

NUCLEAR REGULATORY COMMISSION ISSUANCES

OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS

January 1, 1994 – June 30, 1994

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PREFACE

This is the thirty-ninth volume of issuances (1 - 390) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 1994 - June 30, 1994.

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

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

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

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

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

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

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



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 11004649
(License No. XSNM02748)

TRANSNUCLEAR, INC.
(Export of 93.15% Enriched
Uranium)

January 19, 1994

The Commission denies a petition to intervene and request for a hearing on a license application for the export of 280 kilograms of high-enriched uranium, in the form of mixed uranium and thorium carbide fabricated as unirradiated fuel, to COGEMA in France to be processed for recovery of the uranium and thorium. The Commission determines that the Petitioner is not entitled to intervene as a matter of right under the Atomic Energy Act and that a hearing, as a matter of discretion, would not be in the public interest and is not needed to assist the Commission in making the determinations required by the Atomic Energy Act of 1954, as amended, for issuance of the export license.

RULES OF PRACTICE: STANDING TO INTERVENE

Institutional interest in providing information to the public and the generalized interest of its membership in minimizing danger from proliferation are insufficient for an organization to establish standing under section 189a of the Atomic Energy Act of 1954, as amended.

RULES OF PRACTICE: STANDING TO INTERVENE

Section 304(b)(2) of the Nuclear Non-Proliferation Act of 1978 mandates that the Commission establish procedures for public participation in nuclear export licensing proceedings when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations required by the Atomic Energy Act of 1954, as amended. The criteria set out in 10 C.F.R. § 110.84(a) for granting a hearing in export licensing cases as a matter of discretion accommodate this mandate.

ATOMIC ENERGY ACT: NONPROLIFERATION (SECTION 134)

The focus of section 134 of the Atomic Energy Act of 1954, as amended, is on discouraging the continued use of high-enriched uranium ("HEU") as reactor fuel and not on prohibiting the exportation, per se, of HEU.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Nuclear Control Institute ("NCI") filed a Petition for Leave to Intervene and Request for Hearing on an application from Transnuclear, Inc. ("Transnuclear") for a license to export 280 kilograms of high-enriched uranium ("HEU") in the form of mixed uranium and thorium carbide, as unirradiated fuel fabricated for the Fort St. Vrain reactor, to COGEMA in France to be processed for recovery of the uranium and thorium. For the reasons stated in this Memorandum and Order, we deny the Petition for Leave to Intervene and Request for Hearing.

II. BACKGROUND

Transnuclear filed an application, dated May 5, 1993, for a license to export 280 kilograms of HEU containing 260.9 kilograms of uranium-235 (93.15% enriched) and 2481 kilograms of thorium, in the form of mixed uranium and thorium carbide, as unirradiated fuel fabricated for the Fort St. Vrain reactor,¹ to

¹ The fabricated fuel is from the now-decommissioned Fort St. Vrain Power Station, a high-temperature gas-cooled thorium fuel cycle prototype reactor located at Platteville, Colorado, and owned by the Public Service Company of Colorado. The material is currently owned by Nuclear Fuel Services (NFS) and stored at the Erwin, Tennessee facility of NFS.

COGEMA in France to be processed for recovery of the uranium and thorium.² On June 24, 1993, NCI filed a Petition for Leave to Intervene and Request for Hearing on the Transnuclear license application. NCI asserts that it is a nonprofit, educational corporation based in the District of Columbia, and engages in disseminating information to the public concerning the risks associated with the use of nuclear materials and technology. Petition at 1-2.

NCI seeks intervention to argue that (1) the proposed export, if authorized, would be inimical to the common defense and security of the United States; (2) approval of the proposed export would be contrary to section 134 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2160d (the "Schumer Amendment");³ and (3) the license application is deficient in meeting the information requirements of NRC regulations in that it does not sufficiently describe the ultimate intended end use of the material to be exported. Petition at 10-11.

NCI requests that the Commission (1) grant NCI's Petition for Leave to Intervene, (2) order a full and open public hearing at which interested parties may present oral and written testimony and conduct discovery and cross-examination of witnesses, and (3) act to ensure that all pertinent information regarding the issues addressed by NCI is made available for public inspection at the earliest possible date. *Id.* at 1-2, 18.

Transnuclear filed an Opposition in Response to Petition to Intervene ("Response") on July 27, 1993. Before responding to the petition, Transnuclear amended its application on July 16, 1993, to require that the exported material be blended down and used as low-enriched uranium ("LEU") for research or test reactors. In its Response, Transnuclear argues that the NRC is not statutorily required to provide an adjudicatory hearing on export licenses and that, in any case, NCI is not entitled to a hearing as a matter of right because NCI lacks standing. Response at 2-4. Transnuclear further argued that a discretionary hearing would not be in the public interest or assist the Commission in making its statutory determination because Transnuclear's amended license application makes clear that the uranium recovered from the exported material

² Notice of receipt of the application was published in the *Federal Register* on May 26, 1993 (58 Fed. Reg. 30,187).

³ The Energy Policy Act of 1992, Pub. L. No. 102-486, signed into law on October 24, 1992, among other things, added new restrictions on the export of uranium, in a new section 134 of the Atomic Energy Act (the "Schumer Amendment"). The Schumer Amendment permits the issuance of a license for export of uranium enriched to 20% or more in the isotope-235 to be used as a fuel or target in a nuclear research or test reactor only if, in addition to other requirements of the Atomic Energy Act, the NRC determines that (1) there is no alternative nuclear reactor fuel or target enriched in the isotope-235 to a lesser percent than the proposed export that can be used in that reactor; (2) the proposed recipient of that uranium has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of highly enriched uranium; and (3) the United States Government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor. The applicability of the Schumer Amendment to the instant application is discussed *infra*.

will be blended down to LEU, thus removing the relevance of the contentions proffered by NCI. *Id.* at 8-10.

NCI filed a timely Reply to Applicant's Opposition to the Petition for Leave to Intervene and Request for Hearing ("Reply") on August 16, 1993. In its Reply, NCI argues that a hearing of right is available in export licensing cases. Reply at 2-4. NCI concedes that Commission case law has denied standing, as a matter of right, to organizations with interests substantially similar to NCI's in proceedings substantially similar to the instant one, but argues that the Commission should expand its approach to standing in export licensing proceedings to meet congressional expectations regarding public participation in such proceedings. *Id.* at 5-7. NCI further argues that, notwithstanding Transnuclear's stated intention to blend down the material after it is exported, NCI's contentions remain valid because granting the license will increase the amount of HEU in international transport and commerce, and the expressed intention to down blend is unacceptably vague. *Id.* at 7-14.

