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United States Nuclear Regulatory Commission

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Digest 14

United States Nuclear Regulatory Commission Staff Practice and Procedure Digest

Commission, Appeal Board and Licensing Board Decisions

July 1972 – December 2006

Office of the General Counsel

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Digest 14

UNITED STATES
NUCLEAR REGULATORY COMMISSION STAFF
PRACTICE AND PROCEDURE DIGEST

Commission, Appeal Board and Licensing Board Decisions
July 1972 – December 2006

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UNITED STATES NUCLEAR REGULATORY COMMISSION

STAFF PRACTICE AND PROCEDURE DIGEST

(The January 2009 Update covers Commission, Appeal Board, and Licensing Board Decisions issued from July 1, 1972 through December 2006)

NOTE TO USERS

This is the fourteenth edition of the NRC Staff Practice and Procedure Digest. It contains a digest of significant decisions of the Commission, the Atomic Safety and Licensing Appeal Board Panel, and the Atomic Safety and Licensing Board Panel issued during the period from July 1, 1972 to December 2006), which interpret the NRC's Rules of Practice in 10 CFR Part 2. Although the Appeal Board Panel was abolished in 1991, Appeal Board precedent may still be cited, to the extent it is consistent with more recent case law and the current rules of practice. This edition of the Digest replaces the earlier editions and revisions and includes appropriate changes reflecting the amendments to the Rules of Practice effective through December 2006.

Users of the Digest should recall that the Commission adopted a comprehensive revision to its rules of practice in 2004. *See Changes to Adjudicatory Process*, 69 Fed. Reg. 2182 (Jan. 14, 2004), corrections issued 69 Fed. Reg. 25997 (May 11, 2004). Petitions for review challenging the new rules were denied in *Citizens Awareness, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004). Although our staff has worked diligently to conform the digest to the revised rules of practice, practitioners should ensure that precedent cited in the digest is consistent with the new rules. The NRC has created several tools to aid practitioners in understanding and applying the revised Part 2. These user tools can be found at the NRC Web site at http://www.nrc.gov/about-nrc/regulatory/adjudicatory/part2revisions.html. These tools are provided for informational purposes only and are not a replacement for the regulations in 10 CFR Part 2.

Practitioners should also be mindful of the adoption of two additional rulemakings that affect the Rules of Practice:

Use of Electronic Submissions in Agency Hearings: On August 28, 2007 (72 FR 49139), the NRC published an amendment, effective October 15, 2007, to require the use of electronic submissions in all agency hearings, consistent with the existing practice for the high-level radioactive waste repository application (which is covered under a separate set of regulations). The amendments require the electronic transmission of electronic documents in submissions made to the NRC's adjudicatory boards. Although exceptions to these requirements are established to allow paper filings in limited circumstances, the NRC maintains a strong preference for fully electronic filing and service. The final rule builds upon prior NRC rules and developments in the Federal courts regarding the use of electronic submissions.

Licenses, Certification and Approvals for Nuclear Power Plants: On August 28, 2007 (72 FR 49351), the NRC published an amendment to its regulations, effective September 27, 2007, to revise the provisions applicable to the licensing and approval processes for nuclear power plants (i.e., early site permit, standard design approval, standard design certification, combined license, and manufacturing license). These amendments clarify the applicability of various requirements to each of the licensing processes by making necessary conforming amendments throughout the NRC's regulations, including Part 2, to enhance the NRC's regulatory effectiveness and efficiency in implementing its licensing and approval processes.

The digest includes the text of several Commission policy statements bearing directly on adjudicatory practice. We have included the text of the Commission's 2008 Statement of Policy on Conduct of New Reactor Licensing Proceedings, CLI-08-07, 73 Fed. Reg. 20963 (April 17, 2008). Although this and other policy statements are important expressions of Commission policy on the conduct of adjudicatory proceedings, practitioners should be sure to follow the specific provisions of the rules of practice in 10 CFR Part 2.

This digest also includes as an Appendix a list of NRC adjudicatory decisions appealed to the courts in order to assist practitioners in tracking the case history for final NRC decisions. I appreciate the contribution of Roland Frye of the Office of Commission Appellate Adjudication who compiled the list.

The Digest is roughly structured in accordance with the chronological sequence of the nuclear facility licensing process as set forth in 10 CFR Part 2. Those decisions and subject matter which did not fit easily into that structure are dealt with in a section on "general matters." Where appropriate, particular decisions are indexed under more than one heading. Some topical headings contain no decision citations or discussion. It is anticipated that future updates to the Digest will utilize these headings.

Persons using this Digest are placed on notice that it may not be used as an authoritative citation in support of any positions before the Commission or any of its adjudicatory tribunals. Persons using this Digest are also placed on notice that it is intended for use only as an initial research tool; that it may, and likely does, contain errors; and that the user should not rely on the Digest's analyses and interpretations, but must read, analyze and rely on the user's own analysis of the cited Commission, Appeal Board and Licensing Board decisions. Neither the United States Nuclear Regulatory Commission, nor any of its employees, makes any expressed or implied warranty or assumes liability or responsibility for the accuracy, completeness or usefulness of any material presented in the Digest.

This current edition of the Digest was prepared by the staff of the Office of the General Counsel. I want to acknowledge particularly the contribution to this effort of OGC attorney Margaret Bupp, who guided this comprehensive revision of the digest. She was ably assisted by other attorneys on our staff, including James Adler, Jerry Bonanno, Michael Spencer, Steve Hamrick, Patrick Moulding, Jason Zorn and Carol Lazar. Theresa Mayberry, Joe Gilman and Brian Newell prepared the manuscript for publication. We hope that the Digest will prove to be as useful to the members of the public as it has been to the members of the Office of the General Counsel.

We hope to publish an update to the Digest within the next year. Users of the Digest are encouraged to provide us any comments or suggestions that would improve it usefulness. You may send comments, suggestions or corrections to my attention.

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March 2009

boards to use Federal or State court rooms when these facilities are available and in such cases the policy of those courts in regard to the use of cameras will be observed.

The Commission plans to reassess this policy in about six months after its hearing and appeal boards have had sufficient experience with camera coverage to determine whether it can be carried out without disruption to the proceeding or unacceptable distraction to the participants.

Dated at Washington, D.C., this 27th day of January 1978.

For the Nuclear Regulatory Commission.

SAMUEL J. CHIL,
Secretary of the Commission.

[FR Doc. 78-2893 Filed 1-31-78; 8:45 am]

590-01]

CAMERA COVERAGE OF HEARINGS BEFORE ATOMIC SAFETY AND LICENSING BOARDS AND ATOMIC SAFETY AND LICENSING APPEAL BOARDS

General Statement of Policy

The Nuclear Regulatory Commission has considered requests from television stations and newspapers to permit the use of cameras during proceedings before Atomic Safety and Licensing Boards and Atomic Safety and Licensing Appeal Boards. In the past the NRC has permitted cameras to be used only before and after adjudicatory sessions and during recesses. The Commission has decided that, on a trial basis, it will permit the use of television and still cameras by accredited news media under certain conditions. Cameras may be used by news media during hearings and related public proceedings before Atomic Safety and Licensing Boards and Atomic Safety and Licensing Appeal Boards provided they do not require additional lighting beyond that required for the conduct of the proceeding and are stationed at a fixed position within the hearing room throughout the course of the proceeding. It will continue to be the practice of the hearing and appeal

NUCLEAR REGULATORY COMMISSION

Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings

On August 5, 1983, the Commission set forth interim procedures for handling conflicts between the NRC's responsibility to disclose information to adjudicatory boards and parties, and the NRC's need to protect investigative material from premature public disclosure. "Statement of Policy—Investigations and Adjudicatory Proceedings," 48 FR 36358 (August 10, 1983).

Those interim procedures called for the NRC staff or Office of Investigations (OI), when it felt disclosure of information to an adjudicatory board was required but that unrestricted disclosure could compromise an inspection or investigation, to present the information and its concerns about disclosure to the board *in camera*, without disclosure of the substance of the information to the other parties. A board decision to disclose the information to the parties was appealable to the Commission, and the board was not to order disclosure until the Commission addressed the matter.

That Statement of Policy was to remain in effect until the Commission received and took action on the recommendations of an internal NRC task force established to develop guidelines for reconciling these conflicts in individual cases. The Commission in that Statement also requested public comments on the propriety and desirability of *ex parte in camera* presentation of information to a board, and suggestions for any better alternatives.

The Task Force submitted its report to the Commission on December 30, 1983. A copy of that report will be placed in the Commission's Public Document Room. The Task Force approved the principles discussed in the Commission's earlier Statement of Policy, and made several recommendations intended to define specifically the responsibilities of the boards, the staff, and OI in presenting disclosure issues for resolution.

The Task Force recommended that the final Policy Statement explain that full disclosure of material information to adjudicatory boards and the parties is the general rule, but that some conflicts between the duty to disclose and the need to protect information will be inevitable. The Task Force further recommended that issues regarding disclosure to the parties be initially determined by the adjudicatory boards with provision for expedited appellate review, and that procedures for the resolution of such conflicts be established by rule. Finally, the Task Force suggested that existing board notification procedures should remain unaffected by the Policy Statement, and that those procedures and Commission guidelines for disclosure of information concerning investigations and inspections should apply to all NRC offices. Those recommendations have been incorporated in this Statement.

In addition, two comments were submitted by members of the public.

One commenter stated that the withholding of information from public disclosure should be confined to the minimum essential to avoid compromising enforcement actions, and that appropriate representatives of each party should be allowed to participate under suitable protective orders in any *in camera* proceeding except in the most exceptional cases.

The other commenter maintained that an *in camera* presentation to the board with only one party present is undesirable and violates the *ex parte* rule. That commenter suggested an alternative of having the attorneys or authorized representatives of parties who have signed a protective agreement present at any *in camera* presentation, with appropriate sanctions for violating the protective agreement.[1]

The Commission, after considering these comments and the report of the Task Force, has decided that it would be appropriate, in order to better explain the Commission's policy in this area, to provide the following explanation of the conflict between the duty to disclose investigation or inspection information to the boards and parties and the need to protect that information:

All parties in NRC adjudicatory proceedings, including the NRC staff, have a duty to disclose to the boards and other parties all new information they acquire which is considered material and relevant to any issue in controversy in the proceeding. Such disclosure is required to allow full resolution of all issues in the proceeding. The Commission expects all NRC offices to utilize procedures which will assure prompt and appropriate action to fulfill this responsibility.

However, the Commission recognizes that there may be conflicts between this responsibility to provide the boards and parties with information and an investigating or inspecting office's need to avoid public disclosure for either or both of two reasons: (1) To avoid

[1] Both comments also included suggestions regarding matters beyond the scope of this Policy Statement, which is concerned only with establishing a procedure to handle conflicts between the duty to disclose information to the boards and parties and the need to protect that information. For instance, one suggestion was that the NRC impose a more stringent standard in deciding whether information warrants a board notification. Another recommended that the NRC improve the quality of its investigations.

compromising an ongoing investigation or inspection; and (2) to protect confidential sources. The importance of protecting information for either of these reasons can in appropriate circumstances be as great as the importance of disclosing the information to the boards and parties.

With regard to the first reason, avoiding compromise of an investigation or inspection, it is important to informed licensing decisions that NRC inspections and investigations are conducted so that all relevant information is gathered for appropriate evaluation. Release of investigative material to the subject of an investigation before the completion of the investigation could adversely affect the NRC's ability to complete that investigation fully and adequately. The subject, upon discoving what evidence the NRC had already acquired and the direction being taken by the NRC investigation, might attempt to alter or limit the direction or the nature or availability of further statements or evidence, and prevent NRC from learning the facts. The failure to ascertain all relevant facts could itself result in the NRC making an uninformed licensing decision. However, the need to protect information developed in investigations or inspections usually ends once the investigation or inspection is completed and evaluated for possible enforcement action.

The second reason for not disclosing investigative material—to protect confidential sources—has a different basis. Individuals sometimes present safety concerns to the NRC only after being assured that their individual identity will be kept confidential. This desire for confidentially may arise for a number of reasons, including the possibility of harassment and retaliation. Confidential sources are a valuable asset to NRC inspections and investigations. Releasing names to the parties in an adjudication after promising confidentially to sources would be detrimental to the NRC's overall inspection and investigation activities because other individuals may be reluctant to bring information to the NRC. However, the need to protect confidential sources does not end when the investigation or inspection is completed and evaluated for possible enforcement action.

By this Policy Statement, the Commission is not attempting to resolve the conflict that may arise in each case between the duty to disclose information to the boards and parties and the need to protect that information or its source. The resolution of actual conflicts must be decided on the merits of each individual case. However, the Commission does note that as a general rule it favors full disclosure to the boards and parties, that information should be protected only when necessary, and that any limits on disclosure to the parties should be limited in both scope and duration to the minimum necessary to achieve the purposes of the non-disclosure policy.

The purpose of this Policy Statement is to establish a procedure by which the conflicts can be resolved. The Policy Statement takes over once a determination has been made, under established board notification procedures, that information should be disclosed to the boards and public, but OI or staff believes that the information should be protected. In those cases the Commission has decided that the only workable solution to protect both interests is to provide for an *in camera* presentation to the board by the NRC staff or OI, with no party present. Any other procedure could defeat the purpose of non-disclosure and might actually inhibit the acquisition of information critical to decisions. Allowing the other parties or their representatives to be present in all cases, even under a protective order, could breach promises of confidentiality or allow the subject of an investigation to prematurely acquire information about the investigation. We note in this regard the difficulties of attempting to prevent a party's representative from talking to his client about the relevance of the information and how to respond to it, even under a protective order.

The Commission believes that the boards, using the procedures established in this Policy Statement, can resolve most potential disclosure conflicts once they have been advised of the nature of the information involved, the status of the inspection or investigation, and the projected time for its completion. In many of the cases when the procedures in this Policy Statement are triggered by a concern for premature public disclosure, it may be possible for boards to provide for the timely consideration of relevant matters derived from investigations and inspections through the deferral or rescheduling of issues for hearing. In other instances, the boards may be able to resolve the conflict by placing limitations on the scope of disclosure to the parties, or by using protective orders.

The Commission wishes to emphasize that these procedures do not abrogate the well-established principle of administrative law that a board *may not* use *ex parte* information presented *in camera* in making licensing decisions. These procedures are designed to allow the boards to determine the relevance of material to the adjudication, and whether that information must be disclosed to the parties, and, if disclosure is required, to provide a mechanism for case management both to protect investigations and inspections and to allow for the timely provision of material and relevant information to the parties. As such these procedures are analogous to the procedures for resolving disputes regarding discovery, *see, e.g.*, 10 CFR 2.740(c), and do not violate the prohibition in 10 CFR 2.780 against *ex parte* discussion of substantive matters at issue.

In accord with the above discussion, the Commission has decided that the procedures to be followed, where there is a conflict between the need for disclosure to the board and parties and the need to protect an investigation or inspection, will include *in camera* presentations by the staff or OI. However, because this procedure represents a departure from normal Commission procedure, it is the Commission's view that the decision should be implemented by rulemaking. Accordingly, the Commission directs the NRC staff to commence a rulemaking on the matter.

Until completion of the rulemaking, the following will control the procedures to be followed in resolving conflicts between the duty to disclose to boards and the need to protect information developed in investigation or inspection:

1. Established board notification procedures should be used by staff or OI to determine whether information in their possession is potentially relevant and material to a pending adjudicatory proceeding.[2] The general rule is that all information warranting disclosure to the boards and parties, including information that is the subject of ongoing investigations or inspections, should be disclosed, except as provided herein.

2. When staff or OI believes that it has a duty in a particular case to provide an adjudicatory board with information concerning an inspection or investigation, or when a board requests such information, staff or OI should provide the information to the board and parities unless it believes that unrestricted disclosure would prejudice an ongoing inspection or investigation, or reveal confidential sources. If staff or OI believes unrestricted disclosure

[2] While this Statement refers only to staff and OI who are the organizations principally involved, the statement will apply to any other offices of the Commission which may have the problem.

would have these adverse results, it should propose to the board and parties that the information be disclosed under suitable protective orders and other restrictions, unless such restricted disclosure would also defeat the purpose behind non-disclosure. If staff or OI believes that any disclosure, however restricted, would defeat the purpose behind non-disclosure, it shall provide the board with an explanation of the basis of its concern about disclosure and present the information to the board, *in camera*, without other parties present. A verbatim transcript of the *in camera* proceeding will be made.[3]

All parties should be advised by the board of the conduct and purpose of the *in camera* proceeding but should not be informed of the substance of the information presented. If, after such *in camera* presentation, a board finds that disclosure to other parties under protective order or otherwise is required (*e.g.*, withholding information may prejudice one or more parties or jeopardize timely completion of the proceedings, or the board disagrees that release will prejudice the investigation), it shall notify staff or OI of its intent to order disclosure, specifying the information to be provided, the terms of any protective order proposed, and the basis for its conclusion that prompt disclosure is required. The staff or OI shall provide the board within a reasonable period of time, to be set by the board, a statement of objections or concurrence. If the board disagrees with any objection and the disagreement cannot be resolved, the board shall promptly certify the record of the *in camera* proceeding to the Commission for resolution of the disclosure dispute, and so inform the other parties. Any licensing board decision to order disclosure of the identify of a confidential source shall be certified to the Commission for review regardless of whether OI and staff concur in the disclosure.[4] The board's decision shall be stayed pending a Commission decision. The record before the Commission shall consist of the transcript, the board's Notice of Intent to require disclosure and the objections of Staff or OI. Staff or OI may file a brief with the Commission within ten days of filing a statement of objections with the board. The record before the Commission, including staff or OI's brief, shall be kept *in camera* to the extent necessary to protect the purposes of non-disclosure.

The Commission recognizes that no other party may be in a position effectively to respond to staff or OI's brief because the proceedings have been conducted *in camera*. However, in those cases where another party feels that it is in a position to file a brief, it may do so within seven days after staff or OI files its brief with the Commission.

3. Staff or OI shall notify the board and, as appropriate, the Commission, if the objection to disclosure to the parties of previously withheld information, or any portion of it, is withdrawn. Unless the Commission has directed otherwise, such information—with the exception of the identities of confidential sources—may then be disclosed without further Commission order.

4. When a board or the Commission determines that information concerning a pending investigation or inspection should not be disclosed to the parties, the record of any *in camera* proceeding conducted shall be deemed sealed pending further order. That record will be ordered included in the public record of the adjudicatory proceeding upon completion of the inspection or investigation, or upon public disclosure of the information involved, whichever is earlier, subject to any privileges that may validly be claimed under the Commission's regulations, including protection of the identify of a confidential source. Only the Commission can order release of the identify of a confidential source.

Dated at Washington, D.C. this 7th day of September, 1984.

Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 84-24261 Filed 9-12-84; 8:45 am]

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[3] Nothing in this Statement prohibits staff on OI from sharing information.

[4] The Commission has decided to review any licensing board decision ordering disclosure of the identify of a confidential source because of the importance to the Commission's inspection and investigation program of protecting the identity of confidential sources.

NUCLEAR REGULATORY COMMISSION

Alternative Means of Dispute Resolution; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement.

SUMMARY: This Policy statement presents the policy of the Nuclear Regulatory Commission (NRC) on the use of "alternative means of dispute resolution" (ADR) to resolve issues in controversy concerning NRC administrative programs. ADR processes include, but are not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration or combination of these processes. These processes present options in lieu of adjudicative or adversarial methods of resolving conflict and usually involve the use of a neutral third party.

DATES: This policy statement is effective on August 14, 1992. Because this is a general statement of policy, no prior notice or opportunity for public comment is required. However, an opportunity for comment is being provided. The period for comments expires on September 28, 1992. Comments received after this date will be considered to the extent practical; however, to be of greatest assistance to the Commission in planning the implementation of its ADR policy, comments should be received on or before this date.

ADDRESSES: Mail written comments to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. Deliver comments to One White Flint North, 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays. Copies of comments received may be examined and/or copied for a fee at the NRC Public Document Room, 2120 L Street NW., (Lower Level), Washington, DC, between 7:45 a.m. and 4:15 p.m.

FOR FURTHER INFORMATION CONTACT: James M. Cutchin IV, Special Counsel, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; Telephone: (301) 504-1568.

SUPPLEMENTARY INFORMATION:

Background

Congress enacted the Administrative Dispute Resolution Act (Public Law 101-552) on November 15, 1990. The Act requires each Federal agency to designate a senior official as its dispute resolution specialist, to provide for the training in ADR processes of the dispute resolution specialist and certain other employees, to examine its administrative programs, and to develop, in consultation with the Administrative Conference of the United States (ACUS) and the Federal Mediation and Conciliation Service (FMCS), and adopt, a policy that addresses the use of ADR and case management for resolving disputes in connection with agency programs. Although the Act authorizes and encourages the use of ADR, it does not require the use of ADR. Whether to use or not to use ADR is committed to an agency's discretion. Moreover, participation in ADR processes is by agreement of the disputants. The use of ADR processes may not be required by the agency.

Discussion

The Act provides no clear guidance on when the use of ADR is appropriate or on which ADR process is best to use in a given situation. However, section 581 of the Act appears to prohibit the use of ADR to resolve matters specified under the provisions of sections 2302 and 7121(c) of title 5 of the United States Code, and section 582(b) identifies situations for which an agency shall consider not using ADR. Nevertheless, numerous situations where the use of ADR to resolve disputes concerning NRC programs would be appropriate may arise. A document issued by ACUS in February 1992, entitled "The Administrative Dispute Resolution Act: Guidance for Agency Dispute Resolution Specialists," suggests that the use of ADR may be appropriate in situations involving a particular type of dispute when one or more of the following characteristics is present:

Parties are likely to agree to use ADR in cases of this type;
Cases of this type do not involve or require the setting of precedent;
Variation in outcome of the cases of this type is not a major concern;
All of the significantly affected parties are usually involved in cases of this type;
Cases of this type frequently settle at some point in the process;
The potential for impasse in cases of this type is high because of poor communication among parties, conflicts within parties or technical complexity or uncertainty;
Maintaining confidentiality in cases of this type is either not a concern or would be advantageous;
Litigation in cases of this type is usually a lengthy and/or expensive process; or
Creative solutions, not necessarily available in formal adjudication, may provide the most satisfactory outcome in cases of this type.

As the Act requires, a Dispute Resolution Specialist has been designated, NRC administrative programs have been reviewed, a policy on the use of ADR has been adopted, and the training of certain NRC employees has begun. As the Act requires, input on development of the policy has been sought from ACUS and FMCS. Although the Act does not require it, input on the policy and its implementation is being sought from the public, including those persons whose activities the NRC regulates, because the possible benefits of ADR cannot be realized without the agreement of all parties to a dispute to participate in ADR processes. Among the possible benefits of ADR are:

More control by the parties over the outcome of their dispute than in formal adjudication;
A reduction in levels of antagonism between the parties to a dispute; and
Savings of time and money by resolving the dispute earlier with the expenditure of fewer resources.

Paperwork Reduction Act Statement

This policy statement contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Statement of Policy

This statement sets forth the policy of the Commission with respect to the use of "alternative means of dispute resolution" (ADR) [1] to resolve issues in controversy concerning NRC administrative programs.

The Commission has conducted a preliminary review of its programs for ADR potential and believes that a number of them may give rise to disputes that provide opportunities for the use of ADR in their resolution. For example, as the Commission has long recognized, proceedings before its Atomic Safety and Licensing Boards (ASLBs) provide opportunities for the use of ADR and case management. The Commission has encouraged its ASLBs to hold settlement conferences and to encourage parties to negotiate to resolve contentions, settle procedural disputes and better define substantive issues in dispute. The Commission also has stated that its ASLBs at their discretion should require trial briefs, prefiled testimony, cross-examination plans and other devices for managing parties' presentations of their cases, and that they should set and adhere to reasonable schedules for moving proceedings along expeditiously consistent with the demands of fairness. Statement of Policy on Conduct of Licensing Proceedings, (48 FR 28533, May 27, 1981); CLI-81-8, 13 NRC 452 (1981). In addition, the Commission has indicated that settlement judges may be used in its proceedings in appropriate circumstances. Rockwell International Corporation (Rocketdyne Division), CLI-90-5, 31 NRC 337 (1990).

Opportunities for the use of ADR in resolving disputes may arise in connection with programs such as those involving licensing, contracts, fees, grants, inspections, enforcement, claims, rulemaking, and certain personnel matters. Office Directors and other senior personnel responsible for administering those programs should be watchful for situations where ADR, rather than more formal processes, may appropriately be used and bring them to the attention of the NRC's Dispute Resolution Specialist. Persons who become involved in disputes with the NRC in connection with its administrative programs should be encouraged to consider using ADR to resolve those disputes where appropriate.

The Commission supports and encourages the use of ADR where appropriate. The use of ADR may be appropriate: (1) Where the parties to a dispute, including the NRC, agree that ADR could result in a prompt, equitable, negotiated resolution of the dispute; and (2) the use of ADR is not prohibited by law. The NRC's Dispute Resolution Specialist is available as a resource to assist Office Directors and other senior personnel responsible for administering NRC programs in deciding whether use of ADR would be appropriate. That individual should receive the cooperation of other senior NRC personnel: (1) In identifying information and training needed by them to determine when and how ADR may appropriately be used; and (2) in implementing the Commission's ADR policy.

The Commission believes that certain senior NRC personnel should receive training in methods such as negotiation, mediation and other ADR processes to better enable them: (1) To recognize situations where ADR processes might appropriately be employed to resolve disputes with the NRC; and (2) to participate in those processes.

The Commission recognizes that participation in ADR processes is voluntary and cannot be imposed on persons involved in disputes with the NRC. To obtain assistance in identifying situations where ADR might beneficially be employed in resolving disputes in connection with NRC programs and steps that can be taken to obtain acceptance of NRC's use of ADR, input from the public, including those persons whose activities the Commission regulates, should be solicited.

After a reasonable trial period, the Commission expects to evaluate whether use of ADR has been made where its use apparently was appropriate and whether use of ADR has resulted in savings of time, money and other resources by the NRC. The Commission will wait until some practical experience in the use of ADR has been accumulated before deciding whether specific regulations to implement ADR procedures are needed.

Public Comment

The NRC is interested in receiving comments from the public, including those persons whose activities the NRC regulates, on any aspect of this policy statement and its implementation. However, the NRC is particularly interested in comments on the following:

Specific issues, that are material to decisions concerning administrative programs of the NRC and that result in disputes between the NRC and persons substantially affected by those

[1] ADR is an inclusive term used to describe a variety of joint problem-solving processes that present options in lieu of adjudicative or adversarial methods of resolving conflict. These options usually involve the use of a neutral third party. ADR processes include, but are not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration or combinations of these processes.

decisions, that might appropriately be resolved using ADR processes in lieu of adjudication.

Whether employees of Federal government agencies should be used as neutrals in ADR processes or whether neutrals should come from outside the Federal government and be compensated by the parties to the dispute, including the NRC, in equal shares.

Actions that the NRC could take to encourage disputants to participate in ADR processes, in lieu of adjudication, to resolve issues in controversy concerning NRC administrative programs.

Dated at Rockville, Maryland this 7th day of August, 1992.

For the Nuclear Regulatory Commission.

Samul J Chilk,

Secretary of the Commission.

[FR Doc. 92-19454 Filed 8-13-92; 8:45 am]

BILLING CODE 7590-01-M

NUCLEAR REGULATORY COMMISSION

Policy on Conduct Of Adjudicatory Proceedings; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement: update.

SUMMARY: The Nuclear Regulatory Commission (Commission) has reassessed and updated its policy on the conduct of adjudicatory proceedings in view of the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities.

DATES: This policy statement is effective on August 5, 1998, while comments are being received. Comments are due on or before October 5, 1998.

ADDRESSES: Send written comments to: The Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Rulemakings and Adjudications Staff. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:45 am and 4:15 pm, Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW, (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert M. Weisman, Litigation Attorney, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 415–1696.

Statement of Policy on Conduct of Adjudicatory Proceedings

[CLI–98–12]

I. Introduction

As part of broader efforts to improve the effectiveness of the agency's programs and processes, the Commission has critically reassessed its practices and procedures for conducting adjudicatory proceedings within the framework of its existing Rules of Practice in 10 CFR Part 2, primarily Subpart G. With the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, such assessment is particularly appropriate to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. In its review, the Commission has considered its existing policies and rules governing adjudicatory proceedings, recent experience and criticism of agency proceedings, and innovative techniques used by our own hearing boards and presiding officers and by other tribunals. Although current rules and policies provide means to achieve a prompt and fair resolution of proceedings, the Commission is directing its hearing boards and presiding officers to employ certain measures described in this policy statement to ensure the efficient conduct of proceedings.

The Commission continues to endorse the guidance in its current policy, issued in 1981, on the conduct of adjudicatory proceedings. Statement of Policy on Conduct of Licensing Proceedings, CLI–81–8,13 NRC 452 (May 20, 1981); 46 FR 28533 (May 27, 1981). The 1981 policy statement provided guidance to the Atomic Safety and Licensing Boards (licensing boards) on the use of tools, such as the establishment and adherence to reasonable schedules and discovery management, intended to reduce the time for completing licensing proceedings while ensuring that hearings were fair and produced adequate records. Now, as then, the Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. In this context, the opportunity for hearing should be a meaningful one that focuses on genuine issues and real disputes regarding agency actions subject to adjudication. By the same token, however, applicants for a license are also entitled to a prompt resolution of disputes concerning their applications.

The Commission emphasizes its expectation that the boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 CFR Part 2, as interpreted by the Commission. In addition, the Commission has identified certain specific approaches for its boards to consider implementing in individual proceedings, if appropriate, to reduce the time for completing licensing and other proceedings. The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice. The Commission may consider further changes to the Rules of Practice as appropriate to enable additional improvements to the adjudicatory process.

II. Specific Guidance

Current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. In the 1981 policy statement, the Commission encouraged licensing boards to use a number of techniques for effective case management including: setting reasonable schedules for proceedings; consolidating parties; encouraging negotiation and settlement conferences; carefully managing and supervising discovery; issuing timely rulings on prehearing matters; requiring trial briefs, pre-filed testimony, and cross-examination plans; and issuing initial decisions as soon as practicable after the parties file proposed findings of fact and conclusions of law. Licensing boards and presiding officers in current NRC adjudications use many of these techniques, and should continue to do so.

As set forth below, the Commission has identified several of these techniques, as applied in the context of the current Rules of Practice in 10 CFR Part 2, as well as variations in procedure permitted under the current Rules of Practice that licensing boards should apply to proceedings. The Commission also intends to exercise its inherent supervisory authority, including its power to assume part or all of the functions of the presiding officer in a given adjudication, as appropriate in the context of a particular proceeding. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI–90–3, 31 NRC 219, 229 (1990). The Commission intends to promptly respond to adjudicatory matters placed before it, and such matters should ordinarily take priority over other actions before the Commissioners.

1. Hearing Schedules

The Commission expects licensing boards to establish schedules for promptly deciding the issues before them, with due regard to the complexity of the contested issues and the interests of the parties. The Commission's regulations in 10 CFR 2.718 provide licensing boards all powers necessary to regulate the course of proceedings, including the authority to set schedules, resolve discovery disputes, and take other action appropriate to avoid delay. Powers granted under § 2.718 are sufficient for licensing boards to control the supplementation of petitions for leave to intervene or requests for hearing, the filing of contentions, discovery, dispositive motions, hearings, and the submission of findings of fact and conclusions of law.

Many provisions in Part 2 establish schedules for various filings, which can be varied "as otherwise ordered by the presiding officer." Boards should exercise their authority under these options and 10 CFR 2.718 to shorten the filing and response times set forth in the regulations to the extent practical in a specific proceeding. In addition, where such latitude is not explicitly afforded, as well as in instances in which sequential (rather than simultaneous) filings are provided for, boards should explore with the parties all reasonable approaches to reduce response times and to provide for simultaneous filing of documents.

Although current regulations do not specifically address service by electronic means, licensing boards, as they have in other proceedings, should establish procedures for electronic filing with appropriate filing deadlines, unless doing so would significantly deprive a party of an opportunity to participate meaningfully in the proceeding. Other expedited forms of service of documents in proceedings may also be appropriate. The Commission encourages the licensing boards to consider the use of new technologies to expedite proceedings as those technologies become available.

Boards should forego the use of motions for summary disposition, except upon a written finding that such

a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding. In addition, any evidentiary hearing should not commence before completion of the staff's Safety Evaluation Report (SER) or Final Environmental Statement (FES) regarding an application, unless the presiding officer finds that beginning earlier, e.g., by starting the hearing with respect to safety issues prior to issuance of the SER, will indeed expedite the proceeding, taking into account the effect of going forward on the staff's ability to complete its evaluations in a timely manner. Boards are strongly encouraged to expedite the issuance of interlocutory rulings. The Commission further strongly encourages presiding officers to issue decisions within 60 days after the parties file the last pleadings permitted by the board's schedule for the proceeding.

Appointment of additional presiding officers or licensing boards to preside over discrete issues simultaneously in a proceeding has the potential to expedite the process, and the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (ASLBP) should consider this measure under appropriate circumstances. In doing so, however, the Commission expects the Chief Administrative Judge to exercise the authority to establish multiple boards only if: (1) the proceeding involves discrete and severable issues; (2) the issues can be more expeditiously handled by multiple boards than by a single board; and (3) the multiple boards can conduct the proceeding in a manner that will not unduly burden the parties. Private Fuel Storage, L.L.C. (Private Fuel Storage Facility), CLI–98–7, 47 NRC ____ (1998).

The Commission itself may set milestones for the completion of proceedings. If the Commission sets milestones in a particular proceeding and the board determines that any single milestone could be missed by more than 30 days, the licensing board must promptly so inform the Commission in writing. The board should explain why the milestone cannot be met and what measures the board will take insofar as is possible to restore the proceeding to the overall schedule.

2. Parties' Obligations

Although the Commission expects its licensing boards to set and adhere to reasonable schedules for the various steps in the hearing process, the Commission recognizes that the boards will be unable to achieve the objectives of this policy statement unless the parties satisfy their obligations. The parties to a proceeding, therefore, are expected to adhere to the time frames specified in the Rules of Practice in 10 CFR Part 2 for filing and the scheduling orders in the proceeding. As set forth in the 1981 policy statement, the licensing boards are expected to take appropriate actions to enforce compliance with these schedules. The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.

Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

3. Contentions

Currently, in proceedings governed by the provisions of Subpart G, 10 CFR 2.714(b)(2)(iii) requires that a petitioner for intervention shall provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] The Commission has stated that a board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, but the board cannot do so by ignoring the requirements set forth in § 2.714(b)(2). Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI–91–12, 34 NRC 149, 155 (1991). The Commission re-emphasizes that licensing boards should continue to require adherence to § 2.714(b)(2), and that the burden of coming forward with admissible contentions is on their proponent. A contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 CFR 2.714(b)(2). The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations. For example, with respect to license renewal, under the governing regulations in 10 CFR Part 54, the review of license renewal applications is confined to matters relevant to the extended period of operation requested by the applicant. The safety review is limited to the plant systems, structures, and components (as delineated in 10 CFR 54.4) that will require an aging management review for the period of extended operation or are subject to an evaluation of time-limited aging analyses. See 10 CFR 54.21(a) and (c), 54.29, and 54.30. In addition, the review of environmental issues is limited by rule by the generic findings in NUREG–1427, "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants." See 10 CFR 55.71(d) and 51.95(c).

Under the Commission's Rules of Practice, a licensing board may consider matters on its motion only where it finds that a serious safety, environmental, or common defense and security matter exists. 10 CFR 2.760a. Such authority is to be exercised only in extraordinary circumstances. If a board decides to raise matters on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission and the General Counsel. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI–81–24, 14 NRC 614 (1981). The board may not proceed further with sua sponte issues absent the Commission's approval. The scope of a particular proceeding is limited to the scope of the admitted contentions and any issues the Commission authorizes the board to raise sua sponte.

Currently, 10 CFR 2.714a allows a party to appeal a ruling on contentions only if (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner's standing or the admission of all of a petitioner's contentions) or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied. Although the regulation reflects the Commission's general policy to minimize interlocutory review, under this practice, some novel issues that could benefit from early Commission review will not be presented to the Commission. For example, matters of first impression involving interpretation of 10 CFR Part 54 may arise as the staff and licensing board begin considering applications for renewal of power reactor operating licenses. Accordingly, the Commission encourages the licensing boards to refer rulings or certify questions on proposed contentions involving novel issues to

[1] "[A]t the contention filing stage[,] the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, Final Rule, 54 FR 33168, 33171 (Aug. 11, 1989).

the Commission in accordance with 10 CFR 2.730(f) early in the proceeding. In addition, boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding. The Commission may also exercise its authority to direct certification of such particular questions under 10 CFR 2.718(i). The Commission, however, will evaluate any matter put before it to ensure that interlocutory review is warranted.

4. Discovery Management

Efficient management of the pre-trial discovery process is critical to the overall progress of a proceeding. Because a great deal of information on a particular application is routinely placed in the agency's public document rooms, Commission regulations already limit discovery against the staff. See, e.g., 10 CFR 2.720(h), 2.744. Under the existing practice, however, the staff frequently agrees to discovery without waiving its rights to object to discovery under the rules, and refers any discovery requests it finds objectionable to the board for resolution. This practice remains acceptable.

Application in a particular case of procedures similar to provisions in the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure or informal discovery can improve the efficiency of the discovery process among other parties. The 1993 amendments to Rule 26 provide, in part, that a party shall provide certain information to other parties without waiting for a discovery request. This information includes the names and addresses, if known, of individuals likely to have discoverable information relevant to disputed facts and copies or descriptions, including location, of all documents or tangible things in the possession or control of the party that are relevant to the disputed facts. The Commission expects the licensing boards to order similar disclosure (and pertinent updates) if appropriate in the circumstances of individual proceedings. With regard to the staff, such orders shall provide only that the staff identify the witnesses whose testimony the staff intends to present at hearing. The licensing boards should also consider requiring the parties to specify the issues for which discovery is necessary, if this may narrow the issues requiring discovery.

Upon the board's completion of rulings on contentions, the staff will establish a case file containing the application and any amendments to it, and, as relevant to the application, any NRC report and any correspondence between the applicant and the NRC. Such a case file should be treated in the same manner as a hearing file established pursuant to 10 CFR 2.1231. Accordingly, the staff should make the case file available to all parties and should periodically update it.

Except for establishment of the case file, generally the licensing board should suspend discovery against the staff until the staff issues its review documents regarding the application. Unless the presiding officer has found that starting discovery against the staff before the staff's review documents are issued will expedite the hearing, discovery against the staff on safety issues may commence upon issuance of the SER, and discovery on environmental issues upon issuance of the FES. Upon issuance of an SER or FES regarding an application, and consistent with such limitations as may be appropriate to protect proprietary or other properly withheld information, the staff should update the case file to include the SER and FES and any supporting documents relied upon in the SER or FES not already included in the file.

The foregoing procedures should allow the boards to set reasonable bounds and schedules for any remaining discovery, e.g., by limiting the number of rounds of interrogatories or depositions or the time for completion of discovery, and thereby reduce the time spent in the prehearing stage of the hearing process. In particular, the board should allow only a single round of discovery regarding admitted contentions related to the SER or the FES, and the discovery respective to each document should commence shortly after its issuance.

III. Conclusion

The Commission reiterates its long-standing commitment to the expeditious completion of adjudicatory proceedings while still ensuring that hearings are fair and produce an adequate record for decision. The Commission intends to monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. The Commission will take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.

Dated at Rockville, Maryland, this 28th day of July, 1998.

For the Nuclear Regulatory Commission.
Annette Vietti-Cook,
Assistant Secretary of the Commission.

[FR Doc. 98-20781 Filed 8-4-98; 8:45 am]
BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Conduct of New Reactor Licensing Proceedings; Final Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Final policy statement.

SUMMARY: The Nuclear Regulatory Commission (NRC or the Commission) is adopting a statement of policy concerning the conduct of new reactor licensing proceedings.

DATES: This policy statement becomes effective April 17, 2008.

FOR FURTHER INFORMATION CONTACT: Robert M. Weisman, Senior Attorney, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–1696, e-mail *Robert.Weisman@nrc.gov*.

SUPPLEMENTARY INFORMATION: On June 11, 2007 (72 FR 32139), the Commission published in the **Federal Register** a request for public comment on the draft statement of policy on Conduct of New Reactor Licensing Proceedings (draft Policy Statement). The Commission received eight letters transmitting comments on the draft Policy Statement by the deadline set in the June 11, 2007, notice for receipt of comments. Commenters included a law firm (Morgan Lewis on behalf of five energy companies), a lawyer (Diane Curran), two advocacy groups, (Beyond Nuclear/ Nuclear Policy Research Institute (BN/ NPRI) and the Union of Concerned Scientists (UCS)), an industry organization (the Nuclear Energy Institute (NEI)), a vendor (GE–Hitachi Nuclear Energy), and one individual energy company (UniStar Nuclear)(two letters). BN/NPRI endorsed Ms. Curran's comments, and UCS incorporated them by reference in the UCS comments. Similarly, GE–Hitachi and UniStar endorsed the NEI comments.

The comments fell primarily in the following three categories. First, many comments related to 10 CFR 2.101(a)(5), which permits an applicant to submit its application in two parts filed no more than eighteen months apart. The comments were primarily concerned with whether the NRC should issue a Notice of Hearing (required by 10 CFR 2.104) for each part of the application or just one Notice of Hearing when the application is complete. Second, many comments related to the NRC's consideration of applications that propose to build and operate reactors of identical design (except for site-specific elements). The comments addressed the implementation of the "design-centered review approach" in the NRC Staff's (Staff) review of the applications and the adjudicatory proceedings on the applications before the Atomic Safety and Licensing Board (Licensing Board). Third, many comments requested rulemaking to implement a variety of measures that the commenters believe desirable or necessary for the effectiveness or efficiency of the review or adjudicatory processes. Below, the Commission summarizes and responds to the comments beginning with these three categories of comments. Discussion of additional comments follows. In response to the comments, the Commission has revised the policy statement in several respects, as noted below. The Commission has also corrected the Policy Statement or added explanatory text in a few instances.

Comments on Notice of Hearing

Comment: The Commission should modify the final Policy Statement to provide that the NRC will issue a Notice of Hearing for the complete partial Combined License Application (hereinafter COLA) "as soon as practicable" after the NRC dockets that portion of the COLA, unless the applicant affirmatively requests that the Notice of Hearing be issued after the entire COLA is docketed. (NEI 2, Morgan Lewis 1, UniStar 1)

The commenters state that the approach they suggest will lessen the burdens on all parties. Specifically, these commenters submit that a Notice of Hearing should be issued upon the docketing of the first part of an application submitted under 10 CFR 2.101(a)(5) so that the hearing on that portion of the application may be completed sooner, thus providing an applicant the opportunity to shorten the critical path for the licensing proceeding. These commenters also state that the proposed approach "smoothes" peak resource demands for all parties, provides for earlier public participation, would not call for different NRC staff support or different Staff or Licensing Board reviews, minimizes the likelihood of potential new issues arising late in the review process, would not affect any person's substantive rights, and is consistent with the NRC intent to publish a separate Notice of Hearing on a request for a limited work authorization (LWA). Further, these commenters indicated that docketing one part of an application and then waiting up to 18 months to issue the Notice of Hearing cannot be considered to result in issuing the notice "as soon as practicable" after docketing, as required by 10 CFR 2.104(a). These commenters also state that the draft Policy Statement approach of normally issuing only one Notice of Hearing appears to ignore NRC precedent for adjudication of safety and environmental issues on separate hearing tracks. One commenter states that issuing separate notices focuses all parties on results, not process, while another asserts that the draft Policy Statement, as written, discourages early application submission and causes delay in the licensing process.

UniStar bases its comments on its plans to submit the environmental portion of its COL application first, in accordance with § 2.101(a)(5), and provides the following additional comments. UniStar believes issuing a Notice of Hearing in connection with the first part of the application docketed provides an earlier opportunity for public participation on environmental matters, offers the Staff an early opportunity to consider and address environmental issues unique to COLs, and lessens the potential for the NRC environmental review to be "critical path" for the UniStar application.

NRC Response: The NRC does not believe that an overall benefit can reasonably be predicted to derive from issuing separate Notices of Hearing for separate portions of applications filed pursuant to 10 CFR 2.101(a)(5). The assertion that issuing two Notices of Hearing will provide an applicant the opportunity to shorten the critical path for a licensing proceeding is speculative. The nature and complexity of contentions that may be raised with respect to the safety and environmental aspects of any application may vary considerably. Moreover, while an earlier, separate Notice might be advantageous to an applicant by allowing potential intervenors to raise their concerns early and thus allow the applicant more time to consider the gravity of those concerns and provide information to the staff to address them, if appropriate, we do not believe those possible advantages overcome the inefficiencies that could be introduced into the NRC's internal review and hearing processes as well as the potential burden on the resources of the advocacy community to monitor and respond to multiple Notices of Hearing.

Industry commenters assert that issuing separate notices would not impair the substantive rights of any party, and is consistent with the practice established in the LWA rule and previous licensing proceedings. The Commission agrees that no person's substantive rights would be impaired if either a single Notice of Hearing is issued on a complete application, or if two such notices are issued on parts of an application submitted under 10 CFR 2.101(a)(5). In this respect, the two procedures are equivalent. However, in the case of a request for an LWA, there is a clear potential benefit—issuance of an LWA to permit an applicant to begin certain safety-related construction activities before a COL is issued—not just a more nebulous "smoothing" out of resource demands, to balance against the potential negative impacts noted above.

The industry commenters point to a proceeding in which a Notice of Hearing was issued for a single part of an application relating solely to antitrust matters. *See Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP–83–2, 17 NRC 45, 47 (1983). The requirements of 10 CFR 50.33a that applied in that proceeding, however, explicitly required submission of antitrust information in advance of the rest of the application, presumably because litigation of antitrust matters before the Licensing Boards were virtually always the lengthiest portion of a licensing proceeding. See 10 CFR 50.33a (1983). As described above, that rationale does not apply here. Similarly, the fact that in some proceedings safety and environmental matters were considered on separate tracks, based on the admitted contentions, does not present a rationale for issuing separate Notices of Hearing for such matters. Specifically, hearings on admitted safety and environmental contentions may proceed on separate tracks, if the presiding officer finds that this is warranted. The advantages derived from establishing such separate hearing tracks can be obtained without issuing separate notices for each part of an application submitted under § 2.101(a)(5).

Accordingly, the Commission does not support issuing a separate Notice of Hearing on each part of an application filed under 10 CFR 2.101(a)(5). With respect to the additional issues UniStar raises that are unique to its application, and which are summarized above, the Commission does not believe it appropriate to address such application-specific concerns in responses to comments on a generally applicable policy statement such as this one. The comments do not warrant changes in the Policy Statement.

Comment: Why not, in the name of efficiency and fairness, wait until the application process is complete before holding a hearing—one hearing—on a completed design and completed application for a specific reactor site? (UCS 1, Curran 2). The Commission has previously recognized the unfairness of piecemeal litigation governed by a license applicant's indecision about whether to pursue a project. The Commission should redraft its policy statement to ensure that COL hearings will be conducted in a manner that is fair to all parties (Curran 4).

In essence, the commenter is objecting to the Commission's proposal to consider exemptions to the requirements of § 2.101 if the granting of such exemptions will further the design centered review approach. The commenter indicates that such exemptions will result in issuing two rather than one Notice of Hearing on each complete application, and will overtake the Commission's stated intention to issue just one Notice of Hearing on each complete application in the absence of the advantages of the design centered review approach. The

commenters indicate that under the design-centered approach, intervenors will be forced to participate in "abstract" proceedings in order to protect their rights, and that this will waste the intervenors' resources. Further, the commenters assert that such proceedings may subject them to abusive litigation tactics, since an applicant could request consideration of one design pursuant to an exemption from § 2.101(a)(5), and then drop that design in favor of another upon filing the remaining portion of the application. They conclude that potential intervenors will not be able to prioritize the most important issues that should be raised with respect to a proposed new plant on a particular site.

NRC Response: The commenters misapprehend the effect of an exemption from § 2.101 that would further the design-centered review approach. Such an exemption would not result in an "abstract" application. Rather, the applicant would, in its application, request approval to construct and operate a particular facility at a particular site. Prospective intervenors will not need to guess what plant might be described in an application for a COL that could affect them, nor will they need to participate in proceedings on proposed reactors that do not affect their interests.

Further, exemptions from § 2.101 in furtherance of the design-centered review approach would not result in litigation of design matters that an individual applicant might readily change. The point of allowing such a procedure is to permit the Staff and the Licensing Board to consider the standard portions of an incomplete application submitted pursuant to an exemption from § 2.101 together with other applications involving the same design or operational information. An individual applicant obtains the benefits of participating in such a proceeding by relinquishing some of its ability to change that information.

Although the Commission notes that established doctrines of repose (res judicata, collateral estoppel) apply once an adjudication is finally decided, prospective intervenors need not seek to participate in proceedings unrelated to their locale by virtue of the Policy Statement provisions discussing possible exemptions from § 2.101.

With respect to the concern that an applicant might decide to substitute one design for another in an application, modify its proposal, or decline to complete or pursue an application, and thus render any hearings related to those aspects of an application moot, that possibility exists whether or not an applicant has sought an exemption from § 2.101. For example, it may become apparent during the course of the NRC staff review that the proposed plant is not acceptable for the proposed site. Accordingly, the Commission concludes that these comments do not warrant changes to the Policy Statement.

The Commission notes that UCS, in connection with its comment, identified a confusing sentence in the draft Policy Statement to the effect that the NRC "may give notice" with respect to a complete application. This sentence has been revised to read that the NRC "will give notice" with respect to a complete application.

Comments on Design-Centered Review Approach

Comment: The proposed policy appears to relax or abandon the requirement for reliance on design certifications, allowing license applicants to depart from certified designs in license applications, and then forcing the consolidation of hearings where the applications appear to have something in common. In this respect, the policy seems intended to maximize the rigidity of design certification where intervenors' interests are at stake, and maximize flexibility where license applicants' interests are at stake. The policy should be consistent for both intervenors and applicants. (Curran 3, UCS 1, BY/NPRI)

NRC Response: Part 52 has never required an applicant for a COL to reference a certified design. Rather, a COL applicant has always had the option of requesting a COL for a design that is not certified under Part 52, Subpart B (a "custom" plant). See 10 CFR 52.79. Similarly, Part 52 has always provided for exemptions or departures from a certified design. *See* 10 CFR Part 52, Appendices A, B, C, and D, Section VIII. The draft Policy Statement offered guidance on the effect these provisions might have in the context of an adjudication consolidated to take advantage of the design-centered review approach. The design-centered review approach is an effort to encourage applicants to adopt identical approaches to issues, which should increase reliance on standard design certifications. Moreover, multiple applicants could choose the same uncertified design (*e.g.*, a gas-cooled reactor), which the NRC could review using the design-centered approach. This circumstance would be consistent with the Commission's policy encouraging greater standardization, albeit not via design certification.

With respect to whether proceedings should be consolidated, the draft Policy Statement does not *require* consolidation. Rather, it provides, among other things, that the Chief Judge of the Atomic Safety and Licensing Board Panel (ASLBP) should do so only if consolidation will not impose an undue burden upon the parties. Further, the draft Policy Statement recommends that applicants and intervenors alike agree on a lead representative. The Policy Statement does not treat intervenors and applicants inconsistently in this regard.

Finally, the draft Policy Statement does not state that consolidation is appropriate when "applications appear to have something in common." Rather, the Commission is suggesting that intervenors, applicants, and the NRC alike may save and appropriately focus resources by litigating matters relating to applications for identical designs in consolidated proceedings. Our rules of practice have long provided for the possibility of consolidation of issues and parties.

Comment: Encouraging generic "variances and exemptions" from certified designs and endorsing the notion that "security" considerations in reactor siting are ever "identical" from one site to another flies in the face of the commonly accepted view that each piece of land is unique. To encourage licensees to seek variances, exemptions, and generic licenses based on the premise that only components are at issue without reference to where they are located is, in a Post-9/11 world, burying one's head in the sand. If the Commission needs to encourage, under the guise of a policy statement, myriad exemptions to the new Part 52 rules, the new Part 52 rules patently need revision. (UCS 2)

NRC Response: The Commission of course recognizes that certain aspects of security are site-specific. The Commission has not "endorsed the notion that 'security' considerations in reactor siting are * * * 'identical' from one site to another[,]" as suggested by the commenter. Nonetheless, certified designs include certain features or design elements directed to security and safeguards, and these design matters will be common at sites referencing the design certification. The Policy Statement is focused on "components" in this regard because it is focused on the design-centered approach. The Policy Statement's focus should not be read to exclude site-specific issues from the scope of NRC review. The Commission does not believe it is encouraging a "myriad" of exemptions by this Policy Statement. The Statement identifies limited circumstances under which an exemption to Part 2 may be

entertained or granted. The regulations in Part 52 have long accommodated the need for exemptions to design certification rules in defined circumstances. See 10 CFR part 52, Appendices A, B, C, and D, Section VIII.

Comment: The final Policy Statement should more clearly explain the parameters or necessary conditions for consolidation. (NEI 3, Morgan Lewis 4)

NRC Response: Whether separate proceedings should be consolidated depends on their particular circumstances, and is within the discretion of the presiding officers in the proceedings, as currently set forth in Part 2. See 10 CFR 2.317. The draft Policy Statement adequately explains how the design-centered review approach may be appropriately factored into the presiding officers' decision on consolidation. Whether two applications are sufficiently close in time to warrant consolidation depends on the particular facts involved. No modification to the Policy Statement is warranted.

Comment: The Commission should clarify that consolidation of hearings on identical portions of the COL application is not required to obtain the NRC staff's design-centered review. While the use of Subpart D is permissible, it is not required and should not be presumed. (NEI 4, Morgan Lewis 4)

NRC Response: The Commission believes that the Policy Statement already makes clear that consolidation of hearings is not required to obtain the NRC staff's design-centered review. Without consolidation of hearings, however, some of the benefits of the design-centered review approach may not be realized. Therefore, the Policy Statement presumes the use of Subpart D because the Commission believes that such use will offer benefits not otherwise available. A particular applicant's choice not to seek the use of Subpart D will mean that such benefits will not be available to that applicant.

Comment: The draft Policy Statement should treat COL applications that reference applications for design certification amendments in a manner comparable to COL applications that reference design certifications. (Morgan Lewis 3, NEI 5)

NRC Response: The draft Policy Statement explicitly discusses applications for design certification. The Commission believes that discussion also encompasses an application for an amendment to a design certification, and the Policy Statement need not be changed.

Comment: The Policy Statement should direct the Licensing Board to deny a contention in a COL proceeding if the contention addresses a matter subject to a design certification rulemaking, rather than holding the contention in abeyance and denying it later upon adoption of the final design certification rule. (NEI 6)

NRC Response: While the approach NEI suggests is consistent with the Commission decisions cited in the draft Policy Statement, the Commission believes that an application for design certification calls for a different approach. An applicant for a COL may choose to pursue its application as a custom design if, for example, the review of an application for design certification originally referenced is delayed. In such a case, the Commission believes it inefficient to require previously admitted intervenors to justify, for a second time, admission of contentions which address aspects within the scope of the design certification rulemaking. Holding these contentions in abeyance instead of denying them resolves this problem. Accordingly, the Commission has determined to leave the Policy Statement unchanged in this regard.

Comment: The Commission should clarify the statement in section B.3 of the Policy Statement that "[i]f initial COL applicants referencing a particular design certification rule succeed in obtaining COLs, the Commission fully expects subsequent COL applicants to reference that design certification rule."

NRC Response: The Commission has clarified the sentence by stating that if the NRC grants an initial application referencing a design certification rule, the Commission believes it is likely that subsequent applications referencing that rule will be filed.

Comments Relating to Rulemaking

Comment: The NRC should ensure consistency in its rules by conforming 10 CFR 51.105, which contains mandatory findings on NEPA matters in uncontested proceedings, to 10 CFR 2.104, which does not specify the findings to be made. (Morgan Lewis 6)

NRC response: This proposal would involve rulemaking, which is beyond the scope of the development of this Policy Statement. Because this matter has been raised as a comment on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under § 2.802. If the commenter wishes the agency to undertake such a consideration, the commenter should file such a petition. The Commission would note that the commenter's proposed change was considered in the development of the final Part 52 rulemaking, but was rejected for several reasons. Such a change would have represented a fundamental change to the NRC's overall approach for complying with NEPA, in which the agency's record of decision consists of the presiding officer's findings with respect to NEPA, as required by Section 51.105. The Commission did not believe it made sense to modify the NRC's approach in one specific situation—the issuance of combined licenses—without considering the implications or desirability of adopting a global change to Part 51 with respect to the agency's NEPA's procedures. Moreover, the Commission believed that such a change in the NRC's NEPA compliance procedures should be subject to a notice and comment process and did not want to further delay agency adoption of a final part 52 rule.

