 2282(b), and 10 CFR § 2.205 of the Commission's regulations, a person subject to imposition of a civil penalty must first be given written notice of: (1) the specific statutory, regulatory or license violations; (2) the date, facts, and nature of the act or omission with which the person is charged; and (3) the proposed penalty. The person subject to the fine must then be given an opportunity to show in writing why the penalty should not be imposed. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-31, 16 NRC 1236, 1238 (1982).

Although recognizing the Staff's broad discretion in determining the amount of a civil penalty, results reached in other cases may nonetheless be relevant in determining whether the Staff may have abused its discretion in this case. A nexus to the current proceeding would have to be shown, and differing circumstances might well explain seemingly disparate penalties in various cases. Radiation Oncology Center at Marlton (Marlton, NJ), LBP-95-25, 42 NRC 237, 239 (1995).

When a hearing is requested to challenge the imposition of civil penalties, the officer presiding at the hearing, not the Director of Inspection and Enforcement, decides on the basis of the record whether the charges are sustained and whether civil penalties are warranted. Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536 (1979).

Civil penalties are not invalidated by the absence of a formally promulgated schedule of fees when the penalties imposed are within statutory limits and in accord with general criteria published by the Commission. Radiation Technology, ALAB-567, 10 NRC 533, 541 (1979).

One factor which a Licensing Board may consider in determining the amount of a civil penalty is the promptness and extent to which a licensee takes corrective action. Certified Testing Laboratories, Inc., LBP-92-2, 35 NRC 20, 44 (1992).

A civil penalty may be imposed on a licensee even though there is no evidence of (1) malfeasance, misfeasance, or nonfeasance by the licensee, or (2) a failure by the licensee to take prompt corrective action. In such circumstances, a civil penalty may be considered proper if it might have the effect of deterring future violations of regulatory requirements or license conditions by the licensee, other licensees, or their employees. It does not matter that the imposition of the civil penalty may be viewed as punitive. Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980), vacating ALAB-542, 9 NRC 611 (1979).

An adjudicatory hearing in a civil penalty proceeding is essentially a trial de novo. The penalty assessed by the staff constitutes the upper bound of the penalty which may be imposed after the hearing but the Board may substitute its own judgment for that of the Director. Atlantic Research Corporation, ALAB-594, 11 NRC 841, 849 (1980).

Where the Staff is detailed and complete in explaining its method of calculating the amount of civil penalty and the Licensee has not controverted the Staff's reasoning the amount of the civil penalty will stand. Cameo Diagnostic Centre, Inc., LBP-94-34, 40 NRC 169, 175-76 (1994).

Civil penalties may be imposed for the violation of regulations or license conditions without a finding of fault on the part of the licensee, so long as it is believed such action will positively affect the conduct of the licensee, or serve as an example to others. It matters not that the imposition of the civil penalty might be viewed as punitive. A licensee is responsible for all violations committed by its employees, whether it knew or could have known of them. There is no need to show scienter. One is not exempted from regulation by operating through an employee. Atlantic Research Corp., CLI-80-7, 11 NRC 413 (1980); Pittsburgh-Des Moines Steel Co., ALJ-78-3, 8 NRC 649, 651-52 (1978).

### 6.25.11 Settlement of Enforcement Proceedings

In enforcement proceedings, settlements between the Staff and the licensee, once a matter has been noticed for hearing, are subject to review by the presiding officer. 10 CFR § 2.203. Thus, once an enforcement order has been set for hearing at a licensee's request, the NRC Staff no longer has untrammeled discretion to offer or accept a compromise or settlement. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site), CLI-94-12, 40 NRC 64, 71 (1994).

Where the Staff in an enforcement settlement does not insist on strict compliance with a particular Commission regulation, it is neither waiving the regulation at issue nor amending it, but is instead merely exercising discretion to allow an alternative means of meeting the regulation's goals. Sequoyah Fuels Corp. and General Atomics (Gore, OK, Site), CLI-97-13, 46 NRC 195, 221 (1997).

## 6.25.12 Inspections and Investigations

The Commission has both the duty and the authority to make such investigations and inspections as it deems necessary to protect the public health and safety. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 374 (1978), aff'd, ALAB-527, 9 NRC 126 (1979).

Because the atomic energy industry is a pervasively regulated industry, lawful inspections of licensee's activities are within the warrantless search exception for a "closely regulated industry" delineated by the Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). A licensee's submission to all applicable NRC regulations constitutes advance consent to lawful inspections; a search warrant is not required for such inspections. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 377 (1978), aff'd, ALAB-527, 9 NRC 126 (1979); Radiation Technology, Inc., ALAB-567, 10 NRC 533, 540 (1979); U.S. v. Radiation Technology, Inc., 519 F.Supp. 1266, 1288 (D.N.J. 1981).

Proposed investigation of the discharge by a licensee's contractor of a worker who reported alleged construction problems to the NRC was within the NRC's statutory and regulatory authority to assure public health and safety. The Commission should not defer such an inquiry into the discharge of a worker under a proper exercise of its authority to investigate safety related matters merely because such investigation may touch on matters that are the subject of a grievance proceeding between the licensee and the worker. Union Electric Co. (Callaway Plant, Units 1 & 2), LBP-78-31, 8 NRC 366, 376-78 (1978), aff'd, ALAB-527, 9 NRC 126 (1979).

An agency investigation must be conducted for a legitimate purpose. However, section 161c of the AEA, 42 USC § 2201(c), does not require that the precise nature and extent of the investigation be articulated in a specific provision of the AEA or the Energy Reorganization Act. Rather, the AEA § 161c makes clear that an NRC investigation is proper if it "assist[s] [the NRC] in exercising any authority provided in this, . . . or any regulations or orders issued thereunder." U.S. v. Construction Products Research, Inc., 73 F.3d 464, 471 (2nd Cir. 1996).

Inspections of licensed activities during company-scheduled working hours are reasonable per se. Commission inspections may not be limited to "office hours." In re Radiation Technology, Inc., ALAB-567, 10 NRC 533, 540 (1979); U.S. v. Radiation Technology, Inc., 519 F.Supp. 1266, 1288 (D.N.J. 1981).

The Executive Director of Operations is authorized by the Commission to issue subpoenas pursuant to Section 161c of the Atomic Energy Act where necessary or appropriate for the conduct of inspections or investigations. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-87-8, 26 NRC 6, 9 (1987).

The NRC Staff does inspect construction activities and reports. Where weaknesses or errors which substantially affect safety are detected, the Staff requires the applicant to take appropriate action. Deliberate or careless failure of applicants to adhere to the program is the basis for the imposition of penalties. Illinois Power Co. (Clinton Power Station, Unit 1), LBP-82-103, 16 NRC 1603, 1614 (1982).

### 6.25.13 False Statements

The Commission depends on licensees and applicants for accurate information to assist the Commission in carrying out its regulatory responsibilities and expects nothing less than full candor from licensees and applicants. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427 (1993).

The penalties that flow from making a false statement to a presiding officer and the NRC staff, including the possibility of criminal violations under 18 U.S.C. § 1001 and agency enforcement actions, can be sufficient to ensure compliance without the additional step of incorporating into a decision a list of commitments that an applicant has clearly acknowledged it accepts and will fulfill. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 410 (2000), citing Florida Power and Light Co. (Turkey Point Nuclear Generating Plants, Units 3 and 4), ALAB-898, 28 NRC 36, 41 n.20 (1988) (holding that there was no need to incorporate applicant commitment in order given potential Staff enforcement).

### 6.25.14 Independence of Inspector General

Congress enacted the Inspector General Act of 1978 in order "to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of ... departments and agencies." NRC v. Federal Labor Relations Authority, 25 F.3d 229, 233 (4th Cir. 1994), citing S. Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 USSCAN 2676. One of the most important goals of the Inspector General Act was to make Inspectors General independent enough that their investigations and audits would be wholly unbiased. The bulk of the Inspector General Act's provisions are accordingly devoted to establishing the independence of the Inspectors General from the agencies that they oversee. Thus, shielded with independence from agency interference, the Inspector General in each agency is entrusted with the responsibility of auditing and investigating the agency, a function which may be exercised in the judgment of the Inspector General as each deems it "necessary or desirable." 5 U.S.C. App. 3 § 6(a)(2). NRC v. Federal Labor Relations Authority, 25 F.3d at 234.

To allow the agency and the union, which represents the agency's employees, to bargain over restrictions that would apply in the course of the Inspector General's investigatory interviews in the agency would impinge on the statutory independence of the Inspector General, particularly when it is recognized that investigations within the agency are conducted solely by the Office of the Inspector General. NRC v. Federal Labor Relations Authority, 25 F.3d 229, 234 (4th Cir. 1994).