Subsequent to NCI's Reply, COGEMA submitted a letter dated September 8, 1993, confirming that COGEMA will notify the NRC, in writing, within 30 days after all the exported material has been blended down to LEU. In a letter dated September 24, 1993, COGEMA again confirmed the earlier notification commitment and further confirmed that commercial arrangements regarding the material require that all the exported material be blended down with no substitutions or sale of HEU allowed, and that COGEMA will retain title to the material until it has been blended down to LEU.

III. THE PETITIONER'S STANDING

A. NCI Does Not Have Standing to Intervene as a Matter of Right

Section 189a of the Atomic Energy Act of 1954, as amended, provides, among other things, that the Commission grant a hearing, as a matter of right, to any person "whose interest may be affected by" a proceeding under the Act for the granting of any license. 42 U.S.C. § 2239(a)(1).⁴ To determine if

⁴The Commission's regulations at 10 C.F.R. § 110.84 list the factors to be considered in taking action on a hearing request or intervention petition in a licensing proceeding for the export of nuclear materials. Section 110.84(b) addresses considerations to determine whether a petitioner has standing to intervene as a matter of right and provides that:

(b) If a hearing request or intervention petition asserts an interest which may be affected, the Commission will consider:

- (1) The nature of the alleged interest;
- (2) How the interest relates to issuance or denial; and
- (3) The possible effect of any order on that interest, including whether the relief requested is within the Commission's authority, and, if so, whether granting relief would redress the alleged injury.

10 C.F.R. § 110.84(b).

a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189a, "the Commission has long applied contemporaneous judicial concepts of standing." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993), citing *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *aff'd*, *Environmental & Resources Conservation Organization v. NRC*, No. 92-70202 (9th Cir. June 30, 1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). To satisfy the judicial concept of standing, a petitioner must demonstrate "a concrete and particularized injury that is fairly traceable to the challenged action." CLI-93-21, 38 NRC at 92 (1993).

NCI asserts a claim of interest for standing based on its institutional interests in the dissemination of information concerning nuclear weapons and proliferation in general and the use of HEU in particular. Petition at 3. The Commission has long held that institutional interest in providing information to the public and the generalized interest of their memberships in minimizing danger from proliferation are insufficient for standing under section 189a. *See, e.g., Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572-78 (1976); *Transnuclear, Inc.* (Ten Applications for Low Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 NRC 525, 529-32 (1977); *Westinghouse Electric Corp.* (Export to South Korea), CLI-80-30, 12 NRC 253, 257-60 (1980); *General Electric Co.* (Exports to Taiwan), CLI-81-2, 13 NRC 67, 70 (1981). *See also Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 59-61 (1992) (rejection of "informational interests" as grounds for standing in reactor licensing case).

NCI "concede[s] that there is a line of Commission cases, starting with the pre-NNPA [Nuclear Non-Proliferation Act] decision in *Edlow International Co.*, CLI-76-6, 3 NRC 563 (1976), denying standing to organizations with interests substantially similar to Petitioner in proceedings substantially similar to the present one." Reply at 5. NCI argues, however, that the Commission's approach to standing should be expanded to realize the congressional intention to increase public participation in export licensing through enactment of section 304 of the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2155a ("NNPA"). Reply at 5-7.

The mechanism for increased public participation that NCI urges already is provided for in the Commission's regulations. Section 304(b)(2) of the NNPA mandated that the Commission promulgate regulations establishing procedures "for public participation in nuclear export licensing proceedings when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations required by the 1954 Act." 42 U.S.C. § 2155a(b)(2). The Commission amended its regulations

in 1978 expressly to accommodate this mandate by adding the criteria set out in 10 C.F.R. § 110.84(a) for granting a hearing as a matter of discretion.⁵ See Statement of Considerations, 43 Fed. Reg. 21,641, 21,642-43 (1978). The regulation specifically sets forth the Commission policy to hold a hearing or otherwise permit public participation if the Commission finds that such a hearing or participation would be in the public interest and would assist the Commission in making the required statutory determinations.

Thus, even though NCI has not established a basis on which it is entitled to intervene as a matter of right, the Commission could hold a hearing under 10 C.F.R. § 110.84(a)(1) and (2) if such hearing would be in the public interest and assist the Commission. See *Braunkohle Transport, USA* (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 893 (1987).

B. A Discretionary Hearing Would Not Assist the Commission and Be in the Public Interest

The issues raised by NCI — (1) the common defense and security of the United States, (2) compliance with the Schumer Amendment, and (3) assurance of the ultimate intended end use of the material — do concern matters that the Commission considers in making an export license decision. There is no indication in NCI's pleading, however, that it possesses special knowledge regarding these issues or that it will present information not already available to and considered by the Commission.

The Executive Branch and the Commission staff have addressed the issues sufficiently in their respective reviews of the application. The transportation, international safeguards, and foreign physical security concerns associated with the issue of the common defense and security were addressed by the Executive Branch and the Commission staff in their consideration of the application. The Commission has reviewed the Executive Branch's and Commission staff's evaluation of the ultimate end use of the material and the effect of the COGEMA September 8 and 24, 1993 letters regarding that end use. NCI offers no reason for the Commission to differ with the views expressed by the Executive Branch and the Commission staff on these matters.

⁵ Section 110.84(a) of Title 10 of the *Code of Federal Regulations* provides that:

(a) In an export licensing proceeding, or in an import licensing proceeding in which a hearing request or intervention petition does not assert or establish an interest which may be affected, the Commission will consider:

- (1) Whether a hearing would be in the public interest; and
- (2) Whether a hearing would assist the Commission in making the statutory determinations required by the Atomic Energy Act.

10 C.F.R. § 110.84(a).

The only remaining issue raised by NCI is compliance with section 134 of the Atomic Energy Act of 1954, as amended (the Schumer Amendment), 42 U.S.C. § 2160d. NCI contends that, notwithstanding that the HEU is to be blended down for use as LEU reactor fuel, the Schumer Amendment issue “remains alive” because of the terms of the Amendment. Reply at 13-14. A fair reading of the entire amendment, however, shows that, while Congress may have been concerned about the transportation of HEU, the focus of the statute is on discouraging the continued use of HEU as reactor fuel and not on prohibiting the exportation, *per se*, of HEU. Any other reading would be inconsistent with the plain meaning of the legislation since it allows for the exportation of HEU fuel for use in a reactor, provided that certain provisions are in place to ultimately convert the reactor to use LEU. *See* 42 U.S.C. § 2160d(a)(2) and (3). Further, assuming *arguendo* that the terms of the Schumer Amendment are ambiguous,⁶ a review of its legislative history clearly shows that the intent of the amendment is to “put into law what was, from 1978 to 1990, the policy of both Democratic and Republican administrations — prohibiting the NRC from licensing the exports of *bomb-grade uranium fuel*. . . .” 138 Cong. Rec. H11440 (daily ed. October 5, 1992) (remarks of Representative Schumer) (*emphasis added*). The NRC Staff advises that the material the Applicant seeks to export, although fabricated as HEU fuel for the now defunct Fort St. Vrain reactor, is not in a form that can be used as HEU fuel or target material in a research or test reactor without first processing the material to recover its uranium content. Exporting the material for processing, blending down, and subsequent fabrication into LEU fuel or target material for test and research reactors may aid in discouraging the continued use of HEU as fuel in reactors by increasing the availability of LEU fuel. The action, if nothing else, meets one of the goals of the Schumer Amendment, in that it will remove 280 kilograms of HEU from the world inventory and, thereby, help encourage “developing alternative fuels that will enable an end to the bomb-grade exports.” *Id.*