Comment: The NRC should revise 10 CFR 2.101(a)(5) to permit the first part of a phased application to consist solely of the environmental report plus the general administrative information specified in § 50.33(a) through (e). It is not necessary for the NRC to have complete seismic and other siting information, plus financial and emergency planning information, to review an environmental report. (Morgan Lewis 7)

NRC response: First, this proposal would require a change to Commission rules, which is beyond the scope of the development of this Policy Statement. Second, with respect to the commenter's proposal that siting (which includes seismic) information is not necessary for the first part of a phased COL application (even if the rest of the first part is the environmental report), the Commission does not find persuasive this argument for omitting siting information.

The Commission requirements governing site safety are based upon the Atomic Energy Act (AEA). The NRC's National Environmental Policy Act (NEPA) review responsibilities do not expand its AEA authority, but are complementary thereto. Consequently, there is no need for a NEPA siting review absent consideration of site safety under the AEA. Regarding site safety, the information an applicant must submit to satisfy the requirements of 10 CFR 2.101(a)(5) addresses the suitability of the site with respect to manmade and natural hazards (including seismic information) and potential radiological consequences of postulated accidents and the release of fission products. Furthermore, the site characteristics must comply with 10 CFR part 100, "Reactor Site Criteria." Additional safety elements required in a

siting determination include information on emergency preparedness and security plans. Administrative information, including the protection of sensitive information is necessary to fulfill requirements under the AEA. The Commission considers that much of the above site safety information may be of use in informing the Commission NEPA review.

Because the commenter's suggestion that the agency undertake rulemaking has been raised as part of the comment process on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under 10 CFR 2.802. If the commenter continues to believe the agency should consider rulemaking on this matter, the agency would suggest the commenter file such a petition.

Comment: The final Policy Statement should direct the NRC staff to consider, on a case-by-case basis, whether generic or design-specific issues could be addressed through rulemaking. (GE-Hitachi Nuclear Energy 1, NEI 10)

NRC Response: The Commission does not believe that a direction to the NRC staff to undertake rulemaking, which is an internal agency matter, is an appropriate subject for a policy statement. The Commission has, however, directed the NRC staff, in consultation with the Office of the General Counsel, to consider initiating rulemakings in appropriate circumstances to address issues that are generic to COL applications. See SRM COMDEK-07-0001/COMJSM-07-0001—Report of the Combined License Review Task Force (June 22, 2007) (ADAMS Accession No. ML0717601090). Accordingly, the Commission does not see any further benefit in duplicating this Commission direction in a policy statement.

Comment: The NRC should institute notice-and-comment rulemaking to provide for meaningful public participation in the licensing hearing process under Subpart L of Part 2, including full and fair discovery procedure and cross-examination of adverse witnesses. (UCS 3)

NRC Response: The Commission does not agree that its current requirements in 10 CFR Part 2, Subpart L, governing discovery and cross-examination, are unfair to any potential party in an NRC adjudication, nor does the Commission believe that Part 2 fails to provide for meaningful public participation in the licensing hearing process. The Commission addressed the fairness and expected benefits of the reconstituted discovery process in Subpart L in the statement of considerations for the final 2004 revisions to Part 2. See 69 FR 2182 (January 14, 2004) upheld by *Citizens Awareness Network, Inc.* v. *U.S., 391 F.3rd 338* (1st Cir. 2004). The discovery process provides for mandatory disclosures by all parties of information relating to admitted contentions, and Staff preparation of a hearing file. Furthermore, cross-examination is allowed or may be allowed by the presiding officer under those circumstances in which the Commission has determined that cross-examination would be best-suited to result in the timely development of a record sufficient to inform a fair decision by the presiding officer. The commenter provided nothing other than the generalized assertion that the new procedures are unfair or would preclude meaningful public participation in the licensing hearing process. Because the commenter's suggestion that the agency undertake rulemaking has been raised as part of the comment process on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under 10 CFR 2.802. If the commenter continues to believe the agency should consider rulemaking on this matter, the agency would suggest the commenter file such a petition.

Comment: The NRC should decrease the time periods in the 10 CFR part 2 Milestone Schedules to further streamline the hearing process and promote more timely hearings on ESP and COL applications, by (1) decreasing the 175 day period between issuance of the SER and final EIS and the start of the evidentiary hearing; and (2) reducing from 90 to 60 days the period for the presiding officer to issue its initial decision following the end of the evidentiary hearing. (NEI 13)

NRC Response: The Commission does not agree that the Model Milestones in Appendix B to 10 CFR part 2 should be modified to adopt the two changes suggested by the commenter. The 175 day time period provides for, among other things, scheduling and holding a pre-hearing conference, issuance of the presiding officer's order following the prehearing conference, mandatory disclosures, preparation of summary disposition motions, issuance of presiding officer orders on such motions, preparation of pre-filed written testimony, suggested presiding officer questions based upon the pre-filed testimony, and any motions for cross-examination together with cross-examination plans. It may well be that, with the particular parties involved or matters at issue in any individual case, the schedule can be shortened by the presiding officer. But, given the activities outlined above, the Commission does not believe that the 175 day period is unreasonable or should be significantly shortened at this time.

The Commission believes that the 90 day period provided for issuance of a presiding officer decision is reasonable, given the likelihood—as described above—that the first set of combined license application hearings may be complex and raise issues of first impression for the NRC. If, however, the issues to be addressed in an initial decision are small in number, simple in nature and lack complexity, enabling the presiding officer to issue the initial decision in a shorter period of time, the Commission expects the presiding officer to do so rather than taking the full 90 day period.

The Commission also notes that the Model Milestones were adopted on April 20, 2005 (70 FR 20457), and have yet to be applied in full in any early site permit or combined license proceeding. Hence, the NRC has yet to develop any extensive experience on their application in such proceedings. Absent some fundamental problem or error with the Model Milestones—which the commenter has not described—the Commission is unwilling to modify the Model Milestones at this time. Once the Commission has had greater experience with the conduct of combined license application hearings, the Commission will revisit the Model Milestones to see if adjustments are desirable or if a specific schedule of milestones should be established for early site permit and combined license proceedings. Because the commenter's suggestion that the agency undertake rulemaking has been raised as part of the comment process on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under 10 CFR 2.802. If the commenter continues to believe the agency should consider rulemaking on this matter, the agency would suggest the commenter file such a petition.

Other Comments

Comment: The provisions in the draft Policy Statement (in Section B.1) regarding the finality of COL proceedings should be revised to be consistent with a recent decision by the U.S. Court of Appeals in which the Seventh Circuit held that if all of an intervenor's contentions are resolved by the Licensing Board, then the Board's decision is final agency action with respect to that intervenor. (Morgan Lewis 5)

NRC Response: The Commission agrees that the draft Policy Statement could be misinterpreted on this score. Accordingly, the Commission has modified the pertinent provision of the

Policy Statement to state that "a decision on common issues would become final agency action if it resolves a specific intervenor's contentions in a proceeding on an individual application."

Comment: It is not an insubstantial change in the rules to now state the Commission, presiding officer on any request for hearing filed under § 52.103, will, by fiat, "designate the procedures under which the proceeding shall be conducted." A bit of rulemaking might be in order well before commencement of extraordinary hearings before the Commission. (UCS 1A) NEI recommends that the NRC identify the hearing procedures to be used in the 10 CFR 52.103(a) ITAAC compliance hearings in the near term and certainly well before the first such hearing is imminent. (NEI 8)

NRC Response: Section 189a.(1)(B)(iv) of the Atomic Energy Act explicitly authorizes the Commission to establish procedures for ITAAC compliance hearings. This AEA provision has been reflected in Commission rules since 1992. ITAAC compliance hearing procedures warrant in-depth consideration, which would unduly delay the issuance of the Policy Statement. The Commission believes it appropriate to first issue guidance on proceedings on COL applications, which are indeed imminent, before turning to ITAAC compliance hearings. While the Commission is not addressing ITAAC compliance hearing procedures in this Policy Statement, the Commission intends to do so "well before" the first such hearing, as both intervenor and industry commenters request. The Commission, however, does not believe it necessary to establish such procedures by rule, and retains the discretion to specify such procedures in a future policy statement or on a case-by-case basis by order.

Comment: The draft policy statement instructs licensing boards to tailor hearing schedules to accommodate limited work authorizations, by holding hearings on environmental matters and portions of the Safety Evaluation Report that are "relevant" to environmental matters. Given that compliance with safety regulations is the principal means by which the NRC protects the environment, it is difficult to conceive of any safety-related issues whose resolution could lawfully be considered unrelated to compliance with the National Environmental Policy Act. Therefore, the Commission should eliminate this instruction from the policy statement. (Curran 5)

NRC Response: The Commission agrees that the portion of the draft Policy Statement to which the comment is addressed could be misunderstood, but disagrees with the comment's underlying premise. Specifically, the Commission need not resolve all safety issues in order to perform the environmental evaluation required in connection with a request for an LWA. Rather, the Commission need only resolve those safety issues identified in 10 CFR 50.10 as needing resolution before the Commission may issue an LWA. The Commission has revised the Policy Statement to eliminate the ambiguity identified in the comment.

Comment: The final Policy Statement should incorporate the following revision: "In all proceedings, the licensing boards should formulate hearing schedules to accommodate any limited work authorization request, *unless the applicant specifically requests otherwise.*" (NEI 2A) (additional suggested text in *italics*)

NRC Response: The presiding officer already has the authority to modify the schedule of a proceeding consistent with fairness to all parties and the expeditious disposition of the proceeding. See 10 CFR 2.319, 2.332, and 2.334. In this regard, the presiding officer must consider the interests of all parties, as well as the overall schedule, and not just the interests of the applicant. Accordingly, the Commission declines to add the suggested language to this portion of the Policy Statement.

Comment: The final Policy Statement should incorporate the following revision: "Specifically, if an applicant requests [an LWA] as part of an application, the licensing board should generally schedule the hearings so as to first resolve those issues prerequisite to issuing [an LWA], *up to and including an early partial decision on the LWA.*" (NEI 2B) (additional suggested text in *italics*)

NRC Response: "Resolution" of issues prerequisite to issuing an LWA necessarily includes a Licensing Board decision on those issues. To add the suggested language would be redundant and possibly confusing. Accordingly, the Commission declines to add the suggested language.

Comment: The draft Policy Statement should provide guidance for a proceeding in which a COL application references an early site permit (ESP) application or an application for ESP amendment, comparable to guidance set forth for COL applications which reference a design certification application. (Morgan Lewis 2, NEI 5)

NRC Response: The Commission agrees with this comment, and has modified the Policy Statement accordingly.

Comment: The Commission need not delay issuance of a combined license referencing a design certification application until the certification rule is final, absent a legal prohibition. A COL license condition premised on promulgation of the DC rule could be imposed, allowing any judicial challenge to be raised in a timely manner without adversely impacting the COL. (GE–Hitachi 2, NEI 7)

NRC Response: As the comment recognizes, the AEA requires the NRC to make certain findings before issuing a license. While a license condition may, in some instances, impose specific design or operational requirements to allow the NRC to make the required findings, a license condition may not be used to defer the required findings beyond the issuance of the license, *e.g.*, in order to complete a rulemaking. The Commission believes that the approach proposed in the comment may be inconsistent with the AEA in this respect, and so declines to adopt it.

Comment: The final Policy Statement should clarify the definition of completeness in the context of whether an application is acceptable for docketing, particularly given Commission approval of the Combined License Review Task Force recommendation to extend the duration and broaden the scope of the NRC licensing acceptance reviews. (NEI 1)

NRC Response: The NRC staff is developing detailed guidance on this subject. Such guidance is beyond the scope of this Policy Statement and will not be addressed in it.

Comment: The Commission should seek legislation to eliminate mandatory uncontested hearings. (NEI 9)

NRC Response: The question of whether legislation on a particular matter should be sought is beyond the scope of the Policy Statement. The Commission is not modifying the Policy Statement in response to this comment.

Comment: The Commission should commence COL licensing hearings based on the availability of draft licensing documents where circumstances warrant. (NEI 11)

NRC Response: We have recently addressed this question in our decision in *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI–07–17, 65 NRC 392 (2007). In that decision, we held that the Licensing Board, pursuant to 10 CFR 2.332(d), may not commence a hearing on environmental issues before the final environmental impact statement has been issued. *Id.* at 394. Hearings may be held on safety issues, however, prior to the staff's publication of its safety evaluation. The commenter has not

identified any reason for us to revisit that decision, which provides the basis for our position on the matter, and we decline to do so.

Comment: Commission policy should seek to ensure the NRC staff's timely completion of licensing reviews for new plant applications. (NEI 12)

NRC Response: The NRC has, for the last several years, been diligently preparing to review applications to build and operate new reactors. Part of that preparation has involved significant NRC staff effort in planning for timely reviews that assure that the agency discharges its duties under the Atomic Energy Act and NEPA. These efforts have been and continue to be reflected in the agency's Strategic Plans and budget requests, among other statements. The commenters can be assured that the NRC is committed to timely reviews provided it receives complete, high quality information from applicants.

In closing, the Commission notes that several commenters offered general statements of support or criticism of the Commission's licensing process or parts of that process. While the Commission acknowledges those comments, they do not raise any specific issue related to the Policy Statement, and no response to them is necessary.

STATEMENT OF POLICY ON CONDUCT OF NEW REACTOR LICENSING PROCEEDINGS CLI–08–07

I. Introduction

Because the Commission has received the first several applications for combined licenses (COLs) for nuclear power reactors and expects that several more applications for COLs will be filed within the next two years, the Commission has reexamined its procedures for conducting adjudicatory proceedings involving power reactor licensing. Such examination is particularly appropriate since the Commission will be considering these COL applications at the same time it expects to be reviewing various design certification and early site permit (ESP) applications, and the COL applications will likely reference design certification rules and ESPs, or design certification and ESP applications. Hearings related to the COL and ESP applications will be conducted within the framework of our Rules of Practice in 10 CFR part 2, as revised in 2004 and further updated in 2007 to reflect the revisions to 10 CFR part 52, and the existing policies applicable to adjudications. The Commission has, therefore, considered the differences between the licensing and construction of the first generation of nuclear plants, which involved developing technology, and the currently anticipated plants, which may be much more standardized than previous plants.

We believe that the 10 CFR part 2 procedures, as applied to the 10 CFR part 52 licensing process, will provide a fair and efficient framework for litigation of disputed issues arising under the Atomic Energy Act of 1954, as amended (Act) and the National Environmental Policy Act of 1969, as amended (NEPA), that are material to applications. Nonetheless, we also believe that additional improvements can be made to our process. In particular, the guidance stated in this policy statement is intended to implement our goal of avoiding duplicative litigation through consolidation to the extent possible.

The differences between the new generation of designs and the old, including the degree of standardization, as well as the differences between the 10 CFR part 50 and 10 CFR part 52 licensing processes, have led the Commission to review its procedures for treatment of a number of matters. Given the anticipated degree of plant standardization, the Commission has most closely considered the potential benefits of the staff's conducting its safety reviews using a "design-centered" approach, in which multiple applicants would apply for COLs for plants of identical design at different sites, and of consolidation of issues common to such applications before a single Atomic Safety and Licensing Board (licensing board or ASLB). The Commission has also considered its treatment of Limited Work Authorization requests; the timing of litigation of safety and environmental issues; and the order of procedure for hearings on inspections, tests, analyses, and acceptance criteria (ITAAC), which are completed before fuel loading. In considering these matters, the Commission sought to identify procedural measures within the existing Rules of Practice to ensure that particular issues are considered in the agency proceeding that is the most appropriate forum for resolving them, and to reduce unnecessary burdens for all participants.

The new Commission policy builds on the guidance in its current policies, issued in 1981 and 1998, on the conduct of adjudicatory proceedings, which the Commission endorses. *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI–98–12, 48 NRC 18 (July 28, 1998), 63 FR 41872 (August 5, 1998); *Statement of Policy on Conduct of Licensing Proceedings,* CLI–81–8, 13 NRC 452 (May 20, 1981), 46 FR 28533 (May 27, 1981). The 1981 and 1998 policy statements provided guidance to licensing boards on the use of tools, such as the establishment of and adherence to reasonable schedules, intended to reduce the time for completing licensing proceedings while ensuring that hearings were fair and produced adequate records. Since the Commission issued its previous statements, the Rules of Practice in 10, CFR Part 2 have been revised, and licensing proceedings are now usually conducted under the procedures of Subpart L, rather than Subpart G. *See* "Changes to Adjudicatory Process," Final Rule, 69 FR 2182 (January 14, 2004). In addition, we have recently amended our licensing regulations in 10 CFR Parts 2, 50, 51 and 52 to clarify and improve the 10 CFR Part 52 licensing process. This statement of policy thus supplements the 1981 and 1998 statements.

With both the recent revisions to 10 CFR Part 2 and this guidance, the Commission's objectives remain unchanged. As always, the Commission aims to provide a fair hearing process, to avoid unnecessary delays in its review and hearing processes, and to enable the development of an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. In the context of new reactor licensing under 10 CFR part 52, members of the public should be afforded an opportunity for hearing on each genuine issue in dispute that is material to the particular agency action subject to adjudication. By the same token, however, applicants for a license should not have to litigate each such issue more than once.

The Commission emphasizes its expectation that the licensing boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 CFR Part 2, as interpreted by the Commission. In addition, the Commission has identified certain specific approaches for its licensing boards to consider implementing in individual proceedings, if appropriate, to minimize burdens on all parties involved. The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice. The Commission may consider further changes to the Rules of Practice as appropriate to enable additional improvements to the adjudicatory process.

II. Specific Guidance

Current adjudicatory procedures and policies provide the latitude to the Commission, its licensing boards and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. In the 1981 and 1998 policy statements, the Commission encouraged licensing boards to use a number of techniques for effective case management in contested proceedings. Licensing boards and presiding officers should continue to use these techniques, but should do so with regard for the new licensing processes in 10 CFR part 52 and the anticipated high degree of new plant standardization, which may afford significant efficiencies.

The Commission's approach to standardization through design certification has the potential for resolving design-specific issues in a rule, which subsequently cannot be challenged through application-specific litigation. *See* 10 CFR 52.63 (2007). Matters common to a particular design, however, may not have been resolved even for a certified design. For example, matters not treated as part of the design, such as operational programs, may remain unresolved for any particular application referencing a particular certified design. Further, site-specific design matters and satisfaction of ITAAC will not be resolved during design certification. The timing and manner in which associated design certification and COL applications are docketed may affect the resolution of these matters in proceedings on those applications, *e.g.*, with respect to what forum is appropriate for resolving an issue. As discussed further below, a design-centered review approach for treating such matters in adjudication may yield significant efficiencies in Commission proceedings.

As set forth below, the Commission has identified other approaches, as applied in the context of the current Rules of Practice in 10 CFR Part 2, as well as variations in procedure permitted under the current Rules of Practice that licensing boards should apply to proceedings. The Commission also intends to exercise its inherent supervisory authority, including its power to assume part or all of the functions of the presiding officer in a given adjudication, as appropriate in the context of a particular proceeding. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI–90–3, 31 NRC 219, 229 (1990). The Commission intends to promptly respond to adjudicatory matters placed before it, and such matters should ordinarily take priority over other actions before the Commissioners. We begin with the docketing of applications.

A. INITIAL MATTERS

1. Docketing of Applications

The rules in part 52 are designed to accommodate a COL applicant's particular circumstances, such that an applicant may reference a design certification rule, an ESP, both, or neither. *See* 10 CFR 52.79. The rules also allow a COL applicant to reference a design certification or ESP application that has been docketed but not yet granted. *See* 10 CFR 52.27(c) and *52.55(c)*. Further, we have changed the procedures in § 2.101 to address ESP, design certification, and COL applications, in addition to construction permit and operating license applications. Accordingly, a COL applicant may submit the safety information required of an applicant by §§ 52.79 and 52.80(a) and (b) apart from the environmental information required by § 52.80(c), as is now permitted by § 2.101(a)(5). In addition, we have lengthened the time allowed between submission of parts of an application under § 2.101(a)(5) from six to eighteen months.

Notwithstanding these procedures, the Commission can envision a situation in which an applicant might want to present a particular ESP or COL application for docketing in a manner not currently authorized. For example, an applicant might wish to apply for a COL for a plant identical to those of other applicants under the design-centered approach, and request application of the provisions of 10 CFR part 52, Appendix N and Part 2, Subpart D, before it has prepared the site- or plant-specific portion of the application. Such an applicant might not be prepared to submit its application as required by the rules, even considering the flexibility afforded by § 2.101(a)(5).

Under such circumstances, the Commission would be favorably disposed to the NRC staff's entertaining a request for an exemption from the requirements of § 2.101. Such an exemption request could be granted if it is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Moreover, because this is a procedural rule established for the effective and efficient processing of applications, the Commission can exercise its inherent authority to approve such exemptions based on similar considerations of effectiveness and efficiency. The Commission strongly discourages piecemeal submission of portions of an application pursuant to an exemption unless such a procedure is likely to afford significant advantages to the design-centered review approach described in more detail below. The Commission intends to monitor requests for exemptions from the requirements of § 2.101, and to issue a case-specific order governing such matters if warranted. Whether a COL application is submitted pursuant to § 2.101 or an exemption, the first part of an application submitted should be complete before the staff accepts that part of the application for docketing. Similarly, the staff should not docket any subsequently submitted portion of the application unless it is complete.

2. Notice of Hearing

As required by § 2.104(a), a Notice of Hearing on an application is to be issued as soon as practicable after the application is docketed. A Notice of Hearing for a complete COL application should normally be issued within about thirty (30) days of the staff's docketing of the application. Section 2.101(a)(5), which provides for submitting applications in two parts, does not specify when the Notice of Hearing should be issued, nor is it clear when a Notice of Hearing would be issued for an application filed in parts under an exemption from § 2.101. With two exceptions, the Commission believes it most efficient to issue a Notice of Hearing only when the entire application has been docketed. The first exception is a construction permit application submitted in accordance with § 2.101(a–1), which results in a decision on early site review. The second exception involves circumstances in which: (1) A complete application is submitted; (2) one or more other applications that identify a design identical to that described in the complete application are submitted; and (3) another application is incomplete with respect to matters other than those common to the complete application. Under such circumstances, the Commission will give notice of the hearing on the complete application, and give notice of the hearing on the other application with respect to the matters common to the complete application. The Commission determination in this regard will consider the extent to which any notice is consistent with the timely completion of staff reviews using the design-centered approach and with the efficient conduct of any required hearing, with due regard for the rights of all parties. Upon submission of information

completing the other application, the Commission would give notice of a hearing with respect to that information. Under all other circumstances, the Commission will issue a Notice of Hearing only when a complete application has been docketed in order to avoid piecemeal litigation.

3. Limited Work Authorizations

Section 50.10 contains provisions for limited work authorizations, which allows certain construction activities on production and utilization facilities to commence before a construction permit or combined license is issued. The Commission has redefined the term "construction" in 10 CFR 50.10, as well as the provisions governing limited work authorizations. Accordingly, we are providing additional guidance regarding limited work authorizations.

In all proceedings, the licensing boards should formulate hearing schedules to accommodate any limited work authorization request. Specifically, if an applicant requests a limited work authorization as part of an application, the licensing board should generally schedule the hearings so as to first resolve those issues prerequisite to issuing a limited work authorization. This may lead to hearings on the safety and environmental matters specified in 10 CFR 50.10 before commencement of hearings on other issues. Such considerations should be incorporated into the milestones set for each proceeding in accordance with 10 CFR Part 2, Appendix B.

B. Treatment of Generic Issues

1. Consolidation of Issues Common to Multiple Applications

The Commission believes that generic consideration of issues common to several applications may well yield benefits, both in terms of effective consideration of issues and efficiency. Such benefits would accrue not only to the staff review process, but also to litigation of such matters before the licensing board. We acknowledge that consideration of generic matters common to several applications may be possible in several contexts. For example, an applicant might seek staff review of a corporate program such as quality assurance or security that is common to several of its applications. If contentions on such a program are admitted with respect to more than one application, consolidation of such contentions before a single licensing board may result in more efficient decision making, as well as conserving the parties' resources. Licensing boards should consider consolidating proceedings involving such matters, pursuant to an applicant's motion or pursuant to their own initiative under § 2.317(b). In addition, different applicants may seek COLs for plants of identical design at multiple sites, as in the design-centered review approach, and may therefore seek to implement the provisions of 10 CFR Part 2, Subpart D. In this regard, we have amended Subpart D to Part 2 and Appendix N to 10 CFR Part 52 to provide explicit treatment of COL applications for identical plants at multiple sites.

Because we believe that the design-centered approach is the chief example of circumstances in which generic consideration of issues common to several applications may yield benefits, we discuss that approach in detail below. While much has changed since we first promulgated Subpart D in 1975, we believe many of the concepts originally underpinning Subpart D still apply today, and we presume that Subpart D procedures, as well as other applicable Rules of Practice in 10 CFR Part 2, will be applied to applications employing a design-centered review approach. Our vision for the implementation of a "design-centered" approach under the procedures of Subpart D is set forth below.

As indicated above, issues, such as those involving operational programs or design acceptance criteria,[1] common to several applications referencing a design certification rule or design certification application may be most effectively and efficiently treated with a single review in a "design-centered" approach and, subsequently, in a single hearing. In order to achieve such benefits, however, applicants who intend to apply for licenses for plants of identical design and request the staff to employ the design-centered review approach should submit their applications simultaneously. Subpart D nonetheless affords the licensing board discretion to consolidate applications filed close in time, if this will be more efficient and otherwise provide for a fair hearing. While not required, we believe applicants for COLs for plants of identical design should consolidate the portions of their applications containing common information into a joint submission. In doing so, each applicant would also submit the information required by §§ 50.33(a) through (e) and 50.37 and would identify the location of its proposed facility, if this information has not already been submitted to the Commission.

Appendix N requires that the design of those structures, systems, and components important to radiological health and safety and the common defense and security described in separate applications be identical in order for the Commission to treat the applications under Appendix N and Subpart D. The Commission believes that any variances or exemptions requested from a design certification in this context should be common to all applications. In addition, while not required, the Commission encourages applicants to standardize the balance of their plants insofar as is practicable.

Subpart D provides flexibility in the hearing process. Each application will necessarily involve a separate proceeding to consider site-specific matters, and the required hearings may, as appropriate, be comprised of two (or more) phases, the sequence of which depends on the circumstances. For any of the phases, the hearings may be consolidated to consider common issues relating to all or some of the applications involved.

An applicant requesting treatment of its application under the design-centered approach may seek to submit separate portions of the application at different times, pursuant to § 2.101(a)(5) or an exemption from § 2.101, as discussed above. Under such circumstances, the Commission intends to issue a Notice of Hearing for the portion of the application to be reviewed under the design-centered approach, and a second notice limited to the portion of the application not treated under the design-centered review approach upon submission of the complete application. Such a procedure would not affect any prospective intervenor's substantive rights; i.e., members of the public will still have a right to petition for intervention on every issue material to the Commission's decision on each individual application.

The staff would review the common information in the applications, or in the joint submission, for sufficiency for docketing and, if acceptable, would docket this information as a portion of each application. Each application would be assigned a docket number in connection with the first portion of the application docketed, which could be the common submission. The applicants should designate one applicant to be the single point of contact for the staff review of this common information, and to represent the applicants before the licensing board.

[1] Design acceptance criteria are a special type of ITAAC that are used to verify the resolution of design issues for which completed design information was not provided in the design certification application.

Consistent with our guidance set forth above, we would expect to issue a Notice of Hearing only upon the docketing of at least one complete application that includes the common information. The Notice of Hearing will not only provide an opportunity to petition to intervene in the proceeding on the complete individual application, but will also provide such an opportunity with respect to the information common to all the applications, which would be docketed separately. Accordingly, upon issuance of such a notice, the Chief Judge of the Atomic Safety and Licensing Board Panel (ASLBP or Panel) should, as is the normal practice, designate a licensing board to preside over the application-specific proceeding, and should also designate a licensing board to preside over the consolidated portions of the applications. Initially, these two licensing boards could be the same.

A person having standing with respect to one of the facilities proposed in the applications partially consolidated would be entitled to petition for intervention in the proceeding on the common information. Such a petitioner would be required to satisfy the other applicable provisions of § 2.309 with respect to the application being contested to be admitted as a party to the proceeding on the common information. Petitioners admitted as parties to such a proceeding with respect to a proposed facility for which the application remains incomplete at the time of the initial Notice of Hearing would have an opportunity to propose contentions with respect to the rest of the application upon the docketing of a complete application, but would not need to demonstrate standing a second time. Those persons granted intervention are required to designate a lead for common contentions, as required by § 2.309(f)(3); as stated above, applicants submitting common information under the design-centered approach would likewise designate a representative to appear before the licensing board. In addition, the presiding officer may require consolidation of parties in accordance with § 2.316.

The Commission is willing to consider other methods of managing proceedings involving consideration of information common to several applications. For example, the Commission does not intend to foreclose the Chief Judge of the Panel from designating a licensing board to preside over common portions of applications on the motion of the applicants, even if separate proceedings have already been convened on one or more of the applications involved. In such a case, however, the applicants should jointly identify the common portions of their respective applications when requesting the Chief Judge to take such action. Petitioners admitted as parties to any affected proceeding would of course have the right to answer such a motion.

As stated above, upon issuance of a Notice of Hearing for a complete plant-specific application that includes information on "common issues," the Chief Judge of the Panel should designate a licensing board to preside over the plant-specific portion of each application that is then complete. Each licensing board, whether designated to consider the common issues or a specific application, should manage its respective portion of the proceedings with due regard for our 1981 and 1998 policy statements. We emphasize that the Chief Judge of the Panel should not designate another licensing board to consider specific aspects of a proceeding unless the standards we enunciated in *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI–98–7, 47 NRC 307, 310–11 (1998) for doing so are met. These standards are that the proceeding involve discrete and separable issues; that multiple licensing boards can handle these issues more expeditiously than a single licensing board; and that the proceeding can be conducted without undue burden on the parties. *Id.*

An initial decision by the licensing board presiding over a proceeding on a joint submission containing information common to more than one plant-specific application will be a partial initial decision for which a party may request review under § 2.341 (as is also provided in Subpart D) and which we may review on our own motion. Such a decision would become part of each initial decision in the individual application proceedings, which will become final in accordance with the regulation that applies depending on which subpart of our Rules of Practice has been applied in a proceeding on a particular application (*e.g.*, § 2.713 under Subpart G; § 2.1210 under Subpart L). Accordingly, a decision on common issues would become final agency action if it resolves a specific intervenor's contentions in a proceeding on an individual application.

Revisions of specific applications during the review process could result in formerly common issues being referred to the licensing board presiding over a specific portion of one or more applications. These issues would be resolved in the normal course of adjudication, but may well result in delay in final determination of the individual application.

2. COL Applications Referencing Design Certification and ESP Applications

With respect to a design for which certification has been requested but not yet granted, the Commission intends to follow its longstanding precedent that "licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI–99–11, 49 NRC 328, 345 (1999), *quoting Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB–218, 8 AEC 79, 85 (1974). In accordance with these decisions, a licensing board should treat the NRC's docketing of a design certification application as the Commission's determination that the design is the subject of a general rulemaking. We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible. Upon adoption of a final design certification rule, such a contention should be denied.

Similar considerations apply if a COL applicant references an ESP application that has not been granted. In such a case, the Licensing Board presiding over the proceeding on the COL application should refer contentions within the scope of the ESP proceeding to the Licensing Board presiding over the ESP proceeding.

An individual applicant, nonetheless, may choose to request that the application be treated as a "custom" design, and thereby resolve any specific technical matter in the context of its individual application. An applicant might choose such a course if, for example, the referenced design certification application were denied, or the rulemaking delayed. The application-specific licensing board would then consider contentions on design issues, which otherwise would have been treated in the design certification proceeding. Similarly, a COL applicant referencing a design

certification application may request an exemption from one or more elements of the requested design certification, as provided in § 52.63(b) and Section VIII of each appendix to 10 CFR Part 52 that certifies a design. As set forth in those provisions, such a request is subject to litigation in the same manner as other issues in a COL proceeding. Since the underlying element of the design may change after the exemption request is submitted, such an exemption may ultimately become unnecessary or may need to be reconsidered or conformed to the final design certification rule. Such matters would be considered by an application-specific licensing board. A licensing board considering a COL application referencing a design certification application might conclude the proceeding and determine that the COL application is otherwise acceptable before the design certification rule becomes final. In such circumstances, the license may not issue until the design certification rule is final, unless the applicant requests that the entire application be treated as a "custom" design.

COL applicants should coordinate with vendors applying for certified designs to ensure that decisions on design certification applications do not impede decisions on COL applications. If design certification is delayed, a licensing board considering common technical issues may likewise be delayed.

3. Subsequent Applications Referencing a Design Certification Rule

If the Commission grants initial COL applications referencing a particular design certification rule, the Commission believes it likely that subsequent COL applicants will also reference that design certification rule. In this event, the Commission would expect to develop additional processes to facilitate coordination of proceedings on such applications. We observe, however, that an issue associated with such matters as operational programs or design acceptance criteria may be resolved through the design-centered review approach for initial applications containing common information, but we do not intend to impose any resolution so obtained on subsequent COL applicants. While there is no requirement to adopt a previously-approved resolution of an issue, and subsequent applicants are free to use the most recent state-of-the-art methods to resolve such issues, we nevertheless urge such applicants to consider adopting previous resolutions in order to maximize plant standardization. If a COL applicant adopts an approach to a technical issue previously found acceptable, no further staff review of the adequacy of the approach is necessary. Rather, the staff review should be limited to verification that the applicant has indeed adopted the previously approved approach and will properly implement it, and, for technical issues that depend on site-specific factors, that the previously-approved approach applies to the applicant's proposed facility.

C. ITAAC

In first promulgating 10 CFR Part 52 in 1989, we determined that hearings on whether the acceptance criteria in a COL have been met (ITAAC-compliance hearings) would be held in accordance with the Administrative Procedure Act (APA) provisions applicable to determining applications for initial licenses, but that we would specify the procedures to be followed in the Notice of Hearing. *See* 10 CFR 52.103(b)(2)(i) (1990); 54 FR 15395 (April 18, 1989). In enacting the Energy Policy Act of 1992, Congress subsequently confirmed our authority to adopt 10 CFR Part 52, and by statute accorded us additional discretion to determine procedures, whether formal or informal, for ITAAC-compliance hearings. *See* Atomic Energy Act section 189a.(1)(B)(iv), 42 U.S.C. 2239(a)(1)(B)(iv). We therefore amended § 52.103(d) to provide that we would determine, in our discretion, "appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under [§ 52.103(a)]."

While we recognize that specification of procedures for the treatment of requests for hearings on ITAAC would lend some predictability to the ITAAC compliance process, we are not yet in a position to specify such procedures, since we have not approved even one complete set of ITAAC necessary for issuing a COL. Further, ITAAC-compliance hearings are likely several years distant, and we have no experience with the type and number of hearing requests that we might receive with respect to ITAAC compliance. While it may not be necessary to consider the first requests for ITAAC-compliance hearings in order for us to determine the procedures appropriate to govern such hearings, we believe it premature to specify such procedures now. In addition, the staff is now formulating guidance on the times necessary for the staff to consider different categories of completed ITAAC, and this guidance should assist licensees in scheduling and performing ITAAC so as to minimize the critical path for staff consideration of completed ITAAC.

In view of the above considerations, we have identified one measure to lend predictability to the ITAAC compliance process: The Commission itself will serve as the presiding officer with respect to any request for a hearing filed under § 52.103. In acting as the presiding officer under these circumstances, we will make three initial determinations. First, we will decide whether the person requesting the hearing has shown, *prima facie*, that one or more of the acceptance criteria in the COL have not been, or will not be met, and the attendant public health and safety consequences of such non-conformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety. Second, if we decide to grant a request for a hearing on ITAAC compliance, we will decide, pursuant to § 52.103(c), whether there will be reasonable assurance of adequate protection of the public health and safety during a period of interim operation. Third, we will designate the procedures under which the proceeding shall be conducted. We have amended § 52.103 and our Rules of Practice (10 CFR 2.309, 2.310, and 2.341) to incorporate these changes.

III. Conclusion

The Commission reiterates its long-standing commitment to ensuring that hearings are fair and produce an adequate record for decision, while at the same time being completed as expeditiously as possible. The Commission intends to monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. To this end, the Commission will act in individual proceedings, as appropriate, to provide guidance to licensing boards and parties, and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.

Dated at Rockville, Maryland, this 11th day of April 2008,

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

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APPLICATIONS

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1.0 APPLICATION FOR LICENSE/PERMIT

1.1 Applicants

All co-owners of a nuclear power plant must be co-applicants for NRC licenses for the facility. To hold otherwise could place a cloud on significant areas of the NRC's regulatory authority and is not consistent with the safety considerations with which Congress was primarily concerned in the Atomic Energy Act. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 200-201 (1978). The Appeal Board's decision in Marble Hill thus overrules the Licensing Board's holding to the contrary in Omaha Public Power District (Fort Calhoun Station, Unit 2), LBP-77-5, 5 NRC 437 (1977).

1.2 Renewal Applications - See Section 6.11 for Reactor License Renewal Proceedings

Applications for a renewal of a license may be filed with the NRC. 10 CFR § 2.109 provides that where an application for renewal is filed at least 30 days prior to the expiration of an existing license authorizing activities of a continuing nature, the existing license will not be deemed to expire until the renewal application has been finally determined. A construction permit is a "license" for these purposes. 10 CFR § 2.109(a)(1993). See AEA § 185, 42 U.S.C. 2235 ("[f]or all other purposes of this Act, a construction permit is deemed to be a 'license'"); see also 10 CFR § 2.4. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 202 n.38 (1993).

As part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee's corporate organization and the integrity of its management. The past performance of management may help indicate whether a licensee will comply with agency standards. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995).

Because NRC regulations provide that operating license renewals do not have to furnish information regarding the onsite storage of spent fuel or high level waste disposal, low-level waste storage and disposal, and mixed waste storage and disposal, these subjects are barred as contentions. Duke Energy Corp., LBP-98-33, 48 NRC 381, 391 (1998).

For environmental issues listed in Subpart A, Appendix B of 10 CFR 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 51.171(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 & 4), LBP-01-6, 53 NRC 138, 154 (2001). See generally Entergy Nuclear Generation Co. And Entergy Nuclear

Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 278-79 (2006).

Even when a GEIS has resolved a Category 1 issue generically, the applicant must still provide additional analysis in its Environmental Report if new significant information may bear on the applicability of the Category 1 finding at the particular plant. The Commission has identified three methods by which petitioners can petition the NRC to address significant new information that has arisen since the GEIS on Category 1 issues was finalized: (1) petitioners may seek a waiver to a rule if they possess information that may show that a generic rule would not serve its purpose at the specific plant; (2) petitioners may petition the NRC to initiate a new rulemaking process; or (3) petitioners may use the SEIS notice and comment process to request that the NRC forgo use of the suspect generic finding and suspend license renewal proceedings, pending a new rulemaking or update of the GEIS. However, the Commission treats all spent fuel accidents as generic, whatever their cause. There is to be no litigation of spent fuel accidents. Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 294-95 (2006).

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). 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). See generally Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 279-80 (2006).

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).

1.3 Applications for Early Site Review

The Commission's regulations in 10 CFR Part 2 have been amended to provide for an adjudicatory early site review. See 10 CFR §§ 2.101(a-1), 2.600 to 2.606. These early site review procedures, which differ in both form and effect from those of Subpart A of 10 CFR Part 52 and Appendix Q to 10 CFR Part 52 (formerly, 10 CFR Part 50), are designed to result in the issuance of a partial initial decision with regard to site suitability matters chosen by the applicant.

An applicant who seeks early site review is not required to own the proposed power plant site. The real test for deciding on early site review is whether or not the applicant can produce the information required by regulation and necessary for an effective hearing. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1136 (1981).

The Commission's early site review regulations do not require that the applicant have a "firm plan" to construct a plant at the site, but rather are meant to provide an opportunity to resolve siting issues in advance of any substantial commitment of resources. 10 CFR § 2.101(a-1), §§ 2.600 et seq. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 975-976 (1981).

Three years after the Licensing Board sanctioned a limited work authorization (LWA) and before 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 adopted applicant's suggestion to "vacate without prejudice" the decisions of the Licensing Board sanctioning the LWA. The Appeal Board remanded the cause for proceedings deemed appropriate by the Licensing Board upon formal receipt of an early site approval application. Delmarva Power & Light Company (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5, 6 (1979).

1.4 Application for License Transfer

A formal application for a license transfer is not necessary where the current owner filed for bankruptcy and the transfer was arranged in the settlement agreement and was published in the Federal Register. Moab Mill Reclamation Trust (Atlas Mill Site), CLI-00-7, 51 NRC 216, 219-220 (2000).

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 (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).

1.5 Form of Application for Construction Permit/Operating License

1.5.1 Form of Application for Initial License/Permit

Regulations permit the filing of an application in three parts: Antitrust Information; SAR; and ER (10 CFR § 2.101). The application is initially treated as a "tendered application" pending a preliminary Staff review for completeness. 10 CFR § 2.101(a)(2).

1.5.2 Form of Renewal Application for License/Permit

(RESERVED)

1.6 Contents of Application

1.6.1 Incomplete Applications

The determination as to whether an application is sufficiently complete for docketing is for the Staff, rather than an adjudicatory board, to make. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 280 (1978).

A materials licensee may submit evidentiary material to supplement its license application where intervenors seek to invalidate the license because of alleged deficiencies and omissions in the license application. Curators of the University of Missouri, LBP-90-45, 32 NRC 449, 454-55 (1990). See Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 109-110 (1991), clarified, LBP-91-34, 34 NRC 159 (1991).

Although the Commission by no means encourages defective applications, an application which is minimally flawed is not automatically totally rejected. Further, the application may be modified or improved as NRC review goes forward. Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395 (1995). "An application need not be rejected whenever an omission or error is found." 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).

Pending staff review of a license extension application does not constitute a fatal defect in the application and does not afford an adequate basis for a contention. Such "open items" in license applications are not unusual and are generally not a cause for concern since they must eventually be dealt with by the Staff before the license can be granted. Duke Energy Corp., LBP-98-33, 48 NRC at 381, 386-87 (1998).

It is not true that all licensee commitments must be converted into express license conditions to be enforceable. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235-236 (2001).
For a materials license, having no final estimates, no final plan, and no final NRC Staff review indicates that the NRC staff has not yet resolved all issues material to licensing. Also, an adequate financial assurance plan is material to licensing. Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 241 (2000).

1.6.2 Material False Statements

Under Section 186 of the Atomic Energy Act of 1954 (42 U.S.C. § 2236), a license or permit may be revoked for material false statements in the application. 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).

Liability of an applicant or licensee for a material false statement in violation of Section 186a of the Atomic Energy Act does not depend on whether the applicant or licensee knew of the falsity. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978).

Licensee remains responsible for the contents of the application even if licensee used a consultant to assist in the preparation of the application. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 429 (1993).

Intent to deceive is irrelevant in determining whether there has been a material false statement under Section 186a of the Atomic Energy Act; a deliberate effort to mislead the NRC, however, is relevant to the matter of sanctions, once a material false statement has been found. Consumer Power Co. (Midland Plant, Units 1 and 2) ALAB-691, 16 NRC 897, 915 (1982); The Regents of the University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1387 (1984).

In Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-324, 3 NRC 347 (1976), the Appeal Board held that:

(1) A statement may be "false" within the meaning of Section 186 even if it is made without knowledge of its falsity - i.e., scienter is not a necessary element of a false statement under Section 186.

(2) Information is material under Section 186 if it would have a natural tendency or capability to influence the decision of the person or body to whom it is to be submitted - i.e., the information is material if a reasonable Staff member would consider it in reaching a conclusion. The information need not be relied upon in fact.

Under Section 186a of the Atomic Energy Act, the test for materiality is whether the information is capable of influencing the decisionmaker, not whether the decisionmaker would, in fact, have relied on it. Determinations of materiality require careful, common sense judgments of the context in which information appears and the stage of the licensing process involved. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), citing Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984); The Regents of the University of California (UCLA Research Reactor), LBP-84-22, 19 NRC 1383, 1408-09 (1984); Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 427-29 (1993).

The mere existence of a question or discussion about the possible materiality of information does not necessarily make the information material. Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-691, 16 NRC 897, 914 (1982). The nature (e.g., physical attributes and capabilities) and status of an applicant's proposed facility are material matters in a decision whether to grant a radioactive byproduct materials license. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 428 (1993).

The Commission that it need not rely on a false statement in order for it to be material, nor must the statement in fact induce the agency to grant an application. Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 428 (1993).

For each alleged misrepresentation, section 186 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2236), requires that the Board be apprised of the following as precisely as possible: (1) what was said, (2) in what context the statement existed, (3) the proof that the statement was inaccurate or incomplete, (4) when (if applicable) the statement was corrected, and (5) whether the Board should be concerned about the length of delay between the statement and when it was corrected. This will require proof of the time line of actual events, demonstrating not only that they occurred but also when they occurred. In addition, the Board will require that the proof offered will make some allowance for inaccuracies in expression, understanding, and memory. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) LBP-94-37, 40 NRC 288, 303-04 (1994).

In Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976), the Commission affirmed the Appeal Board's rulings supra and, in addition, held that silence (omissions) as to material facts regarding issues of major importance to licensing decisions is included in the Section 186 phrase "material false statement" since such an interpretation will effectuate the health and safety purposes of the Act. Thus, the sanctions of Section 186 apply not only to affirmative statements but to omissions of material facts important to health and safety.

A "material false statement" under Section 186a of the Atomic Energy Act encompasses omissions as well as affirmative statements. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 911 (1982), citing Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 489 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1357 (1984). The Commission has indicated, however, that it is reconsidering its views on what constitutes a material false statement in this regard. See 49 Fed. Reg. 8583, 8584 (1984).

Information concerning a licensee's or applicant's intent to deceive may call into question its "character," a matter the Commission is authorized to consider under Section 182 of the Atomic Energy Act, 42 U.S.C. 2232a, or its ability and willingness to comply with Agency regulations, as Section 103b, 42 U.S.C. § 2133b, requires. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 915 n.25 (1982).

False statements, if proved, could signify lack of management character sufficient to preclude an award of an operating license, at least as long as responsible individuals retained any responsibilities for the project. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1297 (1984), citing Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 674-75 (1984), and Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

A deliberate false statement or withholding of material information would warrant the imposition of a severe sanction. Not only are material false statements and omissions punishable under Sections 234 and 186 of the Atomic Energy Act, but deliberate planning for such statements or concerns on the part of applicants or licensees would be evidence of bad character that could warrant adverse licensing action even where

those plans are not carried to fruition. When parties and their attorneys engage in conduct which skirts close to the line of improper conduct, they are running a grave risk of serious sanction if they cross that line. Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

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), CLI-01-9, 53 NRC 232, 410 (2001), citing Florida Power & 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).

1.7 Docketing of License/Permit Application

If the application is found to be complete, a docket number will be assigned and the applicant and other appropriate officials notified. 10 CFR § 2.101(a)(3).

1.8 Notice of License/Permit Application

1.8.1 Publication of Notice in Federal Register

The Federal Register Act (44 U.S.C. § 1508) provides that a publication of a notice in the Federal Register constitutes notice to all persons residing in the United States. Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 40 (1982).

One may be charged with notice of matters published in the Federal Register. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7 (1980). (**Note** - The Appeal Board expressly declined to reach the question of whether the Federal Register notice bound the petitioners to its terms. Id. at 10).

The notice to parties wishing to intervene in hearings before the Commission published in the Federal Register is notice to all the world. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1085 (1982).

In Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 & 2), ALAB-445, 6 NRC 865 (1977), it was held that, while 10 CFR § 2.104(a) requires that notice of hearing initiating a construction permit proceeding be published in the Federal Register at least 30 days prior to commencement of hearing, it does not require that such notice establish the time, place and date for all phases of the evidentiary hearings. However, in an unpublished opinion issued on December 12, 1977, the Federal District Court for the Northern District of Mississippi held that the interpretation of the notice requirements by the Appeal Board in Yellow Creek was

erroneous and that at least 30 days prior public notice of the time, place and date of hearing must be provided.

There appears to be no requirement that the rights of interested local governmental bodies to be made parties to a proceeding be spelled out in the notice of opportunity for hearing. Thus, a notice of opportunity for hearing is not defective simply because it fails to state the right of an interested governmental body to participate in a proceeding. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 585 (1978).

1.8.2 Amended Notice After Addition of New Owners

(RESERVED)

1.8.3 Notice on License Renewal

(RESERVED)

1.9 Staff Review of License/Permit Application

An ASLB has ruled that the Staff has a right to continue to meet privately with parties even though a hearing has been noticed, and that, while an ASLB has supervisory authority over Staff actions that are part of the hearing process, it has no such authority with regard to the Staff's review process. Northeast Nuclear Energy Co. (Montague Nuclear Power Station, Units 1 & 2), LBP-75-19, 1 NRC 436 (1975).

The Staff has adopted a meeting policy which is reflected in NRC Management Directive 3.5, "Attendance at NRC Staff Sponsored Meetings" (April 2007).

Note that 10 CFR § 2.102 explicitly provides that the Staff may request any one party to a proceeding to confer informally with the Staff during the Staff's review of an application.

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 would needlessly impair the Staff's ability to obtain information. The Staff should regard the intervenor's 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) and Power Authority of the State of N.Y. (Indian Point, Unit 3), CLI-82-41, 16 NRC 1721, 1722-23 (1982).

Adjudicatory 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 rule 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 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

It is up to the Staff to decide its priorities in the review of applications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 238 (1980), modified, CLI-80-12, 11 NRC 514, 517 (1980). However, where a Licensing Board finds that the Staff cannot demonstrate a reasonable cause for its delay in submitting environmental statements, the Board may issue a ruling noting the unjustified failure to meet a publication schedule and then proceed to hear other matters or suspend proceedings until the Staff files the necessary documents. The Board, sua sponte or on motion of one of the parties, may refer the ruling for review. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 207 (1978).

One aspect of the NRC role in regulating nuclear power plants is to provide criteria forming the engineering baseline against which licensee system designs, including component specifications, are judged for adequacy. It has not been the Staff's practice to certify that any particular components are qualified for nuclear service, but, rather, it independently reviews designs and analyses, qualification documentation and quality assurance programs of licensees to determine adequacy. This review approach is consistent with the NRC's responsibilities under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.). Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 426 (1978).

Pursuant to 10 CFR § 50.47(a)(1), the NRC must find, prior to the issuance of a license for the full-power operation of a nuclear power reactor, that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1008 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1063-64 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 506 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 29 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693-94 (1986), aff'd on other grounds sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 12 (1987).

The NRC is not required to make a new finding on the-adequacy of emergency preparedness plans for the issuance of a renewed nuclear power reactor operating license. 10 CFR § 50.47(a)(1), 56 Fed. Reg. 64943, 64966-67 (Dec. 13, 1991). In accordance with Section 50.47(a)(2), the Commission is to base its finding on a review

of FEMA's "findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented", and on a review of the NRC Staff assessment of applicant's onsite emergency plans. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1094 n.22 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1063-64 (1983); Union Electric Co. (Callaway Plant, Unit 1), ALAB-754, 18 NRC 1333, 1334-1335 (1983), affirming, LBP-83-71, 18 NRC 1105 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 652 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 693 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987). However, 10 CFR 50.47(a)(2) does not mandate that a Board's finding on the adequacy of an emergency plan must be based on a review of FEMA findings and determinations. Since 10 CFR § 50.47(a)(2) also provides that any other information available to FEMA may be considered in assessing the adequacy of an emergency plan, a Board may rely on such evidence, properly admitted into the hearing record, when FEMA findings and determinations are not available. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 531-32 (1988). In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of the adequacy of an emergency plan. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 378 (1983), citing 10 CFR § 50.47(a)(2); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 655 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-49, 22 NRC 899, 910 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 365 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 499 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 239 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-32, 28 NRC 667, 714 (1988), aff'd in part and rev'd in part on other grounds, ALAB-924, 30 NRC 331 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 397, 624 (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 on other grounds, ALAB-947, 33 NRC 299 (1991). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 139 n.38 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 360 (1989). The presumptive validity of FEMA findings does not depend upon the presentation of testimony by FEMA witnesses. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 437 (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 on other grounds, ALAB-947, 33 NRC 299 (1991).

If the Staff determines that the cumulative radiological impacts of a license applicant's proposed project will be inimical to the public health and safety, it must take steps to address those impacts by imposing license conditions that avoid such harm, or, if such mitigating measures would be unavailing, deny the license application. Hydro Resources, Inc., LBP-06-1, 63 NRC 41, 60 (2006), aff'd, CLI-06-14, 63 NRC 510 (2006).

A Staff review of an application is an aid to the Commission in determining if a hearing is needed in the public interest. Without the Staff's expert judgment the Commission probably cannot reach an informed judgment on the need for a hearing in the public interest. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-581, 11 NRC 233, 235 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

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 is thus 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). See Curators of the University of Missouri, LBP-91-31, 34 NRC 29, 108-109 (1991), clarified, LBP-91-34, 34 NRC 159 (1991), aff'd, CLI-95-1, 41 NRC 71, 121 (1995).

1.10 Withdrawal of Application for License/Permit/Transfer

10 CFR § 2.107(a) provides, in part, that "[t]he Commission...may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe." See Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 581 (1988).

A Licensing Board has no jurisdiction to impose conditions on the withdrawal of an application for an operating license where the applicant has filed a motion to terminate the operating license proceeding prior to the Board's issuance of a notice of hearing on the application. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 724 (1986), citing 10 CFR § 2.107(a). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-91-36, 34 NRC 193, 195 (1991). A notice of hearing is only issued after a Board considers any requests for hearing and intervention petitions which may have been submitted, and makes a determination that a hearing is warranted. Thus, the notice of receipt of an application for an operating license, notice of proposed action, and notice of opportunity for hearing are not functionally the notice of hearing referred to in 10 CFR § 2.107(a). Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 723-24 (1986).

Where a party has prevailed or is about to prevail, an unconditional withdrawal cannot be approved. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-8281, 16 NRC 1128, 1135 (1982).

While Section 2.107 is phrased primarily in terms of requests for withdrawal of an application by an applicant, the Commission itself has entertained such requests made by other parties to a construction permit proceeding, Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-29, 8 AEC 10 (1974), and has indicated that such a request is normally to be directed to, and ruled upon by, the Atomic Safety and

Licensing Board presiding in the proceeding. Consumers Power Company (Quanicassee Plant, Units 1 & 2), CLI-74-37, 8 AEC 627, n.1 (1974). Thus, it appears that a Licensing Board has the authority, under 10 CFR § 2.107, to consider a motion to compel withdrawal of an application filed by a party other than the applicant.

The filing of an application to construct a nuclear power plant is wholly voluntary. The decision to withdraw an application is a business judgment. The law on withdrawal does not require a determination of whether the decision is sound. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983).

Where an applicant abandons its construction of a nuclear facility and requests that the construction permit proceeding be terminated prior to resolution of issues raised on appeal from the initial decision authorizing construction, fundamental fairness dictates that termination of the proceedings be accompanied by a vacation of the initial decision on the ground of mootness. Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit 1), ALAB-596, 11 NRC 867, 869 (1980); United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-755, 18 NRC 1337, 1338-1339 (1983), vacating LBP-83-8, 17 NRC 158 (1983).

Withdrawal of a license transfer application also moots an adjudicatory proceeding on the proposed transfer. Niagara Mohawk Power Corp., et. al. (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-00-9, 51 NRC 293, 294 (2000).

The terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed. The record must support any findings concerning the conduct and harm in question. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice §41.05(1) at 41-58.

Intervenors have standing to seek a dismissal with prejudice or to seek conditions on a dismissal without prejudice to the exact extent that they may be exposed to legal harm by a dismissal. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-8281, 16 NRC 1128, 1137 (1982).

A Licensing Board has substantial leeway in defining the circumstances in which an application may be withdrawn but the withdrawal terms set by the Board must bear a rational relationship to the conduct and legal harm at which they are aimed. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981); Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 49 (1983).

Under 10 CFR § 2.107(a), withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe. However, to make a serious case for conditions, the Intervenors reasonably can be held to an obligation to offer some indication of their objective. The proponent of litigation always bears the burden of explaining which direction the litigation will take. Sequoyah Fuels Corp. (Gore, Oklahoma site), CLI-95-2, 41 NRC 179, 191-93 (1995).

The applicant for a license bears the cost of Staff work performed for its benefit, whether or not it withdraws its application prior to fruition. Puerto Rico Electric Power Authority

(North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1137 (1981).

The antitrust information required to be filed under 10 CFR § 50.33a is part of the permit application; therefore, any applicant who wishes to withdraw after filing antitrust information, must comply with the Commission's rule governing withdrawal of license applications (10 CFR § 2.107(a)), even if a hearing on the application had not yet been scheduled. To instead file a Notice of Prematurity and Advice of Withdrawal is an impermissible unilateral withdrawal, and the filing will be treated as a formal request for withdrawal under 10 CFR § 2.107(a). Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), CLI-82-5, 15 NRC 404, 405 (1982).