## 6.26 Stay of Agency Licensing Action - Informal Hearings

As 10 CFR § 2.1205(l) makes clear, for a requested materials (or reactor operator) licensing action that is subject to challenge in a Subpart L informal adjudication, the pendency of a hearing request, or an ongoing proceeding, does not preclude the staff (acting under its general authority delegated by the Commission) from granting a requested licensing action effective immediately. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 225, 261 (1992). Section 10 CFR 2.1263 provides that if a requested licensing action is approved and is made effective immediately by the Staff, then any participant in an ongoing informal adjudication concerning that action

can request that the presiding officer stay the effectiveness of the licensing action. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 225, 261 (1992).

Applications for stay of staff's licensing action are governed by the stay criteria in § 2.788. The participants should use affidavits to support any factual presentations that may be subject to dispute. See 10 CFR § 2.788(a)(3). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 262-63 (1992).

Because no one of the four stay criteria, of itself, is dispositive, the strength or weakness of a movant's showing on a particular factor will determine how strong its showing must be on the other factors. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). However, the second stay factor -- irreparable injury -- is so central that failing to demonstrate irreparable injury requires that the movant make a particularly strong showing relative to the other factors. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 260 (1990). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 263 (1992).

A movant's reliance upon a listing of areas of concern in its hearing petition, along with the otherwise unexplained assertion that it expects to prevail on those issues, is inadequate to meet its burden under the first stay criteria to establish a likelihood of success on the merits. See Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 270 (1990). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 264 (1992).

Further, a movant's failure to make an adequate showing relative to the first two stay criteria makes an extensive analysis of the third and fourth factors unnecessary. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 266 (1992).

As applicant's showing regarding extensive additional financial expenditures it must make if a stay is granted is a relevant consideration under the third stay criterion -- harm to other parties. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985). Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 267 (1992).

**6.27 [Reserved]**

**6.28 Technical Specifications**

10 CFR § 50.36 specifies, inter alia, that each operating license will include technical specifications to be derived from the analysis and evaluation included in the safety analysis report, and amendments thereto, and may also include such additional technical specifications as the Commission finds appropriate. The regulation sets forth with particularity the types of items to be included in technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 351 (2001). Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 272 (1979). The policy of the Commission "is to reserve technical specifications for the most significant

safety requirements", as outlined in 10 C.F.R. § 50.36. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-1, 55 NRC 1, 3 (2002).

There is neither a statutory nor a regulatory requirement that every operational detail set forth in an application's safety analysis report (or equivalent) be subject to a technical specification to be included in the license as an absolute condition of operation which is legally binding upon the licensee unless and until changed with specific Commission approval. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 360 (2001). Technical specifications are reserved for those matters where the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety. Trojan, supra, 9 NRC at 273; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-831, 23 NRC 62, 65-66 & n.8 (1986) (fire protection program need not be included in technical specification).

Originally, 10 C.F.R. § 50.36 contained no well defined criteria specifically describing the required contents of the technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 351 (2001). After 10 C.F.R. 50.36 was issued, the amount of items listed in the technical specifications greatly increased. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 352 (2001). The NRC revised section 50.36 so that it identifies criteria to be used in deciding what should be included in the technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 352 (2001). If a requirement meets one of the criteria, it must be retained in the technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 352 (2001). If it does not meet any of the criteria, it may be transferred to licensee-controlled documents. The agency policy is to limit technical specifications to focus licensee and plant operator attention on the most significant technical concerns. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 352 (2001). NRC "generic letters" issued to licensees identify particular items deemed amenable to removal from the technical specifications. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 352 (2001).

Relative to technical specification conditions for power reactor licenses, the Appeal Board has observed: "technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 409 (2000), citing Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979). While this suggests that the threshold for imposing a technical license condition is not insignificant, in other contexts, in particular financial matters, Commission rulings indicate that the threshold may be somewhat lower. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 32 (adopting as ISFSI license conditions PFS financial qualification commitments made during the licensing process); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308-09 (1997) (adopting as enrichment facility license conditions financial qualification commitments made in licensing proceedings).

Technical specifications for a nuclear facility are part of the operating license for the facility and are legally binding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1257 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 272-73 (1979).

## 6.29 Termination of Facility Licenses

Termination of facility licenses is covered generally in 10 CFR § 50.82.

In a proceeding concerning the adequacy of an License Termination Plan (LTP), the scope of admissible contentions in the proceeding is coextensive with the scope of the LTP itself, which is governed by the requirements of 10 C.F.R. § 50.82. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-99-14, 49 NRC 238, 239 (1999).

The Commission considers the license termination plan (LTP) significant enough to require the LTP to be treated as a license amendment, complete with a hearing opportunity. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1988).

A site characterization in a license termination plan (LTP) must contain a description of the essential character or quality of the plant site. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 59 (2001).

A showing of a violation of 10 C.F.R. § 50.82(a)(9)-- which contains the words, "[t]he [license termination plan] must include" - could constitute a significant indication of a possible of 10 C.F.R. § 50.82(a)(10); if a site characterization as required under section 50.82(a)(9)(ii)(A) is shown to be inadequate, then areas not covered by the site characterization might be omitted or given inadequate attention in cleanup efforts and in the final status survey, which could in turn be an indication that the LTP has not "demonstrate[d]" that the remainder of the decommissioning activitites [1] will be performed in accordance with the regulations in this chapter, [2] will not be inimical to the common defense and security or to the health and safety of the public and [3] will not have a significant effect on the quality of the environment," under section 50.82(a)(10). Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 66-67 (2001).

Spent fuel management is outside the scope of a license termination proceeding, which is confined to a review of the matters specified in 10 C.F.R. § 50.82(a)(9) and (10). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1988).

## 6.30 Procedures in Other Types of Hearings

### 6.30.1 Military or Foreign Affairs Functions

Under the Administrative Procedure Act, 5 U.S.C. § 554(a) (4), and the Commission's Rules of Practice, 10 CFR § 2.700a, procedures other than those for formal evidentiary hearings may be fashioned when an adjudication involves the conduct of military or foreign affairs functions. Nuclear Fuel Services, Inc. (Erwin, Tennessee), CLI-80-27, 11 NRC 799, 802 (1980).

### 6.30.2 Export Licensing

Individual fuel exports are not major Federal actions. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-15, 11 NRC 672 (1980). (Also see Section 3.4.6)

Commission regulations provide in 10 CFR § 110.82(c)(2) that hearing requests on applications to export nuclear fuel are to be filed within 15 days after the application is placed in the Commission's Public Document Room. Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 327 (1994).

United States nonproliferation policy, as set forth in the Nuclear Non-Proliferation Act of 1978 (NNPA) requires the NRC to act in a timely manner on export license applications to countries that meet U.S. non-proliferation requirements. Because Congress viewed timely action on export license applications as fundamental to achieving the nonproliferation goals underlying the NNPA, the Commission is reluctant to grant late hearing requests on export license applications. Because timely action on export licenses supports U.S. nuclear non-proliferation goals under the NNPA, it is particularly important that petitioners in this context demonstrate that the pertinent factors weigh in favor of granting an untimely petition. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 328 (1994).

Under 10 CFR § 110.84(c), untimely hearing requests may be denied unless good cause for failure to file on time is established. In reviewing untimely requests, the Commission will also consider: 1) the availability of other means by which the petitioner's interest, if any, will be protected or represented by other participants in a hearing; and 2) the extent to which the issues will be broadened or action on the application delayed. The potential for delay of action on an export license application is an important factor in the Commission's analysis of a late-filed petition on such applications, in light of the NNPA's directive for timely decisions on export license applications. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 328 (1994).

The first and principal test for late intervention is whether a petitioner has demonstrated "good cause" for filing late. In addressing the good-cause factor, a petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible. Lacking a demonstration of "good cause" for lateness, a petitioner is bound to make a compelling showing that the remaining factors nevertheless weigh in favor of granting the late intervention and hearing request. The fact that no one will represent a petitioner's perspective if its hearing request is denied is in itself sufficient for the Commission to excuse the untimeliness of the request. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994). Also, in the absence of evidence that a hearing would generate significant new information or analyses, a public hearing would be inconsistent with the Nuclear Non-Proliferation Act. CLI-94-7 at 334.

### 6.30.2.1 Jurisdiction of Commission re Export Licensing

The Commission is neither required nor precluded by the Atomic Energy Act or NEPA from considering impacts of exports on the global commons. Provided that NRC review does not include visiting sites within the recipient nation to gather information or otherwise intrude upon the sovereignty of a foreign nation, consideration of impacts upon the global commons is legally permissible. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 637-644 (1980). The Commission's legislative mandate neither compels nor precludes examination of health, safety and environmental effects occurring abroad that could affect U.S. interests. The decision whether to examine these effects is a question of policy to be decided as a matter of agency discretion. CLI-80-14, 11 NRC at 654.