In summary, nothing in the NCI Petition and Reply indicates that a hearing would generate significant new insights for the Commission regarding the instant application. To the contrary, conducting a public hearing on issues concerning matters about which the Commission already has abundant information and analyses would be contrary to one of the purposes of the NNPA, namely,

⁶ The Schumer Amendment states, in part:

a. The Commission may issue a license for the export of highly enriched uranium to be used as a fuel or target in a nuclear research or test reactor only if, in addition to any other requirement of this [Act], the Commission determines that—

(1) there is no alternative nuclear fuel or target enriched in the isotope-235 to a lesser percent than the proposed export, that can be used in that reactor;

42 U.S.C. § 2160d. The meaning of the phrase “to be used as a fuel” in the first sentence, in the context of the whole provision, clearly means “to be used as an HEU fuel.” The NCI argument depends on reading the word “fuel” in the first sentence as meaning either “HEU fuel” or “LEU fuel.”

“that United States government agencies act in a manner which will enhance this nation’s reputation as a reliable supplier of nuclear materials to nations which adhere to our nonproliferation standards by acting upon export license applications in a timely fashion.” *Westinghouse*, CLI-80-30, 12 NRC 253, 261 (1980) (citation omitted). For these reasons, NCI’s petition and request for a public hearing should be denied as not in the public interest and not necessary to assist the Commission in making its statutory determinations.

IV. CONCLUSION AND ORDER

For the reasons stated in this decision, NCI has not established a basis on which it is entitled to intervene as a matter of right under the Atomic Energy Act. Further, a hearing, as a matter of discretion pursuant to 10 C.F.R. § 110.84(a), would not be in the public interest and is not needed to assist the Commission in making the determinations required for issuance of the export license to Transnuclear. The Petition for Leave to Intervene and Request for Hearing is denied.

It is so ORDERED.

For the Commission⁷

JOHN C. HOYLE

Assistant Secretary of the
Commission

Dated at Washington, D.C.,
this 19th day of January 1994.

⁷ Commissioner de Planque was not present for the affirmation of this order; if she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

Docket No. 030-30266-EA
(ASLBP No. 93-697-05-EA)
(Byproduct Material License
No. 30-23697-01E)
(EA 93-067)

INNOVATIVE WEAPONRY, INC.
(Albuquerque, New Mexico)

January 11, 1994

MEMORANDUM AND ORDER
(Terminating Proceeding)

This proceeding was initiated pursuant to the request of the Licensee herein, Innovative Weaponry, Inc., for a hearing on the NRC order modifying its byproduct material license.¹ By a notice served on December 27, 1993, the

¹ Order Modifying License (Effective Immediately), 58 Fed. Reg. 34,598 (June 28, 1993).

Licensee withdrew its request for a hearing. Accordingly, the Board terminates this proceeding as moot.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
January 11, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

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

ONCOLOGY SERVICES CORPORATION

January 24, 1994

In this license suspension proceeding, the Licensing Board rules on prediscovery motions to dismiss or for summary disposition regarding a dozen of the litigation issues specified by licensee Oncology Services Corporation.

ENFORCEMENT ACTIONS: LEGAL BASIS

As a creature of the Congress, the agency can only wield that enforcement authority it has been given by legislative enactment. *See* 5 U.S.C. § 558(b).

ENFORCEMENT ACTIONS: LEGAL BASIS

Previous judicial interpretation makes it clear that the Commission's enforcement authority under sections 161b, 161i(3), and 186a of the Atomic Energy Act (AEA), 42 U.S.C. §§ 2201(b), 2201(i)(3), 2236(a), is wide-ranging, perhaps uniquely so. *See Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

ENFORCEMENT ACTIONS: LEGAL BASIS

The Commission's broad authority under AEA section 182, 42 U.S.C. § 2232(a), to define regulatory requirements likewise has received judicial recognition. See *Union of Concerned Scientists v. NRC*, 880 F.2d 552, 558 (D.C. Cir. 1989) (determination of what constitutes "adequate protection" of the public health and safety for reactor facilities under section 182 is a matter congressionally committed to the Commission's sound discretion).

AGENCY ORDER: COMPARISON TO REGULATION

A valid agency order mandating requirements for a particular licensee is on an equal footing with a valid regulation affecting licensees generally. See AEA § 161b, 42 U.S.C. § 2201(b). See also *Wrangler Laboratories*, ALAB-951, 33 NRC 505, 518 & n.39 (1991).

AGENCY DISCRETION: RULEMAKING OR ADJUDICATION

NUCLEAR REGULATORY COMMISSION (OR NRC): CHOICE OF RULEMAKING OR ADJUDICATION

The choice of whether to use a general rule or an individual order to establish a standard is one within "the informed discretion" of the agency. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). This principle recognizes that in the face of a broad congressional mandate such as that given to the NRC, an agency simply cannot be expected to anticipate and promulgate a rule relative to each activity that a regulated entity undertakes. Therefore, to permit administrative agencies to deal effectively with the varied, complex regulatory problems they face, those agencies must retain the power to address those problems on a case-by-case basis by issuing orders. See *Chenery*, 416 U.S. at 203. In the words of the Supreme Court, to do otherwise "is to exalt form over necessity." *Id.* at 202.

AGENCY DISCRETION: RULEMAKING OR ADJUDICATION

NUCLEAR REGULATORY COMMISSION (OR NRC): CHOICE OF RULEMAKING OR ADJUDICATION

There may be instances when an agency's determination to proceed by order rather than rulemaking would amount to an abuse of discretion. See *Bell Aerospace*, 416 U.S. at 294.

AGENCY DISCRETION: RULEMAKING OR ADJUDICATION

NUCLEAR REGULATORY COMMISSION (OR NRC): CHOICE OF RULEMAKING OR ADJUDICATION

A general “due process” concern about the agency’s failure to give explicit prior notice of the standards set forth in an order generally is not sufficient to establish an agency abuse of discretion in making a choice to proceed by order rather than by regulation, given the Supreme Court’s recognition of the discretion afforded agencies to utilize individual orders to establish binding standards. *See Beazer East, Inc. v. EPA, Region III*, 963 F.2d 603, 609 (3d Cir. 1992).