With regard to design changes affecting an application, where there is a fairly substantial change in design not reflected in the application, the remedy is not summary judgment against the applicant, nor is withdrawal and subsequent refiling of the application necessarily required. Rather, an amendment of the application is appropriate. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877 (1974).

1.10.1 Withdrawal Without Prejudice

An applicant may withdraw its application without prejudice unless there is legal harm to the intervenors or the public. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing LeCompte v. Mr. Chip. Inc., 528 F.2d 601, 604 (5th Cir. 1976). The Board may attach reasonable conditions on a withdrawal without prejudice to protect intervenors and the public from legal harm. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982), citing LeCompte v. Mr. Chip. Inc., 528 F.2d 601, 604 (5th Cir. 1976).

Where a decommissioning plan submitter withdraws its plan and the proceedings are dismissed without prejudiced to allow for possible future resubmission, and the applicant does later submit a new decommissioning plan, the Board may decide, out of fairness and based upon the totality of the circumstances, to allow an intervenor in the original proceeding to intervene in the new proceeding without filing a new hearing request. U.S. Army (Jefferson Proving Ground Site), LBP-05-25, 62 NRC 435, 440-41 (2005).

The possibility of another hearing, standing alone, does not justify either a dismissal with prejudice or conditions on a withdrawal without prejudice. That kind of harm, the possibility of future litigation with its expenses and uncertainties, is the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1135 (1982), citing Jones v. SEC, 298 U.S. 1, 19 (1936); 5 Moore's Federal Practice 41.05(1) at 41-72 to 41-73 (2nd ed. 1981); Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 50 (1983).

In the circumstances of a mandatory licensing proceeding, the fact that the motion for withdrawal comes after most of the hearings should not operate to bar a withdrawal

without prejudice where the applicant has prevailed or where there has been a nonsuit as to particular issues. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1136 (1982).

Where a motion for leave to withdraw a license application without prejudice has been filed with both an Appeal Board and a Licensing Board, it is for the Licensing Board, if portions of the proceeding remain before it, to pass upon the motion in the first instance. As to whether withdrawal should be granted without prejudice, the Board is to apply the guidance provided in Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981) and Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981). Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-668, 15 NRC 450, 451 (1982)

A Board may authorize the revocation of a Limited Work Authorization and the withdrawal of an application without prejudice after determining the adequacy of the applicant's site redress plan and clarifying the responsibilities of the applicant and Staff in the event that an alternate use for the site is found before redress is completed. United States Dep't of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), LBP-85-7, 21 NRC 507 (1985).

1.10.2 Withdrawal With Prejudice

Following a request to withdraw an application the Board may dismiss the case "without prejudice," signifying that no disposition on the merits was made; or "with prejudice," suggesting otherwise. (10 CFR § 2.107(a), 10 CFR § 2.321 (formerly 2.721(d))). A dismissal with prejudice requires some showing of harm to either a party or the public interest in general and requires careful consideration of the circumstances, giving due regard to the legitimate interests of all parties. It is well settled that the prospect of a second lawsuit or another application does not provide the requisite quantum of legal harm to warrant dismissal with prejudice. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132, 1135 (1981); Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973, 978-979 (1981); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), LBP-8281, 16 NRC 1128, 1134 (1982), citing Fed.R. Civ.P. 41(a)(1), (2); LeCompte v. Mr. Chip Inc., 528 F.2d 601, 603 (5th Cir. 1976), citing 5 Moore's Federal Practice, §41.05 (2d ed. 1981).

General allegations of harm to property values, unsupported by affidavits or unrebutted pleadings, do not provide a basis for dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337 (1984), citing Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133-34 (1981), Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 979 (1981).

Allegations of psychological harm from the pendency of the application, even if supported by the facts, do not warrant the dismissal of an application with prejudice. Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337-1338 (1984), citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983).

The Commission has the authority to condition the withdrawal of a license application on such terms as it thinks just. See 10 CFR 2.107(a). However, dismissal with prejudice is a severe sanction which should be reserved for those unusual situations which involve substantial prejudice to the opposing party or to the public interest in general. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132-1133 (1981); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-84-33, 20 NRC 765, 767-768 (1984); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 51 (1999).

1.11 Abandonment of Application for License/Permit

When the applicant has abandoned any intention to build a facility, it is within the Licensing Board's power to dismiss the construction permit application. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980).

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PREHEARING MATTERS

2.0 PREHEARING MATTERS

2.1 Scheduling of Hearings

(See Section 3.3)

2.2 Necessity of Hearing

A person requesting a hearing must make some threshold showing that a hearing would be necessary to resolve opposing and supported factual assertions. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 245, 256 (1982), aff'd sub nom, City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).

The objectives of the NRC adjudicatory procedures and policies are threefold: to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing process, and to produce an informed adjudicatory record that supports agency decisionmaking on public health and safety, the common defense and security, and the environment. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 38 (2001).

There is no general right to a hearing for a hearing's sake. Northeast Nuclear Energy Co. (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 282 (2001).

Atomic Energy Act Section 189a(1), which provides the opportunity to request a hearing to any person whose interest may be affected by a proceeding, confers hearing rights on licensees as well as on interested members of the public. 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), CLI-92-11, 36 NRC 47, 53-54 (1992).

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); ALAB-618, 12 NRC 551 (1980).

The Commission's summary disposition rule (10 CFR § 2.710 (formerly 2.749)) gives a party a right to an evidentiary hearing only where there is a genuine issue of material fact and the party is entitled to a decision as a matter of law. An important effect of this principle is that applicants for licenses may be subject to substantial expense and delay when genuine issues have been raised, but are entitled to an expeditious determination, without need for an evidentiary hearing on all issues which are not genuine. Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299, 301 (1982).

An adjudication need not necessarily involve a hearing. "Adjudication" includes any agency process for the formulation of an order. An order may be developed in a licensing process, i.e. an agency process respecting the modification of a license. Licensees can request a hearing on such an order; the fact that they may not makes the proceeding no less an adjudication. All Power Reactor Licensees and Research

Reactor Licensees who Transport Spent Nuclear Fuel, CLI-05-06, 61 NRC 37, 41 (2005).

2.2.1 Materials License Hearings

Constitutional due process does not require a formal adjudicatory hearing for a materials licensing case where the intervenors have not specified any health, safety, and environmental concerns which constitute liberty or property interests subject to due process protection, where the issues can be evaluated fully and fairly without using formal trial-type procedures, and where formal hearing procedures would add appreciably to the government's administrative burden. Sequoyah Fuels Corporation (Sequoyah UF6 to UF4 Facility), CLI-86-17, 24 NRC 489, 495-498 (1986).

Current NRC environmental regulations do not specify what type of hearing may be required for any Staff environmental finding regarding a materials license action. Sequoyah Fuels Corporation (Sequoyah UF6 to UF4 Facility), CLI-86-17, 24 NRC 489, 498 (1986).

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).

There is no statutory entitlement to a formal on-the-record hearing under the Atomic Energy Act or NRC regulations with regard to materials licensing actions. Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-21, 16 NRC 401, 402 (1982); aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). Rockwell International Corp. (Energy Systems Group Special Nuclear Materials License No. SNM-21), CLI-83-15, 17 NRC 1001, 1002 (1983).

Section 193 of the Atomic Energy Act of 1954, as amended, requires a formal on-the-record hearing for the initial licensing of a uranium enrichment facility.

2.2.2 Operating License/Amendment Hearings

In the Seabrook operating license proceeding, the intervenors sought to litigate contentions involving the low-power testing even though the record had already closed. On appeal, the intervenors argued that the Licensing Board violated their right to a hearing on all issues material to the granting of a full-power operating license, Atomic Energy Act § 189a, by requiring that the intervenors' contentions meet the standards for reopening the record, 10 CFR § 2.326(a) (fomerly 2.734(a)). The Appeal Board affirmed the Licensing Board decision, noting that: (1) although the intervenors labeled their contentions "low-power testing contentions", they actually raised issues which involved generic operational questions about plant readiness for full-power operation which could have been raised when the hearing began, Seabrook, supra, 32 NRC at 233-34, 240-41; and (2) while low-power testing is material to the operation of a licensed facility, it is not material to the initial issuance or grant of a full-power license, Seabrook, supra, 32 NRC at 234-37.

A licensee request to suspend the antitrust conditions in its operating license is a license amendment within the meaning of § 189a(1) of the Atomic Energy Act (AEA) which provides a hearing to any person whose interest may be affected by any

proceeding for the granting, suspending, revoking, or amending of any license. 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, 238-39 (1991), aff'd in part and appeal denied, CLI-92-11, 36 NRC 47, 53-54 (1992). The NRC Staff's initial technical and legal assessment of a license amendment application and its determination concerning the propriety of the request cannot substitute for the adjudicatory hearing to which the licensee would otherwise be entitled under AEA § 189a. Perry and Davis-Besse, supra, 34 NRC at 239, aff'd in part and appeal denied, CLI-92-11, 36 NRC 47, 60 (1992).

2.2.3 Hearings on Exemptions

An exemption from the regulations, standing alone, is not an action for which section 189 of the AEA requires an opportunity for a hearing. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 96 (2000) (exemption concerning security plan). An exemption from regulations generally requiring cask certification before a utility as general licensee could begin construction of casks did not require a hearing under AEA section 189. Kelley v. Selin, 42 F.3d 1501, 1517 (6th Cir. 1995), cert. denied, 515 U.S. 1159 (1995). A temporary exemption from a rule does not alter the license and thereby constitute a license amendment requiring an opportunity for hearing. Commonwealth of Massachusetts v. NRC, 878 F.2d 1516, 1520-21 (1st Cir. 1989). See also Duke Power Co. v. NRC, 770 F.2d 386, 389 (4th Cir. 1985) (noting that parties agreed no amendment involved in exemption request).

For there to be any statutory right to a hearing on the granting of an exemption, such a grant must be an integral part of a proceeding for the granting, suspending, revoking, or amending of any license or construction permit under the Atomic Energy Act. U.S. Dep't of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982). Where an exemption request was directly related to the initial license application, contentions on the propriety of the exemption were permissible subject for a hearing on the application. Private Fuel Storage LLC, CLI-01-12, 53 NRC 459 (2001).

2.2.4 License Transfer Hearings

Atomic Energy Act § 189a(1) does not require a pre-effectiveness hearing on an application to transfer control of a license. However, as a matter of discretion, the Commission may direct the holding of a pre-effectiveness hearing if a proposed transfer of control raises potentially significant public health and safety issues. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 76-79 (1992).

Section 189a.(1)(A) of the Atomic Energy Act requires the Commission to offer an opportunity for a hearing for certain kinds of proceedings, including those involving the "transfer of control" over licensed facilities. In order to trigger hearing rights under the "transfer of control" provision of § 189a.(1)(A), there must actually be a license transfer. Where a corporate merger did not propose to change either operating or possession authority, there was no direct license transfer. Similarly, where the same parent company would indirectly control the licensee – both before and after the proposed merger – there was no indirect license transfer. Therefore, the proceeding did not involve a "transfer of control," and no hearing rights attached. Amergen Energy Co.,

LLC (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 573-74 (2005).

2.2.5 Hearings On Miscellaneous Matters

Part 52 Combined Operating License

The Commission may grant a request for a post-construction hearing on a Part 52 combined construction permit and operating license from any person who makes a prima facie showing that (1) one or more of the acceptance criteria in the combined license have not been, or will not be met, and (2) the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety. 10 CFR § 52.103(a),(b), 57 Fed. Reg. 60975, 60978 (Dec. 23, 1992). See Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir 1992).

Enforcement Order

Where complainants were denied a hearing after they had alleged a failure of the Director to take stronger action, the Appeal Board, in upholding the denial, noted that the Director's decision in no way restricted the authority of the ASLB to further restrict or even deny the license for operation of the facility. Further, it was not grounds for a hearing that, if a hearing was not immediately held on the Director's decision, the money spent on the plant would later influence the Licensing Board's decision. Houston Lighting and Power Company (South Texas Project, Units 1 & 2), CLI-80-32, 12 NRC 281, 288-290 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1264 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

Agreement State Transfer

Before entering into or amending an agreement to transfer to a State its regulatory control over Atomic Energy Act § 11e(2) byproduct material, the NRC must provide notice and an opportunity for a public hearing where the State's proposed regulatory standards for the byproduct material differ from the Commission's standards for such material. Atomic Energy Act § 274o. A formal adjudicatory hearing is not required. Notice and comment procedures are sufficient for determining whether the proposed State standards, evaluated generally and not as applied to specific sites, are equivalent to, or more stringent than, the corresponding Commission standards. State of Illinois, CLI-90-9, 32 NRC 210, 215-16 (1990), reconsid. denied, CLI-90-11, 32 NRC 333 (1990).

Confirmatory Action Letter

A Confirmatory Action Letter whereby the applicants voluntarily ceased low-power testing and agreed to obtain NRC Staff approval prior to resuming operations is not a suspension within the meaning of Section 189(a) of the Atomic Energy Act, and does not give the intervenors the right to a hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 275-76 (1989), aff'd, ALAB-940, 32 NRC 225 (1990).

2.3 Location of Hearing

2.3.1 Public Interest Requirements Affecting Hearing Location

(RESERVED)

2.3.2 Convenience of Litigants Affecting Hearing Location

(See Section 3.3.5.2)

2.4 Issues for Hearing

(See Sections 3.4 to 3.4.6)

2.5 Notice of Hearing

10 CFR 2.105(a) requires that the Commission issue a notice of proposed action - also called a notice of opportunity for hearing - only with respect to an application for a facility license, an application for a license to receive radioactive waste for commercial disposal, an application to amend such licenses where significant hazards considerations are involved, or an application for "any other license or amendment as to which the Commission determines that an opportunity for public hearing should be afforded." A materials license amendment does not fall into any of these categories. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 245 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). Nor do actions involving the shipping and transport of radioactive components taken by an applicant in anticipation of decommissioning, provided those activities do not violate 10 CFR § 50.59(a)(1). Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994). A Person cannot intervene in a proceeding before the issuance of a "notice of hearing" or a "notice of proposed action," which is a prerequisite to the initiation of a proceeding. Petitions filed prior to this issuance are "clearly premature" and may be rejected by the Secretary. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 239-40 (2004).

2.5.1 Contents of Notice of Hearing

Operating license proceedings start with the notice of proposed action (10 CFR § 2.105) and are separate from prior proceedings. Thus, a Licensing Board in a construction permit hearing may not order that certain issues be tried at the OL proceeding. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-80-12, 11 NRC 514, 517 (1980).

A Licensing Board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. This is a holding of general applicability. Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-290 n.6 (1979); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976). See also Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Indiana Public Service Company (Bailly

Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Tulsa Gamma Ray, Inc., LBP-90-42, 32 NRC 387, 388 (1990).

A notice of hearing must correspond to the agency's statutory authority over a given matter; it cannot confer or broaden that jurisdiction to matters expressly proscribed by law. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-661, 14 NRC 1117, 1123 (1981).

2.5.2 Adequacy of Notice of Hearing

One receiving filings in a proceeding is charged with reading and knowing matters therein which might affect his rights. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

Where an original notice of hearing is too narrowly drawn, a requirement in a subsequent notice that those who now seek to intervene state that they did not intervene before because of limitations in the original notice was not improper. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

The notice of hearing in an enforcement proceeding must provide adequate notice of (1) the alleged violations and (2) the specific regulatory provisions upon which the Staff seeks to impose a civil penalty. Tulsa Gamma Ray, Inc., LBP-90-43, 32 NRC 390, 391-92 (1990), citing 5 U.S.C. § 554(b)(3).

Even in the absence of any constructive notice of when an intervention petition must be filed, the possibility remains that an intervenor had actual notice of the pendency of an enforcement proceeding and failed to make a timely intervention request following that notice. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, aff'd, CLI-94-12, 40 NRC 64 (1994).

Where a petitioner sought to have a license-termination proceeding dismissed due to improper and insufficient notice, the Commission found notice to be adequate (and renotice not necessary) where 1) the Federal Register notice was clear enough to alert the petitioner as well as the local government (evidenced by the fact that both organizations had submitted documents, including the petitioner's timely hearing request, that indicated awareness of the subject and timing contained in the notice) that their interests were potentially affected and 2) other persons with similar interests would have recognized the purpose of the notice and responded appropriately, or at least would have reviewed the underlying documents that provided further information on the substance of the notice and were referenced in the associated series of Federal Register notices. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-04-28, 60 NRC 412, 415 (2004).

2.5.3 Publication of Notice of Hearing in Federal Register

In Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 & 2), ALAB-445, 6 NRC 865 (1977), it was held that, while 10 CFR § 2.104(a) requires that notice of hearing initiating a construction permit proceeding be published in the Federal Register at least 30 days prior to commencement of hearing, it does not require that such notice

establish time, place and date for all phases of the evidentiary hearings. However, in an unpublished opinion issued on December 12, 1977, the Federal District Court for the Northern District of Mississippi held that the interpretation of the notice requirements by the Appeal Board in Yellow Creek was erroneous and that at least 30 days prior public notice of the time, place and date of hearing must be provided.

The Federal Register Act expressly provides that such publication of a notice in the Federal Register constitutes notice to "all persons residing within the States of the Union" (44 U.S.C. 1508). See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). See also Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975); Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 191-192 (1979).

In an operating license amendment proceeding, the Licensing Board ruled that the law required the NRC to publish once in the Federal Register notice of its intention to act on the application for amendment to the operating license. Turkey Point, supra, LBP-79-21, 10 NRC at 192.

Publication in the Federal Register of conditions on intervention is notice as to all of those conditions, and one cannot excuse a failure to meet those conditions by a claimed lack of knowledge. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980).

2.5.4 Requirement to Renotice

Where a full-term operating license proceeding had been delayed by a lengthy NRC Staff review and the original notice of the opportunity for a hearing had been issued ten years earlier, a Licensing Board found it necessary to renotice the opportunity for a hearing. Rochester Gas and Electric Corp. (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1233 (1983), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-539, 9 NRC 422 (1979) wherein the Appeal Board opined that a hearing notice issued "perhaps 5 to 10 years" earlier is "manifestly stale". The renotice cannot limit the scope of contentions to those involving design changes or those based on new information. The new notice must allow the raising of any issues which have not been previously heard and decided. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386-387 (1979). However, the Commission did not re-notice the Watts Bar Unit 1 license when it came before the Commission in 1995. At that time, the Commission did not provide a further notice of opportunity for hearing, notwithstanding the fact that the original notice was published some 20 years before the application was granted. Although no challenge was made to the Commission's actions in issuing the license at that time, some letters raising concerns or objections to the Watts Bar operating license were treated as 10 CFR § 2.206 requests. Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1), DD-96-11, 44 NRC 69; DD-96-10, 44 NRC 54 (1996).

The Commission rejected the request of an intervenor who had withdrawn from the Comanche Peak operating license proceeding to re-notice for hearing the issuance of the Unit 2 operating license. The original notice was issued in 1979, the intervenor withdrew in 1982, and the remaining issues in controversy were settled by the remaining intervenor in 1988. After being denied late intervention to re-enter the

proceeding in 1988, the Commission rejected the withdrawn intervenor's subsequent request to renotice the Unit 2 proceeding in 1993 when the license was about to issue, a request the Commission treated as a petition for late intervention. Texas Utilities Elec. Co. (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-1, 37 NRC 1 & CLI-93-4, 37 NRC 156 (1993).

The Licensing Board rejected conclusory assertions that changes to an application required renoticing in Private Fuel Storage LLC, LBP-98-29, 48 NRC 286, 301(1998).

2.6 Prehearing Conferences

Prehearing conference matters are governed generally by 10 CFR § 2.329 (formerly 2.751a, 2.752).

Where a party has an objection to the scheduling of the prehearing phase of a proceeding, he must lodge such objection promptly. Late requests for changes in scheduling will not be countenanced absent extraordinary unexpected circumstances. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Units 1, 2 & 3), ALAB-377, 5 NRC 430 (1977).

A party seeking to be excused from participation in a prehearing conference should present its justification in a request filed before the date of the conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 191 (1978).

2.6.1 Transcripts of Prehearing Conferences

Prehearing conferences may be reported stenographically or by other means. 10 CFR § 2.329(d) (fomerly 2.751a(c), 2.752(b)).

A Licensing Board must make a good faith effort to determine whether the facts support a party's motion to correct the transcript of a prehearing conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 51 (1986).

2.6.2 Prehearing Conference Order

2.6.2.1 Effect of Prehearing Conference Order

A prehearing conference order may describe action taken at the conference, schedule further actions, describe stipulations agreed to, identify key issues, provide for discovery and the like. The order will control the subsequent course of proceedings unless modified for cause. 10 CFR § 2.329(e) (formerly 2.751a(d), 2.752(c)).

2.6.2.2 Objections to Prehearing Conference Order

Objections to the prehearing conference order may be filed by a party within 5 days after service of the order. Parties may not file replies to such objections unless the presiding officer so directs. 10 C.F.R. § 2.329(e).

2.6.2.3 Appeal from Prehearing Conference Order

Since a prehearing conference order is interlocutory in nature, it is not generally appealable except with regard to matters for which interlocutory appeal is provided. In this vein that portion of a prehearing conference order which grants or wholly denies a petition for leave to intervene is appealable under 10 CFR § 2.311 (formerly 2.714a). Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 (1973).

2.7 Television Coverage of Prehearing Conferences

(See Section 6.32)

2.8 Conference Calls

Both prior to the start of a hearing and sometimes during recesses thereof, it may become necessary for the Board to communicate quickly with the parties. In this vein, the practice has grown up of using telephone conference calls. Such calls should not be utilized unless all parties participate except in the case of the most dire necessity. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 NRC 94, 96 (1976). If any rulings are made, the Licensing Board must make and enter a written order reflecting the ruling directly thereafter. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809, 814-815 (1976).

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).

2.9 Prehearing Motions

2.9.1 Prehearing Motions Challenging ASLB Composition

Disqualification of a designated presiding officer or a designated member of the ASLB is covered generally by 10 CFR § 2.313(b) (formerly 2.704).

In Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60 (1973), the Appeal Board listed the circumstances under which a board member is subject to disqualification. Those circumstances include situations in which:

(1) the board member has a direct, personal, substantial pecuniary interest in the results of the case;
(2) the board member has a personal bias against a participant;
(3) the board member has served in a prosecutory or investigative role with regard to the same facts as are in issue;
(4) the board member has prejudged factual -- as distinguished from legal or policy -- issues;
(5) the board member has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

A litigant may move for disqualification of any board member who, by word or deed, has manifested a conflict of interest or a bias covered by the above listing.

10 C.F.R. 2.313(b) is meant to ensure both the integrity and appearance of integrity of the Commission's formal hearing process. Hydro Resources, Inc., CLI-98-9, 47 NRC 326 (1998).

2.9.1.1 Contents of Motion Challenging ASLB Composition

In Duquesne Light Co. (Beaver Valley Power Station, Units 1 & 2), ALAB-172, 7 AEC 42 (1974), the Appeal Board summarized the requirements for disqualification motions as follows:

(1) motions must be accompanied by affidavits establishing a basis for the charge;
(2) motions must be filed in a timely manner, citing Consumers Power Co., ALAB-101, supra; Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 & 2), CLI-73-8, 6 AEC 169 n.1 (1973);
(3) motions for disqualification, as with all other motions, must be served on all parties or their attorneys, citing 10 CFR §§ 2.302(b), 2.323(a) (formerly 2.701(b), 2.730(a)).

The requirement of an affidavit must be met even if the basis for the motion is founded on matters of public record. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-225, 8 AEC 379 (1974).

2.9.1.2 Evidence of Bias in Challenges to ASLB Composition

The Commission applies a "very high threshold for disqualification" to recusal motions. For a member to be disqualified, it must be shown that his "impartiality might reasonably be questioned."

Although no specific guidelines can be set as to the type or quantum of evidence sufficient to support a disqualification motion, it is clear that the mere fact that a Board issued a large number of unfavorable or even erroneous rulings with respect to a given party is not evidence of bias. To establish bias, something more must be shown than that the presiding officials decided matters incorrectly; to be wrong is not necessarily to be partisan. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974).

Nor is an alleged institutional bias sufficient for disqualification. Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 & 2), ALAB-164, 6 AEC 1143 (1973).

2.9.1.3 Waiver of Challenges to ASLB Composition

If a party has reason to believe that there are grounds for disqualification, he must raise the question at the earliest possible moment. Failure to move for disqualification as soon as the information giving rise to such a claim comes to light amounts to a waiver of the objection. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 385 (1974); Northern Indiana Public Service Co., ALAB-224, supra; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-

101, 6 AEC 60, 64 (1973); Public Service Electric & Gas Co. (Atlantic Nuclear Generating Station, Units 1 & 2), LBP-78-5, 7 NRC 147, 149 (1978).

2.9.2 Motions

The listing of a document on a privilege log is the "occurrence or circumstance" that triggers the 10-day period of 10 C.F.R. § 2.323(a) for a motion challenging the asserted privilege. Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-33, 62 NRC 828, 837 (2005).

The consultation requirement of 10 C.F.R. § 2.323(b) does not extend the 10-day filing requirement of 10 C.F.R. § 2.323(a). Id. at 837.

2.10 Intervention

2.10.1 General Policy on Intervention

Public participation through intervention is a positive factor in the licensing process and that intervenors perform a valuable function and are to be complimented and encouraged. See, e.g., Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-256, 1 NRC 10, 18 n.9 (1975); Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Unit 2), ALAB-243, 8 AEC 850, 853 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425 (1974); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222 (1974). Nonetheless, the statutory mandate does not confer the automatic right of intervention upon anyone. The Commission may condition the exercise of that right upon the meeting of reasonable procedural requirements. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

To obtain a hearing, a petitioner must demonstrate 'an interest affected by the proceeding' – i.e., standing – and submit at least one admissible contention. State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 405 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004). Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 272 (2006).

The strict contention rule serves multiple functions, including: (1) A means of focus of the hearing process on real disputes that can be resolved in adjudication. For example, a petitioner cannot demand an adjudicatory hearing to attack generic requirements or regulations or to express general grievances regarding NRC policies. (2) The requirement of detailed pleadings gives all parties in the proceedings notice regarding a petitioner's grievances, giving each party a good sense of the claims they will either support or oppose. (3) The rule helps ensure that adjudicatory hearings are triggered only by petitioners able to provide minimum factual and legal foundations in support of their contentions. Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 273 (2006). The Commission requires intervenors to provide a clear statement of the basis for contentions, as well as supporting information and references to documents and sources that serve to establish the validity of the contention. Notice pleading is not

sufficient. Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-19 (2006).

It is the Commission's general rule that, to establish individual standing, persons seeking to intervene must identify themselves. See generally Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979); Shieldalloy Metallurgical Corp., CLI-99-12, 49 NRC 347, 357 (1999). The general need for such identification should be obvious. If the Commission does not know who the petitioners are, it is usually difficult or impossible for the licensee to effectively question, and for us to ultimately determine, whether petitioners as individuals have "personally" suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact - a determination required for a finding of standing. Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988). See generally Atomic Energy Act, § 189a, 42 U.S.C. § 2239(a); 10 C.F.R. § 2.309 (d) (formerly 2.1205(e)(1), (2)).

The policy on intervention in enforcement cases is more limited than in other proceedings. In order to intervene, a petitioner must show that the proceeding, usually limited to whether the facts in the case are true and support the remedy selected, affects an interest of the petitioner's, and also, generally, must oppose enforcement of the selected remedy. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-03-23, 58 NRC 372, 379 (2003). See also Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-03-26, 58 NRC 396, 401 (2003).

2.10.2 Intervenor's Need for Counsel

The NRC's Rules of Practice permit non-attorneys to appear and represent their organizations in agency proceedings. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

As a rule, pro se petitioners will be held to less rigid standards for pleading, although a totally deficient petition will be rejected. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487 (1973); Shieldalloy Metallurgical Corp., CLI-99-12, 49 NRC 347, 354 (1999). While there is no requirement that an intervenor be represented by counsel in NRC proceedings, there are some indications that the regulations do not contemplate representation of a party by a non-lawyer and that any party who does not appear pro se must be represented by a lawyer. See 10 CFR § 2.314(a), (b) (formerly 2.713(a), (b)); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-474, 7 NRC 746, 748 (1978); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-440, 6 NRC 642, 643 n.3 (1977); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), Licensing Board Order of October 8, 1976 (unpublished). As the Three Mile Island and Cherokee cases cited amply demonstrate, however, any requirement that only lawyers appear in a representative capacity is usually waived, either explicitly or implicitly, as a matter of course.
Insofar as organizations are concerned, 10 C.F.R. § 2.314(b) clearly limits representation to either an attorney or a member, and it can logically be read as precluding representation by an attorney and a member at the same time. But it does not appear to bar representation by a member throughout a proceeding if, at some earlier time during the proceeding, an attorney has made an appearance for the

organization. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-79-17, 9 NRC 723, 724 (1979).

Following the withdrawal of its lead counsel on the eve of its hearing, an intervenor has an affirmative duty to request a postponement. A Board is not required to order a postponement sua sponte. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498 (1985).

2.10.3 Petitions to Intervene

Intervention is covered generally in 10 CFR §§ 2.309, 2.311 (formerly 2.714, 2.714a).

Assuming there exists an NRC proceeding on the issues of concern to a petitioner, that petitioner must satisfy the minimum requirements of 10 CFR § 2.309 (formerly 2.714) which governs intervention in NRC proceedings. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994).

A petition for leave to intervene must set forth with particularity the contentions sought to be raised. 10 CFR. 2.309 (f); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 88, 89, 90 (1990); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140 (1991); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994). The burden is on the petitioner to satisfy these requirements. 10 CFR 2.325 (formerly 2.732); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 34 (1987). A prospective petitioner has an affirmative duty to demonstrate that it has standing in each proceeding in which it seeks to participate since a petitioner's status can change over time and the bases or its standing in an earlier proceeding may no longer apply. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993). A petitioner may seek to rely on prior demonstrations of standing if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing. Id.

An intervention petition must, under 10 CFR § 2.309 (formerly 2.714(a)(2)), set forth with particularity certain factors regarding the petitioner's interest in the proceeding and address the criteria set forth in 10 CFR § 2.309(d)(1) (formerly 2.714(d)). Florida Power and Light Co. (Turkey Point Plant, Units 3 and 4), CLI-81-31, 14 NRC 959, 960 (1981); Consumers Power Co. (Big Rock Point Plant), CLI-81-32, 14 NRC 962, 963 (1981).

Section 189a of the Atomic Energy Act does not provide an unqualified right to a hearing. The Commission is authorized to establish reasonable regulations on procedural matters like the filing of petitions to intervene and on the proffering of contentions. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983), citing BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Easton Utilities Commission v. AEC, 424 F.2d 847 (D.C. Cir. 1970). Intervention is not available where there is no pending "proceeding" of the sort specified in section 189a. State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 292 (1993).

Simply because a filing is labeled a petition to intervene does not prevent the presiding officer from treating it as a request to initiate a hearing if this, in fact, is what the petitioner is seeking. Illinois Power Co. and Soyland Power Cooperative (Clinton Power Station, Unit 1), LBP-97-4, 45 NRC 125, 126 n.1 (1997), citing Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 5 (1996).

Intervention in NRC licensing adjudications whether formal or informal generally arises in one of three ways: (1) an individual seeks to intervene on his or her own behalf; (2) an organization seeks to intervene to represent the interests of one or more of its members; or (3) an organization seeks to intervene on its own. Shieldalloy Metallurgical Corp., LBP-99-12, 49 NRC 155, 158 (1999).

The right of interested persons to intervene as a party in a licensing proceeding stems from the Atomic Energy Act, not from NEPA, and is covered in AEA § 189 and 42 U.S.C. § 2239(a)(1)(A). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 6 (2001).

There is nothing in 10 CFR § 2.309 or the case law interpreting that rule which permits Licensing Boards to exclude certain groups because of their opinions on nuclear power, either generally or as related to specific plants, nor is there a Commission rule prescribing the conduct of any party (other than licensees or others subject to its regulatory jurisdictions) outside adjudicatory proceedings. Consolidated Edison Co. of New York (Indian Point, Unit 2); Power Authority of the State of New York (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, 31, 32 (1982).

The testimony of experts sponsored by petitioner may make a valuable contribution to the record, but the merits of that testimony need not be decided in order to admit a petitioner as a party. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2029 (1982).

While it is true that a petitioning organization must disclose the name and address of at least one member with standing to intervene so as to afford the other litigants the means to verify that standing exists, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979), there is no requirement that the identification of such a member or members be made in the petition to intervene or in an attached affidavit. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).
In the first instance, the decision as to whether to grant or deny a petition to intervene or a request for a hearing lies with the Licensing Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Units 1 & 2), CLI-73-16, 6 AEC 391 (1973).

In past operating license cases, petitions to intervene were sometimes considered and ruled upon by an ASLB especially appointed for that purpose, and a separate ASLB conducted separate proceedings if intervention were permitted. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-78 (1977). In construction permit cases, a single ASLB usually performed both tasks. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 n.2 (1973).

In NRC proceedings in which a hearing is not mandatory but depends upon the filing of a successful intervention petition, an "intervention" Licensing Board has authority only

to pass upon the intervention petition. If the petition is granted, thus giving rise to a full hearing, a second Licensing Board, which may or may not be composed of the same members as the first Board, is established to conduct the hearing. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-78-23, 8 NRC 71, 73 (1978). See also Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 366 (1981), citing Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175 (1977).

In ruling on a petition to intervene, the Licensing Board must consider, inter alia, the nature of petitioner's right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial or other interest in the proceeding, and the possible effect of any Order which may be entered in the proceeding on the petitioner's interests. 10 CFR § 2.309(d) (formerly 2.714(d)); Washington Public Power Supply System (WPPSS Nuclear Projects No. 3 and No. 5), LBP-77-16, 5 NRC 650 (1977). Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 103 (2006). See also Fla. Power & Light Co., FPL Energy Seabrook, LLC, FPL Energy Duane Arnold, LLC, Constellation Energy Group, Inc. (Calvert Cliffs Nuclear Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plants, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 33-34 (2006) (failure to comply with pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests).

The ASLB must make specific determinations as to whether the petition is proper and meets the requirements for intervention and must articulate in reasonable detail the basis for its determination. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-105, 6 AEC 181 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-104, 6 AEC 179 (1973). See Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 722 (1989) (rulings on intervention petitions should be in writing), aff'd, CLI-90-5, 31 NRC 337, 341 (1990).

2.10.3.1 Pleading Requirements

Under 10 CFR § 2.309 (formerly 2.714), a petition to intervene must:

(1) be in writing (2.309(a));

(2) specification of the contentions which the person seeks to have litigated in the hearing (2.309(a));

(3) set forth with particularity the interest of the petitioner in the matter, the manner in which that interest may be affected by the proceeding, and the reasons why the petitioner should be permitted to intervene with particular reference to the petitioner's right to be made a party under the Atomic Energy Act, the nature and extent of petitioner's property, financial or other interest in the proceeding, and the possible effect of any order entered in the proceeding on petitioner's interest (2.309(d).

Under 10 CFR § 2.309 (formerly 2.714) and 10 CFR § 2.309 (f) (formerly 2.714(b)) an intervention petition must not only set forth with particularity the interest of the petitioner and how that interest may be affected by the proceeding, but must also include the bases for each contention, sufficiently detailed and specific to demonstrate that the issues raised are admissible and that further inquiry is

warranted. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 206 (1982). See also Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986); Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234-35 (2006). Intervenors are not asked to prove their case at the contention stage, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset. However, the Commission's contention rules do not allow using reply briefs to provide, for the first time, the necessary threshold support for contentions. Louisiana Energy Services, L.P., CLI-04-35, 60 NRC 619, 623 (2004).

In BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), the Court of Appeals for the District of Columbia Circuit upheld various aspects of 10 CFR § 2.309 (formerly 2.714), including the requirement that contentions be specified, and the requirement that the basis for contentions be set forth.

Petitions drawn by counsel experienced in NRC practice must exhibit a high degree of specificity. In contrast, Licensing Boards are to be lenient in this respect for petitions drawn pro se or by counsel new to the field or to the bar. Kansas Gas & Electric Co. (Wolf Creek Generating Station), ALAB-279, 1 NRC 559, 576-577 (1975). For a more recent case acknowledging that a pro se petitioner for intervention should not be held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere in the petition to intervene, see Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 82 (1978).

Although a totally deficient pleading may not be justified on the basis that it was prepared without the assistance of counsel, a pro se petitioner is not "to be held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere." Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973), cited in Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982).

Section 189a of the Atomic Energy Act does not provide a non-discretionary right to a hearing on all issues arguably related to an acknowledged enforcement problem, without regard to the scope of the enforcement action actually proposed or taken. In order to be granted leave to intervene, one must demonstrate an interest affected by the action, as required by 10 CFR § 2.309 (formerly 2.714). Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), citing BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974).

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 issues. 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).

2.10.3.2 Defects in Pleadings

Although the requirements of 10 CFR § 2.309 must ultimately be met, every benefit of the doubt should be given to the potential intervenor in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116 (1994). As such, petitioners will usually be permitted to amend petitions containing curable defects. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631 (1973). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 40 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 195 (1991); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 15 (1994). A Licensing Board itself has no duty to recast contentions offered by a petitioner to make them acceptable under the regulations. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1660 (1982); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 197 (1999).

Pro se petitioners will be held to less rigid standards of clarity and precision with regard to the petition to intervene. Nevertheless, a totally deficient petition will be rejected. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487, 489 (1973).

The value of having local governments participate in proceedings can justify holding local government intervention petitioners to less stringent pleading standards than those to which an ordinary petitioner would be held. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 69-70 (2005).

The obvious intent of the procedural requirements on contentions is to ensure the identification of bona fide litigative issues. A concern has been expressed in Commission adjudicatory directives about not utilizing pleading "niceties" to exclude parties who have a clear, albeit imperfectly stated, interest. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 120 (1994), citing Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979). Parties who appear before the Commission bear responsibility for any possible misapprehension of their position caused by the inadequacies of their briefs. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 143 n.17 (1993).

Where a petitioner has not expressly requested a hearing on its petition, but where it seems clear from the petition as a whole that a hearing is what the petitioner desires, the Commission will not dismiss that petition solely on the basis of such a technical pleading defect. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1,43 NRC 1, 5 (1996).

Petitioners must follow NRC requirements in filing pleadings seeking a hearing. For an organization, these include a statement as to whom it represents, a sworn

statement as to where the represented individuals reside or how far they reside from the alleged threat, and a plausible scenario concerning how they may suffer health or safety consequences. International Uranium Corp. (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 6 (1997).

The Commission does not consider the exceeding of a page limit to be an error so great that it merits sanctioning especially when the offending counsel immediately corrected the error once attention was brought to it. Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 244 (2000).

Intervention petitions and requests for hearing cannot properly raise antitrust issues and health and safety issues in the same proceedings. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981).

2.10.3.3 Time Limits/Late Petitions

The Commission's regulations at 10 CFR § 2.309 (c) (formerly 2.714(a)(1)) provide that nontimely filings of petitions to participate as a party will not be entertained absent a determination that the petition should be granted based upon a balancing of eight (previously five) factors. (See 2.10.3.3.3 for the factors). The factors involving the availability of other means to protect petitioner's interest and the ability of other parties to represent petitioner's interest are entitled to less weight than the other factors. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1381, 1384 (1982); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984), citing Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992).

If the lateness of a Petition to intervene is not egregious, and will not cause substantial delay to the parties, those considerations will outweigh the fact that the balance of the factors required under 10 CFR § 2.309(c)(1) tips slightly against the petitioner. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982), citing Duke Power Co. (Amendment to Materials License SNM - 1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979).

It is within the presiding officer's discretion to permit an intervenor to make a belated lateness showing. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, aff'd on other grounds, CLI-94-12, 40 NRC 64 (1994).

The exclusion from a proceeding of persons or organizations who have slept on their rights does not offend any public policy favoring broad citizen involvement in nuclear licensing adjudications. Assuming that such a policy finds footing in Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), it must be viewed in conjunction with the equally important policy favoring the observance of established time limits. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 396 n.37 (1983).

Late intervention is possible until issuance of a full-power license. Therefore, issuance of a low-power license does not bar late intervention. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 160 (1993).

A person seeking a discretionary hearing after the expiration of the time period for filing intervention petitions should either address the late intervention and reopening criteria or explain why they do not apply. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), CLI-93-1, 37 NRC 1, 3-4 (1993).

Presentation of new arguments in support of contentions at a prehearing conference improper and may be barred on lateness grounds. USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 476 (2006).

2.10.3.3.1 Time for Filing Intervention Petitions

A Person cannot intervene in a proceeding before the issuance of a "notice of hearing" or a "notice of proposed action," which is a prerequisite to the initiation of a proceeding. Petitions filed prior to this issuance are "clearly premature" and may be rejected by the Secretary. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 239-40 (2004).

With regard to antitrust matters, petitions to intervene or requests for hearing must be filed not later than the time specified in the notice for hearing or as provided by the Commission, the presiding officer or the Licensing Board designated to rule on petitions and/or requests for hearing, or as provided in 10 CFR § 2.102(d)(3; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983).

For an intervenor who wishes to become a party to a hearing to protect its interest in seeing that the Staff enforcement order challenged in a proceeding is sustained, the matter adversely affecting the petitioner's interest is not the "order," with which it agrees, but the agency's "proceeding" relative to that order, which carries the potential for overturning or modifying the order in derogation of the petitioner's interest. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54; aff'd, CLI-94-12, 40 NRC 64 (1994).

The filing of an intervention petition is considered complete on the date it is deposited in the mail, not when it is actually postmarked. 10 CFR § 2.302(c) (formerly 2.701(c)). Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 205-206 (1992).

The award of an operating license effectively terminates the operating license proceeding and any construction permit amendment proceedings. Anyone who subsequently challenges the issuance of the operating license or seeks the suspension of the license should not file a petition for late intervention, but instead, must 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 and 2), CLI-92-12, 36 NRC 62, 67, 77-78 (1992). Texas Utilities Electric Co. (Comanche Peak Steam

Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 160 (1993); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 36 n.4 (2006).

2.10.3.3.1.A Timeliness of Amendments to Intervention Petitions

On issues arising under the National Environmental Policy Act (NEPA), a petitioner must file contentions based on the applicant's environmental report, but may amend its contentions or file new contentions pursuant to 10 C.F.R. § 2.309(f)(2)(i)-(iii) if there are data or conclusions in the draft or final environmental impact statements that are significantly different from the data or conclusions in the applicant's documents. By definition, an amended contention may include additional issues outside the scope of the contention as originally admitted. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-20, 62 NRC 523, 533 (2005).

2.10.3.3.2 Sufficiency of Notice of Time Limits on Intervention

Although the Appeal Board has stated that it would leave open the question as to whether Federal Register notice without more is adequate to put a potential intervenor on notice for filing intervention petitions, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-148, 6 AEC 642, 643 n.2 (1973), the Board tacitly assumed that such notice was sufficient in Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976) (claims by petitioner that there was a "press blackout" and that he was unaware of Commission rules requiring timely intervention will not excuse untimely petition for leave to intervene).

Publication of notice in the Federal Register is deemed notice to all. Once notice is published, no party or potential intervenor may claim ignorance of the contents of the notice, including time limits. Sequoyah Fuels Corp. (Gore, Oklahoma Site), LBP-03-24, 58 NRC 383, 389 (2003).

If the only agency issuance providing constructive notice of a filing deadline for hearing requests is a Staff enforcement order issued in accordance with 10 CFR § 2.202(a)(3) that, by its terms, is not applicable to persons who wish to intervene in support of the order, then an intervention petition filed by such a person cannot be deemed untimely for failing to meet an appropriately noticed filing deadline. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54; aff'd, CLI-94-12, 40 NRC 64 (1994).

Even though there is no Federal Register notice of an amendment application, the fact the amendment was placed in a local public document room (LPDR) created for a facility provides an enhanced opportunity for access to licensing information that should be taken into account in analyzing the timeliness of an intervention petition. It is reasonable to expect that, from time to time, those in the area of the facility who may have an interest in the proceeding, would visit the LPDR to check on its status. At the same time, nonparty status to a proceeding is a pertinent factor in assessing the frequency of such visits. A non party would not be expected to visit the LPDR as often as a party given the need to travel to

the LPDR in order to see the files. With this in mind, one LPDR trip a month by a nonparty to monitor a proceeding seems reasonable. Private Fuel Storage, L.L.C., LBP-99-3, 49 NRC 40, 47 (1999).

There is nothing in either the Commission's Rules of Practice or its jurisprudence that empowers members of its Staff to breathe new life into an opportunity for hearing that is already confronted with the passage of the filing deadline that established that opportunity. General Electric Co. (Vallecitos Nuclear Center), LBP-00-3, 51 NRC 49, 50 (2000).

2.10.3.3.3 Consideration of Untimely Petitions to Intervene

Section 10 CFR 2.309 (c) (formerly 2.714(a)) provides that nontimely petitions to intervene or requests for hearing will not be considered absent a determination that the petition or request should be granted based upon a balancing of the following factors:

(1) good cause, if any, for failure to file on time;
(2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
(3) the nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
(4) the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
(5) the availability of other means for protecting the petitioner's interests;
(6) the extent to which the petitioner's interest will be represented by existing parties;
(7) the extent to which petitioner's participation will broaden the issues or delay the proceeding; and
(8) the extent to which petitioner's participation might reasonably assist in developing a sound record.

Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1429 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.3 (1983), citing 10 CFR § 2.309 (c); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1170 n.3 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 883 (1984); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1643-1644 (1984); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 n.3 (1985), affirmed, ALAB-816, 22 NRC 461 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 278 n.6 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 608-609 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 76 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991); 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, 246-47, 253-54 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992); Private Fuel Storage, L.L.C., LBP-99-3, 49 NRC 40, 46 (1999); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-8, 51 NRC 146, 153 (2000); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-03-23, 58 NRC 372, 378 (2003); Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 n. 7 (2006).

The Commission can summarily reject a petition for late intervention that fails to address the eight factor test set forth in 10 CFR § 2.309 (a)(1)(i)-(viii) or the standing requirements in 10 CFR § 2.309(d)(1) (formerly 2.714(d)(1)). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-11, 37 NRC 251, 255 (1993); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 281-282 (2000). See also Fla. Power & Light Co., FPL Energy Seabrook, LLC, FPL Energy Duane Arnold, LLC, Constellation Energy Group, Inc. (Calvert Cliffs Nuclear Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plants, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 33-34 (2006) (failure to comply with pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests).

The burden of proof is on the petitioner. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-16, 51 NRC 320, 325 (2000). Thus, a person who files an untimely intervention petition must affirmatively address the [eight] lateness factors in his petition, regardless of whether any other parties in the proceeding raise the tardiness issue. Even if the other parties waive the tardiness of the petition, a Board, on its own initiative, will review the petition and weigh the [eight] lateness factors. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).

A late petitioner's obligation to affirmatively address the [eight] lateness factors is not affected by the extent of the tardiness. However, the length of the delay, whether measured in days or years, may influence a Board's assessment of the lateness factors. Pilgrim, supra, ALAB-816, 22 NRC at 468 n.27.

A late petitioner who fails to address the [eight] lateness factors in his petition does not have a right to a second opportunity to make a substantial showing on the lateness factors. However, a Board, as a matter of discretion, may give a late petitioner such an opportunity. Pilgrim, supra, 22 NRC at 468.

A late intervenor may be required to take the proceeding as it finds it. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983), citing Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975). Licensing Boards have very broad discretion in their approach to the balancing process required under 10 CFR § 2.309 (c) (formerly 2.714(a)). Virginia Electric & Power Co. (North

Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). Given this wide latitude with regard to untimely petitions to intervene, a Licensing Board has the discretion to permit intervention, even though an acceptable excuse for the untimely filing is not forthcoming, if other considerations warrant its doing so. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977).

A Licensing Board has no latitude to admit a new party, i.e., an "eleventh hour" intervenor, to a proceeding as the hearing date approaches in circumstances where: (1) the extreme tardiness in seeking intervention is unjustified; (2) the certain or likely consequence would be prejudice to other parties as well as delaying the progress of the proceeding, particularly attributable to the broadening of issues; and (3) the substantiality of the contribution to the development of the record which might be made by that party is problematic. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898, 900 (1981). See also Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 82-83 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

The [eight] (formerly five) factors listed in 10 CFR § 2.309(c) (formerly 2.714(a)) are to be considered in determining whether to allow late intervention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 509 (1982); Cincinnati Gas and Electric Co. (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 213-214 (1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 353 (1989). Newly acquired standing by moving to the vicinity of a plant is not alone enough to justify belated intervention. Nor does being articulate show a contribution can be made in developing the record. Other parties having the same interest weigh against allowing late intervention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 241 (1980).

A petitioner whose late-filed petition to intervene has met the [eight]-part test of 10 CFR § 2.309 (c)(1) need not meet any further late-filing qualifications to have its contentions admitted. It is not to be treated differently than a petitioner whose petition to intervene was timely filed. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-84-17A, 19 NRC 1011, 1015 (1984).

The key policy consideration for barring late intervenors is one of fairness, viz., "the public interest in the timely and orderly conduct of our proceedings." Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648-649 (1979), citing Nuclear Fuel Services. Inc., (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

Non-parties, participating under 10 CFR § 2.315(c) (formerly 2.715(c)), need not comply with the requirements of 10 CFR § 2.309 (formerly 2.714) that mandate that intervenors either file their contentions in a timely fashion or show cause for their late intervention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 688 (1981).

While the late filing of documents is not condoned, a petitioner acting pro se is not always expected to meet the same high standards to which the Commission holds entities represented by lawyers. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-01-8, 53 NRC 204, 207-208 (2001). See also Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 581 (2006).

Until the parties to a proceeding that oppose a late intervention petition suggest another forum that appears to promise a full hearing on the claims petitioner seeks to raise, a petitioner need not identify and particularize other remedies as inadequate. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 n.6 (1982).

A Commission direction to the presiding officer to consider the admissibility of a particular late-filed matter does not preclude the presiding officer from giving the same consideration to other late-filed information submitted by a petitioner relevant to that matter. Cf. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979) (in remand proceeding on management capability issue, additional petitioners' attempt to seek late intervention to partcipate on that issue must be assessed under late-intervention criteria). Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 24 (1996).

Under 10 C.F.R. § 2.309(c)(1), even if a late filing intervenor cannot show good cause for the late filing, the Board must still balance all of the relevant factors to determine whether the late-filed petition should be granted. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 65 (2005).

Where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong. Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977) and cases there cited. See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Absent a showing of good cause for late filing, an intervention petitioner must make a "compelling showing" on the other factors stated in 10 CFR § 2.309(c) governing late intervention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 55 (5th Cir. 1990); 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, 246-47 (1991), aff'd in part on other

grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73-75 (1992). Petitioner satisfies the [fifth] and [sixth] parts of the [eight] late intervention criteria in 10 CFR § 2.309 (c)(1)(i)-(viii) (formerly 2.714(a)(1)(i)-(v)) when there is currently no proceeding, assuming arguendo that the petitioner has standing, because there will generally be no other means by which that petitioner can protect its interest and because there is currently no proceeding, there will be no other party to represent petitioner's interest. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-03-23, 58 NRC 372, 378 (2003).

In determining how compelling a showing a petitioner must make on the other factors, a Licensing Board need not attach the same significance to a delay of months as to a delay involving a number of years. The significance of the tardiness, whether measured in months or years, will generally depend on the posture of the proceeding at the time the petition surfaces. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 398-399 (1983). See 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-92-19, 36 NRC 98, 106 (1992).

A satisfactory explanation for failure to file on time does not automatically warrant the acceptance of a late-filed intervention petition. The additional factors specified under 10 CFR § 2.309(c) must also be considered. However, where a late filing of an intervention petition has been satisfactorily explained, a much smaller demonstration with regard to the other factors of 10 CFR § 2.309 (c) is necessary than would otherwise be the case. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 83 (1978).

A party who was dismissed from a proceeding for failing to respond, without good cause, to Board orders reactivating the proceeding, must satisfy the criteria for untimely petitions to intervene in order to be readmitted. General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1642-1643 (1984).

Because the participation of a late-filing local government petitioner was expected to be particularly valuable to the proceedings, the Board found the balance of factors to favor allowing the local government to intervene despite the local government's inability to show good cause for the delay. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 68-69 (2005).

[Note: Section 2.309 requires that the petition to intervene or request for hearing include a specification of the contentions that the petitioner proposes for litigation. This differs from the former provisions of Part 2 that permitted a petitioner to file a supplement to his or her petition to intervene with a list of contentions which the petitioner sought to have litigated in the hearing. The new practice of requiring contentions to be filed at time of the petition/request does not obviate the concept of late-filed contentions discussed in section 2.10.5.5.

2.10.3.3.3.A Factor #1–Good Cause for Late Filing

Good cause for the petitioner's late filing is the first, and most important element of 2.309 (c)(1) (formerly 2.714(a)(1)). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005).

It has been held that even if a petitioner fails to establish good cause for the untimely petition, the other factors must be examined, Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975), although the burden of justifying intervention on the basis of the other factors is considered to be greater when the petitioner fails to show good cause. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Station, Units 1 & 2), ALAB-289, 1 NRC 395, 398 (1975); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279 (1986); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-92-26, 36 NRC 191 (1992).

The first factor of those specified in 10 CFR § 2.309 (c)(1) is whether there exists "good cause, if any, for the failure to file on time." Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 862 (1980). In considering the "good cause" factor, the Appeal Board pointed out that a strong excuse for lateness will attenuate the showing necessary on the other factors of 10 CFR § 2.309 (c). Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63 (1979). See also Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 22 (1977), affirmed, CLI-78-12, 7 NRC 939 (1978).

The first and principal test for late intervention is whether a petitioner has demonstrated "good cause" for filing late. Private Fuel Storage, L.L.C., LBP-99-3, 49 NRC 40, 49 (1999). 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. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322 (1994). 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. 39 NRC at 329.

The burden of showing good cause is on the late petitioner. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1432 (1982).

Although a concrete definition as to what constitutes "good cause" has not been established, certain excuses for delay have been held to be insufficient to justify late filing. For example, in Boston Edison Co. (Pilgrim Nuclear Power

Station, Unit 2), LBP-74-63, 8 AEC 330 (1974), aff'd, ALAB-238, 8 AEC 656 (1974), it was held that neither the fact that the corporate citizens' group seeking to intervene was not chartered prior to the cutoff date for filing, nor the fact that the applicant changed its application by dropping one of the two units it intended to build, gave good cause for late filing. Similarly, claims by a petitioner that there was a "press blackout" and that he was unaware of the Commission's rules requiring timely intervention will not excuse an untimely petition for leave to intervene. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976), nor will failure to read the Federal Register. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981), citing New England Power and Light Co. (NEP Units 1 and 2), LBP-78-18, 7 NRC 932, 933-934 (1978); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). Similarly a petitioner's failure to read carefully the governing procedural regulations does not constitute good cause for accepting a late-filed petition. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999). See also Fla. Power & Light Co., FPL Energy Seabrook, LLC, FPL Energy Duane Arnold, LLC, Constellation Energy Group, Inc. (Calvert Cliffs Nuclear Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plants, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 33 (2006) (late-filed because petitioner initially believed another agency was the appropriate forum). The showing of good cause is required even though a petitioner seeks to substitute itself for another party. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977).

Licensing Boards and Appeal Boards have both considered various excuses to determine whether they constitute "good cause." Newly-acquired organizational existence does not constitute good cause for delay in seeking intervention. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), cited in Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980) and South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981); and Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 80-81 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). Nor does preoccupation with other matters afford a basis for excusing a nontimely petition to intervene. Poor judgment or imprudence is not good cause for late filing. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), LBP-79-16, 9 NRC 711, 714 (1979). The Appeal Board did not accept as an excuse for late intervention the claim that petitioner, a college organization, could not meet an August petition deadline because most of its members were away from school during the summer and hence unaware of developments in the case. Such a consideration does not relieve an organization from making the necessary arrangements to insure that its interest is protected in its members' absence.

On the other hand, new regulatory developments and the availability of new information may constitute good cause for delay in seeking intervention. Duke Power Company (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148-149 (1979). See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-573 (1980).

In evaluating intervention petitions to determine whether the requisite specificity exists, whether there has been an adequate delineation of the basis for the contentions, and whether the issues sought to be raised are cognizable in an individual licensing proceeding, Licensing Boards will not appraise the merits of any of the assertions contained in the petition. But when considering untimely petitions, Licensing Boards are required to assess whether the petitioner has made a substantial showing of good cause for failure to file on time. In doing so, Boards must necessarily consider the merits of claims going to that issue. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 948-949 (1978).

The availability of new information may provide good cause for late intervention. The test is when the information became available and when the petitioner reasonably should have become aware of the information. The petitioner must establish that 1) the information is new and could not have been presented earlier, and 2) the petitioner acted promptly after learning of the new information. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-73(1992). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 164-65 (1993). Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 (2006).