As a matter of policy, the Commission has determined not to conduct such reviews in export licensing decisions primarily because no matter how thorough the NRC review, the Commission still would not be in a position to determine that the reactor could be operated safely. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 648 (1980).

The Commission lacks legal authority under AEA, NEPA and NNPA to consider health, safety and environmental impacts upon citizens of recipient nations because of the traditional rule of domestic U.S. law that Federal statutes apply only to conduct within, or having effect within, the territory of the U.S. unless the contrary is clearly indicated in the statute. Id., 11 NRC at 637. See also General Electric Co. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 71 (1981).

The alleged undemocratic character of the Government of the Philippines does not relate to health, safety, environmental and non-proliferation responsibilities of the Commission and are beyond the scope of the Commission's jurisdiction. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 656 (1980).

### 6.30.2.2 Export License Criteria

The Atomic Energy Act of 1954, as amended by the Nuclear Nonproliferation Act, provides that the Commission may not issue a license authorizing the export of a reactor, unless it finds, based on a reasonable judgment of the assurances provided, that the criteria set forth in §§ 127 and 128 of the AEA are met. The Commission must also determine that the export would not be inimical to the common defense and security or health and safety of the public and would be pursuant to an Agreement for Cooperation. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 652 (1980).

The Commission may not issue a license for component exports unless it determines that the three specific criteria in 109(b) of AEA are met and also determines that the export won't be inimical to common defense. Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 654 (1980).

The NRC may properly rely on the conclusions of the Executive Branch regarding the common defense and security requirements of section 126 of the AEA (regarding

export licensing procedures). Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-00-16, 52 NRC 68, 77 (2000).

#### 6.30.2.3 HEU Export License-Atomic Energy Act

Diplomatic notes containing a foreign government's assurance that it will use LEU targets when such targets become available, provided that their use does not result in a large percentage increase in the total cost of operating the pertinent reactor, constitute assurance sufficient to satisfy AEA section 134a(2), 42 USC 2160d. That provision requires that the proposed recipient of HEU provide assurance that, whenever an alternative nuclear reactor target can be used in that reactor, it will use that alternative in lieu of HEU. Transnuclear, Inc. (Export of Enriched Uranium), CLI-99-20, 49 NRC 469, 473 (1999).

The requirement under AEA section 134a(3) of an active program for the development of an LEU target that can be used in the particular reactor to which the HEU exports are being made is satisfied where the Commission finds that the principals have executed a confidentially agreement to enable the principals to forward technical information that would enable a feasibility study to be completed, and have provided information pursuant to that agreement. Transnuclear, Inc. (Export of Enriched Uranium), CLI-99-20, 49 NRC 469, 473 (1999).

### 6.30.3 High-Level Waste Licensing

There is no legal requirement for a notice-and-comment rulemaking proceeding concerning the Commission's statutory concurrence in the Department of Energy's General Guidelines for Recommendation of Sites for Nuclear Waste Repositories, pursuant to Section 112(a) of the Nuclear Waste Policy Act of 1982. NRC Concurrence in High-Level Waste Repository Safety Guidelines Under Nuclear Waste Policy Act of 1982, CLI-83-26, 18 NRC 1139, 1140 (1983).

The procedures for the conduct of the adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are specified in Subpart J of 10 C.F.R. Part 2 (10 C.F.R. §§ 2.1000 - 2.1023). These procedures take precedence over the rules of general applicability in 10 C.F.R. Part 2, Subpart G, although 10 C.F.R. § 2.1000 specifies many of the rules of general applicability which will continue to apply to high-level waste licensing proceedings.

Subpart J provides procedures for the development and operation of the Licensing Support Network (LSN), an electronic information management system, that will make documentary material relevant to the proceeding electronically available to the participants. See Digest ¶2.11.7, Discovery in High-Level Waste Licensing Proceedings. Because many of the features of the system contemplated under the original 1988 rule no longer provide optimal approaches to electronic information management, the Commission adopted a revised approach to the LSN in a rulemaking published at 63 Fed. Reg. 71729 (Dec. 30, 1998).

### 6.30.4 Low-Level Waste Disposal

Faced with a looming shortage of disposal sites for low-level radioactive waste in 31 States, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985, which, among other things, imposes upon States, either alone or in "regional compacts" with other States, the obligation to provide for the disposal of waste generated within their borders, and contains three provisions setting forth "incentives" to States to comply with that obligation. The three incentives are: (1) the monetary incentives; (2) the access incentives; and (3) the "take title" provision.

Because the Act's take title provision offers the States a "choice" between two unconstitutionally coercive alternatives--either accepting ownership of waste or regulating according to Congress' instructions--the provision lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment. On the one hand, either forcing the transfer of waste from generators to the States or requiring the States to become liable for the generators' damages would "commandeer" States into the service of federal regulatory purposes. On the other hand, requiring the States to regulate pursuant to Congress' direction would present a simple unconstitutional command to implement legislation enacted by Congress. Thus, the States' "choice" is no choice at all. New York v. U.S., 505 U.S. 144, 176-77 (1992).

The take title provision is severable from the rest of the Act, since severance will not prevent the operation of the rest of the Act or defeat its purpose of encouraging the States to attain local or regional self-sufficiency in low-level radioactive waste disposal. New York v. U.S., 505 U.S. 144, 186-87 (1992).

### 6.30.5 [Reserved]

### 6.30.6 Certification of Gaseous Diffusion Plants

Individuals who wish to petition for review of an initial Director's decision must explain how their "interest may be affected." 10 C.F.R. § 76.62(c). For guidance, petitioners may look to the Commission's adjudicatory decisions on standing. U.S. Enrichment Corp. (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 272 (2001); U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 234, 236 (1996).

An analysis of potential accidents and consequences is required by 10 C.F.R. § 76.85 and should include plant operating history that is relevant to the potential impacts of accidents. U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 245-46 (1996).

By rejecting a petition for review pursuant to 10 C.F.R. § 76.62(c), the Commission allows a Director's decision to become final. U.S. Enrichment Corp. (Paducah, KY), CLI-98-2, 47 NRC 57 (1998).

To be eligible to petition for review of a Director's decision on the certification of a gaseous diffusion plant, an interested party must have either submitted written comments in response to a prior Federal Register notice, or provided oral comments at an NRC meeting held on the application or compliance plan. 10 C.F.R. § 76.62(c). U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-10, 44 NRC

114, 117 (1996); U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 233-34 (1996).

10 CFR Part 76 contemplates a Commission decision on petitions for review of certification decisions within a relatively short (60-day) time period. See 10 C.F.R. § 76.62(c). Extending the Part 76 petition deadline in the absence of a strong reason is not compatible with the contemplated review period. U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-10, 44 NRC 114, 118 (1996).

Pursuant to 10 C.F.R. § 76.45(d), "any person whose interest may be effected," may file a petition requesting the Director of the Office of Nuclear Materials Safety and Safeguards (NMSS) review NRC Staff determinations made on an application for amendment to a certification of a GDP. U.S. Enrichment Corp. (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 271-72 (2001). Pursuant to 10 C.F.R. § 76.54(e), "any person whose interest may be affected and who filed a petition for review or filed a response to a petition for review under § 76.54(d), may file a petition requesting the Commission's review of a Director's decision. U.S. Enrichment Corp. (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 271-72 (2001).

### 6.30.7 Senior Operator License Proceedings

The NRC Staff's policy states that an applicant must score "at least" an 80% on the written exam to pass. The Commission declines to accept a Presiding Officer procedure of rounding up lower scores and declares the practice "impermissible." Ralph L. Tetrick (Denial of Application for Reactor Operator License), CLI-97-10, 46 NRC 26, 32 (1997).

"A presiding officer properly can look to NUREG-1021, "Operator Licensing Examination Standards for Power Reactors" (Interim Rev. 8, Jan. 1997), as an important source in assessing whether the Staff has strayed too far afield of the stated twin goals of 'equitable and consistent' examination administration." Michel A. Phillippon (Denial of Senior Reactor Operator License), LBP-99-44, 50 NRC 347, 358 (1999), quoting Frank J. Calabrese, Jr. (Denial of Senior Reactor Operator License), LBP-97-16, 46 NRC 66, 86 (1997).

### 6.30.8 Subpart K Proceedings

Under 10 C.F.R. § 2.786(b)(4)(1), the Commission will grant a petition for review if the petition raises a "substantial question" whether a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding. The general reviewability standards set out in 10 C.F.R. § 2.786 apply to subpart K by virtue of 10 C.F.R. § 2.1117, which makes the general Subpart G rules applicable "except where inconsistent" with Subpart K. Subpart K has no reviewability rules of its own. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27, n. 6 (2001).