AGENCY DISCRETION: RULEMAKING OR ADJUDICATION

NUCLEAR REGULATORY COMMISSION (OR NRC): CHOICE OF RULEMAKING OR ADJUDICATION

In determining whether an agency has abused its discretion in choosing to proceed by order rather than regulation, the critical factor appears to be whether the challenged agency order “fill[s] interstices in the law” or whether it creates a new standard, either because the order overrules past precedents relied upon by the party subject to the ruling or because it is an issue of first impression. *See United Food & Commercial Workers International Union, Local No. 150-A v. NLRB*, 1 F.3d 24, 34 (D.C. Cir. 1993). Only in the latter instance is a concern about the retroactive application of the order warranted.

ENFORCEMENT ACTIONS: BASIS FOR IMPOSITION OF ENFORCEMENT SANCTION

When it relies on the agency’s general statutory mandate to “protect the public health and safety” instead of a specific, previously issued regulation, order, regulatory guide, or license condition as the basis for imposing an enforcement sanction, the Staff must be prepared to establish with specificity the health and safety consequences of the licensee action or inaction about which it complains. Ultimately, the Staff must show how the standard to which it would hold the licensee (and presumably others similarly situated) regarding those matters is a reasonable component of agency’s general statutory mandate to protect the public health and safety.

RULES OF PRACTICE: DISMISSAL OF ISSUES IN ENFORCEMENT PROCEEDING

After all factual allegations in an issue specified in an enforcement proceeding are presumed to be true and all reasonable inferences are made in favor of the party sponsoring the issue, if there is no set of facts that would entitle that party to relief on the issues, dismissal is appropriate. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

LICENSING BOARDS: AUTHORITY TO DISMISS ISSUES IN ENFORCEMENT PROCEEDING

RULES OF PRACTICE: DISMISSAL OF ISSUES IN ENFORCEMENT PROCEEDING

Consistent with the analogous agency rules regarding contentions filed by intervenors, *see* 10 C.F.R. § 2.714(d)(2)(ii), it is within the Licensing Board's authority in an enforcement proceeding to entertain a Staff motion seeking dismissal of issues specified by the opposing party. *See* 10 C.F.R. § 2.718.

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

LICENSING BOARDS: REVIEW OF NRC STAFF'S ACTIONS

The Commission intended to define the scope of an enforcement proceeding under 10 C.F.R. § 2.202 to limit the Licensing Board to a determination regarding the sufficiency of the legal and factual predicates outlined in the Staff's enforcement order as of the time the order was issued. The extent to which subsequent circumstances warrant agency action to modify or withdraw a suspension order generally is a matter that is within the discretion of the Staff and is not subject to consideration in an agency adjudication. *Cf. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984), *vacated in part and rehearing en banc granted on other grounds*, 760 F.2d 1320 (1985), *aff'd en banc*, 789 F.2d 26, *cert. denied*, 479 U.S. 923 (1986).

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

LICENSING BOARDS: JURISDICTION (STAFF ORDERS)

RULES OF PRACTICE: REVIEW OF NRC STAFF'S ACTIONS; SETTLEMENT OF CONTESTED PROCEEDINGS

The question of the presiding officer's authority to consider whether the Staff *should act* to revise or withdraw a challenged suspension order can be

distinguished from instances in which the Staff actually *has acted* (1) to modify or withdraw a previously issued order during the pendency of an adjudicatory proceeding regarding that order, or (2) to enter into an agreement to take such actions to settle a proceeding. In both of the latter instances, agency rules provide that the Staff's action is subject to scrutiny by the presiding officer. See 10 C.F.R. §§ 2.203, 2.717(b).

MEMORANDUM AND ORDER
(Ruling on Parties' Pre-discovery Motions to Dismiss
or for Summary Disposition)

In a July 15, 1993 memorandum and order, the Board requested that the NRC Staff and licensee Oncology Services Corporation (OSC) consider whether certain of the nearly 100 issues previously identified by OSC for litigation in this license suspension proceeding are subject to motions to dismiss or for summary disposition. The Staff now asks that we dismiss twelve OSC issues while OSC maintains that it is entitled to summary disposition on five of these issues.

For the reasons set forth below, we deny OSC's summary disposition motion and grant the Staff's dismissal request as to ten of the twelve issues.

I. BACKGROUND

By order dated January 20, 1993, the Staff suspended OSC's byproduct materials license authorizing the use of sealed-source iridium-192 for high dose rate (HDR) human brachytherapy treatments at six OSC facilities in Pennsylvania. One of the principal bases for the Staff's suspension determination is a November 16, 1992 incident at OSC's Indiana (Pennsylvania) Regional Cancer Center (IRCC). Following treatment at IRCC, an HDR brachytherapy patient was returned to her nursing home with a iridium-192 source mistakenly lodged in the area of her abdomen. Also cited by the Staff in support of license suspension are the results of December 8, 1992 inspections of OSC facilities in Lehigh and Exton, Pennsylvania, and a December 18, 1992 letter in which OSC's radiation safety officer (RSO) allegedly improperly delegated corporate health and safety responsibilities to OSC satellite facilities.

According to the Staff, the factual circumstances surrounding these matters, as described in the suspension order, "demonstrate a significant corporate management breakdown in the control of licensed activities." 58 Fed. Reg. 6825, 6826 (1993). While noting that the agency was continuing to investigate OSC's activities, the Staff nonetheless found that

as a result of the information available to date and the incident in which an iridium-192 source was unknowingly left within a patient, [the Staff] lack[s] the requisite reasonable assurance that [OSC's] current operations can be conducted under [its license] in compliance with the Commission's requirements and that the health and safety of the public, including [OSC's] employees and patients, will be protected.

Id. at 6827. Based on these findings, the Staff imposed an immediately effective suspension of OSC's license.

This proceeding was convened in response to OSC's timely request for a hearing to contest the order. In response to the first of three Staff requests for a delay of the proceeding to permit the agency to complete its investigations of the November 1992 incident and related matters, we issued a March 1993 memorandum and order postponing discovery by the parties.¹ See LBP-93-6, 37 NRC 207, *vacated in part as moot*, CLI-93-17, 38 NRC 44 (1993). At the same time, in an effort to have the parties begin defining the parameters of this proceeding, the Board directed that they file a joint prehearing report setting forth, among other things, the "central" issues for litigation. See *id.* at 221, 223. OSC specified ninety-nine issues. See Joint Prehearing Report (May 5, 1993) at 2-7, 8-16 [hereinafter Prehearing Report]. The Staff agreed with the wording of nineteen of these issues, see *id.* at 3-4, 6, 8-9, 11-12, 14-16, but objected to the remaining eighty, see NRC Staff's Objections to Issues Proposed by [OSC] (May 11, 1993).²

After reviewing these Staff objections and OSC's response thereto, we issued the previously referenced July 15 memorandum and order. In it we directed that as to thirty-seven of the OSC issues, either the Staff or OSC should provide a filing that requested dismissal or summary disposition of particular issues or that outlined why those issues are not appropriate for further Board consideration at present. See Memorandum and Order (July 15, 1993) at 10, 13-14 (unpublished) [hereinafter July 15, 1993 Order]. We also indicated that either party was free to include any of the other prehearing report issues in any dispositive motion it filed. See *id.* at 3 n.1.