Newly arising information has long been recognized as providing "good cause" for acceptance of a late contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 574 (1980), appeal dismissed, ALAB-595, 11 NRC 860 (1980). Before admitting a contention based on new information, factors must be balanced such as the intervenor's ability to contribute to the record on the contention and the likelihood and effects of delay should the contention be admitted. However, in balancing those factors, the same weight given to each of them is not required. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

The Licensing Board will not accept a petitioner's claim of excuse for late intervention where the petitioner failed to uncover and apply publicly available information in a timely manner. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42,

18 NRC 112, 117, aff'd, ALAB-743, 18 NRC 38i (1983); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

Confusing and misleading letters from the Staff to a prospective pro se petitioner for intervention, and failure of the Staff to respond in a timely fashion to certain communications from such a petitioner, constitute a strong showing of good cause for an untimely petition. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 81-82 (1978). And where petitioner relied to its detriment on Staff's representations that no action would be immediately taken on licensee's application for renewal, elementary fairness requires that the action of the Staff could be asserted as an estoppel on the issue of timeliness of petition to intervene, and the petition must be considered even after the license has been issued. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), LBP-82-24, 15 NRC 652, 658 (1982), rev'd on other grounds, ALAB-682, 16 NRC 150 (1982).

Petitioners proceeding pro se will be shown greater leeway on the question of whether they have demonstrated good cause for lateness than petitioners represented by counsel. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-03-23, 58 NRC 372, 378 (2003).

A petitioner's claim that it was lulled into inaction because it relied upon the State, which later withdrew, to represent its interests does not constitute good cause for an untimely petition. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990). A petitioner who has relied upon a State participating pursuant to 10 CFR § 2.315 (c) (formerly 2.715(c)) to represent her interests in a proceeding cannot rely on her dissatisfaction with the State's performance as a valid excuse for a late-filed intervention petition where no claim is made that the State undertook to represent her interests specifically, as opposed to the public interest generally. Duke Power Company (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-440, 6 NRC 642 (1977). See also South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981); Comanche Peak, supra, 28 NRC at 610 (a petitioner's previous reliance on another party to assert its interests does not by itself constitute good cause), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 55 (5th Cir. 1990); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 80 (1990), aff'd, ALAB-950, 33 NRC 492, 49596 (1991). Nor will an explanation that full-time domestic and other responsibilities was the reason for filing an intervention petition almost three years late suffice. Cherokee, supra.

Just as a petitioner may not rely upon interests being represented by another party and then justify an untimely petition to intervene on the others' withdrawal, so a petitioner may not rely on the pendency of another

proceeding to protect its interests and then justify a late petition on that reliance when the other petition fails to represent those interests. A claim that petitioner believed that its concerns would be addressed in another proceeding will not be considered good cause. Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 39-40 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2027 (1982). It must be established that petitioners were furnished erroneous information on matters of basic fact and that it was reliance upon that information that prompted their own inaction. Palo Verde, supra, 16 NRC at 2027-2028.

Employees of an applicant or licensee are not exempt from the Commission's procedural rules. Thus, an employee's mere assertions of fears of retaliation from the employer do not establish good cause for late intervention. To encourage employees to raise potentially significant safety concerns or information, Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851(a), prohibits employer retaliation against any employee who commences or participates in any manner in an NRC proceeding. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 77-79 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991).

Absent a showing of good cause for a very late filing, an intervention petitioner must make a "compelling showing" on the other factors stated in 10 CFR § 2.309 (c) (formerly 2.714(a)) governing late intervention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); 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, 246-47 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73-75 (1992). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764 (1982), citing Grand Gulf, supra, 16 NRC at 1730; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB 743, 18 NRC 387, 397 (1983); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1645 (1984); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 207 (1993); State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296-97 (1993); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-8, 51 NRC 146, 154 (2000); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 310 (2000).

A petitioner who fails to show good cause for filing late may not always be required to make a compelling showing on the four remaining factors of 10 CFR § 2.309(c). 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-92-19, 36 NRC 98, 105-106 (1992).

The "good cause" element of 10 CFR § 2.309 (c)(1) (formerly 2.714(a)(1)) was deemed fulfilled when the counsel for the intervening party demonstrated by a careful accounting of her schedule that she submitted the pleading in question within a reasonable amount of time. The licensing board particularly noted the late date on which the Staff provided the intervenors with needed documents, and the busy schedule of counsel. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 92 (2000).

A local government trying to show good cause for late filing an intervention petition cannot successfully argue that it had no constructive notice of the proposed license transfers at issue, where its legislature had already demonstrated through legislative action that it had early actual notice of the proposed transfer. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 65 (2005).

2.10.3.3.3.B Factor #2-Nature of the Requestor's/Petitioner's Right Under the Act to Be Made a Party to the Proceeding

[Reserved]

2.10.3.3.3.C Factor #3-Nature and Extent of the Requestor's/Petitioner Propery, Financial or Other Interest in the Proceeding

[Reserved]

2.10.3.3.3.D Factor #4-Possible Effect of Any Order That May Be Entered in the Proceeding on the Requestor's/Petitioner's Interest

[Reserved]

2.10.3.3.3.E Factor #5–Other Means for Protecting Petitioner's Interests

With regard to the fifth factor - other means to protect petitioner's interest - the question is not whether other parties will adequately protect the interest of the petitioner, but whether there are other available means whereby the petitioner can itself protect its interest. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975).

The fifth factor in 10 CFR § 2.309(c) points away from allowing late intervention if the interest which the petitioner asserts can be protected by some means other than litigation. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1433 (1982).

The fifth factor in 10 CFR § 2.309(c)(1) (formerly 2.714(a)(1)), whether other means exist to protect the petitioner's interests, was not satisfied when the petitioner was able to take his concerns to a state judicial forum and was able to voice his concerns in a separate NRC licensing proceeding. Private Fuel

Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC 114, 121-122 (2000).

The suggestion that an organization could adequately protect its interest by submitting a limited appearance statement gives insufficient regard to the value of participational rights enjoyed by parties - including the entitlement to present evidence and to engage in cross-examination. Similarly, assertions that the organization might adequately protect its interest by making witnesses available to a successful petitioner or by transmitting information in its possession to appropriate State and local officials are without merit. Duke Power Company (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 n.7 (1979).

A petition under 10 CFR § 2.206 for a show cause proceeding is not an adequate alternative means of protecting a late petitioner's interests. The Section 2.206 remedy cannot substitute for the petitioner's participation in an adjudicatory proceeding concerned with the grant or denial ab initio of an application for an operating license. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-1176 (1983). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 81 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). After all, despite the long history of §2.206, the number of sucessful petitions brought under that section is extremely small. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 67 (2005).

Participation of the NRC Staff in a licensing proceeding is not equivalent to participation by a private intervenor. WPPSS, id. By analogy, the availability of nonadjudicatory Staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering factor [five] under 10 CFR § 2.309(c) (formerly 2.714(a)). Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985). But see Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21-22 (1986).

2.10.3.3.3.F Factor #6–Extent Petitioner's Interests Will Be Represented By Existing Parties

With regard to the [sixth] factor of 10 CFR § 2.309 (c) (formerly 2.714(a)), the extent to which petitioner's interest will be represented by existing parties, the fact that a successful petitioner has advanced a contention concededly akin to that of a late petitioner does not necessarily mean that the successful petitioner is both willing and able to represent the late petitioner's interest. Duke Power Company (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979). See 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-92-19, 36 NRC 98, 109 (1992).

The Licensing Board in Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979) has expressed the view that NRC practice has failed to provide a clear cut answer to the question of whether the [sixth] factor, the extent to which the petitioner's interest will be represented by existing parties, is applicable when there are no intervening parties and no petitioners other than the latecomer, and a hearing will not be held if the late petitioner is denied leave to intervene. The Licensing Board reviewed past Licensing Board decisions on this question:

(1) In St. Lucie and Turkey Point the Licensing Board decided that the [sixth] factor was not directly applicable, noting that without the petitioner's admission there would be no other party to protect petitioner's interest. Florida Power and Light Company (St. Lucie Plant, Units 1 and 2 and Turkey Point, Units 3 and 4), LBP-77-23, 5 NRC 789, 800 (1977).

(2) In Summer the Licensing Board acknowledged uncertainty as to the applicability of factor [six], but indicated that if the factor were applicable it would be given no weight because of the particular circumstances of that case. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 213-214 (1978).

(3) In Kewaunee, the Board concluded that petitioners' interest would not be represented absent a hearing and decided that the [sixth] factor weighed in favor of admitting them as intervenors. Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 84 (1978).

The Licensing Board ultimately ruled that the Commission intended that all [eight] factors of 10 CFR § 2.309 (c) (formerly 2.714(a)) should be balanced in every case involving an untimely petition. Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979). The Board also ruled that in the circumstances where denial of a late petition would result in no hearing and no parties to protect the petitioner's interest, the question, "To what extent will Petitioners' interest be represented by existing parties?" must be answered, "None." The [sixth] factor therefore, was held to weigh in favor of the late petitioners. Id.

In balancing the factors in 10 CFR § 2.309(c) (formerly 2.714(a)), the Licensing Board may take into account the petitioner's governmental nature as it affects the extent to which petitioner's interest will be represented by existing parties, although the petitioner's governmental status in and of itself will not excuse untimely petitions to intervene. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976).

A local government's overriding, paramount interest in, and responsibility for, emergencies that impact its territory mean that a private party cannot "represent" that government's interest in emergency planning by filing an

emergency planning contention of its own. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 67-68 (2005).

In weighing the [sixth] factor, a board will not assume that the interests of a late petitioner will be adequately represented by the NRC Staff. The general public interest, as interpreted by the Staff, may often conflict with a late petitioner's private interests or perceptions of the public interest. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174-1175 n.22 (1983). See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1407-1408 (1983); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279 (1986). Contra Consolidated Edison Co. of New York (Indian Point, Unit 2), LBP-82-1, 15 NRC 37, 41 (1982). However, the fact that it is likely that no one will represent a petitioner's perspective if its hearing request is denied is in itself insufficient 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).

2.10.3.3.3.G Factor #7–Extent Participation Will Broaden Issues or Delay the Proceeding

The seventh factor of 10 CFR § 2.309 (c)(1), potential for delay, is also of immense importance in the overall balancing process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983). While this factor is particularly significant, it is not dispositive. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976). In considering the factor of delay, the magnitude of threatened delay must be weighed since not every delay is intolerable. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), LBP-77-9, 5 NRC 474 (1977). In addition, in deciding whether petitioners' participation would broaden the issues or delay the proceeding, it is proper for the Licensing Board to consider that the petitioners agreed to allow issuance of the construction permit before their antitrust contentions were heard, thereby eliminating any need to hold up plant construction pending resolution of those contentions. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 23 (1977).

An untimely intervention petition need not introduce an entirely new subject matter in order to "broaden the issues" for the purposes of 10 CFR § 2.309(c); expansion of issues already admitted to the proceeding also qualifies. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 891 (1981).

The mere fact that a late petitioner will not cause additional delay or a broadening of the issue does not mean that an untimely petition should necessarily be granted. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 798 (1977). However, from the standpoint of precluding intervention, the delay factor is extremely important and the later the petition to intervene, the more likely it is that the petitioner's participation

will result in delay. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 762 (1978). The question is whether, by filing late, the petitioner has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180 (1983).

In the instance of a very late petition, the strength or weakness of the tendered justification may thus prove crucial. The greater the tardiness, the greater the likelihood that the addition of a new party will delay the proceeding -- e.g., by occasioning the relitigation of issues already tried. Although the delay factor may not be conclusive, it is an especially weighty one. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976); Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 5 (1979).

The [seventh] factor includes only that delay which can be attributed directly to the tardiness of the petition. Jamesport, supra, ALAB-292, 2 NRC at 631; South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 425 (1981).

Where there is no pending proceeding, the [seventh] factor for late intervention, the potential for delay if the petition is granted, weighs heavily against petitioner because granting the request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 167 (1993).

Holding a hearing on an export license application at a point when the NRC has had in its hands for two months the views of the Executive Branch that the proposed export would not be inimical to the common defense and security would undoubtedly "broaden" the issues and substantially "delay" the Commission's final decision on the fuel export application. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 330 (1994).

Where there is little practical value to be gained from expediting the proceeding, the fact that a participant's participation would "broaden the issues" or "delay the proceeding" is less significant. Thus, in a license renewal proceeding where the existing license will not expire for over a decade and where the Staff's safety review is still several months from its due date for completion, the broadening/delaying factor carried only minimal weight. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 68 (2005).

2.10.3.3.3.H Factor #8–Ability of Petitioner to Assist in Developing Record

When an intervention petitioner addresses the 10 CFR § 2.309(c)(viii) (formerly 2.714(a)(3)) criterion for late intervention requiring a showing of how its participation may reasonably be expected to assist in developing a sound record, it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. See generally South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982);Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd sub nom., Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74-75 (1992). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165-66 (1993).

It is the petitioner's ability to contribute sound evidence rather than asserted legal skills that is of significance in determining whether the petitioner would contribute to the development of a sound record. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 888 (1984), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.14 (1982).

Vague assertions regarding petitioner's ability or resources are insufficient. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1766 (1982), citing Grand Gulf, supra, 16 NRC at 1730.

As to the [eight] factor with regard to "assistance in developing the record," a late petitioner placing heavy reliance on this factor and claiming that it has substantial technical expertise in this regard should present a bill of particulars in support of such a claim. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 764 (1978). At the same time, it is not necessary that a petitioner have some specialized education, relevant experience or ability to offer qualified experts for a favorable finding on this factor to be made. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 212-213 (1978).

The ability to contribute to the development of a sound record is an even more important factor in cases where the grant or denial of the petition will also decide whether there will be any adjudicatory hearing. There is no reason to grant an inexcusably late intervention petition unless there is cause to believe that the petitioner not only proposes to raise at least one substantial safety or environmental issue, but is also able to make a worthwhile contribution on it. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180-1181 (1983). See also Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

When determining a late-filing petitioner's ability to assist in developing the adjudicatory record, the Board should look at not only the petitioner's initial petition, but also any subsequent filings or oral demonstrations by the petitioner the indicating a commitment to participate and contribute. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 68 (2005).

2.10.3.3.4 Appeals from Rulings on Late Intervention

Two considerations play key roles in deliberations on appeals from rulings on untimely intervention. The first is the Commission's admonition in Nuclear Fuel Services Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975), that 10 CFR § 2.309(c) (formerly 2.714(a)) was purposely drafted with the idea of "giving the Licensing Boards broad discretion in the circumstances of individual cases." Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 395-396 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-769, 19 NRC 995, 1000 n.13 (1984). Consequently, a decision granting a tardy intervention petition will be reversed only where it can fairly be said that the Licensing Board's action was an abuse of the discretion conferred by Section 2.309(c). Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). The second consideration flows from the principle that the propriety of the Board's action must be measured against the backdrop of the record made by the parties before it. Accordingly, on review the facts recounted in the papers supporting the petition to intervene must be credited to the extent that they deal with the merits of the issues. Insofar as the facts relate to the excuse for untimely filing, where they are not controverted by opposing affidavits they must be taken as true. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 13 (1977). In view of all of this, the chances of overturning a Licensing Board's finding that intervention, although late, would be valuable are slight. See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), ALAB-223, 8 AEC 241 (1974).

On appeal, factual and legal components of the analysis underlying the Licensing Board's conclusion in reviewing Board decisions on untimely intervention petitions may be closely scrutinized. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Plant, Unit 1), ALAB-642, 13 NRC 881, 885 (1981).

Until a determination is made that intervenor has proffered a litigable contention, a presiding officer's ruling that the petitioner has established its standing is not so final as to be appealable under 10 CFR § 2.311 (formerly 2.714a). Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54; aff'd, CLI-94-12, 40 NRC 64 (1994).

In a decision vacating a Licensing Board's grant of late intervention because the grant was based on improper criteria, the Appeal Board refused to examine whether the petitioner had met the regulatory requirements for intervention (i.e.,

10 CFR § 2.309). Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63-64 (1979), petition for review denied, Puget Sound Power & Light Co. (Skagit Nuclear Project, Units 1 and 2), unreported, (January 16, 1980).

2.10.3.3.5 Mootness of Petitions to Intervene

Where the Commission was in the process of ruling on an untimely petition to intervene, when the applicant moved to amend its application and conclude the proceeding, the petition to intervene was dismissed as moot. Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407, 408 (1980).

Mootness is not necessarily dependent upon a party's views that its claims have been satisfied but, rather, occurs when a justiciable controversy no longer exists. Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-95-19*, 42 NRC 191, 195 (1995).

Generally, the plain language of a contention will reveal whether the contention is (1) a claim of omission, (2) a specific substantive challenge to an application, or (3) a combination of both. In some cases, it may be necessary to examine the language of the contention bases to determine the scope of the contention. In the first situation, where a contention alleges the omission of particular information or an issue from an application, and the information is supplied later by the applicant, the contention is moot. Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006).

When a Licensing Board holds that the sole contention in a proceeding is moot, the mandatory disclosure process for that contention (10 C.F.R. §§ 2.336 and 2.1203) is terminated. Id. at 745.

2.10.3.4 Amendment of Petition Expanding Scope of Intervention

In order to expand the scope of a previously filed petition to intervene, an intervenor carries the burden of persuading the Licensing Board that the information upon which the expansion is based: (a) was objectively unavailable at the time the original petition was filed, and (b) had it been available, the petition's scope would have been broader. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-73-31, 6 AEC 717, appeal dismissed as interlocutory, ALAB-168, 6 AEC 1155 (1973).

2.10.3.5 Withdrawal of Petition to Intervene

Where only a single intervenor is party to a licensing proceeding, its withdrawal serves to bring the proceeding to an end. International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), LBP-00-11, 51 NRC 178, 180 (2000); Florida Power & Light, Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188 n.1 (1999); Public Service Co. of Colorado (Fort St. Vrain Independent Spent Fuel Storage Installation); Boston Edison Co. and Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-99-17, 49 NRC 372, 373 (1999). Where there is more than one intervenor in a case, the

withdrawal of one does not terminate the proceeding. However, according to NRC procedure, it does serve to eliminate the withdrawing party's contention from litigation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 391-92 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 430-31 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990). Accordingly, in the absence of prior timely adoption by another intervenor, those contentions can be preserved for further consideration only if an intervenor shows that the issues are admissible under the late-filing standards of 10 C.F.R. § 2.309(c)(1) (formerly 2.714(a)(1)). Private Fuel Storage, L.L.C., LBP-99-6, 49 NRC 114, 118 (1999). Acceptance of contentions at the threshold stage of a licensing proceeding does not validate them as cognizable issues for litigation independent of their sponsoring intervenor. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113-14 (1981); South Texas, supra, 21 NRC at 383; Seabrook, supra, 31 NRC at 430-31, aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

The test that should be applied to determine whether one intervenor may be permitted to adopt contentions that no longer have a sponsor when the sponsoring intervenor withdraws from the proceeding, is the [eight]-factor test ordinarily used to determine whether to grant a nontimely request for intervention, or to permit the introduction of additional contentions by an existing intervenor after the filing date. South Texas, supra, 21 NRC at 381-82. See 10 CFR § 2.309(c) (formerly 2.714(a)(1), (b)). For a detailed discussion of the [eight]-factor test, see Section 2.10.3.3.3)

A party that voluntarily withdraws from a proceeding that was later resolved by a settlement agreement must satisfy the late intervention standards before seeking to reopen the record of that proceeding. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), CLI-93-1, 37 NRC 1 (1993)

Safety or environmental matters which may be left as outstanding issues by a withdrawing intervenor may be raised by a Board sua sponte or be subject to nonadjudicatory resolution by the NRC Staff. South Texas, supra, 21 NRC at 383 n.100. See Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), ALAB-319, 3 NRC 188, 189-90 (1976).

Voluntary withdrawal of a petition to intervene is without prejudice to reinstate the petition, although reinstatement can only be done on a showing of good cause. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1057 (1973).

Where an intervenor withdraws from a proceeding with prejudice, an issue sponsored solely by that intervenor is also dismissed, but without prejudice. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), LBP-00-30, 52 NRC 335, 362 (2000).

Where a lay person sought to withdraw both as an individual intervention petitioner and as the person on whom an organization relied for standing, a Licensing Board denied the motion to withdraw as the basis for the organization's standing in order to

give the petitioner an opportunity to reconsider, since granting the motion would lead to dismissal of the entire proceeding. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 514 (1990). The organizational intervenor was subsequently dismissed from the proceeding when the individual upon whom it relied for standing was terminated from his employment in the geographical zone of interest of the plant, thereby losing the basis for his standing. Although the organization earlier had been given ample opportunity to establish its standing on other grounds, it failed to do so. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 14-15 (1990), aff'd, ALAB-952, 33 NRC 521 (1991).

Although the Appeal Board in the South Texas proceeding was concerned that a blanket stricture on the later adoption of a withdrawing party's contentions would complicate litigation and settlement by encouraging "nominal" contention co-sponsorship at a proceeding's outset, see Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 (1985), that consideration is not implicated when, as is apparent from its previous late-filed pleading seeking to adopt all other Intervenors' contentions, an Intervenor sought early on to impose those complexities in this proceeding and failed to make the appropriate arguments. Under the circumstances, no reason exists to provide a second bite at the apple, especially when the Intervenor's ultimate justification is based on no more than the "trusted others to vigorously pursue" line of argument rejected in South Texas. See id. at 382-83. Private Fuel Storage, L.L.C., LBP-99-6, 49 NRC 114, 118 (1999).

2.10.3.6 Intervention in Antitrust Proceedings

In addition to meeting the requirements of 10 CFR § 2.309, a petitioner seeking to intervene in an antitrust proceeding must:

(1) describe the situation allegedly inconsistent with the antitrust laws which is the basis for intervention:
(2) describe how that situation conflicts with the policies underlying the Sherman, Clayton or Federal Trade Commission Acts;
(3) describe how that situation would be created or maintained by activities under the proposed license;
(4) identify the relief sought; and
(5) explain why the relief sought fails to be satisfied by license conditions proposed by the Department of Justice.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 32 (1981) (and cases cited therein). Note that for antitrust intervention, Catawba implies that the interest of a ratepayer or consumer of electricity may be within the zone of interests protected by Section 105 of the Atomic Energy Act. The petitioner, however, must still demonstrate that an injury to its interests would be the proximate result of anticompetitive activities by the applicant or licensee and such injury must be more than remote and tenuous. Id. at 13 NRC 30-32; Wolf Creek, ALAB-279 supra.

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 No. 2), ALAB-665,

15 NRC 22, 29 (1982), citing Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 574-575 (1975) and Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973).

When neither the Attorney General nor the NRC Staff has discerned antitrust problems warranting review under Section 105c of the AEA, potential antitrust problems must be shown with reasonable clarity to justify granting a petition that would lead to protracted antitrust litigation involving a pro se petitioner. Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), LBP-78-13, 7 NRC 583, 595 (1978).

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 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). The criteria of 10 CFR § 2.309(c) for late petitioners are as appropriate for evaluation of late antitrust petitions as in health, safety and environmental licensing, but Section 2.309(c) criteria should be more stringently applied to late antitrust petitions, particularly in assessing the good cause factor. Id. 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. Id.

Where a late petition for intervention in an antitrust proceeding is involved, the special factors set forth within 10 CFR § 2.309(c)(1) (formerly 714(a)(1)) must be balanced and applied before petitions may be granted; the test becomes increasingly vigorous as time passes. Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-28, 14 NRC 333, 338, 342 (1981). See 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, 246-47, 253-54 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992).

2.10.4 Interest and Standing for Intervention

"A petitioner's standing, or right to participate in a Commission licensing proceeding, is grounded in section 189a of the Atomic Energy Act, 42 U.S.C. § 2239 (a)(1)(A), which requires the NRC to provide a hearing 'upon the request of any person whose interest may be affected by the proceeding'." Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 61 (2002). See also Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004); Entergy Nuclear Generation Co. And

Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 269-70 (2006); Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 103 (2006)..

Standing is not a mere legal technicality, it is, in fact, an essential element in determining whether there is any legitimate role for a court or an agency adjudicatory body in dealing with a particular grievance. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331-32 (1994). Burden for proving standard rests with the petitioner. U.S. Enrichment Corp. (Padacah, Kentucky Gaseous Diffusion Plant), DD-01-3, 54 NRC 305, 308 (2001); citing Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000).

In making a standing determination, a presiding officer is to "construe the [intervention] petition in favor of the petitioner." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta Georgia), CLI-95-12, 42 NRC 111, 115 (1995). See also Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 414 (2001); General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 158 (1996). Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87, 92 (1998). Molycorp, Inc. (Washington, Pennsylvania, Temporary Waste Storage & Site Decommissioning Plan), LBP-00-10, 51 NRC 163, 168 (2000).

In Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804 (1976), the Appeal Board certified the following questions to the Commission:

(1) Should standing in NRC proceedings be governed by "judicial" standards?
(2) If no "right" to intervene exists under whatever standing rules are found to be applicable, what degree of discretion exists in a Board to admit a petitioner anyway?

The Commission's response to the certified question is contained in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976). Therein, the Commission ruled that judicial concepts of standing should be applied by adjudicatory boards in determining whether a petitioner is entitled to intervene as of right under Section 189a of the Atomic Energy Act. As to the second question referred by the Appeal Board, the Commission held that Licensing Boards may, as a matter of discretion, grant intervention in domestic licensing cases to petitioners who are not entitled to intervene as of right under judicial standing doctrines but who may, nevertheless, make some contribution to the Proceeding. In the absence of a clear misapplication of the facts or misunderstanding of law, the Licensing Board's judgment at the pleading stage that a party has crossed the standing threshold is entitled to substantial deference. Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 14 (2001). The standing requirement arises from the hearing authorization in section 189a(1) of the Atomic Energy Act, providing a hearing "upon the request of any person whose interest may be affected" by a proceeding (emphasis supplied). Quivira Mining Company (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom; see also 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); Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 145-146 (2001).

Both the Atomic Energy Act of 1954, as amended, and the Commission's regulations permit intervention only by a "person whose interest may be affected." The term "person" in this context includes corporate environmental groups which may represent members of the group provided that such members have an interest which will be affected. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). Standing to intervene as a matter of right does not hinge upon a petitioner's potential contribution to the decisionmaking process. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); see generally Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9 (1994). Nevertheless, a petitioner's potential contribution has a definite bearing on "discretionary intervention." See Section 2.10.3.3.3.C.

Standing to intervene, unlike the factual merits of contentions, may appropriately be the subject of an evidentiary inquiry before intervention is granted. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978); Nuclear Engineering Company, Inc., (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 744 (1978); Georgia Power Company, et al., Vogtle Electric Generating Plant, Units 1 and 2), LBP-92-38, 36 NRC 394 (1992); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 83 (1993).

If there is nothing in an intervening party's petition indicating that the party possesses special knowledge or that the party will present significant information not already available to and considered by the Commission, then a discretionary hearing would impose unnecessary burdens on the participants without assisting the Commission in making its statutory findings under the AEA. Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-00-16, 52 NRC 68, 72 (2000).

"There is no question that, in an operating license proceeding, the question of a potential intervenor's standing is a significant one. For if no petitioner for intervention can satisfactorily demonstrate standing, it is likely that no hearing will be held." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 582 (1978).

In Commission practice, a "generalized grievance" shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983), citing Transnuclear Inc., CLI-77-24, 6 NRC 525, 531 (1977); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 34-35 (1987); Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 174 (1992). See 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, 248-49 (1991), aff'd in Part on other grounds and appeal denied, CLI-92-11, 36 NRC

47 (1992); Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 746 (2005)..

Assertions of broad public interest in (a) regulatory matters, (b) the administrative process, and (c) the development of economical energy resources do not establish the particularized interest necessary for participation by an individual or group in NRC adjudicatory processes. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 28 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192 (1991); Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-98-10, 47 NRC 333 (1998).

Economic interest as a ratepayer does not confer standing in NRC licensing proceedings. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 n.4 (1983); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98, affirmed on other grounds, ALAB-816, 22 NRC 461 (1985); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 193 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 443 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991). Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 374 (1992).

In assessing whether a petitioner has set forth a sufficient "interest" within the meaning of the Atomic Energy Act and the agency's regulations to intervene as a matter of right in a licensing proceeding, the Commission has long applied contemporaneous judicial concepts of standing. Atlas Corporation (Moab, Utah), LBP-00-4, 51 NRC 53, 55 (2000); See, e.g., Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 62 (2002). The Commission generally defers to a Presiding Officer's finding on standing, as the Presiding Officer has a greater familiarity than the Commission with the precise allegations and nuances in the factual record before him. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-02-10, 55 NRC 251, 254 (2002).

"The Commission generally defers to the Presiding Officer's determinations regarding standing, absent an error of law or an abuse of discretion." International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 31 (2001); citing International Uranium (USA) Corp. CLI-98-6, 47 NRC 116, 118 (1998); Georgia Institute of Technology, CLI-95-12, 42 NRC 111, 116 (1995).

2.10.4.1 Judicial Standing to Intervene

Judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under Section 189a of the Atomic Energy Act of 1954. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983), citing Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976); Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13 (1994); U.S. Dept. of Energy, CLI-04-17, 59 NRC 357, 363 (2004); see also Energy Fuels Nuclear, Inc., LBP-94-33, 40 NRC 151 (1994); Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 140-41 (1996); Quivira Mining Company (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 153 (1998). See, also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 6 (2001).

The Commission has held that contemporaneous judicial concepts should be used to determine whether a petitioner has standing to intervene. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983), citing Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80 (1993); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13 (1994); Gulf States Utilities Co., et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31; aff'd, CLI-94-10, 40 NRC 43 (1994); Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47 (1994); Quivira Mining Company (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87, 91 (1998); Private Fuel Storage, L.L.C., CLI-99-10, 49 NRC 318, 322-23 (1999); Department of the Army (Aberdeen Proving Ground), LBP-99-38, 50 NRC 227, 229 (1999).

Because agencies are not constrained by Article III, nor are they governed by judicially-created standing doctrines restricting access to federal courts, the criteria for establishing administrative standing may permissibly be less demanding than the criteria for judicial standing. Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 74 (D.C. Cir. 1999).

Judicial concepts of standing require a showing that (a) the action sought in a proceeding will cause "injury-in-fact," and (b) the injury is arguably within the "zone of interests" protected by statutes governing the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13-14 (1994); Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); Northeast Nuclear Energy Company (Millstone

Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87 (1998); Cabot Performance Materials, LBP-00-13, 51 NRC 284, 289 (2000).

In order to establish standing, a petitioner must show: (1) that he has personally suffered a distinct and palpable harm that constitutes injury-in-fact; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision. Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988); Shoreham-Wading River Central School District v. NRC, 931 F.2d 102, 105 (D.C. Cir. 1991); Kelley v. Selin, 42 F.3d 1501, 1507 (6th Cir. 1995), citing Michigan v. U.S., 994 F.2d 1197, 1203 (6th Cir. 1993); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-68 (1991); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72; Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994); Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n. 16 (2004).

A contemporary delineation of those concepts appeared in Bennett v. Spear, 520 U.S. 154, 167, 117 S.Ct. 1154, 1163 (1997)(citing Lujan v. Defenders of the Wildlife, 504 U.S. 555, 560-61 (1992)), where the Court observed that constitutional minimum standards of standing are that (1) the plaintiff suffer injury in fact, both actual or imminent; (2) there is a causal connection between the injury and the conduct in question; and (3) the injury likely will be redressed by a favorable decision. Quivira Mining Corporation (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999); GPU Nuclear, Inc., et. al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000); 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); Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 13 (2001); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 62 (2002).

Contemporaneous judicial concepts of standing require that a petitioner demonstrate that it will suffer an "injury in fact," that there be a causal connection between the alleged injury and the action complained of, and the injury be redressed by a favorable decision. Bennett v. Spear, 520 U.S. 154, 167-68 (1997). In addition, the petitioner must meet the "prudential" requirement that the complaint arguably falls within the zone of interests of the governing law. Id. at 175. See also Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 103 (2006).

As a line of Supreme Court cases makes clear, redressability is an essential element of standing. To establish standing, a petitioner must not only allege actual injury "fairly traceable" to the defendants' actions, it must also show the likelihood that the injury would be "redressed" if the petitioner obtains the relief requested. This requirement is grounded in the provision in article III of the constitution that limits jurisdiction to "cases and controversies." Where an alleged injury does not stem directly from the challenged governmental action, but instead involves predicting the actions of third parties not before the court, the difficulty of showing redressability is particularly great. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7,

39 NRC 322, 331 (1994); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149 (1998).

The redressability element of standing requires a party to show that its claimed actual or threatened injury could be cured by some action of the tribunal. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 14 (2001).

Judicial standing permitted to challenge rule on dry cask storage for petitioners living nearby and asserting harm to their aesthetic interests and their physical health and that the value of his or her property will be diminished by the storage of nuclear waste in the VSC-24 casks at Palisades. Kelley v. Selin, 42 F.3d 1501, 1509 (6th Cir. 1995). Judicial standing to challenge rule on reporting requirement, even though comment was made on earlier "prescriptive" versus later "performance-based" rule. Reytblatt v. U.S. Nuclear Regulatory Comm'n, 105 F.3d 715 (D.C. Cir. 1997).

It generally is the practice for participants making factual claims regarding the circumstances that establish standing to do so in affidavit form that is notarized or includes a declaration that the statements are true and are made under penalty of perjury. Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 427 n.4 (1997).

Where a petitioner does not satisfy the judicial standards for standing, intervention could still be allowed as a matter of discretion. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 358 (1993).

Merely because a petitioner may have had standing in an earlier proceeding does not automatically grant standing in subsequent proceedings, even if the scope of the earlier and later proceedings is similar. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992), citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 125-26 (1992).

The fact that the petitioner is an intervenor with respect to the same issue in another proceeding does not give him standing to intervene for the purpose of protecting himself from adverse precedent in the proceeding in question. Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Power Station, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 4 (1976).

Where there are two ongoing proceedings involving the same facility, an intervenor in the first proceeding need not reiterate its statement of standing in the second proceeding but may instead rely on its standing in the earlier proceeding. Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-95-23, 42 NRC 215, 217 (1995).

A petitioner's standing in a non-NRC proceeding is insufficient to establish standing in an NRC proceeding, at least in the absence of a showing of the equivalence of applicable standards and an overlap of relevant issues. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91 (1990).

Under certain circumstances, petitioners who participated in an earlier NRC proceeding will not be required to establish again their interests to participate in a subsequent, separate NRC proceeding involving the same facility. Thus, an organization which participated in an earlier proceeding as the representative of one of its members who resided in close proximity to the facility was conditionally granted leave to intervene in a subsequent, separate proceeding involving the same facility even though the organization failed to append affidavits to its intervention petition establishing the residence of its member. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 141 (1991). But see Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992).

Where a license amendment grants a co-licensee precisely the relief which the co-licensee seeks as a party to a pending proceeding, the co-licensee loses its standing to assert its claim in the proceeding. Nuclear Fuel Services and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1083 (1982).

Those persons who would have standing to intervene in new construction permit hearings, which would be required if good cause could not be shown for an extension of an existing construction permit, would have standing to intervene in [extension proceedings] to show that no good cause existed and, consequently, that 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, affirmed, ALAB-619, 12 NRC 558, 563-565 (1980).

The ultimate merits of the case have no bearing on the threshold question of standing. Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 15 (2001).

If an intervenor has established standing in a prior proceeding involving the same facility, there is no need for the intervenor to establish standing in a later proceeding. U.S. Army (Jefferson Proving Ground), LBP-04-01, 59 NRC 27, 29 (2004).

However, "a prospective petitioner has an affirmative duty to demonstrate that it has standing in each proceeding in which it seeks to participate since a petitioner's status can change over time and the bases or its standing in an earlier proceeding may no longer obtain. We would acknowledge that, in certain situations, a petitioner may seek to rely on prior demonstrations of standing if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 N.R.C. 156, 163 (1993); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52, NRC 129, 132-33 (2000).

2.10.4.1.1 "Injury-In-Fact" and "Zone of Interest" Tests for Standing to Intervene

Although the Commission's Pebble Springs ruling (CLI-76-27, 4 NRC 610) permits discretionary intervention in certain limited circumstances, it stresses that, as a general rule, the propriety of intervention is to be examined in the light of judicial standing principles. The judicial principles referred to are those set forth in Sierra Club v. Morton, 405 U.S. 727 (1972); Barlow v. Collins, 397 U.S. 159 (1970); and Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Such standards require a showing that (1) the action being challenged could cause injury-in-fact to the person seeking to establish standing, and (2) such injury is arguably within the zone of interests protected by the statute governing the proceeding. Wisconsin Electric Power Co. (Point Beach, Unit 1), CLI-80-38, 12 NRC 547 (1980); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976); Nuclear Fuel Services, Inc. and N.Y. State Energy Research and Development Authority (Western New York Nuclear Service Center), LBP-82-36, 15 NRC 1075, 1083 (1982); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1431, 1432 (1982), citing Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612-13 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 n.6 (1985), affirmed on other grounds, ALAB-816, 22 NRC 461 (1985); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 165, 166 (1991); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), LBP-91-28, 33 NRC 557, 559 (1991), aff'd on other grounds, CLI-91-14, 34 NRC 261, 266-68 (1991). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5 (1993); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80 (1993); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13 (1994); International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-21, 46 NRC 273, 274 (1997); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1998); 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).

Two tests must be satisfied to acquire standing: (1) petitioner must allege "injury-in-fact" (that some injury has occurred or will probably result from the action involved); (2) petitioner must allege an interest "arguably within the zone of interest" protected by the statute. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing Warth v. Selden, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 428 (1984); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19 (1996); International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55 (1997); Quivira Mining Co. (Ambrosia Lake Facility, Grants, NM), CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999); Northeast Nuclear Energy Company (Millstone Nuclear Power

Station, Unit 3), LBP-98-22, 48 NRC 149 (1998); Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 270 (2006).

The existence of judicial standing hinges upon a demonstration of a present or future injury-in-fact that is arguably within the zone of interests protected by the governing statute(s). International Uranium (USA) Corporation (White Mesa Uranium Mill) LBP-01-15, 53 NRC 344, 347 (2001).

To constitute an adequate showing of injury-in-fact within a cognizable sphere of interest, "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." International Uranium (USA) Corporation (White Mesa Uranium Mill) LBP-01-15, 53 NRC 344, 349 (2001) citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688-89 (1973).

No injury-in-fact can result where no new activity is proposed. Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-04-01, 59 NRC 1, 4 (2004).

A petitioner must allege an "injury-in-fact" which must be within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act of 1969. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983). See Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 443, 444 (1991). A hearing petitioner bears the burden of establishing that the various injuries alleged to occur to its AEA-protected health and safety interests or its National Environmental Policy Act (NEPA)-protected environmental interests satisfy the three components of the injury in fact requirement. Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993). Shieldalloy Metallurgical Corp., LBP-99-12, 49 NRC 155, 158 (1999).

In order to establish the factual predicates for the various standing elements, when legal representation is present, it is generally necessary for the individual to set forth any factual claims in a sworn affidavit. Shieldalloy Metallurgical Corp., LBP-99-12, 49 NRC 155, 158 (1999). Petitioners allegations regarding its increased risk, supported by two detailed affidavits and other evidentiary exhibits, are sufficiently concrete and particular to pass muster for standing. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 215 (1999).

The Commission applies judicial tests of "injury-in-fact" and "arguably within the zone of interest" to determine standing. "Injury" as a premise to standing must come from an action, in contrast to failure to take an action. One who claims that an Order in an enforcement action should have provided for more extensive relief does not show injury from relief granted and thus does not have standing to contest the order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980). Maine Yankee

Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57-58 (2004).

In addressing the matter of standing in a decommissioning proceeding, to establish "injury in fact" it must be shown how any alleged harmful radiological, environmental, or other legally cognizable effects that will arise from activities under the decommissioning plan at issue will cause injury to each individual or organizational petitioner or, in the case of an organization relying upon representational standing, the members it represents. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 153 (1992).

A petitioner must allege an "injury-in-fact" which he will suffer as a result of a Commission decision. He may not derive standing from the interests of another person or organization, nor may he seek to represent the interests of others without their express authorization. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 147 (2001).

Under certain circumstances, even if a current proceeding is separate from an earlier proceeding, the Commission may refuse to apply its rules of procedure in an overly formalistic manner by requiring that petitioners participating in the earlier proceeding must again identify their interests to participate in the current proceeding. Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-95-14, 42 NRC 5, 7 (1995) (citing Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2) LBP-91-33, 34 NRC 138 (1991).

2.10.4.1.1.1 "Injury in Fact" Test

A petitioner who supports an application must, of course, show the potential for injury-in-fact to its interests before intervention can be granted. Such a petitioner must particularize a specific injury that it or its members would or might sustain should the application it supports be denied or should the license it supports be burdened with conditions or restrictions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

For purposes of assessing injury in fact (or any other aspect of standing), a hearing petitioner's factual assertions, if uncontroverted, must be accepted. Apollo, 37 NRC at 82. In evaluating a petitioner's claims of injury in fact, care must be taken to avoid "the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits." Apollo, 37 NRC at 82, citing City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted), cert. denied, 117 L. Ed. 2d 460 (1992); Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 68 (1994), aff'd, CLI-94-12, 40 NRC 64 (1994); Sequoyah Fuels Corp. (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 15 (2001).

The test is a cognizable interest that might be adversely affected by one or another outcome of the proceeding. No interest is to be presumed. There

must be a concrete demonstration that harm could flow from a result of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). The alleged injury, which may be either actual or threatened, must be both concrete and particularized, not "conjectural" or "hypothetical." As a result, standing has been denied when the threat of injury is too speculative. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

"[I]njury-in-fact cannot be asserted on the footing of nothing more than a broad interest-shared with many others - in environmental preservation." International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-3, 55 NRC 35, 39 (2002), citing Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972). The Commission has likewise determined that a general interest in 'law observance' is insufficient to establish injury-in-fact. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-02-3, 55 NRC 35, 39 (2002), citing Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations, CLI-77-24, 6 NRC 525, 531 (1997) (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)).

It is not necessary that every injury asserted by petitioners be sufficiently concrete to satisfy these requirements; it is enough if some of the injuries claimed are, or result in, clearly adverse effects on petitioners. Kelley v. Selin, 42 F.3d 1501, 1507 (6th Cir. 1995), citing Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978). Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 31 (1999). An injury in fact must be "actual," "direct," and "genuine," but need not have already occurred. Potential or imminent injury is sufficient; there need only be a real possibility of concrete harm to a petitioner's interest as a result of the proceeding. Quivira Mining Corporation (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 265 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

A petitioner must establish a causal nexus between the alleged injury and the challenged action. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 122 (1992); Apollo, supra, 37 NRC at 81; Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 155 (1998); Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271, 276 (1998); Molycorp, Inc. (Washington, Pennsylvania, Temporary Waste Storage & Site Decommissioning Plan), LBP-00-10, 51 NRC 163, 167 (2000). When a petitioner is challenging the legality of government regulation of someone else, injury in fact as it relates to factors of causation and redressability is "ordinarily `substantially more difficult' to establish." Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 n.20 (1993).

In the case of an amendment to an existing and already licensed facility with ongoing operations, a petitioner's challenge must show how that amendment will cause a distinct new harm or threat that is separate and apart from already licensed activities. International Uranium (USA) Corp. (White Mesa

Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001), citing International Uranium (USA) Corp. (White Mesa Uranium Mill), 54 NRC 27 (2000); see also Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999). "Conclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing." International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001).

It must be demonstrated that the injury is fairly traceable to the proposed action. Such a determination is not dependent on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible. Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271 (1998); Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 105 (2006). It must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision. Sequoyah Fuels, CLI-94-12, 40 NRC at 76; Pa'ina, LBP-06-4, 63 NRC at 105..

In connection with an export application involving a one-time export, under armed guard, of a limited quantity of plutonium oxide, petitioners did not establish a nexus between the agency's actions and their alleged injury because the alleged harm — the attack or diversion of nuclear material by terrorist organizations – does not result from the grant or denial of the export license; rather, the remote potential for harm is dependent on the unlawful intervening acts of unknown third parties, and "the Commission's responsibility for considering the possibility of diversion as one aspect of protecting the common defense and security of the United States does not establish that diversion would cause any concrete personal or direct harm to petitioners which would entitle them to a voice in its proceedings." U.S. Dep't of Energy, CLI-04-17, 59 NRC 357, 365-366 (2004) (quoting Edlow Int'l Co. (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 577 (1976)).

To attain standing, petitioners should show a plausible way in which activities licensed by the challenged amendment would injure them. The injury must be due to the amendment and not to the license itself, which was granted previously. The injury must occur to individuals whose residence is demonstrated in the filing and whom the organizations are authorized to represent. Energy Fuels Nuclear, Inc. (White Mesa Uranium Mill), LBP-97-10, 45 NRC 429, 431 (1997).

A claim that an applicant has violated or will violate the law does not create a presumption of standing, without some showing that the violation could harm the petitioner. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 30 (2001).

To establish the requisite "injury-in-fact" for standing, a petitioner must have a "real stake" in the outcome, that is, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this

requirement where it has identified one of its members who possesses the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-448 (1979).

For a case holding that a petitioner cannot assert the rights of third parties as a basis for intervention, see Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 387, aff'd, ALAB-470, 7 NRC 473 (1978) (mother attempted to assert the rights of her son who attended medical school near a proposed facility).

A statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979); Sequoya Fuels Corp. (Gore, Oklahoma Site Decommissioning), LBP-99-46, 50 NRC 386, 394 (1999).

2.10.4.1.1.1.A Future/Hypothetical/Academic Injury

An alleged future injury which is realistically threatened and immediate, and not merely speculative, may establish standing to intervene. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 123 (1992). See Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 178-79 (1992); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 74 (1994).

An abstract, hypothetical injury is insufficient to establish standing to intervene. 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, 252 (1991), aff'd in part on other grounds and appeal denied, CLI-92-11, 36 NRC 47 (1992); International Uranium Corporation (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116 (1998).

A petitioner who supports an application must, of course, show the potential for injury-in-fact to its interests before intervention can be granted. Such a petitioner must particularize a specific injury that it or its members would or might sustain should the application it supports be denied or should the license it supports be burdened with conditions or restrictions. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, but only that it may be injured in fact by the proposed action. Gulf States Utilities Co., et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, aff'd, CLI-94-10, 40 NRC 43 (1994).

Purely academic interests are not encompassed by 10 CFR § 2.309(c) which states that any person whose interest is affected by a proceeding shall file a written petition for leave to intervene. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), LBP-82-52, 16 NRC 183, 185

(1982). See generally, CLI-81-25, 14 NRC 616 (1981), (guidelines for Board). A mere academic interest in the outcome of a proceeding will not confer standing. The petitioner must allege some injury that has or will occur from the action taken as a result of the proceeding. Skagit/Hanford, supra, 15 NRC at 743.

Concern that "bad precedent" may be set in a proceeding that could impact the petitioner's ability to contest similar matters in another proceeding is a "generalized grievance" that is "too academic" to provide the requisite injury in fact needed for standing as of right. See Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 248-49 (1991), aff'd on other ground, CLI-92-11, 36 NRC 47 (1992), petition for review dismissed, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 (1996).

2.10.4.1.1.1.B Economic/Competitive Injury

A petitioner who suffers only economic injury (i.e., harm to competition), lacks standing to bring a NEPA-based challenge to agency action. International Uranium (USA) (Receipt of material from Tonawanda, New York), CLI-98-23, 48 NRC 259 (1998); Quivira Mining Co. (Ambrosia Lake Facility, Grants, NM), CLI-98-11, 48 NRC 1 (1998); both decisions were sustained on review in Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999). Department of the Army, LBP-99-38, 50 NRC 227, 230 (1999); International Uranium (USA) Corp. (Materials License Amendment), CLI-00-4, 51 NRC 88 (2000) (Affirming two dismissals on basis that "competitor" injury is insufficent as ground for standing to intervene in adjudicatory process).

Although competitive injury may constitute injury in fact in an NRC licensing proceeding, a party relying for its standing on such injury must also demonstrate that it arguably falls within the zone of interests protected or regulated by the AEA or NEPA. Quivira Mining Corporation (Ambrose Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

For antitrust purposes, the interest of a ratepayer or consumer of electricity is not necessarily beyond the zone of interests protected by Section 105 of the Atomic Energy Act. However, the petitioner must still demonstrate that an injury to its economic interests as a ratepayer would be the proximate result of anticompetitive activities by the licensee. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-13, 7 NRC 583, 592-593 (1978).

For an amendment authorizing transfer of 20% of the ownership of a facility, allegations that a petitioner would "receive" only 80% of the electricity produced by the plant rather than the 100% "assumed in the 'NEPA balance'" were insufficient to give standing as a matter of right because it was an economic injury outside the zone of interests to be

protected and the NEPA cost-benefit analysis considers the overall benefits to society rather than benefits to an isolated portion. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 390-90, aff'd, ALAB-470, 7 NRC 473 (1978).

A claim of insufficient funds to ensure safe operation and shutdown, posing a threat of radiological harm to a co-owners interest in a facility, as a result of thin capitalization, inability to fund operation's because of potential litigation liability and financial insulation of shareholders from potential costs is sufficient to establish standing. GPU Nuclear, Inc., et. al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 194 (2000).

For the views of various Appeal Board members on whether a petitioner has the requisite interest where he has an economic interest which competes with nuclear power in generating electricity, see the three opinions in Long Island Lighting Co. (Jamesport Nuclear Power Station), ALAB-292, 2 NRC 631 (1975).

In a license amendment proceeding to allow two electric cooperatives to become co-owners of a nuclear plant, interests of a petitioner which stemmed from membership in the cooperative ("loss of equity," "threat of bankruptcy," "higher rates," "cost of replacement power," or "loss of property taxes") were insufficient to support standing as a matter of right. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978).

Economic injury to ratepayers is not sufficient to confer standing upon State Commissions to challenge proposed license revocation because such injury results from termination of the project and not Commission "action," and because such injury cannot be redressed by favorable Commission action. Northern States Power Company (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 526-527-(1980) (views of Chairman Ahearn and Commissioner Hendrie).

NRC's interpretation of the AEA to preclude intervention by competitor who alleged only economic injury was reasonable, regardless of whether proposed intervenor could meet judicial standing requirements, in view of Act's purpose of increasing private competition, and regulatory burdens that granting such standing would impose on the agency. Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 77-8 (D.C. Cir. 1999).

2.10.4.1.1.1.C Health and Safety/Environmental Injury

A petitioner has not shown any reasonable nexus between himself or herself and any purported radiological impacts when, despite assertions about potential facility-related airborne and waterborne radiological contacts, he or she has not delineated these with enough concreteness to establish some impact on him that is sufficient to provide him or her with standing. By not providing any information that indicates whether water-related activities are being conducted upstream or downstream from a facility and by describing other activities only using vague terms such as

"near," "close proximity," or "in the vicinity" of the facility at issue, the petitioner fails to carry his or her burden of establishing the requisite "injury in fact." Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 425-26 (1997).

Allegations that a plant will cause radiologically contaminated food which a person may consume are too remote and too generalized to provide a basis for standing to intervene. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1449 (1982); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98, affirmed on other grounds, ALAB-816, 22 NRC 461 (1985).

A request to transfer operating authority under a full power license for a power reactor may be deemed an action involving "clear implications for the offsite environment," for purposes of determining threshold injury. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 35 (1993).

An alleged injury to health and safety, shared equally by all those residing near a reactor, can form the basis for standing. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1434 (1982).

Relative to a threshold standing determination, even minor radiological exposures resulting from a proposed license activity can be enough to create the requisite injury in fact. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 70, aff'd, CLI-96-7, 43 NRC 235, 246-48 (1996). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 158 (1996); North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157, 162-63 (1998); Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 104 (2006).

2.10.4.1.1.1.D Injury to Legal and/or Constitutional Rights

An alleged injury to a purely legal interest is sufficient to support standing. Thus, a petitioner derived standing by alleging that a proposed license amendment would deprive it of the right to notice and opportunity for hearing provided by § 189a of the Atomic Energy Act. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501, 506 (1990), reconsid. denied, LBP-90-25, 32 NRC 21 (1990). But see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 123-26 1992), where the Licensing Board in a subsequent Perry license amendment proceeding declined to follow the ruling of the previous Perry board, (LBP-90-15 and LBP-90-25), supra. The Perry Board (LBP-92-4) held that § 189a of the Atomic Energy Act does not give a petitioner an absolute right to intervene in NRC proceedings, and only grants participation rights to a petitioner who has first established standing. An assertion of a procedural right to participate in NRC proceedings as an end in itself is insufficient to establish standing without a demonstration of a causal nexus with a substantive regulatory

injury. But this was subsequently overturned by Commission in CLI-93-21 which essentially affirmed the earlier Perry decision and found that standing may be based upon the alleged loss of a procedural right, as long as the procedure at issue is designed to protect against a threatened concrete injury, and the loss of rights to notice, opportunity for a hearing and opportunity for judicial review constitute a discrete injury. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 93-94 (1993).

A claim of personal injury that allegedly resulted from mismanagement would not result from the proposed extension of the construction permit completion date. Nor is such an injury protected under the AEA or NEPA. This grievance is in the area of employment rights and would not be redressed by a decision favorable to petitioners. A desire to expose alleged mismanagement is not an injury-in-fact and does not enhance petitioners position for standing. Texas Utilities Electric Company, et al., (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 375 (1992).

An individual alleging that violation of constitutional provisions by governmental actions based on a statute will cause him identifiable injury should have standing to challenge the constitutionality of those actions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1445 (1982), citing Chicano Police Officer's Association v. Stover, 526 F.2d 431, 436 (10th Cir. 1975), vacated and remanded on other grounds, 426 U.S. 994 (1976), holding on standing reaffirmed, 552 F.2d 918 (10th Cir. 1977); 3 K. Davis Administrative Law Treatise 22.08, at 240 (1958).

2.10.4.1.1.1.E Injury Due to Proximity to a Facility

A petitioner may base its standing upon a showing that his or her residence, or that of its members, is within the geographical zone that might be affected by an accidental release of fission products. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979). See also Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 270 (2006). Close proximity has always been deemed enough standing alone, to establish the requisite interest for intervention. The incremental risk of reactor operation for an additional 13-15 years is sufficient to invoke the presumption of injury in fact for persons residing within 10 to 20 miles of the facility. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5 (1993). In such a case the petitioner does not have to show that his concerns are well-founded in fact, as such concerns are addressed when the merits of the case are reached. Distances of as much as 50 miles have been held to fall within this zone. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 410, 429 (1984), citing

South Texas, supra, 9 NRC at 443-44; Enrico Fermi, supra, 9 NRC at 78; Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-18, 9 NRC 728, 730 (1979); Pilgrim Nuclear Power Station, LBP-06-23, 64 NRC at 270.

An intervention petitioner who resides near a nuclear facility need not show a causal relationship between injury to its interest and the licensing action being sought in order to establish standing. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153 (1982), citing Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979); Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 287 (1995).

In an operating license amendment proceeding, a petitioner cannot base his or her standing simply upon a residence or visits near the plant, unless the proposed action quite obviously entails an increase potential for offsite consequences. It is incumbent upon the petitioner to provide some "plausible chain of causation," some scenario suggesting how the license amendments would result in a distinct new harm or threat. A petitioner cannot seek to obtain standing in a license amendment proceeding simply by enumerating the proposed license changes and alleging without substantiation that the charges will lead to offsite radiological consequences. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 191 (1999); see also Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-02-14, 56 NRC 15, 26 (2002).

Petitioners may have standing if they reside close enough to a planned project so that there is reasonable apprehension of injury. When the staff delays issuance of the full license that is applied for, it is an indication of the reasonableness of petitioners' apprehensions of injury. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 146-147 (2001).

"A petitioner may base its standing upon a showing that his or her residence, or that of its members, is 'within the geographical zone that might be affected by an accidental release of fission products.' Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 371 n.6 (1973)." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Distances of as much as 50 miles have been held to fall within this zone. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977) (50 miles); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973) (40 miles); Fermi, supra (35 miles); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station,

Unit 2), LBP-03-3, 57 NRC 45, 61-63 (2003)(finding that petitioner living 2 miles from plant demonstrated requisite potential impact by proposed license amendments, while petitioner living 23 miles away did not).

Residence or activities within 10 miles of a facility (and in one case 17 miles from a facility) have been found sufficient to establish standing in a case involving the proposed expansion in capacity of a spent fuel pool. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); see also Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452-454-55 (1988), aff'd, ALAB-893, 27 NRC 627 (1988); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29-31 (1999). Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25 (2000).

A petitioner which bases its standing on its proximity to a nuclear facility must describe the nature of its property or residence and its proximity to the facility, and should describe how the health and safety of the petitioner may be jeopardized. Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 315 (1989).

A petitioner who resides far from a facility cannot acquire standing to intervene by asserting the interests of a third party who will be near the facility but who is not a minor or otherwise under a legal disability which would preclude his own participation. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474 n.1 (1978).