Under 10 C.F.R. § 2.1115(b), a two-part test is used to determine whether a full evidentiary hearing is warranted on a contention in a 10 C.F.R., Part 2, Subpart K proceeding: (1) There must be a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and (2) the decision of the Commission is likely to depend in

whole or in part on the resolution of that dispute. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 26 (2001). The criteria of 10 C.F.R. § 2.1115(b), for determining whether a full evidentiary hearing is warranted are strict and are designed to ensure that the hearing is focused exclusively on real issues. They are similar to the standards for determining whether summary disposition is warranted. They go further in requiring a finding that adjudication is necessary to resolution of the dispute and in placing the burden of demonstrating the existence of a genuine and substantial dispute of material fact on the party requesting adjudication. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 26, n.5 (2001).

In a 10 C.F.R. Part 2, Subpart K proceeding, general allegations are insufficient to trigger an evidentiary hearing. Factual allegations must be supported by experts or documents to demonstrate that an evidentiary hearing is warranted. The applicant cannot be required to prove that uncertain future events could never happen. Although the ultimate burden of persuasion is on the license applicant, the proponent of a contention has the initial burden of coming forward with factual issues, not merely conclusory statements and vague allegations. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001).

"Proceedings subject to 10 C.F.R. Part 2, Subpart K . . . are expected to be conducted with a view toward expedited completion." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-01-29, 54 NRC 223, 227 (2001), citing Statement of Considerations, 10 C.F.R. Part 2, Subpart K, 50 Fed. Reg. 41,662 (Oct. 15, 1985); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998); 63 Fed. Reg. 41,872 (Aug. 5, 1998). Therefore, any deferral of such proceedings should be founded upon significant public interest reasons. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-01-29, 54 NRC 223, 227 (2001).

## 6.31 License Transfer Proceedings

The Atomic Energy Act and NRC's own rules unquestionably confer to NRC the legal power to approve the indirect transfer of control over NRC operating licenses. Northeast Nuclear Energy Co.(Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129 (2000). See 42 U.S.C. § 2234; 10 CFR § 50.80(a).

On its face, section 184 not only broadly prohibits all manner of transfers, assignments, and disposals of NRC licenses, but also all manner of actions that have the effect of, in any way, directly or indirectly, transferring actual or potential control over a license without the agency's knowledge and express written consent. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 451 (1995).

If the statutory proscription against the transfer of control of NRC licenses could be avoided by the expedience of a corporate restructuring, complex or otherwise, then section 184 would be a toothless tiger. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 454 (1995).

As long as section 184 and any other regulation or license condition is not violated, a material licensee may transfer its assets without notifying and obtaining the agency's permission. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal

Denials), LBP-95-9, 41 NRC 412, 456 (1995). When the transfer of control of NRC licenses is involved, section 184 requires the agency's express written consent, not just that the agency be notified. Id.

The language of the Atomic Energy Act itself demonstrates that Congress placed no importance on the corporate form in enacting section 184. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 456 (1995).

The inclusion of a "corporation" in the definition of a "person" in section 11s of the Atomic Energy Act and the use of the latter term in the inalienability of licenses provision in section 184 indicates that Congress intended a corporation to be treated in the same manner as all other entities. Corporate law principles, which are applicable only to the corporate from of organization, are entitled to no consideration under section 184 and do not thwart NRC regulatory jurisdiction over a corporation for violating that provision. It long has been established that the fiction of corporate separateness of state-chartered corporations will not be permitted to frustrate the policies of a federal statute. Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 457 (1995).

The statutory frustration principle permits the NRC to disregard the corporate form and impose liability on the parent corporation shareholder for the obligations of its subsidiary. And, this is true whether or not its intent was to avoid the statutory prohibition of section 184 for "intention is not controlling when the fiction of corporate entity defeats a legislative purpose." Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 458 (1995), quoting Kavanaugh v. Ford Motor Co., 353 F.2d 710, 717 (7th Cir. 1965).

A hearing on the transfer of a license need not be a pre-effectiveness or prior hearing. Atomic Energy Act § 189a(1); 42 U.S.C. § 2239. The NRC has strictly construed 189a(1). Although this section mentions numerous actions for which hearings shall be granted if requested by an interested person, the discussion of pre-effectiveness hearings mentions only four of these actions for which a prior hearing is required. A transfer of control is not one of these four actions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 76-77 (1992).

The Commission's rules for the license transfer at 10 C.F.R. Part 2, Subpart M, set out two possible avenues to address issues that may arise from license transfer applications: written comments or an oral hearing. Duquesne Light Co., Firstenergy Nuclear Operating Co., and Pennsylvania Power Co. (Beaver Valley Power Station, Units 1 & 2), CLI-99-23, 50 NRC 21, 22 (1999).

When a license is transferred, the new licensee is subject to both the terms of the license and the applicable sections of Part 40. Moab Mill Reclamation Trust (Atlas Mill Site), CLI-00-7, 51 NRC 216, 224 (2000).

### 6.31.1 Subpart M Procedures

Subpart M to 10 CFR Part 2 is intended to apply in all license transfer proceedings unless the Commission directed otherwise in a case specific order. Moab Mill Reclamation Trust (Atlas Mill Site), CLI-00-7, 51 NRC 216, 221-22 (2000).

A "suggestion" that formal, trial-type Subpart G procedures be substituted for Subpart M procedures is merely a "poorly disguised effort to sidestep the regulatory prohibition" for waiver of Subpart M regulations. The Commission's rules only specify one ground on which a party may seek waiver of any (or all) of Subpart M's regulations -- "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." See 10 C.F.R. § 2.1329(b); Niagara Mohawk Power Corp., et. al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 345 (1999).

Motions for a Subpart G proceeding are expressly prohibited in Subpart M proceedings, pursuant to 10 CFR § 2.1322(d). Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 290 (2000), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 335 (2002). Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 130 (2001). However, 10 CFR § 2.1329 provides for waiver of the rules under "special Circumstances" that demonstrate that the "application if a rule or regulation would not serve the purposes for which it was adopted." Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 130 (2001). Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 290 (2000). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 335 (2002).

The interpretation of Subpart M as dealing only with financial matters is overly restrictive and does not meet the requisite "special circumstances" for a waiver of the rules. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 290 (2000).

Subpart M calls for "specificity" in pleadings. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), n.23, citing, Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 131-32 (2000). However, where critical information has been submitted to the NRC under a claim of confidentiality and was not available to the petitioners when framing their issues, the Commission has deemed it appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000).

Specific pleadings are required in license transfer hearings. Neither "notice pleading," nor "the filing of a vague, unparticularlized issue," nor the submission of "general assertions or conclusions," suffices to trigger a license transfer hearing. Northeast Nuclear Energy Co., et. al. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132 (2000), (citing GPU Nuclear Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000); Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000)).

These standards do not allow "mere notice pleading"; the Commission will not accept "the filing of a vague, unparticularized" issue, unsupported by alleged fact or expert opinion and documentary support. General assertions or conclusions will not suffice. However the threshold admissibility requirements should not be turned into a fortress to deny intervention. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 295 (2000). An individual license transfer adjudication is not an appropriate forum for a legislative-like inquiry into issues affecting the entire nuclear industry. Id. at 296.

In the NRC's Subpart M rulemaking, which established the agency's current license transfer hearing process, the Commission expressed a willingness to review labor-type issues to a limited extent. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 315 (2000), citing Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66.723 (Dec. 3, 1998). Overall, the Commission generally does not involve itself in the personnel decisions of licensees. "[T]he Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, NRC regulations and policy do not preclude a licensee from reducing or replacing potions of its staff." Id., quoting, Oyster Creek, CLI-00-6, 51 NRC at 214, and citing Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 170 n.1600 (2000).

The Commission's license transfer hearings under Subpart M are designed solely to adjudicate genuine health-and-safety disputes arising out of license transfers. The grant of hearings merely on the broad assertion that contentious labor relations forum, contrary to the Commission's statutory mission and at a significant cost in resources and effort. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 316 (2000).

**6.31.2 Standing in License Transfer Proceedings (Also see 2.10.4.1.4 Standing to Intervene in License Transfer Proceedings)**

For a petitioner to demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

(1) identify an interest in the proceeding by alleging a concrete and particularized injury (actual or threatened) that

(a) is fairly traceable to and may be affected by the challenged action,

(b) is likely to be redressed by a favorable decision, and

(c) lies arguably within the zone of interests protected by the governing statutes; and

(2) specify the facts pertaining to that interest.

Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000). See also 10 CFR §§ 2.3106, 2.1308; Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Power Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 (1999)); Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000), citing, 10 C.F.R. § 2.1306, 2.1308; Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 (1999).