On August 16, 1993, both the Staff and OSC filed such motions. The Staff initially asked that we dismiss thirty-one of the thirty-two issues we had identified for its specific consideration, as well as an additional seven OSC issues not referenced by the Board. See NRC Staff's Motion to Dismiss Certain Issues Proposed by [OSC] (Aug. 16, 1993) at 9-32 [hereinafter Staff Motion to Dismiss]. For its part, OSC moved for summary disposition regarding the

¹ Subsequently, we granted two additional Staff delay requests, postponing discovery through early December 1993. See LBP-93-10, 37 NRC 455, *aff'd*, CLI-93-17, 38 NRC 44 (1993); LBP-93-20, 38 NRC 130 (1993). On November 16, the Staff informed the Board that it was not requesting any further delays in the proceeding as a result of the investigations. See Letter from M. Zabler, NRC Staff, to the Licensing Board (Nov. 16, 1993).

² The Staff proposed nine issues, but OSC agreed to the wording of only one. See Prehearing Report at 1-2, 7-8. None of these Staff issues are the subject of OSC's pending dispositive motion.

five issues that we had asked it to address further. *See* Response of [OSC] to the July 15, 1993 Order of the [Licensing Board] (Requesting Further Party Filings on Controverted Issues) and Motion of [OSC] for Summary Judgment with Respect to Certain of Those Issues (Aug. 16, 1993) at 10-20 [hereinafter OSC Summary Disposition Motion].

Both parties subsequently filed a response opposing the other's dispositive motion and a reply to those responses. As part of its response, the Staff requested that we dismiss the five issues designated by OSC for summary disposition. *See* NRC Staff's Response to [OSC's] Motion for Summary Judgment with Respect to Certain Issues and NRC Staff Motion to Dismiss (Sept. 16, 1993) at 30-33 [hereinafter Staff Summary Disposition Response/Motion to Dismiss]. Additionally, with its reply to the Staff's response, OSC filed a motion to strike the Staff's additional dismissal request. *See* Reply of Licensee [OSC] to NRC Staff's Response to [OSC's] Motion for Summary Judgment with Respect to Certain Issues and Motion of [OSC] to Strike the NRC Staff's September 16, 1993 Motion to Dismiss as Untimely, Unauthorized and Prejudicial (Oct. 1, 1993) at 19-20 [hereinafter OSC Reply to Staff Summary Disposition Response/Motion to Strike].

After reviewing these various pleadings, we issued a November 17, 1993 memorandum and order in which we denied OSC's motion to strike the Staff's additional dismissal request. *See* Memorandum and Order (Denying OSC Motion to Strike Additional Staff Motion to Dismiss Certain OSC Issues and Permitting Further OSC Response to Additional Motion to Dismiss; Requesting Additional Filings Regarding NRC Staff Motions to Dismiss Certain OSC Issues) at 3-4 (Nov. 17, 1993) (unpublished) [hereinafter November 17, 1993 Order]. We also directed that the Staff provide additional information relative to its pending dismissal motions. *See id.* at 4-8. This request was prompted by statements in the Staff's reply to OSC's response to the Staff's initial motion to dismiss indicating that for certain of the issues specified by OSC, the Staff's dismissal request was predicated on its belief that these issues had been raised prematurely. *See* NRC Staff's Reply to [OSC's] Response to NRC Staff's Motion to Dismiss Certain Issues Proposed by [OSC] (Oct. 1, 1993) at 5-7. As presented by the Staff, "dismissing" such an issue now would not necessarily foreclose OSC from later attempting to introduce evidence regarding that issue as part of its challenge to the Staff's January 1993 enforcement order.

Noting that the intent of our July 15 order was to identify those issues that either party believed could be conclusively resolved at this point in the proceeding, in our November 17 memorandum and order we asked that the Staff again review the issues for which it requested dismissal and specify which, if any, were now subject to definitive resolution. *See* November 17, 1993 Order at 6-7. In its November 29 response to this request, the Staff has indicated that twelve of OSC's issues currently are subject to "dismissal" under the terms of

our November 17 issuance. *See* NRC Staff Response to the [Licensing Board's] Order Dated November 17, 1993 (Nov. 29, 1993), at 5-7 [hereinafter Staff Response to November 17, 1993 Order]. Five of these are the same issues for which OSC seeks summary disposition in its favor. *See id.* at 6 n.2. In its reply to the Staff's response, OSC reiterates its position that none of these twelve issues is subject to dismissal. *See* Response of Licensee [OSC] to Staff Filings of November 29, 1993 and September 6, 1993 (Dec. 13, 1993) at 3-6 [hereinafter OSC Response to November/September Staff Filings].

We consider the twelve issues specified in the Staff's November 29 response as being ripe for decision at this time.³

II. ANALYSIS

A. OSC Summary Disposition Motion

1. *The OSC Issues*

In analyzing the parties' motions, we begin with OSC's summary disposition request because it potentially is dispositive of the Staff's request to dismiss the same five issues. In our July 15 order, we asked that, given its response to the Staff's objections to five of its issues — OSC Legal Issues *n*, *s*, *t*, *v*, and *x* — OSC give further consideration to whether it should seek summary disposition regarding those issues. *See* July 15, 1993 Order at 10-14. Those issues were specified by OSC as follows:

OSC Legal Issue n. Whether the RSO not visiting the Lehigh facility during a period of 6-9 months constitutes a violation of 10 C.F.R. § 35.21, 10 C.F.R. § 35.20 or any applicable conditions of the license?

OSC Legal Issue s. Whether, under any applicable regulations or licensing conditions, an appropriate corporate radiation safety communication must be issued before any media disclosure of an event?

OSC Legal Issue t. Whether the failure to issue an appropriate corporate radiation safety communication prior to media disclosure of an event constitutes a basis to support an effective immediately suspension order?