The Licensing Board refused to allow intervention on the basis of the possibility of petitioners' consuming produce, meat products, or fish originating within 50 miles of the site. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336 (1979).
A petitioner owning and renting out farmland 10 to 15 miles from the site and visiting the farm occasionally was held not to meet standing requirements. WPPSS, supra, 9 NRC at 336-338.

One living 26 miles from a plant cannot claim, without more, that his aesthetic interests are harmed. Conjectural interests do not provide a basis for standing. Nor does economic harm or one's status as a ratepayer provide a basis for standing. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242, 243 n.8 (1980).

Intervenors who fail to provide specific information regarding either the geographic proximity or timing of their visits will only complicate matters for themselves. In many instances, a lack of specificity will be sufficient to reject claims of standing. Private Fuel Storage, L.L.C., CLI-99-10, 49 NRC 318, 324 (1999); Shieldalloy Metallurgical Corp., CLI-99-12, 49 NRC 347, 355 (1999).

A bare claim that a challenged reactor license amendment will impact the health, safety and financial interests of petitioners who reside within 50 miles of the facility fails to "set forth with particularity" a statement that could grant standing. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 98 (2000).

Although residence within 50 miles is not an explicit requirement for intervention by right, that limit is consistent with precedent. Without a showing that a plant has a far greater than ordinary potential to injure outside a 50 mile limit, a person has a weak claim to the protection of a full adjudicatory proceeding; rulemaking or lobbying Congress are available to protect public interests of a general nature. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 178-179 (1981); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 (1994); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 149 (2001).

However, the fact that a petitioner may reside within a 50-mile radius of a facility will not always be sufficient to establish standing to intervene. A Board will consider the nature of the proceeding, and will apply different standing considerations to proceedings involving construction permits or operating licenses than to proceedings involving license amendments. Thus, in a license amendment proceeding involving an existing facility's fuel pool, a Board denied intervention to a petitioner who resided 43 miles from the facility because the petitioner failed to demonstrate that the risk of injury from the fuel pool extended that far from the facility. Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), affirmed on other grounds, ALAB-816, 22 NRC 461 (1985). But see, Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 213 (1992) [Intervention granted to petitioners residing within 1 to 3 miles after demonstrating the potential for injury from corrective redesign of the spent fuel pool].

A petitioner's residence within 50 miles of a nuclear facility was insufficient, by itself, to establish standing to intervene in an exemption proceeding where the exemption at issue involved the protection of workers in the facility and did not have the clear potential for offsite consequences affecting the general population. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 156-57 (1991) (proposed license amendments involved potential offsite safety consequences). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 29, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 193, 194 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437 (1991); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 122 (1992); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 129-130 (1992);

Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 212-214 (1992); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149 (1998); Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271 (1998).

Residence more than 75 miles from a plant will not alone establish an interest sufficient for standing as a matter of right. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1447 (1982), citing Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978); Public Service Co. of Oklahoma (Black Fox Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977).

Although an 'obvious potential for offsite consequences' may be sufficient to show standing, it is not in itself sufficient to support an admissible contention. Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 93 (2003).

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. Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995); Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 105-106 (2006). This proximity presumption may apply if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity. Pa'ina, LBP-06-4, 63 NRC at 105 (citing Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146 (2001), aff'd on other grounds, CLI-01-17, 54 NRC 3 (2001)).

Where a petitioner claimed that the 10 C.F.R. § 51.22 categorical exclusion (providing that no EA or EIS need be prepared) for irradiators was inapplicable because of special circumstances unique to the proposed location of the irradiator, and where the Board found it to be a plausible claim that placing an irradiator in a location subject to the specified risks (e.g., aircraft crashes, tsunamis, and hurricanes) would present an obvious potential for offsite consequences, the Board found that the petitioner (whose members the parties agreed were otherwise appropriately proximate to the proposed site) had standing under the geographical proximity presumption. Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 106-107 (2006).

A Licensing Board disagreed that the Commission's decision in Exelon Generation Co. & PSEG Nuclear, LLC (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-83 (2005) stands for

the proposition that a categorical exclusion (such as 10 C.F.R. § 51.22(c)(14)(vii) for irradiators) precludes the possibility of a petitioner's proximity standing based on obvious potential for offsite consequences. The Board asserted that the Peach Bottom ruling involved a merger and license transfer governed by 10 C.F.R. § 50.80, and it noted that although license transfers, like irradiators, are categorically excluded from NEPA review pursuant to 10 C.F.R. § 51.22(c) except when special circumstances are present, the Commission made no mention in the Peach Bottom decision of a categorical exclusion, nor did it suggest that such a determination would be dispositive of the issue for proximity standing. Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 106 n.27 (2006).

The potential for offsite consequences was "obvious" because TVA sought, through a technical specification change, to "add tens of millions of curies of highly combustible radioactive gas to the already significant core inventory" at the reactors. Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-02-14, 56 NRC 15, 25 (2002).

Residence within 30-40 miles of a reactor site has been held to be sufficient to show the requisite interest in raising safety questions. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631, 633-634 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 190, 193, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454-55 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988). Similarly, a person whose base of normal, everyday activities is within 25 miles of a nuclear facility can fairly be presumed to have an interest which might be affected by reactor construction and/or operation. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 (1974). A petitioner must affirmatively state his place of residence and the extent of his work activities which are located within close proximity to the facility. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991). A person who regularly commutes past the entrance of a nuclear facility while conducting normal activities is presumed to have the requisite interest for standing. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990). Moreover, persons who allege that they use an area whose recreational benefits may be diminished by a nuclear facility have been found to possess an adequate interest to allow intervention. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973). On the other hand, it is proper for a Board to dismiss an intervention petition where the intervenor changes residence to an area not in the proximity of the reactor and totally fails to assume any significant participatory role in the proceeding. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-358, 4 NRC 558 (1976).

The initial issue in deciding a question of "proximity standing" is whether the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action "could plausibly lead to the offsite release of radioactive fission products from . . . the . . . reactors." The petitioner carries the burden of making this showing. If the petitioner fails to show that a particular licensing action raises an "obvious potential for offsite consequences," then the standing inquiry reverts to a "traditional standing" analysis of whether the petitioner has made a specific showing of injury, causation, and redressability. In a license transfer case, the Commission concluded that the risks associated with the transfer of the non-operating, 50% ownership interest in a power reactor were de minimis and therefore justified no "proximity standing" at all. Exelon Generation Co., LLC and PSEG Nuclear, LLC (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 581 (2005).

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).

In an adjudicatory hearing regarding decommissioning plans, a hearing petition or supplementary petition which fails to allege any concrete or particularized injury that would occur as a result of the transportation of reactor materials or components to a low-level waste facility, does not satisfy the "injury in fact" prong. In addition, a petition fails to demonstrate "injury in fact" which only alleges that a petitioner's members live "close" to transportation routes that will be used for shipments of reactor materials and components to a low-level was facility and does not identify those routs or explain how "close" to those routes the petitioner's members actually live. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100-02 (1994).

Where the Licensing Board rests its finding of standing on a combination of (a) the petitioners' proximity to the licensed facility, (b) petitioners' everyday use of the area near the reactor, and (c) the decommissioning effects described in the Commission's 1988 GEIS, the Commission determined that it was reasonable for the Board to find "that some, even if minor, public exposures can be anticipated" and "will be visited" on petitioners' members. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996).

In non-reactor cases there is no presumption of standing based upon geographic proximity, absent a determination that the proposed action

involves a significant source of radioactivity producing an obvious potential for offsite consequences. Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source. Where there is no obvious potential for radiological harm at a particular distance frequented by a petitioner, it becomes the petitioner's burden to show a specific and plausible means of how the challenged action may harm him or her. USEC, Inc. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005).

In a proceeding reviewing an extended power uprate application, an organization had representational standing where its representative members each lived within 15 miles of the plant. Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 553-54 (2004).

Proximity alone does not suffice to show standing in materials licensing cases, and would apply only in actions involving a significant source of radioactivity producing an obvious potential for offsite consequences. To show standing in a license amendment case, a petitioner must show some new or increased harm, threat, injury, or risk resulting from the amendment, separate and apart from continuing activities under the existing license and amendments. International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-01-8, 53 NRC 204, 218 (2001). See also Nuclear Fuel Services, Inc., CLI-04-13, 59 NRC 244, 248 (2004). How close a petitioner must live to the source for this "proximity plus" presumption to come into play depends on the danger posed by the source at issue. CFC Logistics, Inc., LBP-03-20, 58 NRC 311, 318 (2003). The analysis will look to (1) proximity, (2) the presence at the facility of a "significant source" of radioactivity, and (3) the "obvious potential" of the source's radioactivity to cause offsite harm. CFC Logistics, Inc., LBP-04-24, 60 NRC 475, 487 (2004).

In a materials license renewal proceeding under 10 CFR Part 30, as in construction permit and operating license proceedings under 10 CFR Part 50, the Appeal Board suggested that proximity to a large source of radioactive material is sufficient to establish the requisite interest for standing to intervene. Whether a petitioner's stated concern is in fact justified must be left for consideration when the merits of the controversy are reached. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982). See generally, LBP-82-24, 15 NRC 652 (1982), (decision reversed regarding petitioner's request to intervene). But see International Uranium Corporation (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116 (1998). However, postcards and letters from individuals allegedly living near nuclear fuel element manufacturing and fuel element decladding facilities which make only vague and generalized allusions to danger or potential injury from radiation do not constitute a proper intervention statement. Rockwell International Corp. (Energy Systems Group Special Materials License No. SNM-21), LBP-83-65, 18 NRC 774, 777 (1983). More recent cases reject proximity to the site alone as a basis for standing. See Babcock & Wilcox (Apollo,

Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 83 (1993) (refusing to apply any presumption based on proximity and denying standing of petitioner residing within one eighth and within two miles of the facility). See also Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426 (1997) (petitioner must assert reasonable nexus between himself and purported radiological impacts). Even though a license is conditional so that certain activities may not take place without further staff approval, the scope of the license is not narrowed. A petitioning party has standing to request a hearing if any of the activities under the license would cause injury. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998).

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 Army (Army Research Laboratory), LBP-00-21, 52 NRC 107 (2000). Mere geographical proximity to potential transportation routes is insufficient to confer standing; instead, section 2.309 petitioners must demonstrate a causal connection between the licensing action and the injury alleged. There is authority that indicates that to establish injury in fact, it is not necessary to proffer radiation impacts that amount to a regulatory violation. However, simply showing the potential for any radiological impact, no matter how trivial, is not sufficient to meet the requirement of showing a distinct and palpable harm under the first standing element. Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 434 (2002), aff'd, CLI-03-1, 57 NRC 1 (2003). See also U.S. Dep't of Energy, CLI-04-17, 59 NRC 357, 364-66 (2004), where an application involving a one-time export, under armed guard, of a limited quantity of plutonium oxide was distinguished from the line of Commission decisions discussing the proximity presumption and involving permanent or long-term licensed facilities. The Commission in CLI-04-17 also noted in a footnote that "[M]ere geographical proximity to potential transportation routes is insufficient to confer standing; instead...Petitioners must demonstrate a causal connection between the licensing action and the injury alleged." Id. at 364 n.11 (quoting Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 434 (2002)).

In a case where petitioners challenged an export license to export weapons-grade plutonium oxide to France, and argued standing in part because of proximity to cross-country shipments of the plutonium, the Commission stated (via dicta in a footnote) that the NRC's jurisdiction to license DOE exports of special nuclear material under AEA § 54d does not extend to any aspects of DOE's domestic transportation of such material. Therefore, it was unclear that denial of DOE's proposed export license would redress or avoid the harm that Petitioners asserted for standing purposes – i.e., DOE's transportation of the plutonium oxide near petitioners' residences. See U.S. Dep't of Energy, CLI-04-17, 59 NRC 357, 366 n.13 (2004).

2.10.4.1.1.1.F Injury Due to Failure to Prepare an EIS

Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury - indeed, irreparable injury. Palisades, supra, 10 NRC at 115-116. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, 10 NRC at 116.

There is no 50-mile presumption for determining areas in which environmental impacts must be evaluated. The standing requirement for showing injury in fact has always been significantly less than for demonstrating an acceptable contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 248-49 (1993).

An organization has established standing by asserting that the Commission's decision not to prepare an environmental impact statement of the alleged de facto decommissioning of the Shoreham facility would injure the organization's ability to disseminate information which is essential to its organizational purpose and is within the zone of interests protected by the National Environmental Policy Act. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 435-36 (1991). The organization's alleged injury also was sufficient to establish standing in the Shoreham possession-only license proceeding where the organization asserted that the application for a possession-only license was another step in the alleged de facto decommissioning of the Shoreham facility. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 541-43 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991). The organization is not required to suffer direct environmental harm in order to establish standing. The organization's alleged injury to its informational purpose is a cognizable injury under NEPA as long as there is a reasonable risk that environmental harm may occur. Shoreham, supra, 34 NRC at 135-36, citing City of Los Angeles v. NHTSA, 912 F.2d 478, 492 (D.C. Cir. 1990). The Licensing Board in the Rancho Seco possession-only license proceeding has held that the alleged injury to an organization's ability to disseminate information is insufficient by itself to establish standing. There must also be a showing of a specific cognizable injury. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-30, 34 NRC 23, 27-28 (1991). See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 57-61 (1992), aff'd, Environmental and Resources Conservation Organization v. NRC, 996 F.2d 1224 (9th Cir. 1993) (Table); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 128 (1992).

A statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979). Failure to produce an environmental impact statement in circumstances where required has been held to constitute

injury - indeed, irreparable injury. Palisades, supra, 10 NRC at 115-116. Persons residing within the close proximity to the locus of a proposed action constitute the very class which an impact statement is intended to benefit. Palisades, supra, 10 NRC at 116. If petitioners fail to respond to a presiding officer's reasonable and clearly articulated requests for more specific information regarding petitioners' claims of standing, the presiding officer is justified in rejecting the petitions for intervention. International Uranium Corporation (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116 (1998).

2.10.4.1.1.1.G Injury Due to Property Interest

The Atomic Energy Act authorizes the Commission to accord protection from radiological injury to both health and property interests. Thus, a genuine property interest in a home situated near a planned uranium enrichment facility, even though the owner did not occupy the home, was sufficient to accord the petitioner standing, given that the home is located within the same distance already found sufficient as a basis to accord actual residents standing to intervene. USEC, Inc. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005).

2.10.4.1.1.2 "Zone of Interests" Test

With respect to "zone of interest," the Appeal Board, in Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 103 n.6 (1976), rejected the contention that the Atomic Energy Act includes a "party aggrieved" provision which would require for standing purposes simply a showing of injury-in-fact. The Commission agreed with this analysis in its Pebble Springs decision. As such, zone of interest requirements are not met simply by invoking the Atomic Energy Act but must be satisfied by other means.

"In order to assess whether an interest is within the 'zone of interests' of a statute, it is necessary to 'first discern the interests "arguably . . . to be protected" by the statutory provision at issue,' and 'then inquire whether the plantiff's interests affected by the agency action are among them." U.S. Enrichment Corp. (Paducah, Kentucky), CLI-01-23, 54 NRC 267, 272-273 (2001), (citing National Credit Union Administration v. First National Bank, 522 U.S. 479, 492 (1998).

The directness of a petitioner's connection with a facility bears upon the sufficiency of its allegations of injury-in-fact, but not upon whether its interests fall within the zone of interest which Congress was protecting or regulating. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976).

The Atomic Energy Act and its implementing regulations do not confer standing but rather require an additional showing that interests sought to be protected arguably fall within the zone of interests protected or regulated by the Act. Virginia Electric & Power Co., ALAB-342 supra; accord, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27,

4 NRC 610 (1976); Cabot Performance Materials, LBP-00-13, 51 NRC 284, 288 (2000).

Injuries to a petitioner for intervention arising from the actions of parties other than the applicant (in this case, the State and its Governor) do not fall within the zones of interest arguably protected by the respective statutes that govern a licensing proceeding. The injury of which the petitioner complained was not a result of the disputed application. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC 114, 124 (2000).

Nuclear expert and citizens group who sought to challenge NRC reporting requirements (for performance-based containment leakage rate testing by nuclear power plants) fell within the zone of interests of the AEA because they arguably need access to information relating to successful as well as failed tests in order to exercise their rights under the AEA's hearing provision, 42 U.S.C. § 2239(a)(1)(A), and the § 2.206 petition provision. Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997).

The Atomic Energy Act authorizes the Commission to accord protection from radiological injury to both health and property interests. See AEA, §§ 103b, 161b, 42 U.S.C. §§ 2133(b), 2201(b). Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994).

As the AEA protects not only human health and safety from radiologically caused injury but also the owner's property interests in their facility, persons or entities who own (or co-own) on NRC-licensed facility plainly have an AEA protected interest in license proceedings involving their facility. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 216 (1999).

While potential loss of business reputation is a cognizable "injury-in-fact," an interest in protecting business reputation and avoiding possible damage claims is not arguably within the zone of interest which the Act seeks to protect or regulate. Virginia Electric & Power Co., ALAB-342, supra (business reputation of reactor vessel component fabricator clearly would be injured if components failed during operation; however, fabricator's interest in protecting his reputation by intervening in hearing on adequacy of vessel supports was not within the zone of interests sought to be protected by the Atomic Energy Act).

The economic interest of a ratepayer is not sufficient to allow standing to intervene as a matter of right since concern about rates is not within the scope of interests sought to be protected by the Atomic Energy Act. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1420-1421 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977); Public Service Co. of Oklahoma (Black Fox Nuclear Power Station, Units 1 & 2), LBP-77-17, 5 NRC 657 (1977); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 158 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear

Generating Station), LBP-92-23, 36 NRC 120, 130-31 (1992); Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 374 (1992). Nor is such interest within the zone of interests protected by the National Environmental Policy Act. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804 (1976).

A person's interest as a taxpayer does not fall within the zone of interests sought to be protected by either the Atomic Energy Act or the National Environmental Policy Act. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 315 (1989).

Economic injury gives standing under the National Environmental Policy Act only if it is environmentally related. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1.977); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 39091 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56-57 (1992), aff'd, Environmental and Resources Conservation Organization v. NRC, 996 F.2d 1224 (9th Cir. 1993) (Table); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 131 (1992). See also Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 640 (1975); Quivira Mining Co. (Ambrosia Lake Facility, Grants, NM), CLI-98-11, 48 NRC 1 (1998) and International Uranium (USA) (Receipt of material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 264 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

The courts have not resolved the issue of whether an individual who suffers economic injury as a result of a Board's decision to bar him from working in a certain job would be within the zone of interests protected by the Atomic Energy Act. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985). See, e.g., Consumers Power Co. (Palisades Nuclear Power Facility), ALAB-670, 15 NRC 493, 506 (1982) (concurring opinion of Mr. Rosenthal), vacated as moot, CLI-82-18, 16 NRC 50 (1982).

Antitrust considerations to one side, neither the Atomic Energy Act nor the National Environmental Policy Act includes in its "zone of interests" the purely economic personal concerns of a member/ratepayer of a cooperative that purchases power from a prospective facility co-owner. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474-475 (1978). See also Puget Sound Power & Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 744 (1982).

General economic concerns are not within the proper scope of issues to be litigated before the boards. Concerns about a facility's impact on local utility rates, the local economy, or a utility's solvency, etc., do not provide an adequate basis for standing of an intervenor or for the admission of an intervenor's contentions. Babcock and Wilcox (Apollo, Pennsylvania Fuel

Fabrication Facility), LBP-93-4, 37 NRC 72, 94 n.64 (1993). Such economic concerns are more appropriately raised before state economic regulatory agencies. Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1190 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 194 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430, 437, 443 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537, 544, 546 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991); Quivira Mining Corporation (Ambrosia Lake Facility, Grants, New Mexico), LBP-97-20, 46 NRC 257, 271 (1997), aff'd, CLI-98-11, 48 NRC 1 (1998), aff'd sub nom. Envirocare, Inc. v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

2.10.4.1.2 Standing of Organizations to Intervene

In order to establish organizational standing, an organization must allege: (1) that the action will cause an "injury in fact" to either (a) the organization's interests or (b) the interests of its members; and (2) that the injury is within the "zone of interests" protected by either the AEA. A party may intervene as of right only when he asserts his own interests under either the Energy Reorganization Act (ERA) or the National Environmental Policy Act (NEPA) and not when he asserts interests of third persons. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 68-69 (1996); aff'd, in part, CLI-96-7, 43 NRC 235 (1996); Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343 (1998). A petitioning organization has standing to request a hearing if any of the activities under the license may cause injury to its interests or to one of its members. Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998).

A party may intervene as of right only when he asserts his own interests under either the Atomic Energy Act or NEPA, and not when he asserts interests of third persons. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977). Commission practice requires each party to separately establish standing. 10 CFR § 2.309 (formerly 2.714). Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981). An organization may meet the injury-in-fact test for standing in one of two ways. It may demonstrate an effect upon its organizational interest, or it may allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646 (1979); Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 112-113 (1979); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998); North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), LBP-98-23,

48 NRC 157 (1998); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1988). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). To determine whether an organization's individual members have standings a petitioner must allege (1) a particularized injury, (2) that is fairly tracable to the challenged action and (3) is likely to be redressed by a favorable decision. Private Fuel Storage, L.L.C., CLI-99-10, 49 NRC 318, 323 (1999). Thus, a corporate environmental group has standing to intervene and represent members who have an interest which will be affected. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). Note, however, that a member's mere "interest in the problem" without a showing that the member will be affected is insufficient to give the organization standing. Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976). An organization does not have independent standing to intervene in a licensing proceeding merely because it asserts an interest in the litigation. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976). An organization seeking to intervene in its own right must demonstrate a palpable injury-in-fact to its organizational interests that is within the scope of interests of the Atomic Energy Act or the National Environmental Policy Act. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-530 (1991). In this vein, for national environmental groups, standing is derived from injury-in-fact to individual members. South Texas, supra, 9 NRC at 647, citing Sierra Club v. Morton, 405 U.S. 727 (1972). However, an organization specifically empowered by its members to promote certain of their interests has those members' authorization to act as their representative in any proceeding that may affect those interests. Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-700, 16 NRC 1329, 1334 (1982); see Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 342-345 (1977); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 n.2 (1979); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 395-396 n.25 (1979); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 13-15 (1994); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998). A member's authorization may be presumed when the sole or primary purpose of the organization is to oppose nuclear power in general or the facility at bar in particular. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140-41 (1991).

To have standing, an organization must show injury either to its organizational interests or to the interests of members who have authorized it to act for them. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982), citing Warth v. Seldin, 422 U.S. 490, 511 (1975); Sierra Club v. Morton, 405 U.S. 727, 739-740 (1972); Consumers Power Co. (Palisades Nuclear Plant), LBP-7920, 10 NRC 108, 113 (1979); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29,

32 NRC 89, 91-92 (1990). See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-17, 33 NRC 379, 389 (1991).

An organization must, in itself, and through its own membership, fulfill the requirements for standing. Skagit/Hanford, supra, 16 NRC at 984, citing Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976).

"[T]he petitioning organization must demonstrate that the interests it seeks to protect are germane to its purposes and that neither the claim it asserts nor the relief it requests requires the participation of an individual member in the proceeding". Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 413-14 (2001).

Absent express authorization, an organization which is a party to an NRC proceeding may not represent persons other than its own members. Since there are no Commission regulations allowing parties to participate as private attorneys general, an organization acting as an intervenor may not claim to represent the public interest in general in addition to representing the specialized interests of its members. In this vein, a trade association of home heating oil dealers cannot be deemed to represent the interests of employees and customers of the dealers. Similarly, an organization of residents living near a proposed plant site cannot be deemed to represent the interests of other residents who are not members. Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-77-11, 5 NRC 481 (1977); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982), citing Shoreham, supra, 5 NRC at 481, 483. An organization lacked standing to litigate the consequences of a possible accident in a research laboratory where the health risks from the accident would be confined within the laboratory and the organization had not demonstrated that any of its members were workers inside the laboratory. Curators of the University of Missouri, LBP-90-30, 32 NRC 95, 103 (1990).

2.10.4.1.2.1 Organizational Standing

A petitioner cannot assert injury-in-fact to itself as an organization based upon nothing more than a broad interest–shared with many others–in the preservation of the environment. See Sierra Club v. Morton, 405 U.S. 727, 734-735 (1972). Nor can standing be founded upon a petitioner's stated strong organizational interest in compliance with the dictates of federal and state laws and regulations. International Uranium (USA) Corporation (White Mesa Uranium Mill) LBP-01-15, 53 NRC 344, 348 (2001); Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations, CLI-77-24, 6 NRC 525, 531 (1977), citing Warth v. Seldin, 422 U.S. 490, 499 (1975); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983).

An organization must demonstrate a discrete institutional injury to the organization itself. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001); Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-

06-23, 64 NRC 257, 271 (2006). General environmental and policy interests are insufficient to confer organizational standing. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

Where an organization is to be represented in an NRC proceeding by one of its members, the member must demonstrate authorization by that organization to represent it. Fermi, supra, 8 NRC at 583. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990)]; Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

If an official of an organization has the requisite personal interests to support an intervention petition, her signature on the organization's petition for intervention is enough to give the organization standing to intervene. However the organization is not always necessarily required to produce an affidavit from a member or sponsor authorizing it to represent that member or sponsor. The organization may be presumed to represent the interests of those of its members or sponsors in the vicinity of the facility. (Where an organization has no members, its sponsors can be considered the equivalent to members where they financially support the organization's objectives and have indicated a desire to be represented by the organization.) Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2) and Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 728-729, 734-736 (1982).

An organization seeking intervention need not demonstrate that its membership had voted to seek intervention on the matter raised by a submitted contention, and had authorized the author of the intervention petition to represent the organization. Duke Power Company (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979). Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 206-207 (1992) [the effect of ratification by a principal of its agent's previous acts is to adopt those acts as the principal's own as of the time the agent acted].
Where the petitioner organization's membership solicitation brochure demonstrates that the organization's sole purpose is to oppose nuclear power in general and the construction and operation of nuclear plants in the northwest in particular, mere membership by a person with geographic standing to intervene, without specific representational authority, is sufficient to confer standing. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-16, 17 NRC 479, 482 (1983). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140-41 (1991).

An organization which bases its standing upon the interests of its sponsors must: (1) identify at least one sponsor who will be injured; (2) describe the nature of that injury; and (3) provide an authorization for the organization to represent the sponsor in the proceeding. Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 314 (1989).

To establish injury-in-fact, an organization must show a causal relationship between the alleged injury to its sponsor and the proposed licensing activity. Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43-44 (1990); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87 (1998); Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-02-14, 56 NRC 15, 23 (2002).

2.10.4.1.2.2 Representational Standing

Where an organization asserts a right to represent the interests of its members, "judicial concepts of standing" require a showing that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit. Longstanding NRC practice also requires an organization to demonstrate that at least one of its members has authorized it to represent the member's interests. Private Fuel Storage, L.L.C., CLI-99-10, 49 NRC 318, 323 (1999). See also Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 103-104 (2006).

An organization seeking 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 that the organization is authorized by that member to request a hearing on the member's behalf. 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 (2000). See GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000); Entergy Nuclear Generation Co. And Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 271 (2006).

There is a presumption of standing where an organization raises safety issues on behalf of a member or members residing in close proximity to a plant. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87, 93-94 (1998). The petitioning organization must identify the members whose interests it represents, and state the members' places of residence and the extent of the members' activities located within close proximity to the plant. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 158 (1991).

An individual satisfies the injury-in-fact requirement of standing by showing that his or her residence is within the geographical area that might be affected by an accidental release of fission products. The Commission's "rule of thumb" for this zone of possible harm is that persons who reside within a 50

mile radius of the facility at issue are presumed to have standing. Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 195 (2006).

Thus, for representational standing, a group must identify at least one of its members by name and address and demonstrate how that member may be affected (such as by activities on or near the site) and show (preferably by affidavit) that the group is authorized to request a hearing on behalf of the member. Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-549, 9 NRC 644, 646-47 (1979). Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998); Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998); North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157, 159, 163 (1998); GPU Nuclear, Inc., et. al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). The group must show that the amendment may injure the group, or someone the group is authorized to represent. International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 57 (1997); 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); 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).

To establish the requisite "injury-in-fact" for standing, a petitioner must have a "real stake" in the outcome, a genuine, actual, or direct stake, but not necessarily a substantial stake in the outcome. An organization meets this requirement where it has identified one of its members who possesses the requisite standing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-448 (1979). See Dellums v. NRC, 863 F.2d 968, 972-73 (D.C. Cir. 1988).

An organization depending upon injury to the interests of its members to establish standing, must provide with its petition identification of at least one member who will be injured, a description of the nature of that injury, and an authorization for the organization to represent that individual in the proceeding. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1976); Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 149 (1989); Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313, 315-16 (1989); Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 565 (1990); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-91-1, 33 NRC 15, 29 (1991); Sequoyah Fuels Corporation, LBP-91-5, 33 NRC 163, 166 (1991); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-91-7, 33 NRC 179, 192-93 (1991); Long Island Lighting

Co. (Shoreham Nuclear Power station, Unit 1), LBP-91-23, 33 NRC 430, 434 (1991); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-91-26, 33 NRC 537, 541 (1991), reconsid. denied, LBP-91-32, 34 NRC 132 (1991). The alleged injury-in-fact to the member must be within the purpose of the organization. Curators, supra, 31 NRC at 565-66.

It is not necessary for the individual on whom organizational standing is based to be conversant with, and able to defend, each and every contention raised by the organization in pursuing his interest. Litigation strategy and the technical details of the complex prosecution of a nuclear power intervention are best left to the resources of the organizational petitioners. WPPSS, supra, 17 NRC at 485.

A petitioner's identification of four organizational members whose interests have allegedly been injured or might be injured by actions taken in relation to the decommissioning process does not satisfy the "injury in fact" prong of the organizational standing test where those members live near the proposed site for the disposal of reactor materials and components and not near the site of the nuclear power plant from which the materials are to be removed. Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101-02 (1994).

The identity of specific individual members of a petitioner organization whose interests are being represented by that organization is not viewed as an integral and material portion of the petition to intervene. Any change in membership, therefore, does not require an amendment of the petition. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

Once a member has been identified sufficiently to afford verification by the other parties and the petition to intervene has been granted, it is presumed that the organizational petitioner continues to represent individual members with standing to intervene who authorize the intervention. It is doubtful that the death or relocation outside the geographical zone of interest of the only named members upon whom standing was based would defeat this presumption and require a further showing of standing. Washington Public Power Supply System (WPPSS Nuclear Project 1), LBP-83-59, 18 NRC 667, 669 (1983).

2.10.4.1.2.2.A The Person an Organization Seeks to Represent Must Be a "Member" and Have Given "Authorization"

A group does not have standing to assert the interest of plant workers, where it has no such workers among its members. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 11-12 (1993).

An organization was denied representational standing where the person on whom it based its standing was not an individual member of the organization, but instead was serving as the representative of another

organization. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 530-31 (1991).

If individuals relied upon to establish representational standing for an organization fail to indicate they are members of that organization, their proximity to the facility cannot be used as a basis for representational standing. See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4) ALAB-952, 33 NRC 521, 530-31 (representational standing not present when individual relied on for standing is not organization member, but only representative of another organization), aff'd, CLI-91-13, 34 NRC185 (1991). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 n.11 (1996).

The petition of an organization to intervene must show that the person signing it has been authorized by the organization to do so. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979). However, another Licensing Board granted an intervention petition filed by the highest ranking organizational officer without express authority from the organization. The Board was willing to infer the general authority of the officer to act on behalf of the organization to further its mission and purposes, pending official approval from the organization. The Board noted that the organization's subsequent filing of an intervention petition ratified the earlier petition filed by its officer. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 206-207 (1992).

An organization seeking to obtain standing in a representative capacity must demonstrate that a member has in fact authorized such representation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 444 (1979), aff'd, ALAB-549, 9 NRC 644 (1979); Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979); Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 113 (1979); Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 185 (1982), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979); see generally, CLI-81-25, 14 NRC 616 (1981), (Guidelines for Board); Cincinnati Gas and Electric Co. (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 216 (1982), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 92 (1990); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 30 (1991); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994); International Uranium (USA) Corporation (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 57 (1997). Where the affidavit of the member is devoid of any statement that

he wants the organization to represent his interests, it is unwarranted for the Licensing Board to infer such authorization, particularly where the opportunity was offered to revise the document and was ignored. Beaver Valley, supra, 19 NRC at 411.

2.10.4.1.2.2.B Timing of Membership

A petitioner organization cannot amend its petition to satisfy the timeliness requirements for filing without leave of the Board to include an affidavit executed by someone who became a member after the due date for filing timely petition. WPPSS, supra, 17 NRC at 483.

An organization cannot meet the "interest" requirement for standing by acquiring a new member considerably after the deadline for filing of intervention petitions who meets the "interest" requirement, but who has not established good cause for the out-of-time filing. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 335 (1979)

2.10.4.1.2.3 Governments/Indian Tribes and Organizational Standing

Although a member of a group with an interest in a proceeding must normally authorize the group to represent his or her interests to achieve standing for the group, such explicit authorization is not necessary in the case of a State representing as sovereign the interests of a number of its citizens. Sequoyah Fuels Corporation (Gore, Oklahoma Site Decommissioning) LBP-99-46, 50 NRC 386, 394 (1999) citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 33 (1998). A state does not need to establish standing when attempting to intervene in a proceeding for a facility located within the state. Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 553 (2004).

When a state advises a licensing board that a proceeding involves a facility within its borders, the licensing board shall not require further demonstration of standing. Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 194 (2006).

State standing stems from its responsibility to protect the welfare of its citizenry and its proprietary interest in the natural resources within its boundaries. Sequoyah Fuels Corp. (Gore, Oklahoma Site), LBP-03-29, 58 NRC 442, 448 (2003); see also Fansteel, Inc. (Muskogee, Oklahoma Facility), LBP-03-22, 58 NRC 363, 367 (2003).

A state does not need the explicit authorization of its citizens to represent them in a proceeding. Sequoyah Fuels Corporation (Gore, Oklahoma Site Decommissioning) LBP-99-46, 50 NRC 386, 391 n.10 (1999) citing International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New

York), LBP-98-21, 48 NRC 137, 145 (1998); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998).

As the Commission has recognized in a somewhat different context, the strong interest that a governmental body has in protecting the individuals and territory that fall under its sovereign guardianship establishes an organizational interest for standing purposes. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 33 (1998); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999).

As the owner of streams, lakes, air, and property on or near the site, Oklahoma has catalogued a number of asserted injuries to those interests resulting from alleged pollution and discharges emanating as a result of the SRSDP. That such pollution or those discharges may conform to regulatory criteria is not controlling for standing purposes–the State's interests will nevertheless be affected by the SRSDP. Sequoyah Fuels Corporation (Gore, Oklahoma Site Decommissioning) LBP-99-46, 50 NRC 386, 395 (1999) citing Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 425 (1997); General Public Utilities Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 158 (1996).

Where the New York State Attorney General has had involvement with the New York Public Service Commission's license transfer proceeding regarding the same parties at issue here, he does not have to establish standing to participate in the hearing. He may participate in a manner analogous to a participating government under 10 C.F.R. § 2.315(c) (formerly 2.715(c)), if a hearing is granted, because the Commission has long recognized the benefits of participation in NRC proceedings by representatives of interested states, counties, and municipalities. Niagara Mohawk Power Corp., et. al. (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 344-45 (1999).

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, 294-295 (2000).

A local government with jurisdiction over a geographical area that will admittedly be affected by a reactor's operations – but which does not actually contain the reactor – does nonetheless have standing in a license renewal adjudication regarding the reactor. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 66-67 (2005).

10 C.F.R. § 2.315(c) (formerly 2.715(c)) does not give all governmental or quasi-governmental entities the right to participate in NRC adjudicative proceedings as full parties. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343 (1998), aff'd, CLI-98-21, 48 NRC 185 (1998).

Indian Tribes, however, have been permitted to intervene as an entity, without demonstrating that a particular tribe member has an interest and wishes to be represented by the tribe. They also have participated in the more routine manner of identifying a tribe member who has individual standing but wishes representation. Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996).

A legislator lacks standing to intervene on behalf of the interests of his constituents who live near a nuclear facility. However, the legislator may participate in a proceeding in a private capacity if he can establish his own personal standing. Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989); Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 358, n. 9 (1992).

2.10.4.1.3 Standing to Intervene in Export Licensing Cases

In Edlow International Co., CLI-76-6, 3 NRC 563 (1976), the Commission dealt with the question as to whether the Natural Resources Defense Council and the Sierra Club could intervene as of right and demand a hearing in an export licensing case. The case involved the export of fuel to India for the Tarapur project. The petitioners contended that at least one member of the Sierra Club and several members of NRDC lived in India and thus would be subject to any hazards created by the reactor.

In rejecting the argument that there was a right to intervene, the Commission stated:

> If petitioners allege a concrete and direct injury their claim of standing is not impaired merely because similar harm is suffered by many others. However, if petitioners' asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction'. 3 NRC at 576. The Commission held that the alleged interests were de minimis (3 NRC at 575), noting that, while in domestic licensing cases claims of risk that were somewhat remote have been recognized as forming a basis for intervention, Section 189a of the Act (42 U.S.C. § 2239(a)) would not be given such a broadly permissive reading (3 NRC at 571) in export licensing cases.

Consistent with its decision in Edlow International Co., CLI-76-6, 3 NRC 563 (1976), the Commission has held that a petitioner is not entitled to intervene as a matter of right where its petition raises abstract issues relating to the conduct of U.S. foreign policy and protection of the national security. The petitioner must establish that it will be injured and that the injury is not a generalized grievance shared in substantially equal measure by all or a large class of citizens. In the Matter of Ten Applications, CLI-77-24, 6 NRC 525, 531 (1977); Transnuclear, Inc. (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1 (1994); Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-98-10, 47 NRC 333, 336 (1998). Nevertheless, the Commission may, in its discretion, direct further public proceedings if it determines that such proceedings would be in the public

interest even though the petitioner has not established a right under Section 189 of the Atomic Energy Act to intervene or demand a public hearing. Id. at 532. See also Braunkohle Transport. UZA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 893 (1987), citing 10 CFR § 110.84(a).

The contention that a major Federal action would have a significant environmental impact on a foreign nation is not cognizable under NEPA, and cannot support intervention. Babcock & Wilcox (Application for Considerations of Facility Export License), CLI-77-18, 5 NRC 1332, 1348 (1977).
Judicial precedents will be relied on in deciding issues of standing to intervene in export licensing. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 258 (1980). The Commission, throughout its history, has applied judicial standing tests to its export licensing proceedings. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994).

Institutional interests in disseminating information and educating the public do not establish a claim of right under Section 189a of the Atomic Energy Act for purposes of standing because it would not constitute an interest affected by the proceeding. There must be a causal nexus between the refusal to allow standing and the inability to disseminate information. Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 259 (1980).

Commission regulations in 10 CFR § 110.84(a)(1) provide that if a petitioner is not entitled to an AEA section 189a hearing as a matter of right because of a lack of standing, the Commission will nevertheless consider whether such a hearing would be in the public interest and would assist the Commission in making the statutory determinations required by the AEA. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 333 (1994).

Organization's institutional interest in providing information to the public and the generalized interest of its membership in minimizing danger from proliferation are insufficient for to confer standing on the organization undersection 189a of the Atomic Energy Act of 1954, as amended. Transnuclear, Inc., CLI-94-1, 39 NRC 1, 5 (1994). See, Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-00-16, 52 NRC 68, 72 (2000). See also Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-99-15, 49 NRC 366, 367-368 (1999); Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-98-10, 47 NRC 333, 336 (1998); U.S. Dep't of Energy, CLI-04-17, 59 NRC 357, 364 (2004).

2.10.4.1.4 Standing to Intervene in License Transfer Proceedings

As part of a petitioner's required demonstration of standing for intervention in a license transfer proceeding, the petitioner must show it "has suffered [or will suffer] a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute [and that this] injury can fairly be traced to the challenged action (the approval of the license transfer). FirstEnergy Nuclear Operating Co. (Beaver Valley Power Station, Units 1 and 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2,

63 NRC 9, 13-14 (2006) (quoting Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

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, 294-295 (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, 293-294 (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 37, reconsid. denied, CLI-00-19, 52 NRC 135, 135 (2000).

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).

A petitioner's involvement – both personal and through organizations – in numerous activities related to a particular nuclear power plant was not enough to demonstrate injury to his financial, property, or other interests. Therefore the petitioner had not demonstrated "traditional standing." "Proximity standing" differs from "traditional standing" in that the petitioner claiming it need not make an express showing of harm. Rather, "proximity standing" rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working, living, or regularly engaging in activities offsite but within a certain distance of that facility. In ruling on claims of "proximity standing," the Commission determines the radius beyond which it believes there is no longer an "obvious potential for offsite consequences" by "taking into account the nature of the proposed action and the significance of the radioactive source" (footnotes omitted). A situation where a corporate merger would not have resulted in changes to the physical plant, operating procedures, design basis accident analysis, management, or personnel at a nuclear power plant, and all merger activity occurred several corporate levels above the current licensee, the Commission held that associated license transfer raised no "obvious potential for offsite consequences." Therefore, the petitioner's presumed claim of "proximity standing" lacked merit. Amergen Energy Co., LLC (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 573-74 (2005); see also Exelon Generation Co., LLC and PSEG Nuclear, LLC (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579-83 (2005).

The initial issue in deciding a question of "proximity standing" is whether the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action "could plausibly lead to the offsite release of radioactive fission products from . . . the . . . reactors." The petitioner carries the burden of making this showing. If the petitioner fails to show that a particular licensing action raises an "obvious potential for offsite consequences," then the standing inquiry reverts to a "traditional standing" analysis of whether the petitioner has made a specific showing of injury, causation, and redressability. In a license transfer case, the Commission concluded that the risks associated with the transfer of the non-operating, 50% ownership interest in a power reactor were de minimis and therefore justified no "proximity standing" at all.Peach Bottom Atomic Power Station, CLI-05-26, 62 NRC at 581.

In a license transfer proceeding, the Commission found a petitioner's "highly general comment" that it and its members "compete with [the entities involved in the transfer] for generation ... services" to be too vague and general to show a real potential for injury sufficient for standing. Petitioners failed to explain how their distribution, generation, and transmission rights would be adversely affected in connection with certain antitrust license conditions that they claimed would allegedly be rendered unenforceable by the license transfer. FirstEnergy Nuclear Operating Co. (Beaver Valley Power Station, Units 1 and 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2, 63 NRC 9, 16 (2006) (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 203 (2000); Pac. Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002)).

2.10.4.2 Discretionary Intervention

The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. In determining whether discretionary intervention should be permitted, the Commission has indicated that the Licensing Board should be guided by the following factors, among others:

(1) Weighing in favor of allowing intervention --
   (i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.
   (ii) The nature and extent of the requestor's/petitioner's property, financial. or other interest in the proceeding.
   (iii) The possible effect of any order which may be entered in the proceeding on the requestor's/petitioner's interest.
(2) Weighing against allowing intervention --
   (i) The availability of other means whereby requestor's/petitioner's interest will be protected.
   (ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties.
   (iii) The extent to which requestor's/petitioner's participation will inappropriately broaden or delay the proceeding.

Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 616 (1976). These six factors were originally developed in case law, but are now codified at 10 C.F.R. § 2.309(e)(1)-(2). See Andrew Siemaszko, CLI-06-16, 63 NRC 708, 715-16 (2006). Of these criteria, the most important weighing in favor of discretionary intervention is whether the person seeking discretionary intervention has demonstrated the capability and willingness to contribute to the development of the evidentiary record, even though they cannot show the traditional interest in the proceeding. The most import factor weighing against discretionary intervention is the potential to appropriately broaden or dely the proceeding.

The discretionary intervention doctrine comes into play only in circumstances where standing to intervene as a matter of right has not been established. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148 n.3 (1979).

Although under our rules the "standing" requirement does not apply to petitions for discretionary intervention, the "admissible contention" requirement does. Andrew Siemaszko, CLI-06-16, 63 NRC at 719-20.

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 Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).

Under the six-factor test for discretionary intervention, a primary consideration is the first factor of assistance in developing a sound record. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976); see also Andrew Siemaszko, CLI-06-16, 63 NRC at 716; General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996).

For discretionary intervention, the burden of convincing the Licensing Board that a petitioner could make a valuable contribution lies with the petitioner. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). Considerations in determining the petitioner's ability to contribute to development of a sound record include:

(1) a petitioner's showing of significant ability to contribute on substantial issues of law or fact which will not be otherwise properly raised or presented;
(2) the specificity of such ability to contribute on those substantial issues of law or fact;
(3) justification of time spent on considering the substantial issues of law or fact;
(4) provision of additional testimony, particular expertise, or expert assistance;
(5) specialized education or pertinent experience.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981) (and cases cited therein). See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 16-17 (1990), aff'd, ALAB-952, 33 NRC 521, 532 (1991). Where a petitioner failed to respond to a

Licensing Board order seeking clarification following presentation of evidence casting shadow on his purported qualifications, the Board was entitled to conclude that a petitioner would not help to create a sound record, and that the veracity of his other statements were suspect, leading to denial of his petition. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 457-458 (1979).

The primary factor to be considered is the significance of the contribution that a petitioner might make. Pebble Springs, supra. Thus, foremost among the factors listed above is whether the intervention would likely produce a valuable contribution to the NRC's decisionmaking process on a significant safety or environmental issue appropriately addressed in the proceeding in question. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418 (1977). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 475 n.2 (1978); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 131-32 (1992); Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-02-14, 56 NRC 15, 28 (2002). The need for a strong showing as to potential contribution is especially pressing in an operating license proceeding where no petitioners have established standing as of right and where, absent such a showing, no hearing would be held. Watts Bar, supra, 5 NRC at 1422. Where there are no intervenors as of right, a Licensing Board will determine whether a discernible public interest would be served by ordering a hearing based on a grant of discretionary intervention. Envirocare of Utah, Inc., LBP-92-8, 35 NRC 167, 183-84 (1992).

Discretionary intervention is meant to ensure a sound adjudicatory record, not simply to provide a second representative to assist (allegedly) ill-represented parties. Granting discretionary intervention based on an admitted party's purported lack of knowledge and experience, as opposed to the petitioner's relevant knowledge and experience, constitutes legal error. Andrew Siemaszko, CLI-06-16, 63 NRC at 723.

As to the second and third factors to be considered with regard to discretionary intervention (the nature and extent of property, financial or other interests in the proceeding and the possible effect any order might have on the petitioner's interest), interests which do not establish a right to intervention because they are not within the "zone of interests" to be protected by the Commission should not be considered as positive factors for the purposes of granting discretionary intervention. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 388, aff'd, ALAB-470, 7 NRC 473 (1978).

In order for the Commission to grant a discretionary hearing in an export license proceeding, a petitioner must reflect in its submissions that it would offer something in a hearing that would generate significant new information or insight about the challenged action. The offer of "new evidence" that consists of documents that have already been in the public domain for some time does not meet the criteria for the grant of a discretionary hearing. Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 334 (1994).

For a case in which the Commission's discretionary intervention rule was applied, see Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-363, 4 NRC 631 (1976), where, despite petitioner's lack of judicial standing, intervention was permitted based upon petitioner's demonstration of the potential significant contribution it could make on substantial issues of law and fact not otherwise raised or presented and a showing of the importance and immediacy of those issues.

Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility, LBP-93-4, 37 NRC 72, 94 n.66 (1993) (If a hearing petitioner does not request permission to intervene in a proceeding as a matter of discretion, see Pebble Springs, CLI-76-27, 4 NRC at 614-17, it is not necessary to determine whether it could be afforded such intervention).

2.10.5 Contentions of Intervenors

Contentions constitute the method by which the parties to a licensing proceeding frame issues under NRC practice, similar to the use of pleadings in their judicial counterparts. Such contentions may be amended or refined as a result of additional information gained by discovery. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981). In proving its claim, a petitioner is not limited to the specific facts relied on to have its contention accepted, as long as the additional facts are material to the contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 20-21 (1993).

In order to be admissible, a contention must comply with every requirement listed in 10 C.F.R. § 2.309(f)(1). U.S. Army (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438 (2006).

"[A] contention must have a basis in fact or law and ... it must entitle a petitioner to relief." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 3), LBP-02-5, 55 NRC 131, 141 (2002). Neither the Commission's Rules of Practice nor the pertinent statement of consideration puts an absolute or relative limit on the number of contentions that may be admitted to a licensing proceeding. See 10 CFR § 2.309(f) (formerly 2.714(a), (b)); 69 FR 2182, Jan. 14, 2004. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982). The Commission, presiding officer or the ASLB will grant the request/petition if it determines that the requestor/petitioner has standing under the standing provisions of 2.309(d) and has proposed at least one admissible contention.

Note that a State participating as an "interested State" under 10 CFR § 2.315(c) (formerly 2.715(c)) need not set forth in advance any affirmative contentions of its own. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-393 (1976). However, government entities seeking to litigate their own contentions are held to the same pleading rules as everyone else. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567-68 (2005).

Since a mandatory hearing is not required at the operating license stage, Licensing Boards should "take the utmost care" to assure that the "one good contention rule" is met in such a situation because, absent successful intervention, no hearing need be

held. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976). See also Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 n.10 (1974).

Where intervenors have been consolidated, it is not necessary that a contention or contentions be identified to any one of the intervening parties, so long as there is at least one contention admitted per intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687 (1981).

A Licensing Board should not address the merits of a contention when determining its admissibility. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982), citing Allens Creek, supra, 11 NRC at 542; Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 617 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 933 (1987); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 446 (1988), reconsidered on other grounds, LBP-89-6, 29 NRC 127 (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); Sierra Club v. NRC, 862 F.2d 222, 228 (9th Cir. 1988). See Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984), citing Allens Creek, supra, 11 NRC 542; Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216 (1974), rev'd on other grounds, CLI-74-12, 7 AEC 203 (1974); and Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244-45 (1973). What is required is that an intervenor state the reasons for its concern. Seabrook, supra, citing Allens Creek, supra.

Determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits. A petitioner does not have to prove its contention at the admissibility stage. However, supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. The contention admissibility standard is less than is required at the summary disposition stage. USEC, Inc. (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 596-97 (2005).

A contention about a matter not covered by a specific rule need only allege that the matter poses a significant safety problem. That would be enough to raise an issue under the general requirement for operating licenses [10 CFR § 50.57(a)(3)] for finding of reasonable assurance of operation without endangering the health and safety of the public. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

Petitioners who have established their standing to present a contention that seeks modification or rejection of a nuclear facility decommissioning plan so as to avoid health and safety or environmental injury to the public also can pursue any contention alleging such modification/rejection relief based on circumstances such as purported

occupational exposure to facility workers from decommissioning activities. See CLI-96-1, 43 NRC at 6. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 70 (1996).

The basis for a contention may not be undercut, and the contention thereby excluded, through an attack on the credibility of the expert who provided the basis for the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-98, 16 NRC 1459, 1466 (1982), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

Orange County expressly approved the final language of its admitted environmental contention. The County should not now be heard to complain that the contention as admitted was too narrow. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 390 (2001).

2.10.5.1 Scope of Contentions

The subject matter of all contentions is limited to the scope of the proceeding delineated by the Commission in its hearing notice and referral order delegating to the Licensing Board the authority to conduct the proceeding. See, Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 151 (2001).

The issue sought to be raised by a contention must fall within the scope of the issues specified in the Notice of Opportunity for Hearing. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411-12 (1991), appeal denied on other grounds, CLI-91-12, 34 NRC 149 (1991); Northeast Nuclear Energy Co. (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 339 (2001).

The scope of permissible contentions is normally bounded by the scope of the proceeding itself. On remand from the Commission, however, the scope of issues is confined to issues identified by the Commission. Beyond that, however, an intervenor may seek to file late-filed contentions, subject to a balancing of the [eight] factors set forth in 10 CFR § 2.309(c)(1) (formerly 2.714(a)), within the scope of the entire proceeding. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 206 (1993).

In a license amendment proceeding, a petitioner's contentions must focus on the issues identified in the notice of hearing, the amendment application, and the Staff's environmental responsibilities relating to the application. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 282 (1991). A petitioner's allegation that a prior Licensing Board ruling is erroneous is a request for reconsideration and is not a proper subject for a contention. Shoreham, supra. 34 NRC at 282; Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 3), LBP-98-28, 48 NRC 279 (1998).

When determining for any reason the scope of a contention, one looks not only to the contention itself but also to the basis or bases provided for the contention. The bases clarify the "reach" and "focus" of a contention, which may not be changed absent an appropriate amendment to a contention. In other words, the basis or

bases originally offered in support of a contention, together with the issue(s) stated in the contention itself, establish a sort of "envelope" within which information will be considered to be within the "reach" or "focus" of a contention and therefore relevant in litigation of the contention. Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), LBP-04-12, 59 NRC 388, 391 (2004) (characterizing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) and Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), aff'd sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), cert. denied, 502 U.S. 899 (1991)).

Thus, if in preparing for an evidentiary hearing on a contention, an intervenor becomes aware of information that it may wish to present as evidence in the hearing, such information would–even if not specifically stated in the original contention and bases–be relevant if it falls within the "envelope," "reach," or "focus" of the contention when read with the original bases offered for it. If it falls outside such ambit, then an amended contention would be necessary in order for the new information to be considered relevant and admissible. Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), LBP-04-12, 59 NRC 388, 391 (2004) (characterizing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) and Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), aff'd sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), cert. denied, 502 U.S. 899 (1991)).

Where an intervenor has provided additional specific information that falls within the ambit of its original admitted contention, it is not really an "amendment" at all. Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), LBP-04-12, 59 NRC 388, 391 (2004). [The Board in LBP-04-12 also commented in a footnote that the principle would apply to information that any party wished to submit as evidence in a proceeding, not just an intervenor. Id. at 391 n.3. Both aspects of the Board's decision could be considered dicta because the Board went on to address the late-filing standards and implied that those standards had been satisfied by the intervenor.]

In order to determine the scope of an otherwise admissible contention, a Board will consider the contention together with its stated bases to identify the precise issue which the intervenor seeks to raise. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n.11 (1988).

2.10.5.2 Pleading Requirements for Contentions

In BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), the U.S. Court of Appeals for the D.C. Circuit upheld, in part, the pleading requirements of 10 CFR § 2.309 (formerly 2.714) governing petitions to intervene. Specifically, the Court ruled that:

(a) ... the requirement that contentions be specified does not violate Section 189(a) of the Act; and
(b) the requirement for a basis for contentions is valid.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982), citing BPI v. Atomic Energy Commission, 502 F.2d 424, 428-429 (D.C. Cir. 1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 591 n.5 (1985).

10 CFR § 2.309(f)(1)(v) (formerly 2.714(b)(2)(ii)) now specifically requires a petitioner to provide a concise statement of the alleged facts or expert opinion which support its proposed contention, together with references to those specific sources and documents of which the petitioner is aware, and on which the petitioner intends to rely to establish those facts or expert opinion. There is no regulatory requirement that an intervenor supply all the bases known at the time he files a contention. What is required is the filing of bases on which the intervenor intends to rely. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-22, 40 NRC 37, 39 (1994). The petitioner also must provide sufficient information to establish the existence of a genuine dispute with the applicant on a material issue of law or fact. 10 CFR § 2.309(f)(1)(v) (formerly 2.714(b)(2)(iii)). See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-9121, 33 NRC 419, 422-24 (1991), appeal dismissed, CLI-92-3, 35 NRC 63 (1992); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 64-68 (2002); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 166, 169-170, 175-76 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 279 (1991); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 (1991); Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 214 (1992); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142 (1993); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 205 (1993); Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 49 (2004). Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 555 (2004).

Failure of a proposed contention to meet any one of the requirements in 10 CFR 2.309(f)(1)(iii), (iv), (vi) is grounds for dismissal. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567-68 (2005).

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 CFR 2.309(c), (f)(2). While a petitioner need not introduce at the contention phase every document on which it will rely in a

hearing, if the contention as originally plead did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions. Nuclear Management Company, LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

The "raised Threshold" for contentions must be reasonably applied and is not to be mechanically construed. Rules of practice are not to be applied in an "overly formalistic" manner. Rancho Seco, 38 NRC at 206.

"[W]here federal courts permit considerably less-detailed 'notice pleadings', the Commission requires far more to plead a contention." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 505 (2001); Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 108 (2006).. Agency procedural requirements simply raising the threshold for admitting some contentions as an incidental effect of regulations designed to prevent unnecessary delay in the hearing process are reasonable. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983). The contention pleading requirements of 10 C.F.R. § 2.309(f) are meant to "focus litigation on concrete issues and result in a clearer and more focused record for decision." Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 108 (2006) (quoting 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004)). Accordingly, contention admissibility is "strict by design." Pa'ina, LBP-06-4, 63 NRC at 108 (quoting Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), petition for reconsid. denied, CLI-02-1, 55 NRC 1 (2002)).

All that is required for a contention to be acceptable for litigation is that it be specific and have a basis. Whether or not the contention is true is left to litigation on the merits in the licensing proceeding. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 n.5 (1983), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1193 n.39 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 694 (1985). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 23-24 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 282 (1989), aff'd on other grounds, ALAB-940, 32 NRC 225 (1990); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411 (1991), appeal denied, CLI-91-12, 34 NRC 149 (1991).