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," i.e., it must demonstrate "standing." See AEA § 189(a), 42 U.S.C. § 2239(a). Pacific Gas and Electric Co. (Diablo

Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 335 (2002); Niagara Mohawk Power Corp., et. al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 340 (1999). The Commission's rules also require that a petition to intervene raise at least one admissible contention or issue. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 335 (2002); see 10 CFR § 2.1306. The standards for meeting these two requirements in reactor license transfer cases come both from our Subpart M procedural regulations and from judicial cases on standing. Niagara Mohawk Power Corp., et. al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 340 (1999).

In a license transfer case in which petitioners plausibly claim that deficiencies may result in a general safety risk affecting their persons or property, the petitioners have standing to seek a hearing on the merits of their arguments. Northern States Power Co. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000).

The standing of petitioners in a license transfer case, involving simply a change in corporate structure, is not affected by the same petitioners having been granted standing to intervene in a separate case which involved an addition to the physical facility. Northeast Nuclear Energy Co., et. al. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132 (2000) citing Texas Utilities Electric Co. (Comanche Park Steam Electronic Station, Unit 2), CLI-93-4, 37 NRC 156, 163 (1993).

Local government entities, such as school districts or townships, have standing to intervene in a license transfer case when the township is the locus of the power plant because it is in a position analogous to that of an individual living or working within a few miles of the plant. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 294-95 (2000).

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," i.e., it must demonstrate "standing." The Commission's rules for license transfer proceedings also require that a petition to intervene raise at least one admissible issue under 10 C.F.R. § 2.1306. An organization that seeks representational standing must demonstrate how at least one of its members may be affected by the licensing action, must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000), citing Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

The Commission has granted standing in license transfer proceedings to petitioners who raised similar assertions and who were authorized to represent members living or active quite close to the site. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293-94 (2000), citing Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163-64 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000); Northern States Power Co., (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent

Spent Fuel Storage Installation), CLI-00-14, 52 NRC 137, reconsid. denied, CLI-00-19, 52 NRC 135 (2000).

The Commission denied a state public utilities commission standing to represent the interests of electric consumers in a proceeding before the Commission when the state commission provided no facts or legal arguments suggesting that it represented citizens on nuclear safety issues. The Commission stated, "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." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 336 (2002).

Employees who work inside a nuclear power plant should ordinarily be accorded standing as long as the alleged injury is fairly traceable to the license transfer. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 294 (2000).

In a reactor license transfer proceeding, the threatened injury (i.e., the grant of the license transfer application) is fairly traceable to the challenged action because the alleged increase in risk associated with AmerGen taking over a majority interest in Unit 2 could not occur without Commission approval of the application. Similarly, this threatened injury can be redressed by a favorable decision because the Commission's denial of the application would prevent the indirect transfer of interest. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1) and Northeast Nuclear Energy Co. (Millstone Station, Unit 3), CLI-99-28, 50 NRC 257, 263 (1999). Cf. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 215 (1999).

"It is hard to conceive of an entity more entitled to claim standing in a license transfer case than a co-licensee whose costs may rise...as a result of an ill-funded license transfer. This kind of situation justifies standing based on the 'real-world consequences that conceivably could harm Petitioners and entitle them to a hearing.'" Niagara Mohawk Power Corp., et. al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 341 (1999), quoting North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 215 quoting Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 205 (1998); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1) and Northeast Nuclear Energy Co. (Millstone Station, Unit 3), CLI-99-27, 50 NRC 257, 262-63 (1999).

The standing of petitioners in a license transfer case, involving simply a change in corporate structure, is not affected by the same petitioners having standing to intervene in a separate case which involved an addition to the physical facility. Northeast Nuclear Energy Co., et. al. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129 (2000) (citing Texas Utilities Electric Co. (Comanche Peak Steam Electronic Station, Unit 2), CLI-93-4, 37 NRC 156, 163 (1993)).

### 6.31.3 Scope of License Transfer Proceedings

Under 10 C.F.R. § 2.1308, in order to demonstrate that issues are admissible under Subpart M, 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 and material 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,
(5) provide a concise statement of the alleged factor expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 338 (2002); Niagara Mohawk Power Corp., et. al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 342 (1999); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1) and Northeast Nuclear Energy Co. (Millstone Station, Unit 3), CLI-99-27, 50 NRC 257, 262-63 (1999); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 215 (1999). See generally Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-349; Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 295 (2000).

In order for issues to be admissible in licensing hearings under subpart M, assertions and conclusions must be supported by alleged fact, expert opinion, or documentary support. "Commission rules require articulation of detailed threshold issues to trigger an agency hearing. Vague unparticularized issues are impermissible". Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 338 (2002). Although generalized assertions or conclusions are not sufficient, the admissibility standards should not be used as an unfair barrier to intervention. Hydro Resources, Inc., CLI-00-12, 52 NRC 1, (2000) (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)). In a license transfer proceeding, a petitioner is entitled to a hearing if the petitioner has raised a genuine issue about the accuracy or plausibility of the applicant's cost and revenue projection submitted to satisfy financial qualification rules. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 220-21 (1999), cited in Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 176 (2000).

NRC's role in evaluation of transferee's financial qualifications is to decide whether the plan as proposed, including the [power sale agreement], will meet our financial qualifications regulations." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 340 (2002). "If an application lacks detail, a Petitioner may meet its pleading burden by providing 'plausible and adequately supported' claims that the data are either inaccurate or insufficient." Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 134 (2001); citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 213-214 (2000).

Pursuant to 10 C.F.R. § 2.1306, an intervention petitioner must "state facts or expert opinions supporting its position." Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 134 (2001). Where an application lacks detail, a petitioner may meet its pleading burden by providing "plausible and adequately supported" claims that the information in the application is either inaccurate or insufficient. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 134 (2001); citing

GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000).

Claims that a proposed license transfer is not in the public interest are too broad and vague to be considered in an NRC adjucation. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 149 (2001). The NRC's goal is to protect the public health and safety, not to make general judgments concerning public interest. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 149 (2001). Such determinations regarding public policy are best left to agencies charged with that mission, such as the Federal Energy Regulatory Commission and state public service commissions. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 149 (2001).

A license transfer proceeding is not a forum for a full review of all aspects of current plant operation. GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 213-214 (2000), cited in Northeast Nuclear Energy Co., et. al. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 133 (2000). Substantive questions related to plant operation, such as the necessity for future remediation, are outside the scope of a license transfer proceeding. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 145 (2001).

The question in indirect transfer cases is whether the proposed shift in ultimate corporate control will affect a licensee's existing financial and technical qualifications. See 65 Fed. Reg. at 18,381 (2000). The transfer applicants need provide only information bearing on the inquiry at hand, and not more extensive information that may be required in other contexts. Northeast Nuclear Energy Co., et. al. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 133 (2000). "A license transfer proceeding is not a forum for a full review of all aspects of current plant operation." GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000), cited in Northeast Nuclear Energy Co., et. al. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 133 (2000).

A petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings. Thus, general attacks on the agency's competence and regulations are not admissible issues in license transfer proceedings. Molycorp, Inc. (Washington, Pennsylvania, Temporary Storage of Decommissioning Wastes), LBP-00-24, 52 NRC 139 (2000). See also North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999).

The enforcement or revision of power purchase contracts entered into by private parties, subject to NRC regulatory authority, is not within the jurisdiction of the NRC, and is outside the scope of a license transfer proceeding. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 139 (2001).

A license transfer hearing is not the proper forum in which to conduct a full-scale health-and-safety review of a plant. Power Authority of the State of New York, et. al. (James

FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 311 (2000), quoting, Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 169 (2000), and citing, GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 213, 214 (2000). A petitioner may file a petition for Staff enforcement pursuant to10 C.F.R. § 2.206 if it is concerned about current safety issues, citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 169 n.14 (2000).

The NRC's responsibility in license transfer cases "is to protect the health and safety of the nuclear workforce and general population by ensuring the safe use of nuclear power. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 140 (2001). Issues that are not in conflict with Commission jurisdiction and are properly contested under a individual state's law, such as contractual matters, are issues for the state to handle, and should not be a part of an NRC license transfer proceeding. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 140 (2001).

Under 10 C.F.R. § 50.54(m), for key positions necessary to operate a plant safely, the Commission has regulations requiring specific staffing levels and qualifications. Other than those specific positions, the licensee has a responsibility to ensure that it has adequate staff to meet the Commission's regulatory requirements. If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then the agency can and will take the necessary enforcement action to ensure the public health and safety. However, so long as personnel decisions do not impose a risk to the public health and safety, NRC regulations and policy do not preclude a licensee from reducing or replacing portions of its staff. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 313 (2000), citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 209, 214 (2000). An intervenor's speculation about the likelihood of staff reductions is insufficient to trigger a hearing on this issue. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 313 (2000).