OSC Legal Issue v. Assuming that OSC voluntarily suspended licensed HDR operations at Exton and Lehigh, whether there was any specific regulatory requirement that OSC inform the physicists at Exton and Lehigh of the November 1992 IRCC incident via "corporate radiation safety communication" designed to prevent "the recurrence of an event such as the November 16, [1992] event," during the period of voluntary suspension and prior to the time

³ If it finds it appropriate to do so, the Staff may renew its dismissal request relative to any of the other issues specified in its motions, subject to any time limitations we place on filing dispositive motions.

that OSC and Dr. Cunningham, the RSO, had an understanding of what had occurred on November 16, 1992?

OSC Legal Issue x. Whether 10 CFR Parts 20, 30, or 35 or any license conditions require a licensee to establish and implement a periodic corporate audit program?

See Prehearing Report at 4-6.

2. *The Parties' Positions*

In its summary disposition filing, OSC asserts that, for purposes of its motion, it will assume that the factual allegations made by the Staff regarding each of these issues is correct, i.e., that the RSO did not visit the Leighton facility for six to nine months; that physicists at the Leighton and Exton facilities learned of the November 1992 IRCC incident from the media rather than a corporate radiation safety communication; and that OSC did not have a periodic corporate audit program in place. See OSC Summary Disposition Motion at 13. According to OSC, even with this assumption, these "Visitation, Audit, and Communication grounds" (as OSC labels them) cannot constitute a basis for the Staff's finding in its enforcement order that there has been a "significant corporate management breakdown" warranting license suspension. OSC maintains that in each instance the Staff has failed to indicate that the purported improper actions violate any specific statutory provision, regulation, license condition, technical specification, or order so as to constitute a proper basis for an enforcement action. Indeed, OSC suggests that this question of a lack of authority has far-reaching implications for this case because, as with these issues, the agency's reliance upon "corporate mismanagement" as the general basis for its suspension action likewise has no foundation in a specific regulatory requirement that would provide grounds for instituting an enforcement action. See *id.* at 13-14.

OSC cites three grounds in support of its position. See *id.* at 14-20. First, it contends that three provisions in the Atomic Energy Act of 1954 (AEA), sections 161b, 182a, and 186a, 42 U.S.C. §§ 2201(a), 2232(a), 2236(a), mandate that to establish a binding norm by which a licensee must abide, the agency has to promulgate an explicit regulatory requirement, i.e., a rule, order, technical specification, or license provision, and that such requirements can only be prospective in application. OSC also declares that 10 C.F.R. Part 2, App. C, § VI.C(2)(a), cited in the Staff's objections to OSC's issues as supporting the agency's authority to suspend OSC's license, is a "policy statement" rather than a rule. This, OSC asserts, means that it can have no binding effect.

Finally, OSC contends that any finding that the matters set forth in these issues constitute a basis for an enforcement action would violate its right to due process under the Constitution's fifth amendment. According to OSC, because

there is no specific regulatory requirement covering the conduct involved in these issues, the Commission has violated OSC's rights by failing to provide it with notice of the legally binding standard to which it must conform its conduct. By the same token, OSC asserts that even if section VI.C(2)(a) of Appendix C is a legally binding requirement, its statement that a suspension order may be used "[t]o remove a threat to the public health and safety, common defense and security, or the environment" violates OSC's due process rights because it is too vague to provide OSC with notice of the standards to which it must conform and because it impermissibly permits arbitrary and discriminatory enforcement.

In response, the Staff declares that the Commission is not limited to issuing enforcement orders based only upon a violation of its regulations. Instead, it asserts that AEA section 161 places orders — such as the Staff's January 1993 enforcement order — that are issued to protect the public health and safety on an equal footing with agency rules designed to afford the same standard of protection. Further, citing the Supreme Court's decision in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), the Staff states that in carrying out its statutorily imposed responsibility to protect the public health and safety, the agency is not limited to promulgating rules, which usually have only prospective application. Rather, it can in appropriate circumstances take action by issuing an order that delineates a standard of conduct and applies that standard to the party that is the subject of the order. Finally, the Staff asserts that the AEA provisions referred to by OSC (which also are cited in the January 1993 order) provide the Commission with broad authority to act by issuing rules or orders, among other things permitting it to suspend a license for any conditions that would warrant refusing to grant an original license application or as otherwise may be necessary to protect public health and safety or to minimize danger to life or property. See Staff Summary Disposition Response/Motion to Dismiss at 10-13.

3. *The Board's Determination*

OSC undoubtedly is correct that section VI.C(2)(a) of Appendix C is not a legally binding requirement. Yet, this circumstance alone will not sustain its overall position. Section 2.202(a)(1) of 10 C.F.R. states that in issuing an enforcement order such as that at issue here, the Staff must "[a]llege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the action proposed." This language suggests that the Commission contemplated that orders need not be based upon a violation of a specific regulatory requirement, such as a rule, license condition, or technical specification.

Yet, it also is true that as a creature of the Congress, the agency can only wield that enforcement authority it has been given by legislative enactment.

See 5 U.S.C. § 558(b). AEA section 186a, 42 U.S.C. § 2236(a), permits revocation and, by necessary implication, suspension of a license for, among other things, "any failure to observe any of the terms and provisions of this Act." Moreover, there apparently are statutory "terms and provisions" that could provide authorization for the Staff's allegations of wrongdoing here. Under sections 161b and 161i(3), *id.* §§ 2201(b), 2201(i)(3), the agency is empowered to issue orders "to protect health or minimize danger to life or property." Previous judicial interpretation makes it clear that the Commission's authority under these provisions is wide-ranging, perhaps uniquely so. See *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

Given the broad sweep of this legislative charge, we cannot say on the present record that the agency would be unable to impose specific requirements regarding either "corporate management" or the visitation, audit, and communications components of the Staff's overall management deficiency finding that are implicated in the five OSC issues.⁴ Further, a valid agency order mandating such requirements for a particular licensee is on an equal footing with a valid regulation affecting licensees generally.⁵ See AEA § 161b, 42 U.S.C. § 2201(b). See also *Wrangler Laboratories*, ALAB-951, 33 NRC 505, 518 & n.39 (1991). What may be less clear, and is the crux of OSC's concern here, is the extent to which such orders can have retroactive application, *i.e.*, whether the agency for the first time in an order can declare that certain conduct, or a failure to act, on the part of a licensee was improper so as to warrant sanctions.

The Supreme Court's pronouncements in this area, particularly its decisions in *Chenery*, 332 U.S. at 203, and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), establish that the choice of whether to use a general rule or an

⁴ A further indication of the agency's broad authority to impose requirements is found in AEA section 182a, 42 U.S.C. § 2232(a), regarding license applications. It states that the Commission has the authority to require an applicant to provide information that, by rule, the Commission finds is necessary to determine that the applicant has the technical, financial, and other qualifications appropriate for a license. In turn, AEA section 186a, *id.* § 2236(a), permits suspension for any conditions revealed by an inspection or other means that would warrant refusal to grant an original license application. The Commission's broad authority under section 182 to define regulatory requirements likewise has received judicial recognition. See *Union of Concerned Scientists v. NRC*, 880 F.2d 552, 558 (D.C. Cir. 1989) (determination of what constitutes "adequate protection" of the public health and safety for reactor facilities under section 182 is a matter congressionally committed to the Commission's sound discretion).