The petitioner has the burden of bringing contentions meeting the pleading requirements. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001). The licensing board may not supply missing information or draw inferences on behalf of the petitioner. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

The factual support necessary to show that a genuine dispute exists need not be in formal evidentiary form, nor be as strong as that necessary to withstand a summary

disposition motion. What is required is "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994) (citing 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), quoting Connecticut Bankers Association v. Board of Governors, 627 F.2d 245 (D.C. Cir. 1980).

The basis and specificity requirements are particularly important for contentions involving broad quality assurance and quality control issues. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 634 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740-41 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 89 (1983).

Technical perfection is not an essential element of contention pleading. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001).

It is not essential that pleadings of contentions be technically perfect. The Licensing Board would be reluctant to deny intervention on the basis of skill of pleading where it appears that the petitioner has identified interests which may be affected by a proceeding. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 650 (1979).
It is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities. Consumers Power Company (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 116117 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 860 (1987), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987). However, a party is bound by the literal terms of its own contention. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 505 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 208 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 242 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 816 (1986); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-6, 27 NRC 245, 254 (1988), aff'd on other grounds, ALAB-892, 27 NRC 485 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 371-372 & n.310 (1991); North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), LBP-98-23, 48 NRC 157, 166 (1998).

Pro se intervenors are not held in NRC proceedings to a high degree of technical compliance with legal requirements and, accordingly, as long as parties are sufficiently put on notice as to what has to be defended against or opposed, specificity requirements will generally be considered satisfied. However, that is not to suggest that a sound basis for each contention is not required to assure that the proposed issues are proper for adjudication. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-83-5, 17 NRC 134, 136 (1983).

Originality of framing contentions is not a pleading requirement. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689 (1980).

The contention admissibility requirements demand a level of discipline and preparedness on the part of petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The need for parties to adhere to the Commission's pleading standards and for the Board to enforce those standards are paramount. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004), recons. den. Louisiana Energy Services, L.P., CLI-04-35, 60 NRC 619 (2004).

2.10.5.2.1 Bases for Contentions

The purposes of the basis-for-contention requirement are: (1) to help assure that the hearing process is not improperly invoked, for example, to attack statutory requirements or regulations; (2) to help assure that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose; (3) to assure that the proposed issues are proper for adjudication in the particular proceeding - i.e., generalized views of what applicable policies ought to be are not proper for adjudication; (4) to assure that the contentions apply to the facility at bar; and (5) to assure that there has been sufficient foundation assigned for the contentions to warrant further explanation. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986), citing Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931-33 (1987); Sierra Club v. NRC, 862 F.2d 222, 227-28 (9th Cir. 1988).

Relevance is not the only criterion for admissibility of a contention. 10 CFR § 2.309 requires that the bases for each contention must be set forth with reasonable specificity. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1821 (1982). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 181-84 (1981); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 617, 627 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 187 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-8, 23 NRC 182, 188 (1986); General Public Utilities Nuclear Corp. (Three

Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 851 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 230 (1986); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 842, 847 (1987), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-24, 26 NRC 159, 162, 165 (1987), aff'd, ALAB-880, 26 NRC 449, 456 (1987), remanded, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 292-94 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 455, 458 (1988), aff'd, ALAB-893, 27 NRC 627 (1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 45-47 (1989) (documents cited by intervenors did not provide adequate bases for proposed contention), 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). A long and detailed list of omissions and problems does not, without more, provide a basis for believing that there is a safety issue. Discovered problems are not in themselves grounds for admitting a contention. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 n.6 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 240 (1986).

A contention that simply alleges that some general, nonspecific matter ought to be considered does not provide the basis for an admissible contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993).

Although an 'obvious potential for offsite consequences' may be sufficient to show standing, it is not in itself sufficient to support an admissible contention. Fansteel Inc. (Muskogee, Oklahoma Facility), LBP-03-13, 58 NRC 96 (2003).

A Licensing Board has defined the failure to demonstrate the existence of a genuine dispute on a material issue of fact as a failure to provide any factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of applicant's documents or that provide supporting reasons that tend to show that there is some specified omission from applicant's documents. The intervention petitioner in this case did not advance an independent basis for any of its contentions, and instead relied on alleged omissions and errors in the applicant's documents and analyses. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 515, 521 & n.12 (1990), citing 10 CFR §§ 2.309(f)(1)(v) and (vi) (formerly 2.714(b) (2)(ii) and (iii)).

The bases for a contention need not originate with the petitioner. Thus a petitioner seeking to challenge the adequacy of an application may base its contention on information contained in an NRC Staff letter to an applicant which requests additional information based on a regulatory guide citation. However, in order for the contention to be admissible, the petitioner must provide an adequate explanation of how alleged deficiencies support its contention and provide additional information in support. Louisiana Energy Services L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338-339 (1991). See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 136 (1992), appeal granted in part and remanded, CLI-93-3, 37 NRC 135 (1993).

A simple reference to a large number of documents does not provide a sufficient basis for a contention. An intervenor must clearly identify and summarize the incidents being relied upon, and identify and append specific portions of the documents. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1741 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 200, 216 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

In pleading for the admission of a contention, an intervenor is not required to prove the contention, but must allege at least some credible foundation for the contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987), remanded, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 47-48 (2001). Under the Commission's contention rule, Intervenors are not asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset. However, the Commission's contention rules do not allow using reply briefs to provide, for the first time, the necessary threshold support for contentions. Louisiana Energy Services, L.P., CLI-04-35, 60 NRC 619, 623 (2004).

Contentions must be based on a genuine material dispute, not the possibility that petitioners, if they perform their own analyses, may ultimately disagree with the application. USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 480 (2006).

A basis for a contention is set forth with reasonable specificity if the applicants are sufficiently put on notice so that they will know, at least generally, what they will have to defend against or oppose, and if there has been sufficient foundation assigned to warrant further exploration of the proposed contention. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984), citing Peach Bottom, supra, 8 AEC at 20-21; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1742 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241

(1986). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 427-28 (1990).

In some cases, the Commission or Board has admitted contentions based on claims of poor licensee character or integrity. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001). To form the basis for an admissible contention, allegations of management improprieties or lack of "integrity" must be of more than historical interest: they must relate directly to the proposed licensing action. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001). Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995). Management issues must be directly germane to the challenged licensing action to serve as the basis for an admissible contention. In determining whether to grant a license, it is proper for a licensing board to evaluate whether the applicant, as presently organized and staffed, can provide reasonable assurance of candor, willingness, and ability to follow NRC regulations. A finding that an applicant's current management is unfit would be cause to deny a license. However, no genuine dispute with regard to a material issue of fact or law is raised where an intervenor relies on the existence of past violations, but then fails to present any information indicating that any person or procedure associated with those past violations will be employed at, or involved with, the proposed facility. USEC, Inc. (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 618-19 (2005).

The basis with reasonable specificity standard requires that an intervenor include in a safety contention a statement of the reason for his contention. This statement must either allege with particularity that an applicant is not complying with a specified regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent. In the absence of a "regulatory gap," the failure to allege a violation of the regulations or an attempt to advocate stricter requirements than those imposed by the regulations will result in a rejection of the contention, the latter as an impermissible collateral attack on the Commission's rules. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982), citing 10 CFR § 2.335 (formerly 2.758).

The Commission has stated that the safety issue in any licensing proceeding involves the adequacy of the applicant's license application, not the NRC staff's safety evaluation. Contentions on the adequacy of content of an SEC are not recognized. U.S. Army (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438, 456 (2006).

Serious violations or other incidents may form the basis for a contention challenging the adequacy of management of a facility. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 297 (1995).

A Licensing Board will deny, without prejudice, a basis for a contention which involves an issue that is already under consideration by the Commission Staff. It would be premature for a Licensing Board to litigate an issue when a Commission determination might make the issue moot. Louisiana Energy

Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 341 (1991).

It is a well-established principle relative to safety-related matters that the adequacy of the application, not the adequacy of the Staff's review or evaluation, e.g., its SER, is the focus for a proper contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 97 (2001). The adequacy of the manner in which the Staff conducts its review of a technical/safety matter is outside the scope of Commission proceedings. Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 66 (2003).
A licensing board will also deny a basis for a contention which involves an inchoate plan of the Licensee. The contended issue must be a part of the current licensing basis that is docketed and in effect. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 293 (2002), citing, 10 C.F.R. § 54.29(a). In Duke Energy Corp., the Commission denied the admission of a MOX contention when the licensee had a contractual arrangement to purchase MOX fuel, but the proposed MOX fuel production facility remained unbuilt and was in the early stages of contested NRC licensing proceeding. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 292 (2002).

Contentions that are based on projected changes to a license, not currently before the NRC in any proceeding or application, are not sufficient to support admission of a contention. 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).

Verification by the NRC Staff that a licensee complies with preapproved design or testing criteria is a highly technical inquiry not particularly suitable for hearing. Hydro Res., Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 5 (2006) (citing Private Fuel Storage, LLC (Independent Storage Installation), CLI-03-8, 58 NRC 11, 20 & n.25 (2003)).

The fact that the Office of Investigation and the Office of Inspector and Auditor are investigating otherwise unidentified allegations is insufficient basis for admitting a contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 858 (1986).

The bare pendency of an investigation does not reflect that there is a substantive problem, or that there has been any violation, or that there even exists an outstanding significant safety issue, and thus cannot serve as a valid basis for a contention. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-9, 37 NRC 433, 446 (1993).

Pending future developments that would overrule controlling Commission precedent, Boards have held a contention (or portion thereof) relying on an argument that a controlling Commission decision was wrongly decided to be inadmissible. See, e.g, Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 113-14 (2006)

(ruling on NEPA terrorism contention based on Commission precedent despite the pendency of a Circuit Court of Appeals review of an analogous issue).

The mere fact that NRC Staff has issued RAIs during its license application review does not indicate that the application is deficient, as RAIs are a common and expected feature of the review process. Safety Light Corp., LBP-04-25, 60 NRC 516, 525-26 (2004) (citing Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999)). See also Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 164 (2006).

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). A contention attacking a Commission rule or regulation is inadmissible, and that inadmissibility bar applies to contentions proffering, for example, additional or stricter requirements than those that are imposed by the regulation. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

To read the agency's hearing notice, which found a categorical exclusion applicable to an application, as thus preventing contentions challenging the use of such categorical exclusions (as authorized by 10 C.F.R. § 51.22) would be tantamount to ruling that the agency need not comply with its own regulations. Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 109 n.38 (2006) (citing, e.g., Fort Stewart Schools v. Fed. Labor Relations Auth., 495 U.S. 641, 654 (1990)).

A Board admitted a contention based on the argument that NEPA analysis requires an explanation of the applicability of a categorical exclusion where a petitioner has alleged special circumstances necessitating an environmental review; the Staff and applicant had not negated the contention because they did not explain the applicability of that categorical exclusion in the specified circumstances, or provide a basis to conclude that the alleged circumstances were actually considered as part of the adoption of the categorical exclusion. Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 108-112 & 108 n.36 (2006) (citing Alaska Center for the Environment v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999); Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986); Steamboaters v. Fed. Energy Reg. Comm'n, 759 F.2d 1382 (9th Cir. 1985); Wilderness Watch & Public Employees for Envi. Responsibility v. Mainella, 375 F.3d 1085, 1096 (11th Cir. 2004)).

Once a contention has been admitted, Intervenor may litigate a new basis for the admitted contention (falling within the scope of the contention) without meeting the five-pronged test for a late-filed contention. The test for admitting the new basis is whether it is timely to consider the new basis, in light of its seriousness and of the timeliness with which it has been raised. The more serious the safety implications of the proposed new basis, the less important delay in presenting the

basis. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-22, 40 NRC 37, 39 (1994).

The test to be applied to determine whether to admit for litigation a new basis for an admitted contention is "whether the motion [to admit the contention] was timely and whether it presents important information regarding a significant issue." Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1296 (1984); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-27, 40 NRC 103, 105 (1994).

General fears or criticisms of past practices of the nuclear industry or the applicant are not appropriate bases for contentions unless there is reason to suspect the specific procedures or safety-related tests used in a proposed demonstration program which requires a license amendment. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017, 1026 (1981).

Where the laws of physics deprive a proposed contention of any credible or arguable basis, the contention will not be admitted. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 870 (1984), aff'd, ALAB-765, 19 NRC 645, 654 n.13 (1984); compare Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

Whether or not a basis for contentions has been established must be decided by considering the contentions in the context of the entire record of the case up to the time the contentions are filed. Thus, when an application for a license amendment is itself incomplete, the standard for the admission of contentions is lowered, because it is easier for petitioners to have reasons for believing that the application has not demonstrated the safety of the proposed procedures for which an amendment is sought. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853 (1981).

A contention may be found valid where it "substitut[es] an active event for what was previously only a hypothetical scenario," even where the new contention shares common elements with contentions that were already rejected. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131, 138-139 (2002).

Complexity of additional administrative controls has previously been found to constitute an admissible contention in the face of numerous alleged cited incidents and violations, albeit in a construction-period recapture proceeding where the adequacy of a quality assurance/quality control program was in issue. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 14-21 (1993). Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 34 (2000).

2.10.5.2.2 Specificity of Contentions

Reasonable specificity requires that a contention include a reasonably specific articulation of its rationale. If an applicant believes that it can readily disprove a

contention admissible on its face, the proper course is to move for summary disposition following its admission, not to assert a lack of specific basis at the pleading stage. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070-2071 (1982).

Particularly in the context of dealing with pro se petitioners, a finding regarding a contention's specificity should include consideration of the contention's bases. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) (both contention and stated bases should be considered when question arises regarding admissibility of contention). General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 162 (1996).

The Commission's pleading requirements differ from pleading requirements in Article III courts because "notice pleadings" are not permitted. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999). Rather, the Commission insists on detailed descriptions of the petitioner's position on issues going to both standing and the merits. Shieldalloy Metallurgical Corp., CLI-99-12, 49 NRC 347, 353 (1999); GPU Nuclear, Inc., et. al. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 203 (2000).

Contentions must give notice of facts which petitioners desire to litigate and must be specific enough to satisfy the requirements of 10 CFR § 2.309 (formerly 2.714). Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 188-190, 193 (1982); see generally, CLI-81-25, 14 NRC 616 (1981) (guidelines for Board). The petitioner is not required to provide an exhaustive discussion in its proffered contention, so long as it meets the Commission's admissibility requirements. Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99, 108 (2006).

The Commission's Rules of Practice do not require that a contention be in the form of a detailed brief; however, a contention, alleging an entire plan to be inadequate in that it fails to consider certain matters, should be required to specify in some way each portion of the plan alleged to be inadequate. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982).

The provisions of 10 CFR 2.309(f)(1)(ii),(v), and (vi) (formerly 2.714(b)(2)(i), (ii), and (iii)) were specifically added by the Commission "to raise the threshold bar for an admissible contention," and prohibit "notice pleading, with the details to be filled in later" and "vague, un[-]particularized contentions." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334, 338 (1999); Northeast Nuclear Energy Co. (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273 (2001).

Under 10 CFR § 2.309(f)(1)(vi) (formerly 2.714(b)(2)(iii)), if an application contains disputed information or omits required information, the petitioner normally must specify the portions of the application that are in dispute or are incomplete. However, a petitioner need not refer to a particular portion of the

licensee's application when the licensee neither identified, nor was obligated to identify, the disputed issue in its application. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 41 (1993). See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 381 (2005).

When a broad contention (though apparently admissible) has been admitted at an early stage in the proceeding, intervenors should be required to provide greater specificity and to particularize bases for the contention when the information required to do so has been developed. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-28, 20 NRC 129, 131 (1984).

An intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor Section 2.309 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 412 (1984), citing Catawba, supra, 16 NRC at 468. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 175-76 (1991). In Catawba, supra, the Board dealt with the question of whether the intervenor had provided sufficient information to support the admission of its contentions. An Appeal Board has rejected an applicant's claim that Catawba imposes on an intervenor the duty to include in its contentions a critical analysis or response to any applicant or NRC Staff positions on the issues raised by the contentions which might be found in the publicly available documentary material. Such detailed answers to the positions of other parties go, not to the admissibility of contentions, but to the actual merits of the contentions. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 62931 (1988). The "ironclad obligation" of a petitioner to examine publicly available documentary evidence in support of its contentions applies only to information in support of a contention. A requirement also to examine contrary publicly available documentary evidence would unduly exacerbate the considerable threshold that a petitioner must already meet under the current revised contention rules. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 22 n.29 (1993).

If, at the contentions stage of litigation, an intervenor offers no specific causes for spent fuel pool accidents other than the seven-step scenario admitted by the Board, the intervenor cannot later transform vague references to potential spent fuel pool catastrophes into litigable contentions. See Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-35 (1999) (NRC's "strict contention rule" requires "detailed pleadings"). Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 390 (2001).

Under section 2.309(f)(1)(vi) (formerly 2.714(b)(2)(iii)), a contention is inadmissible where it fails to contain sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact and does not include references to the specific portions of the application that Petitioners may dispute. Texas Utilities Company, et al., (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 576 (2004).

It is not the Board's responsibility to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; boards may not infer unarticulated bases for contentions. USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006).

The Commission should not be expected to sift unaided through earlier briefs filed before the Licensing Board in order to piece together and discern the intervenors' particular concern or the grounds for their claim. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 15 (2001); (citing Hydro Resources Inc., CLI-01-4, 53 NRC 31, 46 (2001)).

A contention filed in an application proceeding to extend the completion date of a construction permit is not admissible where it does not directly challenge the Applicant's alleged good-cause justification for the delay. Petitioners' allegations of corporate wrongdoing do not show that a genuine dispute exists with Applicant on its justification for the delay. Texas Utilities Company, et al., (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

A claim that a statute or regulation requires a technical specification to remain a part of an operating license is an indispensable element of any contention challenging the relocation of material from a plant's technical specifications to a licensee controlled document because there can only be a right to a hearing or future changes to such material if there is a statutory or regulatory requirement that such matters be included in the plant's technical specifications in the first place. Northeast Nuclear Energy Co. (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 282 (2001).

2.10.5.3 Response to Contentions

Prior to entertaining any suggestion that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response. The petitioners cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for denying admission of those proffered contentions. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 83 n. 17 (1996); rev'd in part on other grounds, CLI-96-7, 43 NRC 235.

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 contentions as are filed.

The cardinal rule of fairness is that each side must be heard. Allens Creek, supra, 10 NRC at 524.

2.10.5.3.1 Reply Briefs

In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief. The reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), recons. den. by Louisiana Energy Services, L.P., CLI-04-35, 60 NRC 619 (2004).

2.10.5.4 Material Used in Support of Contentions

While it may be true that the important document in evaluating the adequacy of an agency's environmental review is the agency's final impact statement, a petitioner for intervention may look to the Applicant's Environmental Report for factual material in support of a proposed contention. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 303 (1979). A petitioner must file contentions based on any environmental issues raised by the applicant's Environmental Report. However, the petitioner may be permitted to file new or amended contentions based on new information contained in subsequent NRC environmental documents. 10 CFR § 2.309(f)(2) (formerly 2.714(b)(2)(iii)), 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 154 (1993). Such new information, though, must "differ significantly" from the information provided in the Environmental Report, and these differences must be "material" to the outcome of the proceeding. Further, the new or amended contention must satisfy the usual substantive admissibility requirements under § 2.309(f)(1). Exelon Generation Company (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 163 (2005).

Where a petitioner seeks to file new or amended contentions arising out of new information derived from sources other than Staff-created NEPA documents, the petitioner must satisfy the requirements of 10 C.F.R. § 2.309(f)(2)(i)-(iii), as well as the usual substantive requirements for admissibility of contentions. Despite differences in regulatory language, analysis under § 2.309(f)(2)(i-iii) is to be conducted in the same manner as analysis under § 2.309(f)(2) of new or amended contentions based upon new information from Staff-created NEPA documents. Therefore, the new information must be materially different from the information that was previously available, and the ordinary contention admissibility criteria of § 2.309(f)(1) must be satisfied as well. Exelon Generation Company (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 160-61 (2005).

The specificity and basis requirements for a proposed contention under 10 CFR § 2.309(f) (formerly 2.714(b)) can be satisfied where the contention is based upon allegations in a sworn complaint filed in a judicial action and the applicable passages therein are specifically identified. This holds notwithstanding the fact that the allegations are contested. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292-94 (1984).

An intervenor can establish a sufficient basis for a contention by referring to a source and drawing an assertion from that reference. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548-49 (1980). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 69-70 (1989), aff'd, 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 also Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-21, 38 NRC 143, 146 (1993).

Like NRC NUREGs and Regulatory Guides, NRC guidance documents are routine agency policy pronouncements that do not carry the binding effect of regulations. International Uranium (USA) Corp., CLI-00-1, 51 NRC 9, 19 (2000).

A document put forth by an intervenor as supporting the basis for a contention is subject to scrutiny, both for what it does and does not show. When a report is the central support for a contention's basis, the contents of that report in its entirety is before the Board and, as such, is subject to Board scrutiny, both as to those portions of the report that support an intervenor's assertions and those portions that do not. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996); rev'd in part on other grounds, CLI-96-7, 43 NRC 235 (1996).

Attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298-99 (1988).

A petitioner's imprecise reading of a reference document, or typographical errors in that document, cannot serve to generate an issue suitable for litigation. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995). A petitioner is obligated to provide the analyses and supporting evidence showing why its bases support its contention. A licensing board may not make factual inferences on a petitioner's behalf. Id. at 305.

However, where a contention is based on a factual underpinning in a document which has been essentially repudiated by the source of that document, a Licensing Board will dismiss the contention if the intervenor cannot offer another independent source of information on which to base the contention. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 136 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989).

An intervention petitioner may rely upon an NRC Staff regulatory guide to support a contention alleging that an application is deficient. The petitioner must provide an adequate explanation of how alleged inadequacies support its contention and provide additional information in support. It is insufficient for a petitioner to merely refer to a Staff letter to an applicant which requests additional information based on

a regulatory guide citation. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338-339, 347, 354 (1991). Furthermore, it is well established that NUREG's and Regulatory Guides, by their very nature, serve merely as guidance and cannot prescribe requirements. Curators of University of Missouri, CLI-95-1, 41 NRC 71, 98, 100 (1995). See also Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC 417, 424 (2004), reconsid. denied, CLI-04-37, 60 NRC 646 (2004) ("Guidance documents are, by nature, only advisory. They need not apply in all situations and do not themselves impose legal requirements on licensees."). Nor does the NRC's review of regulations governing a particular issue serve as a basis for a particular contention concerning that issue. A petitioner's differing opinion as to what applicable regulations should (but do not) require also cannot serve as a basis for a contention. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 303 (1995).

A petitioner is not permitted to incorporate massive documents by reference as the basis for, or a statement of, his contentions. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 216 (1976).

2.10.5.5 Timeliness of Submission of Contentions

Where a contention challenges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot. Without requiring submission of a new or amended contention, the original "omission" contention could be transformed into a broad series of disparate claims. This approach would, in turn, circumvent NRC contention pleading standards and defeat the contention rule's purposes: (1) providing notice to the opposing party of the issues that will be litigated; (2) ensuring that at least a minimal factual or legal foundation exists for the different claims that have been alleged; and (3) ensuring there exists an actual genuine dispute with the applicant on a material issue of law or fact. Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002), clarifying CLI-02-17, 56 NRC 1 (2002). See also Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), LBP-04-7, 59 NRC 259, 263 (2004).
Where a contention of omission that is the sole contention in the proceeding has been rendered moot and no other motions remain pending, an order dismissing the contention ordinarily would terminate the proceeding. However, the Commission has instructed that when a contention of omission has been rendered moot, the intervenor – if it wishes to raise specific challenges regarding the new information – may timely file a new contention that addresses the admissibility factors in 10 C.F.R. 2.309 (f)(1). Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 744 (2006).

The Atomic Safety Licensing Board decided that the time to file a contention tolls when sufficient information is reasonably available on which to base the contention. The intervener State of Utah claimed its NEPA contentions were timely, as they were filed within 30 days of the issuance of the Staff's DEIS. However, the Board found that sufficient information on which to base the interventer's contention was known to the intervener many months prior to the issuance of the Staff's DEIS. The Board decided that the intervener's time to submit contentions tolled when the

information first became available, and not later when the Staff issued its DEIS. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216 (2000).

The question of when a new or amended contention must be filed in order to meet the late filing standard of 10 C.F.R. 2.309 - and specifically the critical criteria concerning "good cause" for late filing - calls for a judgment about when the matter is sufficiently factually concrete and procedurally ripe to permit the filing of a contention.

The Licensing Board's general authority to shape the course of a proceeding, 10 CFR § 2.319(g) (formerly 2.718(e)), will not be utilized as the foundation for the Board's acceptance of a late-filed contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1290 (1984).

A party seeking to add a new contention after the close of the record must satisfy both standards for admitting a late-filed contention set forth in 10 CFR § 2.309 and the criteria, as established by case law, for reopening the record, Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983), citing Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982), despite the fact that nontimely contentions raise matters which have not been previously litigated. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing Diablo Canyon, supra, 16 NRC at 1714-15.

A licensing board need not address in any particular order whether a late-filed contention meets the basis and specificity requirements and satisfies late-filed contention requirements so long as both are addressed. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-9, 37 NRC 433, 436-37 (1993).

Generally, in dealing with a late-filed contention, a presiding officer first analyzes the question of the issue's admissibility under the late-filing factors in 10 C.F.R. § 2.309(c) (formerly 2.714(a)(1)). Then, to the degree the balancing process mandated by that provision supports admission of the contention, the presiding officer goes on to determine whether the issue statement merits admission under the specificity and basis standards set forth in section 2.309(f). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-01, 51 NRC 1,5 (2000).

In considering the admissibility of late-filed contentions, the Licensing Board must balance the [eight] factors specified in 10 CFR § 2.309(c)(1) (formerly 2.714(a)) for dealing with nontimely filings. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear station), LBP-79-22, 10 NRC 213, 214 (1979); Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). In addition, late-filed contentions filed on subsequently issued NRC environmental review documents are subject to the [eight] factor test set forth in 10 CFR 2.309(c)(1)(i)-(viii) (formerly § 2.714(a)(1)(i)-(v)). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993).

To be accepted, a late-filed contention must satisfy not only the late-filed factors but also the requirements for contentions. A licensing board need not address these considerations in any particular order, although both are required for admissibility. Analyzing the contention requirements first permits a board to determine whether or not a significant health and safety or environmental question is being advanced, thus assisting the board in considering lateness factor (viii), the contribution to an adequate record to be made by the intervenor. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 207 (1993).

The determination whether to accept a contention that was susceptible of filing within the period prescribed by the Rules of Practice on an untimely basis involves a consideration of all [eight]10 CFR § 2.309(c)(1) factors and not just the reason, substantial or not as the case may be, why the petitioner did not meet the deadline. Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-687, 16 NRC 460, 470 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

The proponent of a late contention should affirmatively address the [eight} factors and demonstrate that, on balance, the contention should be admitted. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982), citing Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

If a petitioner fails to address the criteria in 10 CFR § 2.309(c)(1) that govern late filed contentions, a petitioner does not meet its burden to establish the admissibility of such contentions. Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 241 (1998); Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998).
10 CFR § 2.309(c) (formerly 2.714(a)(1)) requires that all the factors enumerated in that regulation should be applied to late-filed contentions even where the licensing-related document, upon which the contentions are predicated, was not available within the time prescribed for filing timely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983); Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing Catawba, CLI-83-19 supra, 17 NRC at 1045; Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 207 (1994). The Commission has held that any refiled contention would have to meet the [eight]-factor test of 10 CFR § 2.309(c)(1) (formerly 2.714(a)(1)), if not timely filed, even if the specifics could not have been known earlier because the documents on which they were based had not yet been issued. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 796 (1983), citing Duke Power Co. (Catawba Nuclear station, Units 1 and 2), CLI-83-13, 17 NRC 1041 (1983).

A Board must perform this balancing of the lateness factors, even where all the parties to the proceeding have waived their objections and agreed, by stipulation, to the admission of the late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 251 (1986). See Boston Edison Co. (Pilgrim Nuclear Power station), ALAB-816, 22 NRC 461, 466 (1985).

The required balancing of factors is not obviated by the circumstances that the proffered contentions are those of a participant that has withdrawn from the proceeding. South Texas, supra, 16 NRC at 1367, citing Gulf states Utilities Co. (River Bend station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-98 (1977).

In balancing the lateness factors, all factors must be taken into account; however, there is no requirement that the same weight be given to each of them. South Texas, supra, 16 NRC at 1367, citing South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984). A Board is entitled to considerable discretion in the method it employs to balance the lateness factors. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing Virginia Electric and Power Co. (North Anna Power station, Units 1 and 2), ALAB-342, 4 NRC 98, 107 (1976).

The admissibility of a late-filed contention must be determined by a balancing of all of the late intervention factors in 10 CFR § 2.309(c)(1) (formerly 2.714(a)). Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), CLI-83-23, 18 NRC 311, 312 (1983).

Even where an applicant does not comply with a standing order to serve all relevant papers on the Board and parties, the admissibility of an intervenor's late-filed contention directed toward such papers must be determined by a balancing of all the factors. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-765, 19 NRC 645, 657 (1984), overruling in part, LBP-84-16, 19 NRC 857, 868 (1984).

NRC staff activities that occur after issuance of a notice of opportunity for hearing are not grounds for the Board to extend the deadline that the notice provides for filing contentions. A party seeking to file contentions after the notice's deadline in such circumstances must, therefore, either file a timely motion for leave to file a new contention–showing, pursuant to 10 C.F.R. § 2.309(f)(2), that the staff's activities engendered materially different information that was not previously available–or satisfy the NRC's rules governing late-filed contentions. Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 577-78 (2004).

NRC could adopt, without resort to notice-and-comment rulemaking, "unavoidable and extreme circumstances" test, in lieu of a "good cause" test, to assess requests for extensions of time in which to file contentions in nuclear power plant license renewal proceedings. The new rule was procedural since it merely altered the standard for enforcement of filing deadlines and did not purport to regulate or limit the interested party's substantive rights. National Whistleblower Center v. NRC, 208 F.3d 256, 262-63 (D.C. Cir. 2000).

The Commission's regulations at 10 C.F.R. 2.309(f)(2) provide for the filing of new or amended contentions only with the leave of the presiding officer, and upon a showing of three factors: (1) the information upon which the amended or new contention is based was not previously available; (2) the information upon which the

amended or new contention is based is materially different than information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information. If new and materially different information becomes available during the processing of the application, and a petitioner promptly files a new contention based on this new information, the contention is admissible, assuming that it also satisfied the general contention admissibility standards contained in 10 CFR § 2.309(f)(1). Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (2006).

If a contention satisfies the timeliness requirement of 10 CFR 2.309(f)(2)(iii), then, by definition, it is not subject to 10 CFR 2.309(c), which specifically applies to non-timely filings. The three (f)(2) factors are not mere elaborations on the "good cause" factor of section 2.309(c)(1)(i), since "good cause" to file a non-timely contention may have nothing to do with the factors set forth in (f)(2). Vermont Yankee, LBP-06-14, 63 NRC at 573.

A new or amended contention may be timely for purposes of 10 CFR 2.309(f)(2)(iii) if the new and material information was revealed in a piecemeal fashion, and where the foundation for the contention is not reasonably available until the later pieces fall into place. In such cases, the licensing board must determine when, as a cumulative matter, the separate pieces of the information puzzle were sufficiently in place to make the particular concerns readily apparent. Vermont Yankee, LBP-06-14, 63 NRC at 579. [**Note**: Section 2.309 requires that the petition to intervene or request for hearing include a specification of the contentions that the petitioner proposes for litigation. This differs from the former provisions of Part 2 that permitted a petitioner to file a supplement to his or her petition to intervene with a list of contentions which the petitioner sought to have litigated in the hearing. The new practice of requiring contentions to be filed at time of the petition/request does not obviate the concept of late-filed contentions discussed below.]

2.10.5.5.1 Factor #1–Good Cause for Late Filing

A late filed contention must meet the requirements concerning good cause for late filing pursuant to 10 CFR § 2.309(c)(1) (formerly 2.714(a)(1)). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-90, 16 NRC 1359, 1360 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983).

Considerable importance generally has been attributed to factor one -- "good cause" for late filing -- in that a failure to meet this factor enhances considerably the burden of justifying the other factors. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 24 (1996). Among the other four "late-filing" factors, factors [eight] and [seven] -- contribution to a sound record and broadening issues/delay in the proceeding -- generally have been considered as having the most significance in proceedings in which there are no other parties or ongoing related proceedings. See Shoreham, ALAB-743, 18 NRC at 399, 402; see also South Texas, LBP-82-91, 16 NRC at 368. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 25

(1996); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286 (1998); Private Fuel Storage, L.L.C., LBP-99-6, 49 NRC 114, 119 (1999); Private Fuel Storage, L.L.C., LBP-99-7, 49 NRC 124, 128 (1999).

In evaluating the admissibility of a late-filed contention, the first and foremost factor in this appraisal is whether good cause exists that will excuse the late-filing of the contention. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 44 (2004). And the good cause element has two components that may impact on a presiding officer's assessment of the timeliness of a contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information was available, how long did it take for the contention admission request to be prepared and filed. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 46-48 (assessing late-filing factors relative to petition to intervene), aff'd, CLI-99-10, 49 NRC 318 (1999). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-13, 53 NRC 319, 324 (2001).

Under 10 CFR § 2.309(c) (formerly 2.714(a)), good cause may exist for a late-filed contention if it: (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once that document comes into existence and is amenable to rejection on the strength of a balancing of all five of the late intervention factors set forth in that section. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n:4 (1983), citing Duke Power Co. (Catawba Nuclear station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983); Kansas Gas & Electric Co. (Wolf Creek Generating station, Unit 1), LBP-84-1, 19 NRC 29, 31 (1984). See also Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-16, 29 NRC 508, 514 (1989). When a licensing-related document becomes available, an intervenor must file promptly its contentions based on that document. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). However, an intervenor is not required to file contentions based upon a draft licensing-related document. West Chicago, supra, 29 NRC at 514.

In considering the extent to which the petitioner had shown good cause for filing supplements out-of-time, the Licensing Board recognized that the petitioner was appearing pro se until just before the special prehearing conference. Petitioner's early performance need not adhere rigidly to the Commission's standards and, in this situation, the Board would not weigh the good cause factor as heavily as it might otherwise. Florida Power and Light Company (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 190 (1979).

An intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available several months prior to the filing of the contention. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628-629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-828, 23 NRC 13, 21 (1986).

Withdrawal of one party has been held not to constitute good cause for the delay of a petitioner in seeking to substitute itself for the withdrawing party, or, comparably, to adopt the withdrawing party's contentions. South Texas, supra, 16 NRC at 1369, citing Gulf States Utilities Co. (River Bend station, Units 1 and 2), ALAB-444, 6 NRC 760, 796-97 (1977). The same standards apply to an existing intervenor seeking to adopt the abandoned contentions of another intervenor as to a "newly arriving legal stranger." South Texas, supra, 16 NRC at 1369. However, if under the circumstances of a Particular case, there is a sound foundation for allowing one entity to replace another, it can be taken into account in making the "good cause" determination under 10 CFR § 2.309(c)(1) (formerly 2.714(a)). Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 (1985), citing River Bend, supra, 6 NRC at 796.

Generally a "good cause" finding based on "new information" can be resolved by a straightforward inquiry into when the information at issue was available to the petitioner. In some instances, however, the answer to the "good cause" factor may involve more than looking at the dates on the various documents submitted by the petitioners. Instead, the inquiry turns on a more complex determination about when, as a cumulative matter, the separate pieces of the new information "puzzle" were sufficently in place to make the particular concerns espoused reasonably apparent. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996).

The appearance of information for the first time in a document not available when contentions initially were to be filed would satisfy the "good cause for delay" aspect of the late-filed contention criteria, assuming the proposed contention was filed shortly after the information became available. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 (1996). However, see Duke Power Co., (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983) (unavailability of licensing-related document does not establish good cause for late filing of a contention if information was publicly available early enough to provide the basis for the timely filing of that contention). Power Authority of the State of New York (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), LBP–01-4, 53 NRC 121, 127 (2001).

When 'new information' does not, because of its proprietary status, become available to an intervenor until after the time for filing contentions generally has elapsed, good cause for late filing would be demonstrated, assuming the contention is filed shortly after the information becomes available. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983); Power Authority of the State of New York, et. al. (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), LBP-01-4, 53 NRC 121, 132 (2001).

The fact that petitioners raise an argument to support admission of a contention for the first time late in a proceeding is not necessarily fatal where the argument rests significantly on a licensee document prepared after the petitioner submitted its original contention and where petitioners promptly bring it to the adjudicator's attention. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 (1996).

The institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was publicly available early enough to provide the basis for the timely filing of that contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 436-37 (1984); Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-813, 22 NRC 59, 84-85 (1985). Section 189a of the Act is not offended by a procedural rule that simply recognizes that the public's interest in an efficient administrative process is not properly accounted for by a rule of automatic admission for certain late-filed contentions. Catawba, supra, 17 NRC at 1046. See Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing Catawba, CLI-83-19, supra, 17 NRC at 1045-47. Cf. BPI v. AEC, 502 F.2d 424 (D.C. cir. 1974).

Section 189a of the AEA does not require the Commission to give controlling weight to the good cause factor in 10 CFR § 2.309(c)(1)(i) (formerly 2.714(a)(1)(i)) in determining whether to admit a late-filed contention based on licensing documents which were not required to be prepared early enough to provide a basis for a timely-filed contention. The unavailability of those documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983).

The appearance of a newspaper article is not sufficient grounds for the late-filing of a contention about matters that have been known for a long time. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-11, 15 NRC 348 (1982). Compare, LBP-82-53, 16 NRC 196, 200-01 (1982) (Up-to-date journals demonstrate good cause) and LBP-82-15, 15 NRC 555, 557 (1982).

A submitted document, while perhaps incomplete, may be enough to require contentions related to it to be filed promptly. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

A contention based on a Draft Environmental statement (DES) which contains no new information relevant to the contention, lacks good cause for late filing. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1118 (1982).

An intervenor who has previously submitted timely contentions may establish good cause for the late filing of amended contentions by showing that the

amended contentions: restate portions of the earlier timely-filed contentions; and were promptly filed in response to a Commission decision which stated a new legal principle. Texas Utilities Electric Co. (Comanche Peak steam Electric station, Unit 1), LBP-86-36A, 24 NRC 575, 579 (1986), aff'd, ALAB-868, 25 NRC 912, 923 (1987).

The finding of good cause for the late filing of contentions is related to the total previous unavailability of information. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

Ordinarily, it is sufficient to show good cause for lateness when a showing that the Staff's environmental review documents significantly differ from the applicant's environmental report. However, a petitioner may be able to meet the late-filed contention requirements without a showing that the Staff's environmental review documents significantly differ from the applicant's environmental report by presenting significant new evidence not previously available. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993). The fact that a party previously raised an issue in a comment regarding EIS scoping does not excuse the party from contention timeliness rules when later challenging the EIS itself. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 45 (2004).

The Atomic Safety Licensing Board decided that, notwithstanding that an intervenor state's contentions were based on the Staff's draft environmental impact statement, the intervenor still bore the burden of demonstrating that the late contentions merited submission. The Board cited the Commission's decisions and statements in the Federal Register that, although 10 CFR § (2.309(f)(2) (formerly 2.714(b)(2)(iii)) permits contentions based on an applicant's environmental report to be amended if new or conflicting data are later presented in a final environmental impact statement or a supplement to the draft environmental impact statement, this does not alter the standards of 10 CFR § 2.309(c)(1) (formerly 2.714(a)). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226 (2000). See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983); 54 Fed. Reg. 33,168, 33,172 (1989). However, an ASLB has held that if a contention is timely under 10 C.F.R. § 2.309(f)(2)(ii), it is contradictory to rule that the intervenor must also satisfy the eight additional factors for nontimely filings found in 10 C.F.R. § 2.309(c). Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 (2005).

Before a contention is excluded from consideration, the intervenor should have a fair opportunity to respond to applicant's comments. When an intervenor files a late contention and argues that it has good cause for late filing because of the recent availability of new information, intervenor should have the chance to comment on applicant's objection that the information was available earlier. Intervenors should be permitted to reply to the opposition to the admission of a late filed contention. The principle that a party should have an opportunity to respond is reciprocal. When intervenor introduces material that is entirely new, applicant will be permitted to respond. Due process requires an opportunity to

comment. If intervenors find that they must make new factual or legal arguments, they should clearly identify the new material and give an explanation of why they did not anticipate the need for the material in their initial filing. If the explanation is satisfactory, the material may be considered, but applicant will be permitted to respond. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1356 (1982); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 206 (1994), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

The fact that a party may have delayed the filing of a contention in the hopes of settling the issue without resorting to litigation in an adjudicatory proceeding does not constitute good cause for failure to file on time. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986).

Informal negotiations among parties, even under a Board's aegis, is not an adequate substitute for a party's right to pursue its legitimate interest in issues in formal adjudicatory hearings. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1191 (1985).

Where good cause for a late filing is demonstrated, the other factors are given lesser weight. Midland, supra, 16 NRC at 589; Texas Utilities Generating Co. (Comanche Peak steam Electric station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984).

Relative to the other late-filing factors, in the absence of good cause there must be a compelling showing on the remaining elements, of which factors five and six-availability of other means to protect the petitioner's interest and extent of representation of petitioner's interests by other parties - are to be given less weight that factors eight and seven - assistance in developing a strong record and broadening the issues/delaying the proceeding. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-13, 53 NRC 319, 324 (2001).

Where good cause for failure to file on time has not been demonstrated, a contention may still be accepted, but the burden of justifying acceptance of a late contention on the basis of the other factors is considerably greater. Even where the factors are balanced in favor of admitting a late-filed contention, a tardy petitioner without a good excuse for lateness may be required to take the proceeding as he finds it. South Texas, supra, 16 NRC at 1367, 1368, citing Nuclear Fuel Services. Inc. and N.Y.S. Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275, 276 (1975).

2.10.5.5.2 Factor #2-Nature of the Requestor's/Petitioner's Right Under the Act to Be Made a Party to the Proceeding

[Reserved]

2.10.5.5.3 Factor #3-Nature and Extent of the Requestor's/Petitioner Propery, Financial or Other Interest in the Proceeding

[Reserved]

2.10.5.5.4 Factor #4-Possible Effect of Any Order That May Be Entered in the Proceeding on the Requestor's/Petitioner's Interest

[Reserved]

2.10.5.5.5 Factor #5–Other Means Available to Protect the Petitioner's Interests

With respect to the [fifth] factor of 10 CFR § 2. 309(c)(1) (availability of other means of protecting late petitioners' interest) and the [sixth] factor (the extent to which late petitioners' interest will be represented by existing parties), the applicants in Zimmer, supra, 10 NRC at 215, claimed that the Staff would represent the public interest and by inference, late petitioners' interest as well. The Licensing Board ruled that although the Staff clearly represents the public interest, it cannot be expected to pursue all issues with the same diligence as an intervenor would pursue its own issue. Moreover, unless an issue was raised in a proceeding, the Staff would not attempt to resolve the issue in an adjudicatory context. Applicants' reliance on the Staff review gave inadequate consideration to the value of a party's pursuing the participational rights afforded it in an adjudicatory hearing. Zimmer, supra, 10 NRC at 215; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1407-1408 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 527-528 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173-77 (1983); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 914 (1985).

When considering the [fifth] factor of 10 CFR §2.309(c)(1), the availability of other means to protect an intervenor's interests, a Board may only inquire whether there are other forums in which the intervenor itself might protect its interests. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating station, Unit 1), ALAB-671, 15 NRC 508, 513 n.13 (1982).

In determining what other means are available to protect a petitioner's interest, a board will consider the issues sought to be raised, the relief requested, and the stage of the proceeding. There may well be no alternative to providing a petitioner with an opportunity to participate in an adjudicatory hearing. However, in some circumstances, such as where the proposed contention deals with routinely filed post licensing reports by an applicant, a

10 CFR 2.206 petition may be sufficient to protect the petitioner's interests. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-828, 23 NRC 13, 21-22 (1986).

Late contentions filed by a city did not overlap a contention of another intervenor which had already been accepted in the proceeding. The representative of a private party cannot be expected to represent adequately the presumably broader interests represented by a governmental body. Zimmer, supra, 10 NRC at 216 n.4, citing Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

When there are no other available means to protect a petitioner's interests, that factor and the factor of the extent to which other parties would protect that interest are entitled to less weight than the other factors enumerated in 10 CFR § 2.309(c) (formerly 2.714(a)). Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-83-42, 18 NRC 112, 118 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985), citing South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981); Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241, 245 (1986); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (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-90-1, 31 NRC 19, 34 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-8, 51 NRC 146, 154 (2000).

2.10.5.5.6 Factor #6–Extent Petitioner's Interests are Represented By Existing Parties

A petitioner who otherwise has standing can put forth any contention that would entitle that petitioner to the relief it seeks, see CLI-96-1, 43 NRC 1, 6 (1996). Therefore, in deciding whether to admit a late-filed contention the petitioner otherwise would be entitled to litigate, the fact that the petitioner's contentions focus primarily on matters that will protect the interests of others does not mean the petitioner's "interest" should be afforded short shrift in assessing the late-filing factors of whether other means or other parties will protect the petitioner's interests. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 30 (1996).

A Petitioner's interest can adequately be protected or represented by another party where Petitioner's interest as a co-owner of a nuclear facility are, by Petitioner's own description, identical to those of a party that is also a co-owner. North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999).

In analyzing the [sixth] criteria for admitting a late filed contention, the extent to which a petitioner's interest will be represented by existing parties, the analysis will favor the petitioner where there are no other parties involved in the proceeding that could represent the petitioner's interests. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 3), LBP-02-5, 55 NRC 131, 141 (2002).

2.10.5.5.7 Factor #7–Extent Participation Will Broaden Issues or Delay the Proceeding

The [seventh] criteria for admission of a late-filed contention requires a board to determine whether the proceeding, and not the issuance of a license or the operation of a plant, will be delayed. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-828, 23 NRC 13, 23 (1986); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 29-30 (1996). In addition the [seventh] criteria - broadening the issues/delaying the proceeding - clearly does not weigh in favor of admission when the contentions otherwise would not be part of the proceeding because of the sponsoring interventor's withdrawal. Private Fuel Storage, L.L.C., LBP-99-6, 49 NRC 114, 119 (1999).

The admission of any new contention may broaden and delay the completion of a proceeding by increasing the number of issues which must be considered. A Board may consider the following factors which may minimize the impact of the new contention: how close to the scheduled hearing date the new contention was filed; and the extent of discovery which had been completed prior to the filing of the new contention. A Board will not admit a new contention which is filed so close to the scheduled hearing date that the parties would be denied an adequate opportunity to pursue discovery on the contention. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-11, 21 NRC 609, 630-631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear station, Unit 1), ALAB-642, 13 NRC 881, 889 (1981).

In evaluating the extent to which admission of a late-filed contention would delay the proceeding, a Board must determine whether, by filing late, the intervenor has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. Texas Utilities Electric Co. (Comanche Peak steam Electric station, Unit 1), ALAB-868, 25 NRC 912, 927 (1987).

A Board may refuse to admit a late-filed contention where it determines that the contention is so rambling and disorganized that any attempt to litigate the contention would unduly broaden the issues and delay the proceeding. Texas Utilities Generating Co. (Comanche Peak steam Electric station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1262-1263 (1983).

In evaluating the potential for delay, it is improper for the Board to balance the significance of the late-filed contention against the likelihood of delay. Such a

balancing of factors is made in the overall evaluation of all the criteria for the admission of a late-filed contention. Braidwood, supra, 23 NRC at 248.

An intervenor's voluntary withdrawal of other, unrelated contentions may not be used to counterbalance any delays which might be caused by the admission of a late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 248 (1986).

Where the delay in filing contentions is great and the issues are serious, the seriousness of an issue does not imply that the party raising it is somehow forever exempted from the Rules of Practice. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983).

2.10.5.5.8 Factor #8–Ability of Petitioner to Assist in Developing Record

Ability to contribute to the record is relevant to the admissibility of late-filed contentions. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 56 n.5 (1983). An intervenor should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), citing Mississippi Power and Light Co. (Grand Gulf Nuclear station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v . NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991). An intervenor must demonstrate special expertise concerning the subjects which it seeks to raise. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), LBP-90-1, 31 NRC 19, 35-36 (1990), aff'd on other grounds, ALAB-936, 32 NRC 75 (1990). An intervenor need not present expert witnesses or indicate what testimony it plans to present if it has established its ability to contribute to the development of a sound record in other ways. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1408 n.14 (1983). See also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1182-1183 (1983).

With regard to late-filing factor [eight] - assistance in developing a sound record - when legal issues are a focal point of a late-filed contention, the need for an extensive showing regarding witnesses and testimony may be less compelling. Private Fuel Storage, L.L.C., LBP-99-7, 49 NRC 124, 129 (1999).

Nevertheless, an intervenor should provide specific information from which a Board can infer that the intervenor will contribute to the development of a sound record on the particular issue in question. An intervenor's bare assertion of past effectiveness in contributing to the development of a sound record on other issues in the current proceeding and in past proceedings is insufficient. Duke Power Co. (Catawba Nuclear station, Units 1 and 2), ALAB-

813, 22 NRC 59, 85 (1985), citing WPPSS, supra, 18 NRC at 1181, and Mississippi Power and Light Co. (Grand Gulf Nuclear station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power station), ALAB-919, 30 NRC 29, 40-41 (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).

In assessing the "late-filing" factor of assistance in developing a sound record, the need to conduct discovery no doubt may excuse a lack of specificity about potential witnesses' testimony in those nontechnical cases where any testimonial evidence likely will come from licensee employees or contractors. See Comanche Peak, ALAB-868, 25 NRC at 925-26. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 28-29 (1996).

In analyzing the [eighth] criteria for admitting a late filed contention, if an intervenor has previously provided assistance earlier in a proceeding, there is a presumption weighing in favor of the petitioner that the petitioner's participation can reasonably be expected to once again assist in developing a sound record. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131, 140-141 (2002).

In determining an intervenor's ability to assist in the development of a sound record, it is erroneous to consider the performance of counsel in a different proceeding. Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246-47 (1986). Contra Texas Utilities Electric Co. (Comanche Peak steam Electric station, Unit 1), ALAB-868, 25 NRC 912, 926-27 (1987).

The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record is only meaningful when the proposed participation is on a significant, triable issue. Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-84-30, 20 NRC 426, 440 (1984).

The extent to which an intervenor may reasonably be expected to assist in developing a sound record is the most significant of the factors to be balanced with respect to late-filed contentions, at least in situations where litigation of the contention will not delay the proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985).

2.10.5.6 Contentions Challenging Regulations

Contentions challenging the validity of NRC regulations are inadmissible under the provisions of 10 CFR § 2.335 (formerly 2.758). Commonwealth Edison Company (Byron Nuclear Power station, Units 1 and 2), LBP-80-30, 12 NRC 683, 692-93 (1980); Kansas Gas and Electric Co. (Wolf Creek Generating station, Unit 1), ALAB-784, 20 NRC 845, 846 (1984); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), LBP-89-1, 29 NRC 5, 18 (1989); Arizona Public Service Co. (Palo

Verde Nuclear Generating station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 410 (1991), appeal denied, CLI-91-12, 34 NRC 149, 156 (1991) (petitioner may not attack the testing methodology specified in a regulation, but may attack new proposed performance requirements); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 296 (1998). Northeast Nuclear Energy Co. (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 286 (2001).

The assertion of a claim in an adjudicatory proceeding that a regulation is invalid is barred as a matter of law. Metropolitan Edison Co. (Three Mile Island Nuclear station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978).

Under 10 CFR § 2.335 (formerly 2.758), the Commission has withheld jurisdiction from Licensing Boards to entertain attacks on the validity of Commission regulations in individual licensing proceedings except in certain "special circumstances." Potomac Electric Power Co. (Douglas Point Nuclear Generating station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 444 (1985). 10 CFR § 2.335 (formerly 2.758) sets out those special circumstances which an intervenor must show to be applicable before a contention attacking the regulations will be admissible. Further, 10 CFR § 2.335 (formerly 2.758) provides for certification to the Commission of the question of whether a rule or regulation of the Commission should be waived in a particular adjudicatory proceeding where an adjudicatory board determines that, as a result of special circumstances, a prima facie showing has been made that application of the rule in a particular way would not serve the purposes for which the rule was adopted and, accordingly, that a waiver should be authorized. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 584-585 (1978); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546 (1986).

Intervenors are authorized to file a petition for a waiver of a rule, pursuant to 10 CFR § 2.335 (formerly 2.758). It is not, however, enough merely to allege the existence of special circumstances; such circumstances must be set forth with particularity. The petition should be supported by proof, in affidavit or other appropriate form, sufficient for the Licensing Board to determine whether the petitioning party has made a prima facie showing for waiver. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

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. Vermont Yankee Nuclear Power Corp., et. al. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-166 (2000). See also North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999).

A contention presents an impermissible challenge to the Commission's regulations by seeking to impose requirements in addition to those set forth in the regulations. See Shoreham, CLI-87-12, 26 NRC at 395; Public Service Co. of New Hampshire

(Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159 (2001).

Although Commission regulations may permit a board in some situations to approve minor adjustments to Commission-prescribed standards, a board will reject as inadmissible a contention which seeks major changes to those standards. Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), ALAB-832, 23 NRC 135, 147-48 (1986) (intervenors sought major expansion of the emergency planning zone), rev'd in part, CLI-87-12, 26 NRC 383, 395 (1987) (the Appeal Board incorrectly admitted contentions which involved more than just minor adjustments to the emergency planning zone). See also Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-836, 23 NRC 479, 507 n.48 (1986).

When a Commission regulation permits the use of a particular analysis or technique, a contention which asserts that a different analysis or technique should be utilized is inadmissible because it attacks the Commission's regulations. Metropolitan Edison Co. (Three Mile Island Nuclear station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1273 (1983).

A contention must be rejected where: it constitutes an attack on applicable statutory requirements; it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations; it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be; it seeks to raise an issue which is not proper for adjudication in the proceeding; or it does not apply to the facility in question; or it seeks to raise an issue which is not concrete or litigable. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982), citing Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1268-1269 (1983); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 365 (1998); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 151 (2001).

That orders impose requirements in addition to those imposed by the regulations does not create a genuine dispute as to whether compliance with the regulations fails to comport with the "no undue risk" standard in 42 U.S.C. § 2077 (Section 57 of the Atomic Energy Act of 1954). As a general matter, compliance with applicable NRC regulations ensures that public health and safety are adequately protected in areas covered by the regulations. Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-19, 60 NRC 5 at 9, 12 (2004).

2.10.5.7 Contentions Involving Generic Issues/Subject of Rulemaking

Before a contention presenting a generic issue can be admitted, the intervenor must demonstrate a specific nexus between each contention and the facility that is the subject of the proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-15, 15 NRC 555, 558-59 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-24, 26

NRC 159, 165 (1987), aff'd on other grounds, ALAB-880, 26 NRC 449, 456-57 n.7 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988).

Licensing Boards should not accept in individual licensing cases any contentions which are or are about to become the subject of general rulemaking. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985). Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 345. They appear to be permitted to accept "generic issues" which are not and are not about to become the subject of rulemaking, however. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-83-76, 18 NRC 1266, 1271 (1983). In order for a party or interested State to introduce such an issue into a proceeding, it must do more than present a list of generic technical issues being studied by the Staff or point to newly issued Regulatory Guides on a subject. There must be a nexus established between the generic issue and the particular permit or application in question. To establish such a nexus, it must be shown that (1) the generic issue has safety significance for the particular reactor under review, and (2) the fashion in which the application deals with the matter is unsatisfactory or the short term solution offered to the problem under study is inadequate. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 773 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1608 (1982), citing River Bend, supra, 6 NRC at 773; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1657 (1982); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 418, 420 (1984), citing River Bend, supra, 6 NRC at 773, and Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, NRC 245, 248 (1978).

Contentions challenging NRC regulations or determinations made by the NRC during the rulemaking process are inadmissible. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 38-39 (2004).

While a Licensing Board should not accept contentions that are or are about to become the subject of general rulemaking, where a contention has long since been admitted and is still pending when notice of rulemaking is published, the intent of the Commission determines whether litigation of that contention should be undertaken. Texas Utilities Generating Co. (Comanche Peak steam Electric station, Units 1 and 2), LBP-81-51, 14 NRC 896, 898 (1981), citing Potomac Electric Power Co. (Douglas Point Nuclear Generating station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

Where the Commission has explicitly barred Board consideration of the subject of a contention on which rulemaking is pending, the Board may not exercise jurisdiction over the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 and 2), LBP-82-11, 15 NRC 348, 350 (1982). Where the Commission has held its own decision whether to review an Appeal Board opinion in abeyance pending its decision whether or not to initiate a further rulemaking, and has instructed the Licensing Boards to defer consideration of the issue, a contention involving the

issue is unlitigable and inadmissible. Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 417-18 (1984), citing Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

A brief suspension of consideration of a contention will not be continued when it no longer appears likely that the Commission is about to issue a proposed rule on the matter which was the subject of the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842, 846-847 (1981).