New licensees must meet all requirements of 10 C.F.R. § 50.47 and Appendix E to 10 C.F.R. Part 50 concerning emergency planning and preparedness. For the issue to be admissible at a license transfer hearing, the petitioner must allege with supporting facts that the new licensee is likely to violate the NRC's emergency planning rules. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 317 (2000).

A plant's proximity to various cities, towns, entertainment centers, and military facilities is not relevant to the question whether to approve the license transfer to that plant. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 317 (2000).

The Commission denied a petitioner's request to arrange for an independent analysis of plants' conditions based on "historical problems" in the NRC's Region I since such a inquiry would go considerably beyond the scope of the license transfer proceeding. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian

Point, Unit 3), CLI-00-22, 52 NRC 266, 318 (2000), citing, Vermont Yankee, CLI-00-20, 52 NRC at 171 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000); see Final Rule, Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

A petitioner's contentions regarding the overall performance of NRC's Region I office in overseeing a plant for which a license transfer was being considered were deemed to be far outside the scope of a license transfer proceeding. Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 171 (2000).

In a license transfer proceeding, the Commission held that where both petitioners have independently met the requirements for participation, the Presiding Officer may provisionally permit petitioners to adopt each other's issues early in the proceeding. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132 (2001). If the primary sponsor of a contention withdraws from the proceeding, the remaining petitioner must demonstrate that it can independently litigate the issue. If the petitioner can not make such a showing, the issue is subject to dismissal prior to hearing. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132 (2001). The Commission cautioned that it did not "give carte blanche approval of this practice of incorporation by reference, particularly in cases where it would have the effect of circumventing NRC-prescribed page limits or specificity requirements. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132-33 (2001). Incorporation should also be denied to parties who merely establish standing and then attempts to incorporate issues of other petitioners. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 133 (2001). Incorporation by reference would also be improper in cases where a petitioner has not independently established compliance with requirements for admission in its own pleadings by submitting at least one admissible contention. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 133 (2001).

### 6.31.3.1 Consideration of Financial Qualifications

Outside of the reactor context, it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable financial assurance, such as license conditions and other commitments. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 30 (2000) (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997)). In a license transfer proceeding, our financial qualifications rule is satisfied if the applicant provides a cost and revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs. GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206-08 (2000), cited in Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 176 (2000).

In a case of a license transfer where the new owner and the new operator of the nuclear power plant facility is not an electric utility, as defined in applicable regulations, the transferee must demonstrate its financial qualifications to own and/or operate the paint. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 129 (2001), citing 10 C.F.R. § 50.33.

Pursuant to 10 C.F.R. § 50.33(f)(2), applicants for a license transfer "shall submit estimates for total annual operating costs for each of the first five years of operation of the facility." The Commission has interpreted this rule as requiring "data for the first five 12-months periods after the proposed transfer. . . ." Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131 (2001). If the submissions are deemed sufficient, this alone is not grounds for rejecting the application. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131 (2001); citing Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 95-96 (1995), reconsideration denied, CLI-95-8, 41 NRC 386, 395 (1995). If the missing data concerning financial qualifications can easily be submitted for consideration at the adjudicatory hearing, the Presiding Officer need not reject the application. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131 (2001).

Where a petitioner raises a genuine issue about the accuracy or plausibility of an applicant's cost and revenue projections, the petitioner is entitled to a hearing. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 220-21 (1999), cited in Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 176 (2000).

The adequacy of a corporate parent's supplemental commitment is not material to our license transfer decision, absent a demonstrated shortfall in the revenue predictions required by 10 CFR § 50.33(f). GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 205 (2000), cited in Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 177 (2000).

Consideration of supplemental funding is not warranted where the applicant has not relied on supplemental funding as a basis for its financial qualifications. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 139 (2001).

In a license transfer proceeding, our financial qualifications rule is satisfied if the applicant provides a cost and revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs. GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206-08, cited in Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151 (2000). In determining the applicable financial requirements to be met by applicants in license transfer proceedings, the NRC does not need to examine site-specific conditions in calculating the cost of decommissioning. Our

decommissioning funding regulation, 10 CFR § 50.75(c), generically establishes the amount of decommissioning funds that must be set aside. Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-166 (2000).

Under 10 C.F.R. § 50.33(f)(2), the sufficiency vel non of the transferee's supplemental funding does not constitute grounds for a hearing; and the parent company guarantee is supplemental information and not material to the financial qualifications determination. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 299-300 (2000), citing Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 175 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 205 (2000).

Petitioner can challenge the transferee's cost and revenue projections if the challenge is based on sufficient facts, expert opinion, or documentary support. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), citing Oyster Creek, CLI-00-6, 5 NRC at 207-08.

The Commission does not require "absolute certainty" in financial forecasts. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), citing North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 20, 221-22. Challenges by interveners to financial qualifications "ultimately will prevail only if [they] can demonstrate relevant certainties significantly greater than those that usually cloud business outlooks." Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000), quoting Seabrook, CLI-99-6, 49 NRC at 222.

A petitioner's argument that the applicant must meet financial requirements in addition to those imposed by our regulations constitutes a demand for additional rules, but does not provide an adequate basis for a hearing. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 301 (2000), n. 24, citing Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 178 (2000).

### 6.31.3.2 Antitrust Considerations

The AEA does not require, and arguably does not allow, the Commission to conduct antitrust evaluations of license transfer applications. As a result, failure by the NRC to conduct an antitrust evaluation of a license transfer application does not constitute a Federal action warranting a NEPA review. Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168 (2000). See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1) CLI-99-19, 49 NRC 441 (1999); Final Rule, "Antitrust Review Authority: Clarification," 65 Fed. Reg. 44,649 (July 19, 2000). The fact that a particular license transfer may have antitrust implications does not remove it from the NEPA categorical exclusion. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266 (2000), quoting Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167-68 (2000).

The Commission no longer conducts antitrust reviews in license transfer proceedings. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 318 (2000), citing, Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 168, 174 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, Antitrust Review Authority; Clarification, 56 Fed. Reg. 44,649 (July 19, 2000).

NRC antitrust review of post-operating license transfers is unnecessary from both a legal and policy perspective. GPU Nuclear, Inc., et. al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 210 (2000). (responding to petitioner's concern that corporations may be "stretched too thin in their ability to operate a multitude of nuclear reactors").

### 6.31.3.3 Need for EIS Preparation

License transfers fall within a categorical exclusion for which EISs are not required, and the fact that a particular license transfer may have antitrust implications does not remove it from the categorical exclusion. Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167-168 (2000). See also 10 CFR § 51.22(c)(21).

The Commission may reject a petitioner's request for an EIS on the ground that the scope of the proceeding does not include the new owner's operation of the plant - but includes only the transfer of their operating licenses. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 309 (2000).

### 6.31.3.4 Concurrent Proceedings

Simultaneous litigation in multiple proceedings does not impose a "tremendous burden" upon parties in reactor license transfer proceedings sufficient to suspend the NRC proceedings, as such parties are frequently participants in proceedings concurrently conducted by other state and federal agencies. Niagara Mohawk Power Corp., et. al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 343 (1999). See also Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982), aff'd, City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-171, 7 AEC 37, 39 (1974).

The occurrence of concurrent proceedings before a state regulatory agency is not a sufficient ground for suspension of a reactor license transfer proceeding, when the state agency is reviewing a license transfer under a different statutory authority than the NRC (and its conclusion would therefore not be dispositive of issues before the NRC) and when an insufficient explanation of financial burden reduction on the parties has not been fully explained. Niagara Mohawk Power Corp., et. al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 344 (1999).

### 6.31.3.5 Decommissioning

Pursuant to 10 C.F.R. § 50.33(k)(1), a license transfer application must contain information pertaining to the adequacy of its funding for decommissioning of the facility. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 142 (2001). A reactor licensee must provide assurances that it has adequate resources to fund decommissioning by one of the methods described in 10 C.F.R. § 50.75(e). Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 142 (2001). The Commission has held that showing compliance with 10 C.F.R. § 50.75 demonstrates sufficient assurance of decommissioning funding. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 142 (2001); see also North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999).

The Commission's regulations regarding decommissioning funding are intended to minimize administrative effort and provide reasonable assurance that funds will be available to carry out decommissioning in a manner that protects public health and safety. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 143 (2001); citing Final Rule: "General Design Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,030 (June 27, 1988). The generic formulas set out in 10 C.F.R. § 50.75(c) fulfill the dual purpose of the rule. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 144 (2001).

"Price-Anderson indemnification agreements continue in effect even after plants have ceased permanent operation and are engaged in decommissioning. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300-01 (2000), citing, 10 C.F.R. § 140.92, and quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 175 (2000).