⁵ OSC refers to the Administrative Procedure Act (APA) provision on license revocations and suspensions, 5 U.S.C. § 558(c), as providing a basis for its assertions regarding the need for the agency to allege a violation of a specific agency regulatory requirement, such as a rule, as the basis for a suspension order. See OSC Reply to Staff Summary Disposition Response/Motion to Strike at 11-12. We find this provision inapplicable.

Section 558(c) permits an agency, in cases where the "public health, interest, or safety requires," to take action without observing the requirements for affording prior notice and a "compliance" opportunity that otherwise are mandated prior to imposing a suspension. This "immediate effectiveness" authority does not, however, address the question of what violations must be alleged to provide an appropriate basis in support of the order. Rather, this depends principally upon the provisions of the agency's organic statute, such as the AEA. See 5 U.S.C. § 558(b). See also U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 88-89, 91 (1947), reprinted in Administrative Conference of the U.S., *Federal Administrative Procedure Sourcebook* 154-55, 157 (2d ed. 1992).

individual order to establish a standard is one within “the informed discretion” of the agency.⁶ This principle recognizes that in the face of a broad congressional mandate such as that given to the NRC, an agency simply cannot be expected to anticipate and promulgate a rule relative to each activity that a regulated entity undertakes. Therefore, to permit administrative agencies to deal effectively with the varied, complex regulatory problems they face, those agencies must retain the power to address those problems on a case-by-case basis by issuing orders. See *Chenery*, 416 U.S. at 203. In the words of the Court, to do otherwise “is to exalt form over necessity.” *Id.* at 202.

There may be instances, however, when an agency’s determination to proceed by order rather than rulemaking would amount to an abuse of discretion. See *Bell Aerospace*, 416 U.S. at 294. OSC’s general “due process” concern about the agency’s failure to give it explicit prior notice of the standards set forth in an order generally is not sufficient to establish such an abuse, given the Supreme Court’s recognition of the discretion afforded agencies to utilize individual orders to establish binding standards. See *Beazer East, Inc. v. EPA, Region III*, 963 F.2d 603, 609 (3d Cir. 1992). Instead, the critical factor appears to be whether the challenged agency order “fill[s] interstices in the law” or whether it creates a new standard, either because the order overrules past precedents relied upon by the party subject to the ruling or because it is an issue of first impression. See *United Food & Commercial Workers International Union, Local No. 150-A v. NLRB*, 1 F.3d 24, 34 (D.C. Cir. 1993). Only in the latter instance is a concern about retroactive application warranted.⁷

OSC has made no showing that the Staff’s expressed concern about a “corporate management breakdown” or the propriety of OSC’s actions relative to the specific audit, communication, and visitation matters referenced in the five OSC issues are inconsistent with some prior administrative precedent. Nor can we say that this is an instance involving a question of first impression

⁶OSC maintains that the *Chenery* decision is inapposite here because (1) that case was decided prior to the effective date of the APA’s suspension provision, 5 U.S.C. § 558(c), which OSC asserts directly addresses the instant situation, and (2) the Court’s ruling did not address a situation such as this one in which an agency took summary enforcement action based upon conduct that was not previously identified as subject to any regulatory requirement or guideline. See OSC Reply to Staff Summary Disposition Response/Motion to Strike at 10 n.4. Even putting aside our doubts about the applicability of section 558(c) to the instant case, see *supra* note 5, we are not aware of any authority suggesting that the vitality of the *Chenery* decision is impacted by the fact that it was decided before the APA became effective. See *Bell Aerospace*, 416 U.S. at 292 n.23 (although *Chenery* did not involve APA rulemaking, it is analogous). Further, the tenants of that decision have been viewed as applicable in enforcement cases such as this proceeding. See *National Distillers & Chem. Corp. v. Dep’t of Energy*, 498 F. Supp. 707, 720 (D. Del. 1980), *aff’d*, 662 F.2d 754 (Temp. Emer. Ct. App. 1981).

⁷In *United Food & Commercial Workers*, 1 F.3d at 35, the United States Court of Appeals for the District of Columbia Circuit noted that any exceptions to the rule regarding the general validity of the retroactive application of individual agency orders may not withstand scrutiny under the Supreme Court’s recent holding in *Harper v. Virginia Dep’t of Taxation*, 125 L. Ed. 2d 74 (1993), abolishing exceptions to the retroactive application of judicial rulings in civil cases. Like the District of Columbia Circuit, we need not reach that question here given our finding below that the Staff’s order does not run afoul of existing exception standards.

relative to the agency's regulatory program. Previously, the Staff's combination of individual instances of licensee conduct have been found to support an overall finding of "corporate management breakdown" sufficient to warrant an enforcement action. See *Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297, 317-18 (1991). See also 10 C.F.R. Part 2, App. C, § VII.A (particularly serious violations, such as "serious breakdowns in management controls" may warrant escalation of enforcement sanctions). In fact, whether the Staff's management deficiency allegation will stand depends on its ability to fill a number of "interstices," among which are questions about the extent of an RSO's responsibility to stay abreast of matters at a corporate licensee's various facilities; the need for and timing of information bulletins by a corporate licensee to alert other potential material users under its license about possibly hazardous conditions; and the need for a periodic audit program by a corporate licensee when it has authorized material users at a number of facilities.

Accordingly, we must deny OSC's request for summary disposition on its Legal Issues *n*, *s*, *t*, *v*, and *x*. This is not to say, however, that the validity of the Staff's general charge of a "corporate management breakdown" or its specific concerns regarding the audit, communications, and visitations matters referred to in these OSC issues are now established. Because of its apparent reliance on the agency's general statutory mandate to "protect the public health and safety" instead of a specific, previously issued regulation, order, regulatory guide, or license condition as the basis for these matters, the Staff must be prepared to establish with specificity the health and safety consequences of the licensee action or inaction about which it complains. Ultimately, the Staff must show how the standard to which it would hold the Licensee (and presumably others similarly situated) regarding those matters is a reasonable component of the agency's general statutory mandate to protect the public health and safety.