Parties interested in litigating unresolved safety issues must do something more than simply offer a checklist of unresolved issues; they must show that the issues have some specific safety significance for the reactor in question and that the application fails to resolve the matters satisfactorily. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 889 (1983), aff'd on other grounds, CLI-84-11, 20 NRC 1 (1984), citing Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772-73 (1977).

Contentions which constitute a general attack upon the methods used by the NRC Staff to insure compliance with regulations, without raising any issues specifically related to matters under construction, are not appropriate for resolution in a particular licensing proceeding. Commonwealth Edison Company (Byron Nuclear Power station, Units 1 and 2), LBP-80-30, 12 NRC 683, 690 (1980).

In Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-1A, 15 NRC 43 (1982), the Licensing Board rejected the applicant's contention that Douglas Point, supra, requires dismissal whenever there is pending rulemaking on a subject at issue. The Board distinguished Douglas Point on several grounds: (1) In Douglas Point, there were no existing regulations on the subject, while in Perry, regulations do exist and continue in force regardless of proposed rulemaking; (2) The issue in Perry --whether Perry should have an automated standby liquid control system (SLCS) given the plant's specific characteristics -- is far more specific than the issues in Douglas Point (i.e., nuclear waste disposal issues); (3) The proposed rules recommend a variety of approaches on the SLCS issue requiring analysis of the plant's situation, so any efforts by the Board to resolve the issue would contribute to the analysis; (4) The Commission did not bar consideration of such issues during the pendency of its proposed rulemaking, as it could have. Unless the Commission has specifically directed that contentions be dismissed during pendency of proposed rulemaking, no such dismissal is required.

In order to posit a contention that requires the analysis of an action violating a specific technical specification, a petitioner would have to make some particularized demonstration that there is a reasonable basis to believe that the applicant will act contrary to the terms of such a requirement. See General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 34 (1999).

2.10.5.8 Contentions Challenging Absent or Incomplete Documents

Section 2.309(f)(2) (formerly 2.714(b)(2)(iii)) requires that a petitioner file its initial contentions based on an applicant's environmental report. A petitioner can "amend those contentions or file new contentions if there are data or conclusions in the NRC draft of final environmental impact statement . . . or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document" Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000), n.6, citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).; Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-20, 62 NRC 523, 526, 533 (2005); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993).

At the contention formulation stage of the proceeding, an intervenor may plead the absence or inadequacy of documents or responses which have not yet been made available to the parties. The contention may be admitted subject to later refinement and specification when the additional information has been furnished or the relevant documents have been filed. Commonwealth Edison Company (Byron Nuclear Power station, Units 1 and 2), LBP-80-30, 12 NRC 683 (1980). Note, however, that the absence of licensing documents does not justify admission of contentions which do not meet the basis and specificity requirements of 10 CFR § 2.309. That is, a non-specific contention may not be admitted, subject to later specification, even though licensing documents that would provide the basis for a specific contention are unavailable. Duke Power Co. (Catawba Nuclear station, Units 1 & 2), ALAB 687, 16 NRC 460 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). Where there is no local public document room in an area near a facility, and where a petitioner for intervention unsuccessfully seeks information from a local NRC office, a licensing board may judge the adequacy of a proposed contention on the basis of available information. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 297-98 (1995).

Rulings on contentions concerning undeveloped portions of emergency plans may be deferred. To admit such contentions would be to risk unnecessary litigation. But to deny the contentions would unfairly ignore the insufficient development of these portions. Fairness and efficiency seem to dictate that rulings on such contentions be deferred. The objectives of such deferrals are to encourage negotiation, to avoid unnecessary litigation, and to make necessary litigation as focused as possible. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-18, 19 NRC 1020, 1028 (1984). Cf. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power station, Unit 1), ALAB-727, 17 NRC 760, 775-76 (1983).

When information is not available, there will be good cause for filing a contention based on that information promptly after the information becomes available. However, the [eight] late-filing factors must be balanced in determining whether to admit such a contention filed after the initial period for submitting contentions. Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983); Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985).

The admission of a contention does not require anticipation of the contents of a document that has not been filed. A contention may address any current deficiency of the application, providing the contention is specific. Perry, supra, 16 NRC at 1469.

Should the subsequent issuance of the SER lead to a change in the FSAR and thereby modify or moot a contention based on that document, that contention can be amended or promptly disposed of by summary disposition or a stipulation. However, the possibility that such a circumstance could occur does not provide a reasonable basis for deferring the filing of safety-related contentions until the Staff issues its SER. Catawba, supra, 17 NRC at 1049.

NRC has the burden of complying with NEPA. The adequacy of the NRC's environmental review as reflected in the adequacy of a DES or FES is an appropriate issue for litigation in a licensing proceeding. Because the adequacy of those documents cannot be determined before they are prepared, contentions regarding their adequacy cannot be expected to be proffered at an earlier stage of the proceeding before the documents are available. That does not mean that no environmental contentions can be formulated before the Staff issues a DES or FES. While all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual aspects of particular issues can be raised before the DES is prepared. Just as the submission of a safety-related contention based on the FSAR is not to be deferred simply because the Staff may later issue an SER requiring a change in a safety matter, so too, the Commission expects that the filing of an environmental concern based on the applicant's environmental report will not be deferred simply because the Staff may subsequently provide a different analysis in its DES. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983). See 10 CFR § 2.309(f)(2) (formerly 2.714(b)(2)(iii)), 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989).

Contentions initially framed as challenges to the substance of the applicants Environmental Report analysis may not necessarily require a late-filed revision or substitution relative to the Staff's DEIS or FEIS. Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-01-26, 54 NRC 199, 208 (2001). However, significant changes in the nature of the alleged NEPA imperfection, from one comprehensive information omission to an imperfection based on deficient analysis of the subsequent information provided by the Staff may warrant a late-filed revision or substitution. Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-01-26, 54 NRC 199, 208 (2001).

Where a contention challenges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot. Without requiring submission of a new or amended contention, the original "omission" contention could be transformed into a broad series of disparate claims. This approach would, in turn, circumvent NRC contention pleading standards and defeat the contention rule's purposes: (1) providing notice to the opposing party of the issues that will be litigated; (2) ensuring that at least a minimal factual or legal foundation exists for the different claims that have been alleged; and (3) ensuring there exists an actual genuine dispute with the applicant on a material issue of law or fact. Duke Energy

Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002), clarifying CLI-02-17, 56 NRC 1 (2002). See also Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), LBP-04-7, 59 NRC 259, 263 (2004). Something obviously is different than nothing, so the availability of new information on an issue where there previously was none, fulfills the requirement that late contentions be based on "materially different information" in 10 C.F.R. § 2.309(f)(2)(ii). Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 820 (2005).

It is well recognized that where a contention based on a applicant's environmental report is superceded by the subsequent issuance of an environmental impact statement or a response to a request for additional information, the contention must be disposed of or modified. USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444 (2006).

Generally, the plain language of a contention will reveal whether the contention is (1) a claim of omission, (2) a specific substantive challenge to an application, or (3) a combination of both. In some cases, it may be necessary to examine the language of the contention bases to determine the scope of the contention. In the first situation, where a contention alleges the omission of particular information or an issue from an application, and the information is supplied later by the applicant, the contention is moot. Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006).

Where a contention of omission that is the sole contention in the proceeding has been rendered moot and no other motions remain pending, an order dismissing the contention ordinarily would terminate the proceeding. However, the Commission has instructed that when a contention of omission has been rendered moot, the intervenor – if it wishes to raise specific challenges regarding the new information – may timely file a new contention that addresses the admissibility factors in 10 C.F.R. 2.309 (f)(1). Oyster Creek, LBP-06-16, 63 NRC at 744.

A contention that alleges omission of a seismic and structural analysis becomes moot, and must be dismissed, when the applicant provides such an analysis. To challenge the substance of the applicant's analysis, the intervenor must file a new or amended contention pursuant to 10 C.F.R. § 2.309(f)(2). Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Plant), LBP-05-24, 62 NRC 429, 431-32 (2005).

2.10.5.9 Contentions re Adequacy of Security Plan

The adequacy of a nuclear facility's physical security plan may be a proper subject for challenge by intervenors in an operating license proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980); Consolidated Edison Co. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 949 (1974). The adequacy of an applicant's physical security plan is also a permissible issue in an operating license renewal proceeding. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 288 (1995).

An intervenor may not introduce a contention which questions the adequacy of an applicant's security plan "against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities." Commonwealth Edison Co. (Braidwood Nuclear Power station, Units 1 and 2), LBP-85-27, 22 NRC 126, 135-36, 138 (1985), citing 10 CFR § 50.13. However, section 50.13 does not preclude intervenors from challenging whether security systems satisfy governing security requirements set forth in 10 CFR Part 73. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 292 (1995).

NEPA does not require a terrorism review, and that an EIS is not the appropriate format in which to address the challenges of terrorism. Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1, 6-7 (2003).

A request for an exemption under 10 CFR § 73.5 does not constitute a license amendment, so a hearing under Section 189 of the AEA is not required. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 96 (2000).

Where an intervenor seeking to challenge an applicant's security plan does not produce a qualified expert to review the plan and declines to submit to a protective order, its vague contentions must be dismissed for failure to meet conditions that could produce an acceptably specific contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 177 (1982); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 366 (1998).

Admission of a contention involving a security plan does not transform the security plan into a public document. Licensing Boards may adopt appropriate protective measures to preclude public release of information concerning such a plan. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 292 (1995).

The applicable design-basis threats against which an applicant must protect appear in 10 CFR § 73.1, to the extent referenced in sections applicable to particular types of reactors. The design-basis threat for research reactors includes "radiological sabotage." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 292-93 (1995). The security plan for certain research reactors, insofar as it protects against radiological sabotage, may be modified to account for special circumstances. 10 CFR § 73.60(f). Id.

An intervenor may not challenge orders issued to [Part 72] licensees until such an order specifically applies to the licensee involved in the instant proceeding. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-5, 57 NRC 233, 235 (2003).

Orders directed to individual facilities cause no change to the regulations and create no new review standard for other licensees or applicants, even if the orders had imposed requirements on each facility then in the category. Therefore, orders

issued in light of the 9/11 attacks did not create a de facto change in the 10 C.F.R. § 73.1 design basis threat for Category I facilities, and the intervenor's contention challenging the requested license amendment was rejected. Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-19, 60 NRC 5 at 10-12 (2004).

2.10.5.10 Defective Contentions

Where contentions are defective, for whatever reason, Licensing Boards have no duty to recast them to make them acceptable under 10 CFR § 2.309 (formerly 2.714). Commonwealth Edison Co. (Zion station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974).

The contention pleading criteria set forth in 10 CFR 2.309 (f)(1) (formerly 2.714(b)(2)) are mandatory and must be scrupulously followed. As the Commission has stated with respect to these regulatory provisions, "[i]f any one of these requirements is not met, a contention must be rejected." Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 64 (2002); Northeast Nuclear Energy Co. (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273 (2001); Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 47 (2001). Failure to submit at least one admissible contention is grounds for dismissing the petition under 10 CFR § 2.309(a)(1) (formerly 2.714(b)(1)). Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 64 (2002). Where a licensing board holds that a contention is inadmissible for failing to meet more than one of the requirements specified in § 2.309(f)(1)(i)-(vi), a petitioner's failure to address each ground for the board's ruling is sufficient justification for the Commission to reject the petitioner's appeal. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 638 (2004).

However, although a Licensing Board is not required to recast contentions to make them acceptable, it also is not precluded from doing so. Pennsylvania Power & Light Co. (Susquehanna steam Electric station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-296 (1979). See also Arizona Public Service Co. (Palo Verde Nuclear Generating station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 406-408, 412-413 (1991), appeal denied on other grounds, CLI-91-12, 34 NRC 149 (1991). The Palo Verde Licensing Board erred by inferring a basis for the petitioners' contention when the petitioners failed to comply with the requirements of 10 CFR § 2.309(f) (formerly 2.714(b)(2)) to clearly state the basis for its contention and to provide sufficient information to support its contention. Palo Verde, supra, 34 NRC at 155-56.

A contention's proponent must be afforded the opportunity to be heard in response to objections to the contention. Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 119 (1994), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

It is the responsibility of the intervenor, not the Licensing Board, to provide the necessary information to satisfy the basis requirement for the admission of its contentions. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-417 (1990). Northeast Nuclear Energy Co. (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 286 (2001).

A Licensing Board has consolidated otherwise inadmissible contentions with properly admitted contentions involving the same subject matter where such consolidation would not require the applicant to mount a defense that is substantially different or expanded from that which would be required by the admitted contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 33-34 (1989).

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).

The Atomic Safety and Licensing Board (ASLB) interpreted agency jurisprudence as reflecting a general reluctance to base the dismissal of contentions on pleading or other procedural defects, including defects of timing. At the same time, the ASLB judged that the Commission expects its presiding officers to set schedules, expects that parties will adhere to those schedules, and expects that presiding officers will enforce compliance with those schedules. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226 (2000)(citing Sequoyah Fuels Corp., (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 120 (1994); Yankee Atomic Electrical Co., (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 5 (1996); Statement of Policy on Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998)).

Extraneous matters such as preservation of rights, statements of intervention, and directives for interpretation which accompany an **intervenor's list** of contentions will be disregarded as contrary to the Commission's Rules of Practice. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689-690 (1980).

Consistent with the analogous agency rules regarding contentions filed by intervenors, issues that would constitute "defenses" to an enforcement order are subject to dismissal under the appropriate circumstances. Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 334 n.5 (1994); citing Indiana Regional Cancer Center, LBP-94-21, 40 NRC 22, 33 n.4 (1994).

2.10.5.11 Discovery to Frame Contentions

A petitioner is not entitled to discovery to assist him in framing the contentions in his petition to intervene. Northern States Power Co. (Prairie Island Nuclear Generating

Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

An intervenor may not file a vague contention and place the burden upon the applicants and Staff to obtain further details through discovery. Public Service Co. of New Hampshire (Seabrook station, Units 1 and 2), ALAB-942, 32 NRC 395, 426-27 (1990).

2.10.5.12 Stipulations on Contentions

[RESERVED]

2.10.6 Conditions on Grants of Intervention

10 CFR § 2.319 (formerly 2.714(f)) empowers a Licensing Board to condition an order granting intervention on such terms as may serve the purposes of restricting duplicative or repetitive evidence and of having common interests represented by a single spokesman. 10 CFR § 2.316 (formerly 2.715a) deals with the general authority to consolidate parties in construction permit or operating license proceedings. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 n.9 (1979).

2.10.7 Reinstatement of Intervenor After Withdrawal

A voluntary withdrawal of intervention is "without prejudice" in that it does not constitute a legal bar to the later reinstatement of the intervention upon the intervenor's showing of good cause. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1057 (1973). The factors to be considered in the good cause determination are generally the same as those considered under 10 CFR § 2.309(c) (formerly2.714(a)) with primary emphasis on the delay of the proceeding, prejudice to other parties and adequate protection of the intervenor's interests. Grand Gulf, supra.

2.10.8 Rights of Intervenors at Hearing

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 in an operating license proceeding 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. Concomitantly, once the record has closed, generic safety issue may be litigated directly only if standards for late-filed contentions and reopening the record are met. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

The rules cannot legitimately be read as requiring that, once an intervenor is represented by counsel, that counsel be the party's sole representative in the proceeding. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 994 (1983).

When a party is permitted to enter a case late, it is expected to take the case as it finds it. It follows that when a party that has participated in a case all along simply changes

representatives in midstream, knowledge of the matters already heard and received into evidence is imputed to it. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An intervenor's status as a party in a proceeding does not of itself make it a spokesman for others. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 550 n.1 (1986), aff'd, ALAB-854, 24 NRC 783 (1986), citing Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 33 (1979).

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863, 867-68 (1974), aff'd in pertinent part, CLI-75-1, 1 NRC 1 (1975). However, that does not elevate the intervenor's status to that of co-sponsor of the contentions. The Commission's regulations require that, at the outset of a case, each intervenor submit "a list of the contentions which it seeks to have litigated." 10 CFR § 2.309(a) (formerly 2.714(b)). It follows from this that one intervenor may not introduce affirmative evidence on issues raised by another intervenor's contentions. Prairie Island, supra, 8 AEC at 869 n.17; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 n.102 (1985).

Contentions left without a sponsor due to the withdrawal of one intervenor may be adopted by another intervenor upon satisfaction of the [eight]-factor balancing test. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381-82 (1985). See 10 CFR § 2.309 (c). For a detailed discussion of the [eight] factor test, See Section 2.10.5.5.

A contention which has been joined by two joint intervenors may not be withdrawn without the consent of both joint intervenors. Either of the joint intervenors may litigate the contention upon the other intervenor's withdrawal of sponsorship for the contention. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-22, 24 NRC 103, 106 (1986).

The contention rules explicitly provide the option for petitioners to "adopt" other petitioners' contentions, thus providing an avenue of participation for any party in connection with any of the contentions proffered by another participant. However, the contention rules do not provide an unconstrained right for a party to cross-examine and submit proposed findings on all other parties' contentions, regardless of whether the contentions were ever adopted. Louisiana Energy Services, L.P., CLI-04-35, 60 NRC 619, 626-27 (2004).

An intervenor in an operating license proceeding may not proceed on the basis of allegations that the Staff has somehow failed in its performance; at least when the evidence shows that the alleged inadequate Staff review did not result in inadequacies in the analyses and performance of the applicant. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 565 n.29 (1983), citing Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

2.10.8.1 Burden of Proof

A licensee generally bears the ultimate burden of proof. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982), citing 10 CFR § 2.325 (formerly 2.732). But intervenors must give some basis for further inquiry. Three Mile Island, supra, 16 NRC at 1271, citing Pennsylvania Power and Light Co. and Alleghany Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980). See Section 3.7.

Although 10 C.F.R. § 2.309 (formerly 2.714) imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner. 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, 249 (1996).

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 EA determination that an EIS is not necessarily relative to a license amendment request. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 249 (2001).

An intervenor has the burden of going forward with respect to issues raised by his contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 388-89 (1974). For a more detailed discussion, see Section 3.7.2.

While an applicant has the ultimate burden of proof on any issues upon which a hearing is held, hearings are held on only those issues that an intervenor brings to the fore. The burden of going forward on any issues that make it to the hearing process is on the intervenor which is pursuing that issue. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319, 326 (2005), aff'd Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403 (2005)..

In decommissioning cases there is a presumption that the licensee's choice of decommissioning alternatives is reasonable. It is, therefore, petitioners' burden to show "extraordinary circumstances" rebutting this presumption. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 252 (1996).

2.10.8.2 Presentation of Evidence

2.10.8.2.1 Affirmative Presentation by Intervenor/Participants

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 869 n.17, reconsid. den., ALAB-252, 8 AEC 1175 (1974), aff'd, CLI-75-1, 1 NRC 1 (1975). This rule does not apply to an interested State participating under 10 CFR § 2.315(c) (formerly 2.715(c)). Such a State may produce evidence on issues not raised by it. Project Management Corp. (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 392-93 (1976).

2.10.8.2.2 Consolidation of Intervenor Presentations

A Licensing Board, in permitting intervention, may consolidate intervenors for the purpose of restricting duplicative or repetitive evidence and argument. 10 CFR § 2.316 (formerly, § 2.714(f)). In addition, parties with substantially similar interests and contentions may be ordered to consolidate their presentation of evidence, cross-examination and participation in general pursuant to 10 CFR § 2.316 (formerly 2.715a). An order consolidating the participation of one party with the others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308-309 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-83-52A, 18 NRC 265, 272-73 (1983), citing Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1601 (1985); Hydro Resources, Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 284 (1998).

Only parties to a Commission licensing proceeding may be consolidated. Petitioners who are not admitted as parties may not be consolidated for the purposes of participation as a single party. 10 CFR § 2.316 (formerly 2.715a); Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

Where intervenors have filed consolidated briefs they may be treated as a consolidated party; one intervenor may be appointed lead intervenor for purposes of coordinating responses to discovery, but discovery requests should be served on each party intervenor. It is not necessary that a contention or contentions be identified to any one of the intervening parties, so long as there is at least one contention admitted per intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687 (1981).

The Commission has issued a policy statement relating to consolidation of intervenors and the conduct of licensing proceedings. Pursuant to that Commission guidance, consolidation should not be ordered when it will prejudice the rights of any intervenor; however, in all appropriate cases, single, lead intervenors should be designated to present evidence, conduct cross-examination, submit briefs, and propose findings of fact, conclusions of law, and argument. Except where other intervenors' interests will be prejudiced or upon a showing that the record will be incomplete, those activities should not be performed by such other intervenors. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

2.10.8.3 Cross-Examination by Intervenors

An intervenor may engage in cross-examination of witnesses dealing with issues not raised by him if the intervenor has a discernible interest in resolution of those issues. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 867-68 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated

as moot, ALAB-842, 24 NRC 197 (1986). Licensing Boards must carefully restrict and monitor such cross-examination, however, to avoid repetition. Prairie Island, supra, 1 NRC 1.

In general, the intervenor's cross-examination may not be used to expand the number or boundaries of contested issues. Prairie Island, supra, 8 AEC 857. For a further discussion, see Section 3.13.1.

2.10.8.4 Intervenor's Right to File Proposed Findings

An intervenor may file proposed findings with respect to all issues whether or not raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986).

A 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).

The right to file proposed findings of fact in an adjudication is not unlawfully abridged unless there was prejudicial error in refusing to admit the evidence that would have been the subject of the findings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

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).

2.10.8.5 Attendance at/Participation in Prehearing Conferences/Hearings

An intervenor seeking to be excused from a prehearing conference should file a request to this effect before the conference date. Such a request should present the justification for not attending. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 190-91 (1978). For a discussion of a party's duty to attend hearings, see Section 3.6.

Where an intervenor indicates its intention not to participate in the evidentiary hearing, the intervenor may be held in default and its admitted contentions dismissed although the Licensing Board will review those contentions to assure that they do not raise serious matters that must be considered. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 429-31 (1990), aff'd in part, ALAB-934, 32 NRC 1 (1990).

Notwithstanding cases suggesting that a presiding officer must undertake a review of an issue subject to dismissal because of a party default to ensure there are no serious matters that require consideration, see Pilgrim, LBP-76-7, 3 NRC at 157; see also Seabrook, LBP-90-12, 31 NRC at 431, such an evaluation must be tempered by the Commission's admonition that a presiding officer should, on it own initiative, engage in the consideration of health, safety, environmental, or common defense and security matters outside the scope of admitted contentions only in "extraordinary circumstances" and then in accordance with the appropriate procedural dictates, which includes Commission referral of any decision to look into such matters. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22-23 (1998).

An appropriate sanction for willful refusal to attend a Prehearing Conference is dismissal of the petition for intervention. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-13, 33 NRC 259, 262-63 (1991); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-92-3, 35 NRC 107, 109 (1992). In the alternative, an appropriate sanction is the acceptance of the truth of all statements made by the applicant or the NRC Staff at the Special Prehearing Conference. Application of that sanction would also result in dismissal. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 (1982).

A Licensing Board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 CFR § 2.319 (formerly 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 § 2.320 (formerly 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).

As part of a presiding officer's duty to maintain order and to take appropriate action to avoid delay and regulate the course of a hearing and the conduct of the parties, a licensing board is expected to take action when parties, for whatever reason, fail to comply with scheduling and other orders. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-5, 51 NRC 64, 67 (2000); See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

A party may not be heard to complain that its rights were unjustly abridged after having purposefully refused to participate. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935 (1982).

Dismissal of a party is the ultimate sanction applicable to an intervenor. Consumers Power Co. (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-1596 (1982), citing Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit No. 2), LBP-76-7, 3 NRC 156 (1976).

2.10.8.6 Pleadings and Documents of Intervenors

An intervenor may not disregard an adjudicatory board's direction to file a memorandum without first seeking leave of the board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187 (1978).

If an error or omission is noted by a litigant in a document that it has served and/or filed, the proper procedure is to file a document that is clearly marked as an amended or corrected version of the pleading, and to accompany that amended pleading with a motion requesting leave to substitute the amended pleading for the original. Such a motion should also fully explain the differences between the amended pleading and the original, as well as the circumstances justifying the filing of the amended pleading. Failure to follow such a procedure will ordinarily result in the second pleading being stricken. USEC, Inc. (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 593 (2005).

2.10.9 Cost of Intervention

2.10.9.1 Financial Assistance to Intervenors

Congress has barred the use of appropriated monies to pay the expenses of, or otherwise compensate, parties intervening in NRC regulatory or adjudicatory proceedings. Pub. L. No. 102-377, Title V, § 502, 106 Stat. 1342 (1992), 5 U.S.C. § 504 note. This law made permanent the proscription against such funding that had been attached to NRC appropriations bills for several previous years. See, e.g., Pub. L. No.97-88, Title V, § 502, 95 Stat. 1148 (1981) and Pub. L. No. 97-276, § 101(9), 96 Stat. 1135 (1982).

Prior to adoption of this bar, the Commission had considered financial assistance to intervenors, even in the absence of express statutory authority to do so. Although a Comptroller General opinion had suggested that the Commission might do so under certain circumstances, see Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494 (1976), a judicial decision overruled a later related Comptroller General opinion involving another agency. Green County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1977), cert. denied, 434 U.S. 1086 (1978). On this basis, in part, funding for intervenors was denied in Exxon Nuclear Co., (Low Enriched Uranium Exports ot EURATOM Member Nations), CLI-77-31, 6 NRC 849 (1977). The Commission indicated that it favored funding intervenors but noted Congress had precluded such funding in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-19, 11 NRC 700 and CLI-80-20, 11 NRC 705 (1980). The Commission had authorized free transcripts in adjudicatory proceedings on an application for a license or an amendment thereto in prior Commission rules, 10 CFR §§ 2.708(d), 2.712(f) and 2.750(c), 45 Fed. Reg. 49535 (July 25, 1980), but those rules were suspended in the face of the legislative bar on intervenor funding. See 46 Fed. Reg. 13681 (Feb. 24, 1981).

The Commission does not have the authority to require the utility-applicants to themselves fund intervention nor to assess fees for that purpose where the service to be performed is for intervenors' benefit and is not one needed by the Commission to discharge its own licensing responsibilities. See Mississippi Power and Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). See also

National Cable Television Association Inc. v. United States, 415 U.S. 336 (1978); Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-40, 16 NRC 1717 (1982); Metropolitan Edison Co. (Three Mile island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1273 (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), ALAB-807, 21 NRC 1195, 1212 (1985), citing Pub. L. No. 98-360, 98 Stat. 403 (1984). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 14-15 (1981).

Ordinarily parties are to bear their own litigation expense; a claim for litigation costs under the "private attorney general" theory must have a statutory basis. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1139 (1982), citing Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240, 269; 44 L.Ed.2d 141; 95 S. Ct. 1612 (1975).

2.10.9.2 Intervenors' Witnesses

The Appeal Board has indicated that where an intervenor would call a witness but for the intervenor's financial inability to do so, the Licensing Board may call the witness as a Board witness and authorize NRC payment of the usual witness fees and expenses. The decision to take such action is a matter of Licensing Board discretion which should be exercised with circumspection. If the Board calls such a witness as its own, it should limit cross-examination to the scope of the direct examination. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603, 607-608 (1977). This decision is of questionable weight in view of the developments pertaining to intervenor funding discussed in section 2.9.9.1.

2.10.10 Appeals by Intervenors

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. § 2.311 (formerly 2.714a and 2.1205(o)). Commission rules, as set forth in 10 C.F.R. § 2.306 (formerly 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). See also Nuclear Fuel Services, Inc., CLI-04-13, 59 NRC 244, 248 (2004).

Despite the substantial deference given to presiding officers in determining standing, such decisions are reviewable on appeal for abuse of discretion. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-02-13, 55 NRC 269, 273 (2002).

An intervenor may seek appellate redress on all issues whether or not those issues were raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974).

2.10.11 Intervention in Remanded Proceedings

The Licensing Board was "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. The Licensing Board had limited jurisdiction in the proceeding and

could consider only what had been remanded to it. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979).

2.11 Nonparty Participation - Limited Appearance and Interested States

2.11.1 Limited Appearances in NRC Adjudicatory Proceedings

Although limited appearers are not parties to any proceeding, statements by limited appearers can serve to alert the Licensing Board and the parties to areas in which evidence may need to be adduced. Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

2.11.1.1 Requirements for Limited Appearance

The requirements for becoming a limited appearer are set out in 10 CFR § 2.315 (formerly 2.715). Based upon that section, the requirements for limited appearances are generally within the discretion of the presiding officer in the proceeding. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

2.11.1.2 Scope/Limitations of Limited Appearances

Under 10 CFR § 2.315(a) (formerly 2.715(a)), the role of a limited appearer is restricted to making oral or written statements of his position on the issues within such limits and on such conditions as the Board may fix.

Pursuant to 10 CFR § 2.315(a) (formerly 2.715(a)), limited appearance statements may be permitted at the discretion of the presiding officer, but the person admitted may not otherwise participate in the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983).

A limited appearance statement is not evidence and need only be taken into account by the Licensing Board to the extent that it may alert the Board or parties to areas in which evidence may need to be adduced. Iowa Electric Light & Power Co. ALAB-108, supra, (dictum).

The purpose of limited appearance statements is to alert the Licensing Board and parties to areas in which evidence may need to be adduced. Such statements do not constitute evidence, and accordingly, the Board is not obligated to discuss them in its decision. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983), citing 10 CFR § 2.315(a) (formerly 2.715(a)); Iowa Electric Light and Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

A person who makes a limited appearance before a Licensing Board may not appeal from that Board's decision. Metropolitan Edison Company (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

2.11.2 Participation by Nonparty Interested States and Local Governments

State agencies may choose to participate either as a party under 10 C.F.R. § 2.309 (d)(2) (formerly 2.714) or as an interested state under 10 C.F.R. § 2.315(c) (formerly 2.715(c)). To participate under 10 C.F.R. § 2.309(d)(2) (formerly 2.714), a state agency must satisfy the same standards as an individual petitioner except that a state agency that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under 10 CFR 2.309(d)(1). Northern States Power Co. (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996).

Under 10 CFR § 2.315(c) (formerly 2.715(c)), an interested State may participate in a proceeding even though it is not a party. In this context, the Board must afford representatives of the interested State the opportunity to introduce evidence, interrogate witnesses and advise the Commission. In so doing, the interested State need not take a position on any of the issues. Even though a State has submitted contentions and intervened under 10 CFR § 2.309 (formerly 2.714), it may participate as an "interested State" under 10 CFR § 2.315(c) (formerly 2.715(c)) on issues in the proceeding not raised by its own contentions. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2); LBP-82-76, 16 NRC 1029, 1079 (1982), citing Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977). However, once a party is admitted as an interested State under Section 2.315(c), it may not reserve the right to intervene later under Section 2.309 with full party status. petition to intervene under the provisions of the latter section must conform to the requirements for late filed petitions. Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2) and Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 723 (1982).

A Licensing Board may require the representative of an interested State to indicate in advance of the hearing the subject matter on which it wishes to participate, but such a showing is not a prerequisite of admission under 10 CFR § 2.315(c) (formerly 2.715(c)). Indian Point, supra, 15 NRC at 723.

A State participating as an interested State may appeal an adjudicatory board's decision so that an interested State participating under 10 CFR § 2.315(c) (formerly 2.715(c)) constitutes the sole exception to the normal rule that a nonparty to a proceeding may not appeal from the decision in that proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

Section 274(l) of the Atomic Energy Act confers a right to participate in licensing proceedings on the State of location for the subject facility. However, 10 CFR § 2.315(c) (formerly 2.715(c)) of the Commission's Rules of Practice extends an opportunity to participate not merely to the State in which a facility will be located, but also to those other States that demonstrate an interest cognizable under Section 2.315(c) (formerly 2.715(c)). Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873 (1977). See, e.g., Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-74-32, 8 AEC 217 (1974).

Although a State seeking to participate as an "interested State" under Section 2.315(c) (formerly 2.715(c)) need not state contentions, once in the proceeding it must comply

with all the procedural rules and is subject to the same requirements as parties appearing before the Board. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1615 (1982), citing River Bend, supra, 6 NRC at 768. Nevertheless, the Commission has emphasized that the participation of an interested sovereign State, as a fullparty or otherwise, is always desirable in the NRC licensing process. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535 (1977). A State's participation may be so important that the State's desire to be a party to Commission review may be one factor to consider in determining whether the State should be permitted to participate in the Commission review, even though the State has not fully complied with the requirements for such participation. Id.

A State has no right to participate in administrative appeals when it has not participated in the underlying hearing. The Commission will deny a State's extremely untimely petition to intervene as a non-party interested State which is filed on the eve of the Commission's licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-20, 24 NRC 518, 519 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987).

A governmental body must demonstrate a genuine interest in participating in the proceeding. A Licensing Board denied a municipality permission to participate as an interested State in a reopened hearing where the municipality failed to: file proposed findings of fact; comply with a Board Order to indicate with reasonable specificity the subject matters on which it desired to participate; appear at an earlier evidentiary hearing; and specify its objections to the Staff reports which were the focus of the reopened hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 136 (1986).

The mere filing by a State of a petition to participate in an operating license application pursuant to 10 CFR § 2.315(c) (formerly 2.715(c)) as an interested State is not cause for ordering a hearing. The application can receive a thorough agency review, outside of the hearing process, absent indications of significant controverted matters or serious safety or environmental issues. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 216 (1983); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 426 (1984), citing Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980).

Although a State has a statutory right to a reasonable opportunity to participate in NRC proceedings, it may not seek to appeal on issues it did not participate in below, or seek remand of those issues. However, the State is given an opportunity to file a brief amicus curiae. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447 (1980).

A late decision by the Governor of a State to participate as representative of an interested State can be granted, but the Governor must take the proceeding as he finds it. He cannot complain of rulings made or procedural arrangements settled prior to his participation. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 8 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-13, 17 NRC 469, 471-72 (1983),

citing 10 CFR § 2.315(c) (formerly 2.715(c)); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Station), LBP-80-6, 11 NRC 148, 151 (1980).

An interested State that has elected to litigate issues as a full party under 10 CFR § 2.309 (formerly 2.714) is accorded the rights of an "interested State" under 10 CFR § 2.315(c) (formerly 2.715(c)) as to all other issues. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-9, 17 NRC 403, 407 (1983), citing Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-93 (1976). **[NOTE: This decision reflects "old Part 2" and may not reflect current caselaw after Part 2 was amended on January 14, 2004]**

The plain terms of 10 CFR 2.315(c) allow government entities to claim "interested state" participation only if they are not already admitted as parties under 10 CFR 2.309. The contention rules explicitly provide the option for petitioners to "adopt" other petitioners' contentions, thus providing an avenue of participation for any party in connection with any of the contentions proffered by another participant. Louisiana Energy Services, L.P., CLI-04-35, 60 NRC 619, 626-27 (2004).

10 CFR § 2.315(c) (formerly 2.715(c)) authorizes an interested State to introduce evidence with respect to those issues on which it has not taken a position. However, at the earliest possible date in advance of the hearing, an interested State must state with reasonable specificity those subject areas, other than its own contentions, in which it intends to participate. Seabrook, supra, 17 NRC at 407.

The presiding officer may require an interested governmental entity to indicate with reasonable specificity, in advance of the hearing, the subject matters on which it desires to participate. However, once the time for identification of new issues by even a governmental participant has passed, either by schedule set by the Board or by circumstances, any new contention thereafter advanced by the governmental participant must meet the test for nontimely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1140 (1983). See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982).

An interested State, once admitted to a proceeding, must observe the procedural requirements applicable to other participants. Every party, however, may seek modification for good cause of time limits previously set by a Board. Moreover, good cause, by its very nature, must be an ad hoc determination based on the facts and circumstances applicable to the particular determination. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983).

Although an interested State must observe applicable procedural requirements, including time limits, the facts and circumstances which would constitute good cause for extending the time available to a State may not be coextensive with those warranting that action for another party. States need not, although they may, take a position with respect to an issue in order to participate in the resolution of that issue. Reflecting political changes which uniquely bear upon bodies such as States, a State's position on an issue (and the degree of its participation with respect to that issue) might understandably change during the course of a Board's consideration of the issue. The Commission itself has recognized such factors, and it has permitted States to participate even where contrary to a procedural requirement which might bar another

party's participation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535 (1977); See 10 CFR § 2.315(c) (formerly 2.715(c)).

A county does not lose its right to participate as an interested governmental agency pursuant to 10 CFR § 2.315(c) (formerly 2.715(c)) because it has elected to participate as a full intervenor on specified contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1139 (1983), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19. 15 NRC 601, 617 (1982).

Any governmental participant seeking to advance a late contention or issue, whether or not it be a participant already in the case or one seeking to enter, must satisfy the criteria for late-filed contentions as well as the criteria for reopening the record. Shoreham, supra, 17 NRC at 1140.

A State's status as an interested State does not confer upon it any special power to adopt contentions which have been abandoned by their sponsor. A State must observe the procedural requirements applicable to other participants. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 430-31 (1990), aff'd in part on other grounds, ALAB-934, 32 NRC 1 (1990).

2.12 Discovery

2.12.1 Time for Discovery

A potential intervenor has no right to seek discovery prior to filing his petition to intervene. Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 & 2), CLI-74-45, 8 AEC 928 (1974); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973). See also BPI v. AEC, 502 F.2d 424, 428-29 (D.C. Cir. 1974). Discovery on the subject matter of a contention in a licensing proceeding can be obtained only after the contention has been admitted to the proceeding. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988) (the scope of a contention is determined by the literal terms of the contention, coupled with its stated bases), reconsid. denied on other grounds, LBP-88-25A, 28 NRC 435 (1988).

A Licensing Board denied an applicant's motion for leave to commence limited discovery against persons who had filed petitions to intervene (at that point, nonparties). The Board entertained substantial doubt as to its authority to order the requested discovery, but denied the motion specifically because it found no necessity to follow that course of action. The Board discussed at length the law relating to the prohibition found in 10 CFR § 2.705(b)(1) (formerly 2.740(b)(1)) against discovery beginning prior to the prehearing conference provided for in 10 CFR § 2.329 (formerly 2.751a). Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 577-584 (1978).

Applicants are entitled to prompt discovery concerning the bases of contentions, since a good deal of information is already available from the FSAR and other documents early in the course of the proceeding. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 369 (1981).

The fact that late intervention has been permitted should not disrupt established discovery schedules since a tardy petitioner with no good excuse must take the proceeding as he finds it. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

When a Licensing Board holds that the sole contention in a proceeding is moot, the mandatory disclosure process for that contention (10 C.F.R. §§ 2.336 and 2.1203) is terminated. Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 745 (2006).

Under 10 CFR § 2.705(b)(1) (formerly 2.740(b)(1)), discovery is available after a contention is admitted and may be terminated a reasonable time thereafter. Litigants are not entitled to further discovery as a matter of right with respect to information relevant to a contention which first surfaces long after discovery on that contention has been terminated. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1418, 1431-32 (1984), aff'd, ALAB-813, 22 NRC 59 (1985). However, an Appeal Board held that a Licensing Board abused its discretion by denying intervenors the opportunity to conduct discovery of new information submitted by the applicant and admitted by the Board on a reopened record. The Appeal Board found that, although there might have been a need to conduct an expeditious hearing, it was improper to deny the intervenors the opportunity to conduct any discovery concerning the newly admitted information where it was not shown that the requested discovery would delay the hearing. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 160-61 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987).

The Commission has expressly advised the Licensing Boards to see that the licensing process moves along at an expeditious pace, consistent with the demands of fairness, and the fact that a party has personal or other obligations or fewer resources than others does not relieve the party of its hearing obligations. Nor does it entitle the party to an extension of time for discovery absent a showing of good cause, as judged by the standards of 10 CFR § 2.307 (formerly 2.711). Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982).

Under normal circumstances, motions for a stay of discovery should be filed with the licensing board rather than the Commission. See 10 CFR § 2.323(a) (formerly 2.730(a)). The Commission has the authority to exercise its "inherent supervisory powers over adjudicatory proceedings" and to address the stay motion itself, rather than either dismiss it or refer it to the licensing board. Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 n.1 (1994) (citing Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991), reconsideration denied, CLI-92-6, 35 NRC 86 (1992)).

A party seeking to extend discovery beyond a deadline may obtain an extension on the discovery period only by showing that there is good cause shown for why the deadline

was not met. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-16, 39 NRC 257, 260-61 (1994).

A party is not excused from compliance with a Board's discovery schedule simply because of the need to prepare for a related state court trial. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 (1985).

Though the period for discovery may have long since terminated, at least one Appeal Board decision seems to indicate that a party may obtain discovery in order to support a motion to reopen a hearing provided that the party demonstrates with particularity that discovery would enable it to produce the needed materials. Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973). But see Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985) and Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986) where the Commission has made it very clear that a movant seeking to reopen the record is not entitled to discovery to support its motion.

The question of Board management of discovery was addressed by the Commission in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-456 (1981). The Commission stated that in virtually all cases individual Boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted. A Licensing Board may establish reasonable deadlines for the completion of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-79, 18 NRC 1400, 1401 (1983), citing Statement of Policy, supra, 13 NRC at 456. Although a Board may extend a discovery deadline upon a showing of good cause, a substantial delay between a discovery deadline and the start of a hearing is not sufficient, without more, to reopen discovery. Perry, supra, 18 NRC at 1401.

An intervenor who has agreed to an expedited discovery schedule during a prehearing conference is considered to have waived its objections to the schedule once the hearing has started. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 251 (1986).

2.12.2 Discovery Rules

In general, the discovery rules as between all parties except the Staff follow the form of the Federal Rules of Civil Procedure in formal adjudicatory proceedings. The legal authorities and court decisions pertaining to Rule 26 of the Federal Rules of Civil Procedure provide appropriate guidelines for interpreting NRC discovery rules. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983), citing Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975).

If there is no NRC rule that parallels a Federal Rule of Civil Procedure, the Board is not restricted from applying the Federal rule. While the Commission may have chosen to adopt only some of the Federal rules of practice to apply to all cases, it need not be

inferred that the Commission intended to preclude a Licensing Board from following the guidance of the Federal rules and decisions in a specific case where there is no parallel NRC rule and where that guidance results in a fair determination of an issue. Seabrook, supra, 17 NRC at 497.

Rule 26(b)(4) differentiates between experts whom the party expects to call as witnesses and those who have been retained or specially employed by the party in preparation for trial. The Notes of Advisory Committee on Rules explain that discovery of expert witnesses is necessary, particularly in a complex case, to narrow the issues and eliminate surprise, but that purpose is not furthered by discovery of non-witness experts. Seabrook, supra, 17 NRC at 497; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 178-79 (1986) (discovery of a non-witness expert permitted only upon a showing of exceptional circumstances). The filing of an affidavit as part of a non-record filing with a Licensing Board does not make an individual an expert witness. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945, 947 (1987).

A party may seek discovery of another party without the necessity of Licensing-Board intervention. Where, however, discovery of a nonparty is sought (other than by deposition), the party must request the issuance of a subpoena under Section 2.702. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 690 (1979).

Only those State agencies which are parties in NRC proceedings are required to respond to requests under 10 CFR § 2.707 (formerly 2.741) for the production of documents. In order to obtain documents from non-party State agencies, a party must file a request for a subpoena pursuant to 10 CFR § 2.702 (formerly 2.720). Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 21-22 (1985), citing Stanislaus, supra, 9 NRC at 683.

Applicants are entitled to discovery against intervenors in order to obtain the information necessary for applicant to meet its burden of proof. This does not amount to shifting the burden of proof to intervenors. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 338 (1980).

Each co-owner of a nuclear facility has an independent responsibility, to the extent that it is able, to provide a Licensing Board with a full and accurate record and with complete responses to discovery requests. The majority owner must keep the minority owners sufficiently well informed so that they can fulfill their responsibilities to the Board. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-27, 26 NRC 228, 230 (1987).

Intervenor may not directly seek settlement papers of the applicant through discovery. Rule 408 of the Federal Rules of Evidence provides that offers of settlement and conduct and statements made in the course of settlement negotiations are not admissible to prove the validity of a claim. 10 CFR § 2.338 (formerly 2.759) states a policy encouraging settlement of contested proceedings and requires all parties and boards to try to carry out the settlement policy. Requiring a party to produce its settlement documents because they are settlement documents would be inconsistent

with this policy. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 183-184 (1979).
A plan to seek evidence primarily through discovery is a permissible approach for an intervenor to take. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1943 (1982).

Lack of knowledge is always an adequate response to discovery. A truthful "don't know" response is not sanctionable as a default in making discovery. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1945, 1945 n.3 (1982).

Discovery of the foundation upon which a contention is based is not only clearly within the realm of proper discovery, but also is necessary for an applicant's preparation for hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).

A party's need for discovery outweighs any risk of harm from the potential release of information when the NRC Staff has indicated that no ongoing investigation will be jeopardized, when all identities and identifying information are excluded from discovery; and when all other information is discussed under the aegis of a protective order. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 288 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), affirmed, ALAB-764, 19 NRC 633 (1984).

Although a Demand for Information issued by the NRC is an important event that may affect an individual's career, the pendency of such a demand is not a reason to postpone a scheduled deposition. Where the individuals involved have known about the facts of the case for years, further preparation is not necessary for them to tell the truth. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-14, 39 NRC 251 (1994).

2.12.2.1 Construction of Discovery Rules

For discovery between parties other than the Staff, the discovery rules are to be construed very liberally. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974); Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1742 (1981).

Where a provision of the NRC discovery rules is similar or analogous to one of the Federal rules, judicial interpretations of that Federal rule can serve as guidance for interpreting the particular NRC rule. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 581 (1978).

2.12.2.2 Scope of Discovery

The scope of discovery is usually quite broad, as indicated on the face of NRC rules. Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC 417, 421 n.14 (2004), reconsid. denied, CLI-04-37, 60 NRC 646 (2004) (referencing 10 C.F.R. § 2.740(b)(1) [now 10 C.F.R. § 2.705(b)(1)]).

The test as to whether particular matters are discoverable is one of "general relevancy." This test will be easily satisfied unless it is clear that the evidence sought can have no possible bearing on the issues. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974). While the "general relevancy" test is fairly liberal, it does not permit the discovery of material far beyond the scope of issues to be considered in a proceeding. Thus, parties may obtain discovery only of information which is relevant to the controverted subject matter of the proceeding, as identified in the prehearing order, or which is likely to lead to the discovery of admissible evidence. This rule applies as much to Part 70 licenses for special nuclear material as to Part 50 licenses for construction of utilization facilities. Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977). However, when a lawyer has asked questions that are properly within the scope of the proceeding, objections to letting the witness answer are an obstruction to the discovery process. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-15, 39 NRC 254, 263 (1994).

A motion to compel discovery need not seek information which would be admissible per se in an adjudicatory proceeding. The motion need only request information which reasonably could lead to admissible evidence. Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-112 (1992).

An intervenor may obtain information about other reactors in the course of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982).

An intervenor's motion which sought to preserve deficient components which the Applicant was removing from its plant was denied because the motion did not comply with the requirements for (1) a stay, or (2) a motion for discovery, since it did not express an intention to obtain information about the components. The questions raised in the intervenor's motion, including the possible need for destructive evaluation of the components, were directed to the adequacy and credibility of the applicant's evidence concerning the components. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434, 438 n.6 (1985).

In general, the discovery tools are the same as or similar to those provided for by the Federal Rules of Civil Procedure. The Commission's regulations permit depositions and requests for production of documents between intervenors and applicants without leave of the Commission and without any showing of good cause (10 CFR §§ 2.706, 2.707 (formerly 2.740a, 2.741)). The regulations (10 CFR § 2.706 (formerly 2.740b)) specifically provide for interrogatories similar to those addressed by Rule 33 of the Federal Rules, although such interrogatories are not available for use against nonparties. The scope of discovery under the Commission's Rules of Practice is similar to discovery under the Federal Rules of Civil Procedure. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

Since written answers to interrogatories under oath as provided by 10 CFR § 2.706 (formerly 2.740(b)) are binding upon a party and may be used in the same manner as depositions, the authority of the person signing the answers to, in fact, provide

such answers may be ascertained through discovery. Statements of counsel in briefs or arguments are not sufficient to establish this authority. Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1045 (1978).

If a party has insufficient information to answer interrogatories, a statement to that effect fulfills its obligation to respond. If the party subsequently obtains additional information, it must supplement its earlier response to include such newly acquired information, 10 CFR § 2.705 (e) (formerly 2.740(c)). Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 911 (1980).

To determine subject matter relevance for discovery purposes, it is first necessary to examine the issue involved. In an antitrust proceeding, a discovery request will not be denied where the interrogatories are relevant only to proposed antitrust license conditions and not to whether a situation inconsistent with the antitrust laws exists. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

In evaluating an intervenor's discovery request for guidance documents, the fact that the applicant did not rely on the documents is not controlling; if the guidance documents are indeed generic and clarify governing regulatory requirements, they could be relevant for supporting an intervenor's contentions. See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC 417, 423 (2004), reconsid. denied, CLI-04-37, 60 NRC 646 (2004).

At least one Licensing Board has held that, in the proper circumstances, a party's right to take the deposition of another party's expert witness may be made contingent upon the payment of expert witness fees by the party seeking to take the deposition. Public Service Co. of Oklahoma (Black Fox, Units 1 & 2), LBP-77-18, 5 NRC 671, 673 (1977).

Intervenor has the burden of demonstrating that the benefit of a deposition of a seriously ill person outweighs the burden, given the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-24, 40 NRC 83, 85 (1994).

The lawyer of an ill individual sought as subject of a deposition may not assert that the deposition would impose an undue burden unless the proposed subject seeks to be protected or there is some reason to question the rationality behind the persons's willingness to be deposed. Vogtle, supra, 40 NRC at 86. The Licensing Board establishes conditions under which a voluntary agreement may be reached concerning the deposition of a seriously ill individual. Id.

Based on 10 CFR § 2.702(d) and 2.706(a)(8) (formerly 2.720(d) and § 2.740a(h), fees for subpoenas and the fee for deponents, respectively, are to be paid by the party at whose instance the subpoena was issued, and the deposition was held. Pursuant to 10 CFR § 2.706(a)(4) (formerly 2.740a(d)), objections on questions of evidence at a deposition are simply to be noted in short form, without argument. The relief of a stay of a hearing to permit deposition of witnesses is inappropriate in

the absence of any allegation of prejudice. Each party to an NRC proceeding is not required to convene its own deposition if it seeks to question a witness as to any matter beyond the scope of those issues raised on direct by the party noticing the deposition. No party has a proprietary interest in a deposition; therefore, no party has a proprietary interest in a subpoena issued to a deponent. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1544-1546 (1982).

The Licensing Board, as provided by 10 CFR 2.705(b)(2), may and should, when not inconsistent with fairness to all parties, limit the extent or control the sequence of discovery to prevent undue delay or imposition of an undue burden on any party. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979); Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994). Thus, a Licensing Board may issue a protective order which limits the representatives of a party in a proceeding who may conduct discovery of particular documents. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 75 (1987).

Consistent with Board management of discovery under 10 CFR 2.319(g) (formerly 2.718(e)), discovery may be limited to the admitted bases of a contention during the first phase of a proceeding. After the hearing on the first phase, the Board can determine whether it has a complete record for decision or whether further discovery is necessary. [The actual scope of a contention may be broader than its specifically pleaded bases.] Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-15, 38 NRC 20 (1993).

A party is only required to reveal information in its possession or control. A party need not conduct extensive independent research, although it may be required to perform some investigation to determine what information it actually possesses. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334 (1980). This holding has been codified in the Rules of Practice at 10 CFR § 2.705(b)(5) (formerly 2.740(b)(3)) which also prohibits the use of interrogatories which request a party to explain the reasons why the party did not use alternative data, assumptions, and analyses in developing its position on a matter in the proceeding. 54 Fed. Reg. 33168, 33181 (August 11, 1989).

A party is not required to search the record for information in order to respond to interrogatories where the issues that are the subject of the interrogatories are already defined in the record and the requesting party is as able to search the record as the party from whom discovery is requested. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945, 948 (1987).

2.12.2.3 Requests for Discovery During Hearing

Requests for background documents from a witness, to supply answers to cross-examination questions which the witness is unable to answer, cannot be denied solely because the material had not been previously requested through discovery. However, it can be denied where the request will cause significant delay in the hearing and the information sought has been substantially supplied through other

testimony. Illinois Power Co. (Clinton Nuclear Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

2.12.2.4 Privileged Matter

Pursuant to 10 CFR § 2.705(b)(1) (formerly 2.740(b)(1)), parties may generally obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the proceeding. While the Federal Rules of Civil Procedure are not themselves directly applicable to practice before the Commission, judicial interpretations of a Federal Rule can serve as guidance for the interpretation of a similar or analogous NRC discovery rule. By choosing to model Section 2.705(b) (formerly 2.740(b)) after Federal Rule 26(b), without incorporating specific limitations, the Commission implicitly chose to adopt those privileges which have been recognized by the Federal Courts. Shoreham, supra, 16 NRC at 1157.

The existence of a privileged matter is in tension with the concept of civil discovery. Therefore, most privileges are qualified, rather than absolute. Courts frequently engage in a fact-driven balancing in order to decide if an asserted privilege should trump a party's interest in discovery. The greater the interest protected by the privilege, the more compelling the need and other circumstances must be to overcome it. David Geisen, LBP-06-25, 64 NRC 367, 376-77 (2006).

As under the Federal Rules of Civil Procedure, privileged or confidential material may be protected from discovery under Commission regulations. To obtain a protective order (10 CFR § 2.705(c)), it must be demonstrated that:

(1) the information in question is of a type customarily held in confidence by its originator;
(2) there is a rational basis for having customarily held it in confidence;
(3) it has, in fact, been kept in confidence; and
(4) it is not found in public sources.

Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). See also Section 6.23.3.

The claimant of a privilege must bear the burden of proving that it is entitled to such protection, including pleading it adequately in its response. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982), citing In re Fischel, 557 F.2d 209 (9th Cir. 1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983); see also United States v. Construction Products Research, Inc., 73 F.3d 464, 473 (1996).

The party asserting the privilege regarding document sought in administrative agency investigation must establish the essential elements of the privilege. United States v. Construction Products Research, Inc., 73 F.3d 464, 473 (1996). See Shoreham, supra, 16 NRC at 1153. Intervenors' mere assertion that the material it is withholding constitutes attorney work product is insufficient to meet that burden. Seabrook, supra, 17 NRC at 495. Louisiana Energy Services (Claiborne Enrichment Center), LBP-93-3, 37 NRC 64, 69 (1993).

A party objecting to the production of documents on grounds of privilege has an obligation to specify in its response to a document request those same matters which it would be required to set forth in attempting to establish "good cause" for the issuance of a protective order, i.e., there must be a specific designation and description of (1) the documents claimed to be privileged, (2) the privilege being asserted, and (3) the precise reasons why the party believes the privilege to apply to such documents. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

Claims of privilege must be specifically asserted with respect to particular documents. Privileges are not absolute and may or may not apply to a particular document, depending upon a variety of circumstances. Shoreham, supra, 16 NRC at 1153, citing United States v. El Paso Co., 682 F.2d 530, reh'g denied, 688 F.2d 840 (1982), cert. denied, 104 S. Ct. 1927 (1984); United States v. Davis, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981).

Under NRC rules, it is not clear when a balancing of interests is required before permitting disclosure of a report that is claimed to contain trade secrets or privileged or confidential commercial or financial information. The Federal Rules of Civil Procedure clearly permit a balance. See Fed R. Civ. P. 26(c)(7). NRC rules include a comparable balancing test, see 10 CFR § 2.705(c)(1)(vi) (formerly 2.740(c)(6)), but this test is subject to the provisions of 10 CFR § 2.390 (formerly 2.790). In particular, the balancing test appears to be overridden by section 2.390(b)(6). Cf. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-24, 11 NRC 775 (1980) (access by intervenors to security plan permitted subject to protective order). Even though INPO reports to the NRC fall within the FOIA exemption for commercial or financial information obtained from a person privileged or confidential as set forth under NRC rules in 10 CFR § 2.390(a)(4), Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert denied, 507 U.S. 984 (1993), they may be provided under a protective order in accordance with 10 CFR 2.390(b)(6). Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-93-13, 38 NRC 11, 14-16 (1993).

Even where a First Amendment or common law privilege is found applicable to a party or nonparty resisting discovery, that privilege is not absolute. A Licensing Board must balance the value of the information sought to be obtained with the harm caused by revealing the information. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 288 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), aff'd, ALAB-764, 19 NRC 633, 641 (1984).

It is not sufficient for a party asserting certain documents to be privileged from discovery to await a motion to compel from the party seeking discovery prior to the asserting party setting forth its assertions of privilege and specifying those matters which it claims to be privileged. Shoreham, supra, 16 NRC at 1153.