The Commission has accepted the question of whether the applicants' financial assurance arrangement is lawful under 10 C.F.R. § 50.75 as a genuine dispute of law and fact that is admissible at a hearing. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 302 (2000). Other issues which have been recognized as appropriate in a hearing on a license transfer are whether NRC approval of the transfers will deprive the Commission of authority to require the applicant to conduct remediation under decommissioning, and whether, under those circumstances, the applicant would no longer have access to the decommissioning trust for the remediation it would need to complete. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 307 (2000).

A petitioner's challenge to an applicant's use of the very decommissioning cost estimate methodology sanctioned by the Commission's rules amount to an impermissible collateral attack on 10 C.F.R. § 50.75. Power Authority of the State of

New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 303 (2000), citing 10 C.F.R. § 2.1329; Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-66 (2000).

The Commission does not have statutory authority to determine the recipient of excess decommissioning funds. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 305 (2000).

In addition, once the funds are in the decommissioning trust, withdrawals are limited by 10 C.F.R. § 50.82, so that "non-decommissioning" funds (as defined by the NRC) could be spent after the NRC-defined "decommissioning" work had been finished or committed. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 308 n.52 (2000).

The use of site-specific estimates were expressly rejected by the Commission in its decommissioning rulemaking, although the Commission did recognize that site-specific cost estimates may be prepared for rate regulators. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 144 (2001); citing Final Rule: "Financial Assurances Requirements for Decommissioning Nuclear Power Reactors," 63 Fed. Reg. 50,465, 50,469-69 (Sept. 22, 1998); Final Rule: "General Design Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,030 (June 27, 1988).

NRC regulations do not require a license transfer application to provide an estimate of the actual decommissioning and site cleanup costs. Instead the Commission's decommissioning funding regulation under 10 C.F.R. § 50.75(c) generically establishes the amount of decommissioning funds that must be set aside. A petitioner cannot challenge the regulation in a license transfer adjudication. The NRC's decommissioning funding rule reflects a deliberate decision not to require site-specific estimates in setting decommissioning funding levels. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 308 (2000), citing Northern States Power Co., (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, reconsid. denied, CLI-00-14, 52 NRC 37, 59 (2000).

The argument that decommissioning technology is still in an experimental stage is considered a collateral attack on 10 C.F.R. § 50.75(c) establishing the amount that must be set aside, and is thus invalid. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 309 (2000), quoting Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 167 n.9 (2000) and citing (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, reconsid. denied, CLI-00-14, 52 NRC 37, 59 (2000).

NRC regulations regarding decommissioning funding do not require the inclusion of costs related to nonradioactive structures or materials beyond those necessary to

terminate an NRC license. Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 145 (2001).

### 6.31.4 Motions for Stay/Suspension of Proceedings

When ruling on stay motion in a license transfer proceeding, the Commission applies the four pronged test set forth in 10 CFR § 2.1327(d):

> (1) Whether the requestor will be irreparably injured unless a stay is granted.
> (2) Whether the requestor has made a strong showing that it is unlikely to prevail on the merits.
> (3) Whether the granting of a stay would harm other participants; and
> (4) Where the public interest lies.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000).

A temporary suspension of a license transfer proceeding where several parties have not yet exercised their right of first refusal to buy out a co-owner's share of a reactor does not contravene the Commission's stated policy of expedition in Subpart M proceedings, because it would not be sensible to require the expenditure of both public and co-owner funds in a proceeding, part or all of which may well be rendered moot in the immediate future. See Final Rule, Streamlined Hearing Process for NRC approval of License Transfers, 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998) (Subpart M "procedures are designed to provide for public participation... while at the same time providing an efficient process that recognizes the time-sensitivity normally present in transfer cases.)" Niagara Mohawk Power Corp., et.al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 343 (1999).

The pendency of parallel proceedings before other forums is not an adequate ground to stay a license transfer adjudication. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 289 (2000), citing Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 343-44 (1999). But the parties should inform the Commission promptly of any court or administrative decision that might in any way relate to, or render moot, all or part of the proceeding. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 289 (2000).

When a number of arguments apply to the plants for which a request for a joint license transfer hearing was made, and the Commission's resources would be better spent by addressing these arguments only once, the Commission may grant the motion to consolidate the license transfer proceedings. Power Authority of the State of New York, et. al. (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 288 (2000).

## 6.32 Television and Still Camera Coverage of NRC Proceedings

Under current agency practice, any individual or organization may videotape a Commission-conducted open meeting so long as their activities do not disrupt the

proceeding. See U.S. Nuclear Regulatory Commission, "A Guide to Open Meetings," NUREG/BR-0128, Rev. 2 (4th ed.); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-14, 44 NRC 3, 5 (1996).

Videotaping of a Board proceeding must be done in a manner that does not present an unacceptable distraction to the participants or otherwise disrupt the proceeding. The Board may terminate videotaping at any time it determines a videotape-related activity is disruptive (i.e. interferes with the good order of the proceeding). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-14, 44 NRC 3, 6 (1996).

Anyone videotaping a proceeding held in the Atomic Safety and Licensing Board Panel Hearing Room must abide by the following conditions:

1. Cameras must remain stationary in the designated camera area of the Licensing Board Panel Room.
2. No additional lighting is permitted.
3. No additional microphones will be permitted outside of the designated camera area. A connection is available in the designated camera area that provides a direct feed from the hearing room audio system.

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-14, 44 NRC 3, 6 (1996).

As provided in the 1978 Commission policy statement, 43 Fed. Reg. 4294 (1978), when a Licensing Board is using other facilities, such as a state or federal courtroom, the Board generally will follow the camera policy governing that facility, even if it is stricter than the agency's camera policy. However, in order to prevent disruption of the proceeding and maintain an appropriate judicial atmosphere, the Board reserves the right to impose restrictions beyond those generally used at the facility. Yankee Atomic Electric Co., LBP-96-14, 44 NRC 3, 6 n.2 (1996).

## 6.33 National Historic Preservation Act Requirements

The National Historic Preservation Act contains no prohibition against a "phased review" of a property. Section 470(f) of that statute provides only that a federal agency shall, "prior to the issuance of any license. . . Take into account the effect of the undertaking on any disctrict, site, building, structure, or object that is included in or eligible for inclusion in the National Register." Nor does federal case law suggest any such prohibitions. The regulations implementing section 470(f) are ambiguous on the matter. Hydro Resources, Inc. (Albuquerque, NM), CLI-98-8, 47 NRC 314, 323 n.15 (1998); Hydro Resources, Inc., CLI-99-22, 50 NRC 3, 12 (1999).

Absent a clear Congressional statement, adjudicatory tribunals should not infer that Congress intended to alter equity practices such as the standards for reviewing stay requests. The National Historic Preservation Act contains no such clear congressional statement. Hydro Resources, Inc. (Albuquerque, NM), CLI-98-8, 47 NRC 314, 323 (1998).

## 6.34 Cultural Resources Plan

When intervenors fail to show deficiency in the staff's Cultural Resources Management Plan, their NEPA claims are without merit. Hydro Resources, Inc. (Albuquerque, NM), LBP-99-9, 49 NRC 136, 143-144 (1999).

## 6.35 Native American Graves Protection and Repatriation Act Requirements

Under the Native American Graves Protection and Repatriation Act (NAGPRA), consultation and concurrence of the affected tribe take place prior to the intentional removal from or excavation of Native American cultural items from federal or tribal lands. Where no intentional removal or excavation of cultural items is planned, the applicable regulatory provisions is 43 C.F.R. § 10.4, which applies to inadvertent discoveries of human remains, funeral objects, sacred objects, or objects of cultural patrimony. The regulations generally do not require prior consultation or concurrence with the affected tribe for unintentional activities. Hydro Resources, Inc., CLI-99-22, 50 NRC 3, 14-15 (1999).

## 6.36 Hybrid Procedures under Subpart K (Also see Section 6.16.9)

The procedures in Subpart K apply to contested proceedings on applications filed after January 7, 1983, for a license or license amendment under Part 50 of this chapter, to expand the spent fuel storage capacity at the site of a civilian nuclear power plant, through the use of high density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity or by other means. See 10 CFR § 2.1103.

The subpart K process empowers a licensing board to resolve fact questions, when it can do so accurately, at the abbreviated hearing stage. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

Subpart K establishes a two-part test to determine whether a full evidentiary hearing is warranted: (1) there must be a genuine and substantial dispute of fact "which can only be resolved with sufficient accuracy" by a further adjudicatory hearing; and (2) the Commission's decision "is likely to depend in whole or in part on the resolution of that dispute." See 10 C.F.R. § 2.1115(b). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

Subpart K derives from the NWPA, where Congress called on the Commission to "encourage and expedite" onsite spent fuel storage. See 42 U.S.C. § 10151(a)(2). To help accomplish this goal, the NWPA required the Commission, "at the request of any party," to employ an abbreviated hearing process -- i.e., discovery, written submissions, and oral agrument. See 42 U.S.C. § 10154. The NWPA authorized the Commission to convene additional "adjudicatory" hearings "only" where critical fact questions could not otherwise be answered "with sufficient accuracy." See 42 U.S.C. § 10154(b)(1)(A). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001).