2.12.2.4.1 Attorney-Client Privilege

The attorney-client protects from discovery confidential communications from a client to an attorney made to enable the attorney to provide informed legal advice. The privilege is applicable when a corporation is the client. Georgia

Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 185 (1995).

The purpose of the rule has been described as to protect "[s]ubject matter that relates to the preparation, strategy, and appraisal of the strengths and weaknesses of an action, or to the activities of the attorneys involved, rather than to the underlying evidence . . . ." Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-93-3, 37 NRC 64, 68-69 (1993)(citing 4 Moore's Federal Practice ¶26.64[I] (2d ed. 1191), at 26-349.

Statements from an attorney to the client are privileged only if the statements reveal, either directly or indirectly, the substance of a confidential communication by the client. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing In re Fischel, 557 F.2d 209 (9th Cir. 1977); Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980). An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction. Shoreham, supra, 16 NRC at 1158, citing Fischel, 557 F.2d at 212.

The attorney-client privilege does not protect against discovery of underlying facts from their source, merely because those facts have been communicated to an attorney. Shoreham, supra, 16 NRC at 1158, citing Upjohn Co. v. United States, 449 U.S. 383, 395 (1981), Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 188 (1995).

The attorney-client privilege may not be asserted where there is a conflict of interests between various clients represented by the same attorney. There is no attorney-client relationship unless the attorney is able to exercise independent professional judgment on behalf of the interests of a client. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1468-1469 (1984), citing Rule 1.7 of the ABA Model Rules of Professional Conduct.

Interrogatories that seek the disclosure of the factual bases and legal requirements that underlie contentions constitute proper discovery of the intervenor so long as the interrogatories do not seek the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the proceeding." 10 CFR § 2.705(b)(4) (formerly 2.740(b)(2)). This rule was adopted from Rule 26(b)(3) of the Federal Rules of Civil Procedure. Where an NRC rule of practice is based on a Federal Rule of Civil Procedure, judicial interpretations of that federal rule can serve as guidance for the interpretation of the analogous rule. Louisiana Energy Services (Claiborne Enrichment Center), LBP-93-3, 37 NRC 64, 68-69 (1993) (citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1159-62 (1982).

When a claim of attorney-privilege is made for a document containing a simple report of facts, the Atomic Safety and Licensing Board may examine the document further in order to ascertain whether granting privilege to the document is consistent with the purposes of the attorney-privilege. Georgia Power Co.

(Vogtle Electric Generating Plant, Units 1 and 2), LBP 95-15, 42 NRC 51 (1995); rev'd on other grounds CLI-95-15, 42 NRC 181 (1995).

Proof at a hearing that clients had been "hounded" or otherwise improperly treated could overcome claim of privilege, either under the work product privilege or the attorney-client privilege. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-18, 38 NRC 121, 125-126 (1993).

To claim the attorney-client privilege, it must be shown that: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom a communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) legal assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094, 1098 (1983), citing United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The fact that a document is authored by in-house counsel, rather than by an independent attorney is not relevant to a determination of whether such a document is privileged. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing O'Brien v. Board of Education of City School District of New York, 86 F.R.D. 548, 549 (S.D.N.Y. 1980).

To invoke the attorney-client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice. U.S. v. Construction Products Research, Inc., 73 F.3d 464, 473 (2nd Cir. 1996).

The attorney-client privilege is only available as to communications revealing confidences of the client or seeking legal advice. Shoreham, supra, 16 NRC at 1158, citing SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), interlocutory appeal dismissed, 534 F.2d 1031 (2d Cir. 1976). Even if some commonly known factual matters were included in the discussion, or non-legal advice was exchanged, where the primary purpose of a meeting was the receipt of legal advice, the entire contents thereof are protected by privilege. Midland, supra, 18 NRC at 1103, citing Barr Marine Products Co. v. Borg-Warner Corp., 84 F.R.D. 631, 635 (E.D. Pa. 1979); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950).

An attorney's representation, that all communications between the attorney and the party were for the purpose of receiving legal advice, is sufficient for an assertion of attorney-client privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 285 (1983), reconsideration denied, LBP-83-64, 18 NRC 766 (1983).

Communications from the attorney to the client should be privileged only if it is shown that the client had a reasonable expectation in the confidentiality of the statement; or, put another way, if the statement reflects a client communication that was necessary to obtain informed legal advice [and] which might not have been made absent the privilege. Shoreham, supra, 16 NRC at 1159, citing Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980).

Where legal advice is sought from an attorney in good faith by one who is or is seeking to become a client, the fact that the attorney is not subsequently retained in no way affects the privileged nature of the communications between them. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094 (1983).

The attorney-client privilege was not waived by the presence of third persons at a meeting between client and attorney, where the situation involved representatives of two joint clients seeking advice from the attorney of one such client about common legal problems. Midland, supra, 18 NRC at 1100.

Where the date of a meeting, its attenders, its purpose, and its broad general subject matter are revealed, the attorney-client privilege was not waived as to the substance of the meeting. Midland, supra, 18 NRC at 1102.

Key to application of the attorney-client privilege is a showing that the communication was made for the corporation to obtain legal advice, that it was made confidentially, and that it was not disseminated beyond those with a need to know. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 187 (1995).
Under appropriate circumstances, the attorney-client privilege may extend to certain communications from employees to corporate counsel. However, not every employee who provides a privileged communication is thereby a "client" represented by corporate counsel, or a "party" to any pending legal dispute, for purposes of ABA Disciplinary Rule 7-104. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-31, 18 NRC 1303, 1305 (1983), citing Upjohn Co. v. United States, 449 U.S. 383 (1981). Upjohn, supra, did not overturn the well-established principle that counsel should be at liberty to approach witnesses for an opposing party. Catawba, supra, 18 NRC at 1305, citing Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977).

When the client is a corporation the attorney-client privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation. Georgia Power Co. et al, (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-18, 38 NRC 121, 124 (1993), citing Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1981).

Not every communication by an employee to counsel is privileged. Communications made for business or personal advice are not covered by the privilege. Privileged communication concerns matters within the scope of the

employee's duties. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 187 (1995).

When the client is a corporation, the power to waive the attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. Vogtle, LBP-93-18, 38 NRC 121, 126 (1993) supra, citing In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129 v. Under Seal, 902 F.2d. 244, 248 (4th Cir. 1990).

Drafts of canned testimony not yet filed by a party are not subject to discovery. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-75-28, 1 NRC 513, 514 (1975).

2.12.2.4.2 Identity of Confidential Informants

See "Protecting the Identity of Allegers and Confidential Sources; Policy Statement," 61 Fed. Reg. 25924 (May 23, 1996).

An interrogatory seeking the identity and professional qualifications of persons relied upon by intervenors to review, analyze and study contentions and issues in a proceeding and to provide the bases for contentions is proper discovery. Such information is not privileged and is not a part of an attorney's work product even though the intervenor's attorney solicited the views and analyses of the persons involved and has the sole knowledge of their identity. General Electric Company (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461, 464-468 (1978).

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 § 2.709(e), 2.390(a)(7) (formerly 2.744(d), 2.790(a)(7)); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 91 (1983); and is embodied in FOIA, 5 USC 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 future similar reports. South Texas, supra.

There may be a limited privilege for the identity of individuals who have expressly asked or been promised anonymity in coming forward with information

concerning safety-related problems at a nuclear plant. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 537 (1982).

When the NRC Staff seeks the disclosure of the identities of sources of information alleging public health and safety violations at a facility, the Staff must explore any possible alternative means of obtaining the requested information from the individuals in order to protect their confidentiality and to minimize the intrusion into their First Amendment association rights. Richard E. Dow, CLI-91-9, 33 NRC 473, 479-80 (1991), citing United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987).

In determining whether or not to issue a protective order to protect the confidentiality or to limit the disclosure of the identities of prospective witnesses, a Board will weigh the benefit of encouraging the testimony of such witnesses against the detriment of inhibiting public access to that information and the cumbersome procedures necessitated by a protective order. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-40, 22 NRC 759, 763 (1985).

Even where an informer's qualified privilege exists, it will fail in light of the Board's need for the particular information in informed decisionmaking. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 538 (1982).

Security plans are not "classified," and are discoverable in accordance with the provisions of 10 CFR § 2.390(d) (formerly 2.790(d)). However, they are sensitive documents and are not to be made available to the public at large. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977). See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-92-15A, 36 NRC 5, 11 (1992). In order to discover such plans, (1) the moving party must demonstrate that the plan or a portion of it is relevant to the party's contentions; (2) the release of the plant security plan must usually be subject to a protective order; and (3) no witness may review the plan until he is first qualified as an expert with sufficient competence to evaluate it. Id. Only those portions of a security plan which are both relevant and necessary for the litigation of a party's contentions are subject to discovery. Id. at 1405.

2.12.2.4.3 FOIA Exemptions–Executive/Deliberative Process Privilege

FOIA does not establish new government privileges against discovery. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

The Commission's rules on discovery have incorporated the exemptions contained in the FOIA. Id; David Geisen, LBP-06-25, 64 NRC 367, 380 (2006).

If information would be withholdable under FOIA, then it must be analyzed according to the three factors in 10 C.F.R. § 2.709(d), and in the case of the deliberative process privilege, the overriding need test. This analysis will

determine whether or not the information is discoverable. David Geisen, LBP-06-25, 64 NRC 367, 380 (2006).

Section 2.390 of the Rules of Practice is the NRC's promulgation in obedience to the Freedom of Information Act. Id. at 120. The Commission, in adopting the standards of Exemption 5, and "necessary to a proper decision" as its document privilege standard under 10 CFR § 2.709(e) (formerly 2.744(d)), has adopted traditional work product/executive privilege exemptions from disclosure. Id. at 123. The Government is no less entitled to normal privilege than is any other party in civil litigation. Id. at 127.

The executive or deliberative process privilege protects from discovery governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967); Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994); Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-33, 62 NRC 828, 843 (2005). A government decision-maker will not be compelled to testify about the mental processes and methods by which a decision was made, unless there is a clear showing of misconduct or wrongdoing. Franklin Savings Association v. Ryan, 922 F.2d 209, 211-212 (4th Cir. 1991), citing United States v. Morgan, 313 U.S. 409 (1941).

Documents compiled in investigations and inspections whose production could reasonably be expected to interfere with enforcement proceedings may be exempt from disclosure under 10 CFR § 2,390(a)(7)(i) (formerly 2.790(a)(7)(i)). This privilege protects investigatory files, including factual materials, from disclosure in order to prevent harm to either ongoing or contemplated investigations, or to prospective enforcement actions. The Commission itself may invoke the privilege. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 200-201 (1994). Vermont Yankee, LBP-05-33, 62 NRC at 843.

The deliberative process privilege applies to information that is both predecisional and deliberative. A document is predecisional if it was prepared before the adoption of an agency decision and specifically prepared to assist the decisionmaker in arriving at his or her decision. Communications are deliberative if they reflect a consultative process. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197-98 (1994); David Geisen, LBP-06-25, 64 NRC 367, 381 (2006). See also Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-3, 63 NRC 85, 91 (2006).

Purely factual material is generally not protected by the deliberative process privilege, but there are exceptions to this rule. If a factual matter is inextricably linked with deliberative sections of documents such that the disclosure of the

factual material would reveal government deliberations, the factual material is protected by the privilege. David Geisen, LBP-06-25, 64 NRC 367, 382 (2006).

The executive privilege may be invoked in NRC proceedings. Shoreham, supra, 19 NRC at 1333, citing Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971); Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994).

Discussions between Staff members concerning the adequacy and completeness of the application, the potential need for requests for additional information (RAIs), and the adequacy of RAI responses may be protected by the deliberative process privilege. Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-3, 63 NRC 85, 93 (2006). Likewise, internal staff communications concerning the appropriate wording and scope of a license condition are deliberative because they contain opinions of individual Staff members and do not necessarily represent part of the NRC's final policy decision concerning the sufficiency of an application. Id. at 94. Similarly, Staff recommendations and opinions about whether a license condition should be imposed are protected because they are intended to assist the NRC in reaching a final decision on the appropriateness of a particular condition. Id. at 95.

An agency's decision to assert the deliberative process privilege over a document, while not requiring the personal review of the actual head of the agency, must at least be made by a senior person, such as the head of the department having control over the requested information. Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-33, 62 NRC 828, 843 (2005). This person must have both expertise and an overview-type perspective concerning the balance between the agency's duty of disclosure versus its need to conduct frank internal debate without the chilling effect of public scrutiny. #140 at 846-47. However, the Board does not require a specific privilege invocation process, or a specific level of senior executive to assert the privilege. Id. at 849. The requirement that a Division Director or other high-ranking official make the agency decision to assert the deliberative process privilege does not mean that such high-ranking individuals be involved in the deliberation reflected in the privileged document. Id. at 846.

Documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice including analysis, reports, and expression of opinion within the agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164 (1982), citing Federal Open Market Committee of the Federal Reserve System v. Merril, 443 U.S. 340, 360 (1979); Vermont Yankee, LBP-05-33, 62 NRC at 851-52.

The executive privilege is a qualified privilege, and does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. Shoreham,

supra, 16 NRC at 1164, citing EPA v. Mink, 410 U.S. 73, 87-88 (1973); Smith v. FTC, 403 F. Supp. 1000, 1015 (D. Del. 1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); See also Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-3, 63 NRC 85, 91 (2006). The executive privilege does apply where purely factual material is inextricably intertwined with privileged communications or the disclosure of the factual material would reveal the agency's decisionmaking process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1342 (1984), citing Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994). Staff communications that summarize the applicable review procedures or report on the status of a matter are factual in nature and are not protected by the privilege. Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-3, 63 NRC 85, 93 (2006) (citing EPA v. Mink, 410 U.S. 73, 87-88 (1973)).

The executive privilege protects both intra-agency and interagency documents and may even extend to outside consultants to an agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1346 (1984), citing Lead Industries Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979).

Communications that fall within the protection of the privilege may be disclosed upon an appropriate showing of need. Shoreham, supra, 16 NRC at 1164, citing United States v. Leggett and Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing Carl Zeiss Stiftung, supra, 40 F.R.D. at 327. See also Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-3, 63 NRC 85, 91 (2006).

10 C.F.R. § 2.336(b)(5) requires deliberative process privilege logs to contain "sufficient information for assessing the claim of privilege. An inadequate privilege log is particularly problematic in Subpart L proceeding, where no other discovery is allowed, because without sufficient information as to what makes the document "deliberative," the challenger must shoot in the dark and face a substantive answer by the withholder, without the right of reply. Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-33, 62 NRC 828, 839-40 (2005)

In determining the need of a litigant seeking the production of documents covered by the executive privilege, an objective balancing test is employed, weighing the importance of documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the Government interest in secrecy. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164-1165 (1982), citing United States v. Leggett and Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983); Long

Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984); Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994). Vermont Yankee, LBP-05-33, 62 NRC at 844.

In balancing the need for deliberative process documents against the government's interest in nondisclosure, courts have considered various factors, including: (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-3, 63 NRC 85, 91-92 (2006) (citing In re Franklin National Bank Securities Litigation, 478 F. Supp. 577, 583 (E.D.N.Y. 1979); In re Supoena Duces Tecum, 145 F.3d 1422, 1423-24 (D.C. Cir. 1998); In re Subpoena Served upon the Comptroller of the Currency, 967 F.2d 630, 634 (D.C. Cir. 1992); Paul F. Rothstein & Susan Crump, Federal Testimonial Privileges § 5:10 (2d ed. 2005)). The importance of the evidence to the case is generally determinative in this balancing, and the first two factors – relevance and the availability of other evidence – focus on the importance of the evidence. Vermont Yankee, LBP-06-3, 63 NRC at 92. If the documents at issue are not relevant, then, as a matter of law, a showing of sufficient need is not possible. Id. (citing U.S. v. Farley, 11 F.3d 1385, 1389-91 (7th Cir. 1993)). Even if a draft document is relevant and important, once the final version of the document becomes available, the need for the draft (or comments suggesting changes to a draft) may become moot or minimal. Vermont Yankee, LBP-06-3, 63 NRC at 92 (citing, e.g., Missouri v. Army Corps of Eng'rs, 147 F.3d 708, 711 (8th Cir. 1998); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1345 (1984)).

The burden is upon the claimant of the executive privilege to demonstrate a proper entitlement to exemption from disclosure, including a demonstration of precise and certain reasons for preserving the confidentiality of governmental communications. Shoreham, supra, 16 NRC at 1144, 1165, citing Smith v. FTC, 403 F. Supp. 1000, 1016 (D. Del 1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

It is appropriate to look to cases decided under Exemption 5 of the FOIA for guidance in resolving claims of executive privilege in NRC proceedings related to discovery, so long as it is done using a common-sense approach which recognizes any differing equities presented in such FOIA cases. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1163-1164 (1982).

A claim of executive privilege is not waived by participation as a litigant in the proceeding. Shoreham, supra, 16 NRC at 1164.

The privilege against disclosure of intragovernmental documents containing advisory opinions, recommendations and deliberations is a part of the broader executive privilege recognized by the courts. Shoreham, supra, 16 NRC at 1164,

citing United States v. Nixon, 418 U.S. 683, 705-711 (1974); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1226-1227 (1983).

The executive privilege is not limited to policymaking, but may attach to the deliberative process that precedes most decisions of government agencies. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing Russell v. Dep't of the Air Force, 682 F.2d 1045, 1047 (D.C. Cir. 1982).

The purpose behind the privilege is to encourage frank discussions within the Government regarding the formulation of policy and the making of decisions. Shoreham, supra, 16 NRC at 1164, citing United States v. Berrigan, 482 F.2d 171, 181 (3rd Cir. 1973); David Geisen, LBP-06-25, 64 NRC 367, 380 (2006).

Where an NRC regulation expressly requires that a party produce a particular type of deliberative document, this regulatory requirement will override the general deliberative process privilege with respect to the type of document in question. U.S. Department of Energy (High-Level Waste Repository), LBP-05-27, 62 NRC 478, 518-19 (2005).

Courts are not generally willing to compel disclosure of deliberative materials, even if an individual's due process rights are at stake, unless some particularly compelling interest is at stake. The Commission and the former Appeal Board has recognized the strength of interest in deliberative process and have rarely ordered the disclosure of such materials. David Geisen, LBP-06-25, 64 NRC 367, 391 (2006).

2.12.2.4.4 FOIA Exemptions-Personal Privacy Privilege

The reason behind the personal privacy privilege is that unsubstantiated allegations of criminal activity against individuals should not be publicly disseminated. David Geisen, LBP-06-25, 64 NRC 367, 393 (2006).

2.12.2.4.5 FOIA Exemptions-Proprietary Information

Because 10 C.F.R. § 2.790 [now 10 C.F.R. § 2.390] embodies the standards of Exemption 4 of the Freedom of Information Act (FOIA), the agency looks for guidance to the plentiful federal case law on that exemption, although that case law does not bind the Commission. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 163, 172 (2005). Under Exemption 4, the current generally accepted legal definition of "confidential" is information whose disclosure is likely to (1) impair the government's future ability to obtain necessary information; or (2) impair other government interests such as compliance, program efficiency and effectiveness, and the fulfillment of an agency's statutory mandate; or (3) cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 163-64 (citing McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303, 305 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999); Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir 1992)

(en banc), cert. denied, 507 U.S. 984 (1993), approving on this ground but rev'g and vacating on other grounds, 830 F.2d 278, 286 (D.C. Cir. 1987); 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 7-10 (1st Cir. 1983). The federal courts (and now the Commission) have interpreted the third prong to require a showing of (a) the existence of competition and (b) the likelihood of substantial competitive injury. PFS, CLI-05-1, 61 NRC at 164, 171 (citing CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976)). While federal court decisions are divided on the question as to what constitutes "competitive injury," the Commission has adopted the broader of two interpretations, finding that interpretation to be closer to the heart of Exemption 4 and § 2.790 [now § 2.390]; this position concludes that such injury can flow from either competitors or noncompetitors (such as customers and suppliers). PFS, CLI-05-1, 61 NRC at 164 (citing McDonnell Douglas Corp., 180 F.3d at 306; Nat'l Parks & Conservation Ass'n, 547 F.2d at 687; Cont'l Oil Co. v. Fed. Power Comm'n, 519 F.2d 31, (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976)).

2.12.2.4.6 Waiver of a Privilege

In determining whether a party's inadvertent disclosure of a privileged document constitutes a waiver of the privilege, a Board will consider the adequacy of the precautions taken initially to prevent disclosure, whether the party was compelled to produce the document under a Board-imposed expedited discovery schedule, the number of documents which the party had to review, and whether the party, upon learning of the inadvertent disclosure, promptly objected to the production of the document. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 19-20 (1985).

Privilege against non-disclosure deemed waived where documents have been produced in public forum, e.g., to the NRC in a section 2.206 proceeding, for an investigation, or to the Congress. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-11, 37 NRC 469, 475 (1993).

2.12.2.5 Access to Classified, Safeguards, or Other Security-Related Information

A sensible application of need-to-know doctrine starts with the traditional discovery rules and then narrows their breadth to take account of the sensitive nature of security information. Such information warrants tight control and enhanced precautions. Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC 417, 422 (2004), reconsid. denied, CLI-04-37, 60 NRC 646 (2004). The need-to-know 'indispensability' standard is properly defined by reference to the discovery standard, with appropriate balancing of the public safety and other factors unique to the case. Id.

The Commission expects Boards and the NRC Staff to take a hard look at requests for sensitive security documents to make sure disclosure is truly useful in litigating admitted contentions, and not simply an exercise of curiosity or of a party's hope that something useful may turn up. Duke Energy Corp. (Catawba Nuclear Station,

Units 1 and 2), CLI-04-29, 60 NRC 417, 422 (2004), reconsid. denied, CLI-04-37, 60 NRC 646 (2004).

Where security-related guidance documents are applicable to an entirely different type of facility than the one at issue in a particular proceeding, it is not 'indispensable' for an intervenor to obtain those documents in discovery related to litigation of security issues, particularly if the guidance documents constitute classified information. See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC 417, 425 (2004), reconsid. denied, CLI-04-37, 60 NRC 646 (2004).

2.12.2.6 Protective Orders

When a protective order is in place, parties in federal court must carry a heavy burden to show entitlement to privacy-based withholding of otherwise-discoverable documents. David Geisen, LBP-06-25, 64 NRC 367, 387 (2006).

In using protective information, "those subject to the protective order may not corroborate the accuracy (or inaccuracy) of outside information by using protected information gained through the hearing process." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 6 (1980).

An affidavit in support of a corporation's request for a protective order is insufficient where it does not establish the basis for the affiant's personal knowledge (if any) respecting the basis for the protective order - - that is, the policies and practices of the corporation with regard to preserving the confidentiality of information said to be proprietary in nature. The Board might well disregard the affidavit entirely on the ground that it was not shown to have been executed by a qualified individual. While it may not be necessary to have the chief executive officer of the company serve as affiant, there is ample warrant to require that facts pertaining to management policies and practices be presented by an official who is in a position to attest to those policies and practices (and the reasons for them) from personal knowledge. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 28 (1979). In North Anna, the Appeal Board granted a protective order request but explicitly declined to find that the corporation requesting the order had met its burden of showing that the information in question was proprietary and entitled to protection from public disclosure under the standards set forth in Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). No party had objected to the order, and the Appeal Board granted the order in the interest of obtaining the requested information without untoward further delay. However, its action should not be taken as precedent for future cases in which relief might be sought from an adjudicatory board based upon affidavits containing deficiencies as described above. North Anna, supra, 10 NRC at 28.

Pursuant to 10 CFR § 2.705(h)(2) (formerly 2.740(f)(2)), the Board is empowered to make a protective order as it would make upon a motion pursuant to Section 2.705(c) (formerly 2.740(c)), in ruling upon a motion to compel made in accordance with Section 2.740(f). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1152 (1982).

In at least one instance, a Licensing Board deemed it unnecessary to act on a motion for a protective order where a timely motion to compel is not filed. In such a case, the motion for protective order will be deemed granted and the matter closed upon the expiration of the time for filing a motion to compel. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1952 (1982).

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 the threat 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 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, 485-86 (1983).

A movant seeking a grant of confidentiality with regard to its identity must demonstrate the harm which it could suffer if its identity is disclosed. Joseph J. Macktal, CLI-89-12, 30 NRC 19, 24 (1989), reconsid. denied, CLI-89-13, 30 NRC 27 (1989); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 77 (1992).

Licensing and Appeal Boards assume that protective orders will be obeyed unless a concrete showing to the contrary is made. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-764, 19 NRC 633, 643 n. 14 (1984); see Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 287-88 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 769 (1983), citing Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25 (1983). One who violates such orders risks "serious sanction". Midland, supra, 18 NRC at 769. A Board may impose sanctions to remedy the harm resulting from a party's violation of a protective order, and to prevent future violations of the order. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-28, 28 NRC 537, 541 (1988).

2.12.2.7 Work Product

To be privileged from discovery by the work product doctrine, as codified in 10 CFR § 2.705(b)(4) (formerly 2.740(b)(2)), a document must be both prepared by an attorney, or by a person working at the direction of an attorney, and prepared in anticipation of litigation. Ordinary work product, which does not include the mental impressions, conclusions, legal theories, or opinions of the attorney (or other agent), may be obtained by an adverse party upon a showing of "substantial need of materials in preparation of the case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Opinion work product is not discoverable, so long as the material was in fact prepared by an attorney or other agent in anticipation of litigation, and not assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1162 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units

1 and 2), LBP-83-17, 17 NRC 490, 495 (1983); U.S. v. Construction Products Research, Inc., 73 F.3d 464, 473 (2nd Cir. 1996). See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 179 (1986) (documents required by NRC regulations are discoverable even though attorneys may have assisted in preparing the documents in anticipation of litigation). An intervenor's mere assertion that the material it is withholding constitutes attorney work product is insufficient to meet the burden of proving it is entitled to protection from discovery. Seabrook, supra, 17 NRC at 495.

In the absence of unusual circumstances, a corporate party cannot immunize itself from otherwise proper discovery merely by using lawyers to make file searches for information required to answer an interrogatory. Houston Lighting & Power Company (South Texas Project, Units 1 & 2), LBP-79-5, 9 NRC 193, 195 (1979).

Drafts of testimony are not covered by the attorney work product privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1793-1794 (1981).

Although a report prepared by a party's non-witness experts qualifies for the work product privilege, a Licensing Board may order discovery of those portions of the report which are relevant to 10 CFR 50, Appendix B determinations concerning the causes of deficiencies in the plant. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), LBP-87-20, 25 NRC 953, 957 (1987).

A qualified work product immunity extends over material gathered or prepared by an attorney for use in litigation, either current or reasonably anticipated at a future time. Although the privilege is not easily overridden, a party may gain discovery of such material upon a showing of a substantial need for the material in the preparation of its case and an inability to obtain the material by any other means without undue hardships. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1473-1474 (1984), citing Hickman v. Taylor, 329 U.S. 495 (1947), and 10 CFR § 2.705(b)(4) (formerly 2.740(b)(2)).

Even if a document is prepared in part in anticipation of adjudication, the work product privilege will not protect the document if, irrespective of the adjudicatory process, the document would have been prepared anyway in essentially similar form. Thus, a draft license application prepared in part in anticipation of the license application adjudicatory process was not protected by work product privilege, as a license application is a necessary prerequisite for obtaining a license, regardless of whether there is to be adjudication over the application. U.S. Department of Energy (High Level Waste Repository), LBP-05-27, 62 NRC 478, 519-20 (2005).

2.12.2.8 Updating Discovery Responses

The requirements for updating discovery responses are set forth in 10 CFR § 2.705(e). Generally, a response that was accurate and complete when made need not be updated to include later acquired information with certain exceptions set forth in Section 2.705(e) (formerly 2.740(e)). Of course, an adjudicatory board may impose the duty to supplement responses beyond that required by the regulations.

Under 10 C.F.R. § 2.705(e), the obligation to update discovery responses ends upon issuance by the Licensing Board of a ruling terminating that aspect of the proceeding to which the discovery relates. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-01-1, 53 NRC 75, 80 (2001).

2.12.2.9 Interrogatories

Interrogatories must have at least general relevancy, for discovery purposes, to the matter in controversy. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981).

Interrogatories will not be rejected solely on the number of questions. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 330-335 (1980). However, Licensing Boards may limit the number of interrogatories in accordance with the Commission's rules. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-456 (1981).

Numbers alone do not determine the propriety of interrogatories. While a Board is authorized to impose a limit on interrogatories, the rules do not do so of their own force. In the absence of specific objections there is no occasion to review the propriety of interrogatories individually. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1941 (1982).

An intervenor must come forward with evidence "sufficient to require reasonable minds to inquire further" to insure that its contentions are explored at the hearing. Interrogatories designed to discover what, if any, evidence underlies an intervenor's own contentions are not out of order. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

Interrogatories served to determine the "regulatory basis" or "legal theory" for a contention are appropriate and important. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

Answers should be complete in themselves; the interrogating party should not need to sift through documents or other materials to obtain a complete answer. Instead, a party must specify precisely which documents cited contain the desired information. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-67, 16 NRC 734, 736 (1982), citing Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1421, n.39 (1982); 4A Moore's Federal Practice 33.25(1) at 33-129-130 (2d ed. 1981); Martin v. Easton Publishing Co., 85 F.R.D. 312, 315 (E.D. Pa. 1980).

To the extent the interrogatory seeks to uncover and examine the foundation upon which an answer to a specific interrogatory is based, it is proper, particularly where it relates to the interrogee's own contention. Interrogatories which inquire into the basis of a contention serve the dual purposes of narrowing the issues and preventing surprise at trial. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 493-94 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).

2.12.3 Discovery Against the Staff

Discovery against the Staff is on a different footing than discovery in general. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 97-98 (1981); Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980). Discovery against the NRC Staff is not governed by the general rules but, instead, is governed by special provisions of the regulations. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-9, 37 NRC 433, 452-53 (1993); see 10 CFR 2.709.

With respect to requests for admissions addressed to the Staff, the Staff stands on the same footing as any party. Neither 10 CFR § 2.708 (formerly 2.742) nor any other section of the regulations provides for any different treatment of the Staff. The Board also found that Rule 36(b) of the Federal Rules of Civil Procedure is helpful in interpreting the Commission's rules concerning admissions. That rule states that the court may permit withdrawal or amendment of an admission when the presentation of the merits of the action will be served thereby. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 95-96 and n.4 (1994).

Depositions of named NRC Staff members may be required only upon a showing of exceptional circumstances. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-4, 13 NRC 216 (1981); 10 CFR § 2.709(a)(1) (formerly 2.720(h)(2)); Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 112 (1992). Factors considered in such a showing include whether: disclosure of the information is necessary to a proper decision in the proceeding; the information is not reasonably obtainable from another source; there is a need to expedite the proceeding. Id. at 223, citing Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974).

According to provisions of 10 CFR § 2.709(a)(2) (formerly 2.720), interrogatories against the Staff may be enforced only upon a showing that the answers to be produced are necessary to a proper decision in the proceeding. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 119 (1980).

With respect to interrogatories asked of the Staff, the Staff is not required to answer interrogatories unless this Licensing Board finds: (1) answers to the interrogatories are necessary to the determination of this case, and (2) answers to the interrogatories are not reasonably attainable from any other source. Vogtle, supra, 40 NRC at 94-95 (citing 10 CFR § 2.705(a)(2) (formerly 2.720(h)(2)(ii)); compare 10 CFR § 2.706(b)(1) (formerly 2.740b(a)).

The Staff must respond to interrogatories requesting the names of Staff involved in issuing a Notice of Violation. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 143 (1994).

Document requests against the Staff must be enforced where relevancy has been demonstrated unless production of the document is exempt under 10 CFR § 2.390. In that case, and only then, must it be demonstrated that disclosure is necessary to a proper decision in the matter. Palisades, supra. Even if a relevant document is exempt from disclosure pursuant to section 2.390(a), the document must still be

released if it is necessary to a proper decision in the proceeding and not reasonably obtainable from another source. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994).

The Licensing Board weighed several factors related to the Staff's motion to defer discovery of certain documents related to an ongoing investigation. In limiting the extent of the deferral, the Board used a balancing test comprised of four factors: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right to a prompt proceeding, and (4) the prejudice to the defendant of a delay in the civil proceeding. It applied the Commission's guidance that these elements are guides "'in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.'" Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-22, 38 NRC 189, 193 (1993) (citing Oncology Services Corp., CLI-93-17, 38 NRC 44, 51 (1993), quoting United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency, 461 U.S. 555, 565 (1983)).

The NRC Staff is not required to compile a list of criticisms of a proposal nor to formulate a position on them in response to an interrogatory. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), LBP-82-113, 16 NRC 1907, 1908 (1982).

It is appropriate to require the Staff to answer requests for admissions concerning the truth of findings in its own report, which contains important collateral facts. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140-41 (1994). It is also appropriate to require the Staff to release segregable facts on which decisions have been made, even if those facts are contained in predecisional documents. Facts that are inextricably intertwined with opinions in predecisional documents need not be released. Georgia Power, et al., 40 NRC at 142.

FEMA (Federal Emergency Management Agency) is acting as a consultant to the NRC in emergency planning matters; therefore, its employees are entitled to limitations on discovery afforded NRC consultants by 10 CFR § 2.709 (formerly 2.720(h)(2)(i)). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 701 (1983).

Provisions of the Memorandum of Understanding between FEMA and NRC qualify FEMA as an NRC consultant for purposes of 10 CFR § 2.709 (formerly 2.720(h)(2)(i)). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-61, 18 NRC 700, 704 (1983).

2.12.4 Responses to Discovery Requests

It is an adequate response to any discovery request to state that the information or document requested is available in public compilations and to provide sufficient information to locate the material requested. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979). This holding has been codified at 10 CFR § 2.705(b)(1) (formerly 2.740(b)(1)). 54 Fed. Reg. 33168, 33181 (August 11, 1989).

A party's response to an interrogatory is adequate if it is true and complete, regardless of whether the discovering party is satisfied with the response. However, where a

party's response is inconsistent with the party's previous statements and assertions made to the Staff, a Board will grant a motion to compel discovery. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 397-99 (1988), reconsid. denied, LBP-88-25A, 28 NRC 435 (1988).

An applicant is entitled to prompt answers to interrogatories inquiring into the factual bases for contentions and evidentiary support for them, since intervenors are not permitted to make skeletal contentions and keep the bases for them secret. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-52, 14 NRC 901, 903 (1981), citing Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317 (1980); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81-82 (1986). An intervenor's failure to timely answer an applicant's interrogatories is not excused by the fact that the delay in answering the interrogatories might not delay the remainder of the proceeding. West Chicago, supra, 23 NRC at 82.

Answers to interrogatories should be complete in themselves. The interrogating party should not need to sift through documents or other materials to obtain a complete answer. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1421 n.39 (1982), citing 4A Moore's Federal Practice 33.25(1) at 33-129-130 (2d ed. 1981).

10 CFR § 2.705(b)(1) (formerly 2.740(b)(1)) provides in part that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding ... including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Answers to interrogatories or requests for documents which do not comply with this provision are inadequate. Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737-1738 (1981).

Pursuant to 10 CFR § 2.707(d) (formerly 2.741(d)), a party upon whom a request for the production of documents is served is required to serve, within 30 days, a written response stating either that the requested inspection will be permitted or stating its reasons for objecting to the request. A response must state, with respect to each item or category, either that inspection will be permitted or that the request is objectionable for specific reasons. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1152 (1982).

A Board may require a party, who has been served with a discovery request which it believes is overly broad, to explain why the request is too broad and, if feasible, to interpret the request in a reasonable fashion and supply documents (or answer interrogatories) within the realm of reason. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-41, 22 NRC 765, 768 (1985).

A request for documents should not be deemed objectionable solely because there might be some burden attendant to their production. Shoreham, supra, 16 NRC at

1155. Pursuant to 10 CFR § 2.705(f)(1) (formerly 2.740(f)(1)), failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to 10 CFR § 2.705(c) (formerly 2.740(c)). A party is not required to seek a protective order when it has, in fact, responded by objecting. An evasive or incomplete answer or response shall be treated as a failure to answer or respond. Shoreham, supra, 16 NRC at 1152.

Where intervenors have filed consolidated briefs they may be treated as a consolidated party; one intervenor may be appointed lead intervenor for purposes of coordinating responses to discovery, but discovery requests should be served on each party intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687-688 (1981).

The involvement of a party's attorneys in litigation or other professional business does not excuse noncompliance with, nor extend deadlines for compliance with, discovery requests or other rules of practice, and is an inadequate response to a motion to compel discovery. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 373 (1981).

2.12.5 Compelling Discovery/Subpoenas

Discovery can be compelled where the person against whom discovery is sought resists (See 10 CFR § 2.705(f) (formerly 2.740(f))). Subpoenas may also issue pursuant to 10 CFR § 2.702 (formerly 2.720).

In the first instance, no one appears to be immune from an order compelling discovery. The ACRS, for example, has been ordered to provide materials which it declined to provide voluntarily. Viriginia Electric Power Co. (North Anna Power Station, Units 1 & 2), CLI-74-16, 7 AEC 313 (1974). Nevertheless, where discovery is resisted by a nonparty (discovery against nonparties impliedly permitted under language of 10 CFR § 2.702(f), 2.705(c) (formerly 2.720(f), 2.740(c)), a greater showing of relevance and materiality appears to be necessary, and a party seeking discovery must show that:

(1) information sought is otherwise unavailable; and
(2) he has minimized the burden to be placed on the nonparty.

Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-118, 6 AEC 263 (1973). Moreover, Licensing Boards have, on occasion, shown reluctance to enforce the discovery rules to the letter against intervenors. See, e.g., Gulf States Utilities Co. (River Bend Station, Units 1 & 2), LBP-74-74, 8 AEC 669 (1974).

Section 2.705(f) (formerly 2.740(f)) like its counterpart in the last sentence of Rule 37(d) of the Federal Rules of Civil Procedure from which the Commission's provision was copied, applies exclusively to situations where a person or party totally fails to respond to a set of interrogatories or document request. Louisiana Energy Services, L.P. (Claiborne Enrichment Cener), LBP-94-38, 40 NRC 309, 310 (1994) citing 8 Charles A. Wright et al., Federal Practice and Procedure § 2291 at 809-10 (1970).

Section 2.702 (formerly 2.740) of the NRC's Rules of Practice, under which subpoenas are issued, is not founded upon the Commission's general rulemaking powers; rather, it rests upon the specific authority to issue subpoenas duces tecum contained in Section 161(c) of the Atomic Energy Act. Therefore, the rule of FMC v. Anglo-Canadian Shipping Company, 335 F.2d 255 (9th Cir. 1964) that agency discovery rules cannot be founded on general rulemaking powers does not come into play. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 694 (1979). See also OIA Investigation, CLI-89-11, 30 NRC 11, 14-15 (1989), aff'd sub nom. U.S. v. Comley, 890 F.2d 539 (1st Cir.1989).

The federal courts generally will enforce an administrative subpoena if: (1) the agency can articulate a proper purpose for issuing the subpoena; (2) the information sought by the subpoena is reasonably relevant to the purpose of the investigation; and (3) the subpoena is not too definite. The Commission can establish a proper purpose for issuing a subpoena by showing that the matter under investigation implicates public health and safety concerns in matters involving nuclear materials. U.S. v. Oncology Services Corp., 60 F.3d 1015, 1020 (3rd Cir. 1995); United States v. Construction Products Research, Inc., 73 F.3d 464, 471 (2nd Cir. 1996); U.S. v. Comley, 890 F.2d 539, 541-42 (1st Cir. 1989); Five Star Products, Inc. and Construction Products Research, Inc., CLI-93-23, 38 NRC 169, 177-178 (1993). The courts may deny enforcement of the subpoena if it is shown by firm evidence that: the subpoena was issued for an improper purpose, such as bad faith or harassment; or enforcement of the subpoena would infringe upon the right to freedom of association by compelling a private organization to reveal the identities of its existing members, subjecting them to harassment, and discouraging the recruitment of new members. U.S. v. Comley, 890 F.2d 539, 542-44 (1st Cir. 1989).

The Commission may enforce a subpoena against a contractor or a subcontractor of a licensee to investigate alleged unlawful discrimination. Five Star Products, supra; see also, Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126 (1979).

The information sought by an administrative subpoena need only be "reasonably relevant" to the inquiry at hand. Pacific Gas & Electric Co. (Stanislaus Nuclear Project Unit 1), ALAB-550, 9 NRC 683, 695 (1979); United States v. Construction Products Research, Inc., 73 F.3d 464, 471 (2nd Cir. 1996).

Subpoenas must be issued in good faith, and pursuant to legitimate agency investigation. Metropolitan Edison Company (Three Mile Island, Unit 2), CLI-80-22, 11 NRC 724, 729 (1980).

The district court must enforce agency subpoenas unless information is plainly incompetent and irrelevant to any lawful purpose of the agency. U.S. v. Oncology Services Corp., 60 F.3d 1015, 1020 (3rd Cir. 1995).

The referral of matters to the Department of Justice for criminal proceedings, which are separate and distinct from matters covered by subpoenas issued by the Director of Office of Inspection and Enforcement, does not bar the Commission from pursuing its general health and safety and civil enforcement responsibilities through issuance of subpoena. Section 161(c) of Atomic Energy Act, 42 U.S.C. § 2201(c). Metropolitan Edison Company (Three Mile Island, Unit 2), CLI-80-22, 11 NRC 724, 725 (1980).

10 CFR § 2.702(a) (formerly 2.720(a)) contemplates ex parte applications for the issuance of subpoenas. Although the Chairman of the Licensing Board "may require a showing of general relevance of the testimony or evidence sought," he is not obligated to do so. The matter of relevance can be entirely deferred until such time as a motion to quash or modify the subpoena raises the question of relevance. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 698 n.22 (1979).

A Licensing Board is required to issue a subpoena if the discovering party has made a showing of general relevance concerning the testimony or evidence sought. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

Section 2.702(f) (formerly 2.720(f)) of the Rules of Practice specifically provides that a Licensing Board may condition the denial of a motion to quash or modify a subpoena duces tecum "on just and reasonable terms." That phrase is expansive enough in reach to allow the imposition of a condition that the subpoenaed person or company be reimbursed for document production costs. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 698-699 (1979).

The Commission denied a motion to quash a Staff subpoena where the subpoenaed individual simply alleged that the records sought by the subpoena contained information of Staff misconduct. Richard E. Dow, CLI-91-9, 33 NRC 473, 478-79 (1991).
Generally, document production costs will not be awarded unless they are found to be not reasonably incident to the conduct of a respondent's business. Stanislaus, supra, 9 NRC at 702.

Where a party has filed objections to one or more interrogatories or document requests or set forth partial, albeit incomplete, answers in a discovery response, the last sentence of section 2.705(h) (formerly 2.740(f)) has no applicability. The proper procedure in such a situation is for the party opposing the discovery to await the filing of a motion to compel and then respond to that motion. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-38, 40 NRC 309, 310 (1994).

Under 10 CFR § 2.705(h), the presiding officer of a proceeding will rule upon motions to compel discovery which set forth the questions contained in the interrogatories, the responses of the party upon whom they were served, and arguments in support of the motion to compel discovery. An evasive or incomplete answer or response to an interrogatory shall be treated as a failure to answer or respond. Houston Lighting & Power Company (South Texas Project, Units 1 and 2), LBP-79-5, 9 NRC 193, 194-195 (1979).

Specific objections must be made to the alleged inadequacy of discrete responses. South Texas, supra, 9 NRC at 195.

A discovering party is entitled to direct answers or objections to each and every interrogatory posed. Objections should be plain enough and specific enough so that it can be understood in what way the interrogatories are claimed to be objectionable. General objections are insufficient. The burden of persuasion is on the objecting party to show that the interrogatory should not be answered, that the information called for is

privileged, not relevant, or in some way not the proper subject of an interrogatory. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1944 (1982).

A motion to compel is required under the rules to set forth detailed bases for Board action, including arguments in support of the motion. 10 CFR § 2.705(h) (formerly 2.740(f)). This means that relief will only be granted against a party resisting further discovery when the movant gives particularized and persuasive reasons for it. Generalized claims that answers are evasive or that objections are unsubstantial will not suffice. The movant must address each interrogatory, including consideration of the objection to it, point by point. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1950 (1982).

2.12.5.1 Compelling Discovery From ACRS and ACRS Consultants

Although 10 CFR § 2.709 (formerly 2.720) does not explicitly cover consultants for advisory boards like the Advisory Committee on Reactor Safeguards (ACRS), it may fairly be read to include them where they have served in that capacity. Therefore, a party seeking to subpoena consultants to the ACRS may do so but must show the existence of exceptional circumstances before the subpoenas will be issued. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-519, 9 NRC 42, 42 n.2 (1979).

The Advisory Committee on Reactor Safeguards (ACRS) is an independent federal advisory committee that is not under the Staff's control. In the context of an uncontested ("mandatory") hearing, a Board may ask the Staff to produce relevant ACRS documents that it has reviewed but should not ask the Staff to obtain additional ACRS documents that it has not reviewed. Exelon Generation Co., LLC; Sys. Energy Res., Inc. (Early Site Permit for Clinton ESP Site; Early Site Permit for Grand Gulf ESP Site), CLI-06-20, 64 NRC 15, 25-26 (2006).

2.12.5.2 Sanctions for Failure to Comply with Discovery Orders

10 CFR § 2.320 (formerly 2.707) authorizes the presiding officer to impose various sanctions on a party for its failure to, among other things, comply with a discovery order. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-56, 18 NRC 421, 433 (1983). Those sanctions include a finding of facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order. Pursuant to 10 CFR § 2.320 (formerly 2.707), the failure of a party to comply with a Board's discovery order constitutes a default for which a Board may make such orders in regard to the failure as are just. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121, 1122 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 80 (1986).

A Licensing Board may dismiss the contentions of an intervenor who has failed to respond to an applicant's discovery requests, particularly where the intervenor has failed to file a response to the applicant's motion for summary disposition. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 810 (1986). An intervenor's alleged poor preparation of a contention and a related motion for summary

disposition, as distinguished from the intervenor's failure to respond at all to discovery requests, does not warrant the dismissal of the intervenor's contention. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-35, 30 NRC 677, 679 (1989), vacated and reversed on other grounds, ALAB-944, 33 NRC 81 (1991).

Pursuant to 10 CFR § 2.320 (formerly 2.707), an intervenor can be dismissed from the proceeding for its failure to comply with discovery orders. Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975); Public Service Electric & Gas Co. (Atlantic Generating Station, Units 1 & 2), LBP-75-62, 2 NRC 702 (1975).

Intervenors were dismissed from a proceeding when the Board determined that: the intervenors had engaged in a willful, bad faith strategy to obstruct discovery; the intervenors' actions and omissions prejudiced the applicant and the integrity of the adjudicatory process; and the imposition of lesser sanctions earlier in the proceeding had failed to correct the intervenors' actions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 375-77 (1988), rev'd in part and vacated in part, ALAB-902, 28 NRC 423 (1988), review denied and stay denied, CLI-88-11, 28 NRC 603 (1988). Where multiple Licensing Boards are presiding over different portions of an operating license proceeding, an individual Licensing Board's authority to order the dismissal of a party applies only to the hearing over which it has jurisdiction, and does not extend to those portions of the proceeding pending before the other Licensing Boards. A party who seeks the dismissal of another party from the entire proceeding must request the sanction of dismissal from each of the Boards before which different parts of the proceeding are pending. Shoreham, supra, 28 NRC at 428-30, review denied and stay denied, CLI-88-11, 28 NRC 603 (1988). On directed certification from the Appeal Board of the intervenors' appeal of their dismissal as parties by the OL-3 Licensing Board (which issued LBP-88-24, supra), the Commission determined that the intervenors' conduct before the Licensing Board warranted their dismissal as parties from all proceedings pending before the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211, 231-32 (1989).

A licensee's motion for sanctions against an intervenor for failure to comply with discovery requests poses a three part consideration: (1) due process for the licensee; (2) due process for the intervenor; and (3) an overriding consideration of the public interest in a complete evidentiary record. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-80-17, 11 NRC 893, 897 (1980).

Counsel's allegations of certain problems as excuses for intervenor's failure to provide discovery did not justify reconsideration of the Board's imposition of sanctions for such failure, where such allegations were expressly dealt with in the Board's order compelling discovery. Nor can an intervenor challenge the sanctions on the grounds that other NRC cases involved lesser sanctions, where the intervenor has willfully and deliberately refused to supply the evidentiary bases for its admitted contentions. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-82-5, 15 NRC 209, 213-214 (1982). See, however, ALAB-678, 15 NRC 1400 (1982), reversing the Byron Licensing Board's dismissal of intervenor

for failure to comply with discovery orders on the ground that such a sanction was too severe in the circumstances.

The sanction of dismissal from an NRC licensing proceeding is to be reserved for the most severe instances of a participant's failure to meet its obligations. In selecting a sanction, Licensing Boards are to consider the relative importance of the unmet obligation; its potential harm to other parties or the orderly conduct of the proceeding; whether its occurrence is an isolated incident or a part of a pattern of behavior; the importance of the safety or environmental concerns raised by the party and all of the circumstances. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982), citing Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1947 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586, 590 (1983), citing Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 392 (1983); Kerr-McGee Chemical Corp. (Kress Creek Decontamination), LBP-85-48, 22 NRC 843, 848-49 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 80-81 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 365-68 (1988); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211, 223 (1989).

The refusal of any party to make its witnesses available to participate in the prehearing examinations is an abandonment of its right to present the subject witness and testimony. An intervenor's intentional waiver of both the right to cross-examine and the right to present witnesses amounts to an effective abandonment of their contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935, 1936 (1982).

Although failure to comply with a Board order to respond to interrogatories may result in adverse findings of fact, the Board need not decide what adverse findings to adopt until action is necessary. When another procedure has been adopted requiring intervenors to shoulder the burden of going forward on a motion for summary disposition, it may be appropriate to await intervenor's filing on summary disposition, before deciding whether or not to impose sanctions for failure to respond to interrogatories pursuant to a Board order. Sanctions only will be appropriate if failure to respond prejudices applicant in the preparation of its case. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-10, 15 NRC 341, 344 (1982).

Where an intervenor has failed to comply with discovery requests and orders, the Licensing Board may alter the usual order of presentation of evidence and require an intervenor that would normally follow a licensee, to proceed with its case first. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985). See Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977), cited with approval in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 338 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station,

Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978); 10 CFR § 2.324 (formerly 2.731).

2.12.6 Appeals of Discovery Rulings

A Licensing Board order granting discovery against a third party is a final order for which appellate review may be sought; an order denying such discovery is interlocutory, and an appeal is not permitted. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973).
Motions to reconsider Board Orders must be made promptly, generally within 10 days of the date of issuance. In some cases, even shorter filing deadlines will be imposed. Once the opportunity to file a motion for reconsideration has run, the Board's rulings become the law of the case and may not subsequently be challenged successfully. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-16, 39 NRC 257, 259 (1994).

Interlocutory review of a discovery order is warranted when the alleged harm would be immediate and could not be redressed through future review of a final decision of the licensing board. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994).

A discovery order entered against a nonparty is a final order and thus is appealable. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 686 n.1 (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-764, 19 NRC 633, 636 n.1 (1984).

Typically, discovery orders can be reviewed on appeal following a final judgment. A claim of privilege is not alone sufficient to justify interlocutory review. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995).

Earlier caselaw suggests that where a nonparty desires to appeal a discovery order against him, the proper procedure is for such person to enter a special appearance before the Licensing Board and then file an appropriate appeal. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85 (1976).

To establish reversible error from the curtailment of discovery procedures, a party must demonstrate that such curtailment made it impossible to obtain crucial evidence. Implicit in such a showing is proof that more diligent discovery was impossible. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). The Appeal Board refused to review a discovery ruling referred to it by a Licensing Board when 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 Company (Midland Plant, Units 1 & 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."

Questions about the scope of discovery concern matters which are particularly within a trial board's competence and appellate review of such rulings is usually best conducted

at the end of case. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321 (1980).

2.12.7 Discovery in High-Level Waste Licensing Proceedings

2.12.7.1 Pre-Licene Application Licensing Board

Pursuant to 10 CFR § 2.1010, a Pre-License Application Licensing Board is authorized to resolve questions concerning: access to the Licensing Support Network (LSN); the entry of documentary material into the LSN; discovery requests; and the development and operation of the LSN.

2.12.7.2 Licensing Support Network (Formerly Licensing Support System)

The Licensing Support Network (LSN) is an electronic information management system, established pursuant to Subpart J of 10 CFR Part 2, which will contain the documentary material generated by the participants in the high-level waste licensing proceeding as well as NRC orders and decisions related to the proceeding. In June 2004 the Commission updated the rules on the LSN and established basic requirements and standards for submission of adjudicatory materials to the electronic docket for the HLW repository licensing proceeding, addressed the issue of reducing unnecessary loading of duplicate documents into the system, addressed obligations of LSN participants to update their documentary material, and addressed provisions on material that could be excluded from the LSN. Licensing Proceeding for a High-Level Radioactive Waste Geologic Respository; Licensing Support Network, Submissions to the Electronic Docket, 69 Fed. Reg. 32836 (June 14, 2004).

Under regulations governing the High Level Waste Repository proceedings, parties must make available to the Licensing Support Network (LSN) any document that is both "documentary material" and a "circulated draft." According to 10 C.F.R. § 2.1001, "documentary material" includes (1) documents upon which the applicant will rely, (2) relevant information known to, possessed by, or developed by the applicant but that does not support the applicant's position, and (3) relevant reports and studies, which includes basic documents relevant to licensing. A circulated draft, according to § 2.1001, is "a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred." U.S. Department of Energy (High-Level Waste Repository), LBP-05-27, 62 NRC 478, 496, 503 (2005) (holding that a July 2004 Department of Energy Draft license application must be made available to the LSN).

The regulatory requirement to make available all documentary material pursuant to 2.1003(a) implies a good faith standard by which DOE must, on the date it chooses to certify its document production, have in good faith made every reasonable effort to make all of its documentary material available. Factors to be considered in determining whether the good faith standard has been met include the time DOE has had to produce such documents, the purpose and importance of DOE's production obligation, and DOE's status and financial ability. U.S. Dept. of Energy (High Level Waste Repository), LBP-04-20, 60 NRC 300, 314-315 (2004).

The certification requirement set forth in 10 CFR § 2.1009(b) requires that DOE complete the privilege review of its documents and make the full text of all nonprivileged documents available before it can certify that it has made all documents available. High Level Waste Repository, LBP-04-20, 60 NRC at 319.

When document production occurs pursuant to 10 CFR § 2.1003, documents created after a reasonable cutoff date might not be included in the initial document production. High Level Waste Repository, LBP-04-20, 60 NRC at 325.

The duty to supplement document production pursuant to 10 CFR § 2.1003(e) is not a mechanism for DOE to submit documents created before its initial certification. The duty to supplement only applies to documents created after the certification date, thus DOE cannot rely on this provision to certify their production even though it had not yet completed its review. High Level Waste Repository, LBP-04-20, 60 NRC at 327.

Subpart J requires participants to make their documentary material electronically available in or via the LSN. However, being "in the LSN" means that a documentary material must be indexed on the central LSN site to that its integrity and stablility is assured and it can be accessed via the single, consistent central LSN site search engine. Merely making documentary material available by loading it onto the participant's own server and making the material available for indexing by the LSNA does not satisfy this requirement. High Level Waste Repository, LBP-04-20, 60 NRC at 330-33.

DOE's 10 CFR § 2.1009(b) certification letter was facially deficient because it excluded the word "all" before "documents submitted to the CACI." 2.1003 requires that "all documents" be made available, and the certification letter must so indicate. High Level Waste Repository, LBP-04-20, 60 NRC at 339.

A draft document must be placed on the LSN when it has received a non-concurrence satisfying the definition of "circulated draft" set forth in 10 CFR § 2.1001. The heart of the definition of circulated draft is the meaning of non-concurrence. The 3 elements of non-concurrence include: (1) A non-concurrence must be part of a formalized process; (2) a non-concurrence must be unresolved, with the original author or others in the concurrence process in disagreement with the final product; and (3) the decision-making on the document must be completed. Thus, for purposes of availability on the LSN, in order for documentary material to be considered to be a "circulated draft," it must have received a non-concurrence in a formalized process and the decision-making on the document must be complete. U.S. Department of Energy (High Level Waste Repository), CLI-06-5, 63 NRC 143, 158-59 (2006).

Subpart J does not treat drafts of the license application for the high level waste facility at Yucca Mountain as either Class 1 or Class 2 documentary material thus requiring they be made available on the Licensing Support Network. High Level Waste Repository, CLI-06-5, 63 NRC at 150-52. Similarly, a draft of the license application for the high level waste facility at Yucca Mountain is not a Class 3 circulated draft report or study under Subpart J, and should not be made available on the Licensing Support Network. Id. at 157.