In promulgating section 2.1115(b) of Subpart K, the Commission used the same test described in the Nuclear Waste Policy Act of 1983 ["NWPA"] at 42 U.S.C. § 10154(b)(1). The statutory criteria are quite strict and are designed to ensure that the hearing is focused

exclusively on real issues. They are similar to the standards under the Commission's existing rule for determining whether summary disposition is warranted. They go further, however, in requiring a finding that adjudication is necessary to resolution of the dispute and placing the burden of demonstrating the existence of a genuine and substantial dispute of material fact on the party requesting adjudication. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-84 (2001), quoting, Final Rule, Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors, 50 Fed. Reg. 41,662, 41,667 (Oct. 15, 1985).

It seems unlikely to us that Congress intended the Commission to enact Subpart K simply to replicate the NRC's existing summary disposition practice. Congress "cannot be presumed to do a futile thing." Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997). Accord Independent Insurance Agents of America, Inc. v. Hawke, 211 F.3d 638, 643 (D.C. Cir. 2000). Hence, Subpart K extends beyond the NRC's pre-existing summary disposition practice. Unlike summary disposition, which requires an additional evidentiary hearing whenever a licensing board finds, based on the papers filed, that there remains a genuine issue of material fact, Subpart K's procedure authorizes the board to resolve disputed facts based on the evidentiary record made in the abbreviated hearing, without convening a full evidentiary hearing, if the board can do so with "sufficient accuracy." Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384-85 (2001).

Subpart K directs the Board to "[dispose] of any issues of law or fact not designated for resolution in an adjudicatory hearing." See 10 C.F.R. § 21115(a)(2) (emphasis added). "Issues" are, by definition, points of debate or dispute. To "dispose" of issues, a board must resolve them. To move from Subpart K's abbreviated hearing stage to an additional evidentiary hearing, a licensing board must make a specific determination that issues "can only be resolved with sufficient accuracy" at such a hearing. See 10 C.F.R. § 2.1115(b)(1) (emphasis added). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370 (2001).

The Statement of Considerations for Subpart K reinforces the rule's text:

"The appropriate evidentiary weight to be given an expert's technical judgment will depend, for the most part, on the expert's testimony and professional qualifications. In some circumstances, it may be possible to make such a determination without the need for an adjudicatory hearing. The presiding officer must decide, based on the sworn testimony and sworn written submissions, whether the differing technical judgment gives rise to a genuine and substantial dispute of fact that must be resolved in an adjudicatory hearing." See 50 Fed. Reg. at 41,667 (1985). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 385 (2001).

The NWPA and our rule implementing it (Subpart K) contemplate merits rulings by licensing boards based on the parties' written submissions and oral arguments, except where a board expressly finds that "accuracy" demands a full-scale evidentiary hearing. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 385 (2001). Under 10 C.F.R. § 2.1115(b), a two-part test is used to determine whether a full evidentiary hearing is warranted on a contention in a 10 C.F.R., Part 2, Subpart K proceeding: (1) There must be a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and (2) the decision of the Commission is likely to depend in whole or in part on the resolution of that dispute. Northeast Nuclear Energy Co. (Millstone Nuclear

Power Station, Unit 3), CLI-01-3, 53 NRC 22, 26 (2001). The criteria of 10 C.F.R. § 2.1115(b), for determining whether a full evidentiary hearing is warranted are strict and are designed to ensure that the hearing is focused exclusively on real issues. They are similar to the standards for determining whether summary disposition is warranted. They go further in requiring a finding that adjudication is necessary to resolution of the dispute and in placing the burden of demonstrating the existence of a genuine and substantial dispute of material fact on the party requesting adjudication. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 26 (2001) n.5.

Licensing boards are fully capable of making fair and reasonable merits decisions on technical issues after receiving written submissions and hearing oral arguments. The Commission is a technically oriented administrative agency, an orientation that is reflected in the makeup of its licensing boards. Most licensing boards have two, and all have at least one, technically trained member. In Subpart K cases, licensing boards are expected to assess the appropriate evidentiary weight to be given competing experts' technical judgments, as reflected in their reports and affidavits. The inquiry is similar to that performed by presiding officers in materials licensing cases, where fact disputes normally are decided "on the papers," with no live evidentiary hearing. See, e.g., Hydro Resources, Inc., CLI-01-4, 53 NRC at 45; Curators of the University of Missouri, CLI-95-1, 41 NRC at 118-20. The NRC's administrative judges, in other words, and the Commission itself, are accustomed to resolving technical disputes without resort to in-person testimony. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 385-86 (2001).

There may be issues, such as those involving witness credibility, that cannot be resolved absent face-to-face observation and assessment of the witness. Or there may be issues involving expert or other testimony where key questions require follow-up and dialogue to be answered "with sufficient accuracy." In these kinds of cases, Subpart K contemplates further evidentiary hearings. Many issues, however, particularly those involving competing technical or expert presentations, frequently are amenable to resolution by a licensing board based on its evaluation of the thoroughness, sophistication, accuracy, and persuasiveness of the parties' submissions. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 (2001).

The Commssion generally will defer to licensing boards' judgment on when they will benefit from hearing live testimony and from direct questioning of experts or other witnesses. If a decision can be made judiciously on the basis of written submissions and oral argument, r boards are expected to follow the mandate of the NWPA and Subpart K to streamline spent fuel pool expansion proceedings by making the merits decision expeditiously, without additional evidentiary hearings. See 42 U.S.C. §§ 10151(a)(2), 10154. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 (2001).

The Commission is generally not inclined to upset the Board's fact-driven findings and conclusions, particularly where it has weighed the affidavits or submissions of technical experts. Where the Board analyzed the parties' technical submissions carefully, and made intricate and well-supported findings in a 42-page opinion. The Commission, on appeal, saw no basis to redo the Board's work. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 388 (2001).

The Commission saw no basis for upsetting the Board's probability estimate or its decision against a further evidentiary hearing. Even if a further evidentiary hearing were convened,

Intervenor apparently intends merely to reiterate its critique of the probabilistic risk assessment of others (the NRC Staff and the Licensee), but not to offer a fresh analysis of its own. Under these circumstances, scheduling a further hearing would serve only to delay the proceedings and increase the costs for all parties, in direct contravention of the NWPA. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 389 (2001).

In a 10 C.F.R. Part 2, Subpart K proceeding, general allegations are insufficient to trigger an evidentiary hearing. Factual allegations must be supported by experts or documents to demonstrate that an evidentiary hearing is warranted. The applicant cannot be required to prove that uncertain future events could never happen. Although the ultimate burden of persuasion is on the license applicant, the proponent of a contention has the initial burden of coming forward with factual issues, not merely conclusory statements and vague allegations. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001).

Under 10 C.F.R. § 2.786(b)(4)(1), the Commission will grant a petition for review if the petition raises a "substantial question" whether a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding. The general reviewability standards set out in 10 C.F.R. § 2.786 apply to subpart K by virtue of 10 C.F.R. § 2.1117, which makes the general Subpart G rules applicable "except where inconsistent" with Subpart K. Subpart K has no reviewability rules of its own. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001) n.6.

Once an intervenor crosses the admissibility threshold relative to its environmental contention, the ultimate burden in a subpart K proceeding then rests with the proponent of the NEPA document-the staff (and the applicant to the degree it becomes a proponent of the staff's EIS-related action) - to establish the validity of that determination on the question whether there is an EIS preparation trigger. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 249 (2001).

# CFR Index

# Statute Index

In using this index, check any indicated parallel citations for additional references.

AEA = Atomic Energy Act of 1954
FOIA = Freedom of Information Act
NEPA = National Environmental Policy Act

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# NRC KEY WORD INDEX

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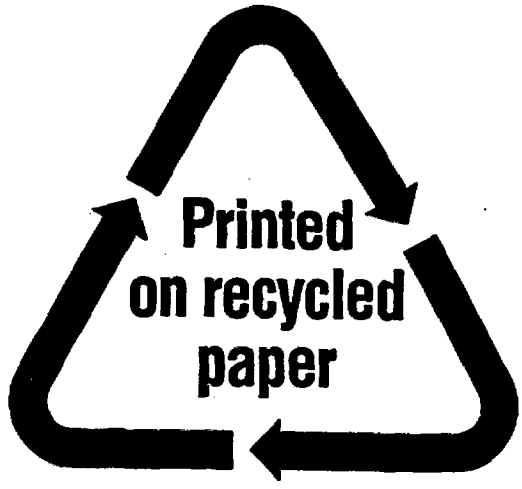


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