B. Staff Motion to Dismiss OSC Summary Disposition Issues

Having thus rejected OSC's summary disposition motion regarding its Legal Issues *n*, *s*, *t*, *v*, and *x*, we next consider whether to grant the Staff's motion to dismiss these same issues. As the Staff correctly observes, if after all factual allegations in these issues are presumed to be true and all reasonable inferences are made in favor of OSC, there is no set of facts that would entitle OSC to relief on these issues, dismissal is appropriate.⁸ See Staff Summary Disposition Response/Motion to Dismiss at 26 (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). See also Staff Motion to Dismiss at 8.

⁸ Notwithstanding any OSC suggestion to the contrary, see Response of Licensee [OSC] to NRC Staff's Motion to Dismiss Certain Issues Proposed by [OSC] (Sept. 16, 1993) at 2-4, and consistent with the analogous agency rules regarding contentions filed by intervenors, see 10 C.F.R. § 2.714(d)(2)(ii), we find it within our authority to entertain the Staff's motions seeking dismissal of some OSC issues. See 10 C.F.R. § 2.718.

Applying this standard here, we note that OSC Legal Issues *n*, *s*, and *x* only ask whether there are any rules or license conditions that govern certain OSC activities. Because we have concluded that a negative Staff response to these questions would not adversely impact the Staff's prosecution of this action, these issues can be dismissed.

Legal Issues *t* and *v* present a somewhat different question, however. Both are worded more broadly. Legal Issue *t* inquires whether the Staff's purported concern about the timing of a corporate safety communication regarding the November 1992 IRCC incident constitutes an appropriate "basis" for the order. As we outlined above, this is still an open question. So too, Legal Issue *v* asks whether any "regulatory requirement" mandated a corporate safety communication when licensed activities at other facilities were voluntarily suspended, a specification that can still be explored in the context of the statutory provisions discussed above. Therefore, given their wording, we will permit these issues to stand.⁹

C. Staff Motion to Dismiss Other OSC Issues

As noted previously, the Staff also seeks dismissal of seven other OSC issues. Within the framework we used for differentiating among issues in our July 15 order, we consider these matters.

1. *Unreferenced Factual Occurrences*

The first category of OSC issues identified in our July 15 order are those relating to factual circumstances that are not referenced in the Staff's January 20 suspension order. See July 15, 1993 Order at 5-6. Although the Staff designated a number of these in its initial motion to dismiss, in response to our November 17 memorandum and order it has indicated that only two — Factual Issues *bk* and *bl* — are now subject to dismissal. See Staff Response to November 17, 1993 Order at 7. These issues were set forth by OSC as follows:

OSC Factual Issue bk. Whether on April 2, 1993, the NRC approved an amendment sought by OSC changing its Radiation Safety Officer from David E. Cunningham Ph.D., to Bernard Rogers, M.D.?

OSC Factual Issue bl. Whether substantial patient need exists for HDR treatment at the facilities of OSC?

Prehearing Report at 28.

⁹We note, however, that the reference in Legal Issue *t* to the immediate effectiveness of the January 1993 order is superfluous, given OSC's failure to challenge that condition at the appropriate time. See LBP-93-6, 37 NRC at 211 n.9.

The Staff asserts that both these issues are irrelevant because they fail to disprove or challenge any of the bases for the January 1993 enforcement order. *See* Staff Motion to Dismiss at 20, 32. OSC responds that both these issues are relevant to the overarching question of whether there was a significant corporate management breakdown threatening the public health and safety so as to “justify a continuing license suspension.” OSC Response to November/September Staff Filings at 6.

Both of these issues involve matters that are irrelevant to this proceeding. With its Factual Issue *bk*, OSC raises the question of whether a licensee’s post-suspension efforts (and the Staff’s response to those efforts) can be considered as factors that can mitigate or nullify the bases for a suspension order. In the context of this proceeding, OSC apparently wants to present evidence showing that, regardless of the situation at the time the suspension order was imposed, subsequent events demonstrate that it now is exercising effective corporate management control so that the suspension order should not be upheld. *See* Response of Licensee [OSC] to NRC Staff’s Motion to Dismiss Certain Issues Proposed by [OSC] (Sept. 16, 1993) at 13 [hereinafter OSC Response to Staff Motion to Dismiss].

Under the January 1993 suspension order, the issue to be considered is whether the order “should be sustained.” 58 Fed. Reg. at 6827. If we were writing on a clean slate, we might well find that our inquiry into whether the order is to be “sustained” should encompass postsuspension activities proffered as corrective actions that support modifying or remitting the suspension. We do not do so, however. As defined by the Commission, our authority pursuant to this directive is to consider “whether the facts in the order are true and whether the remedy selected is supported by those facts.” *Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), *aff’d*, *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983). Likewise, in 10 C.F.R. § 2.202(b), the Commission has directed that an answer to an enforcement order is to specify “the reasons why the order should not have been issued.” Moreover, while the Commission’s enforcement policy explicitly notes that licensee “corrective actions” are a factor to be considered in imposing the other two types of enforcement actions, a notice of violation or a civil penalty, *see* 10 C.F.R. Part 2, App. C, §§ VI.A, VI.B.2(b), it makes no such representation concerning orders, including a suspension order such as that involved here.¹⁰

¹⁰ Section VI.C.2 of Appendix C does state that “[o]rdinarily, a licensed activity is not suspended (nor is a suspension prolonged) for failure to comply with requirements where such failure is not willful and adequate corrective action has been taken.” So too, the January 1993 suspension order states that it is being entered “pending . . . the institution of appropriate corrective actions on the part of the licensee.” 58 Fed. Reg. at 6827. These statements, along with the provision of the order providing for the Staff to relax or rescind any of its provisions upon a good cause showing by OSC, *see id.*, are an explicit recognition of the Staff’s authority to consider and act upon corrective actions put forth by OSC. Nonetheless, given the Commission’s explicit

(Continued)

What this tells us is that the Commission intended to define the scope of the proceeding to limit the Board to a determination of the sufficiency of the legal and factual predicates outlined in the order as of the time the order was issued.¹¹

The extent to which subsequent circumstances warrant agency action to modify or withdraw a suspension order generally is a matter that is within the discretion of the Staff and is not subject to consideration in an agency adjudication.¹² *Cf. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984), *vacated in part and rehearing en banc granted on other grounds*, 760 F.2d 1320 (1985), *aff'd en banc*, 789 F.2d 26, *cert. denied*, 479 U.S. 923 (1986). Accordingly, because it seeks to present a postsuspension event that is not relevant to establishing whether the Staff suspension order should be sustained, OSC Factual Issue *bk* must be dismissed.

Factual issue *bl* must suffer the same fate, albeit for a different reason. The Staff's order is based upon a judgment about whether the license suspension is necessary to protect the public health and safety in conformity with the agency's regulatory responsibilities under the AEA. *See supra* pp. 20-21. Whatever the patient "need" for the treatment with licensed materials, the agency cannot authorize their use until it is satisfied that the licensee will act consistent with this statutory mandate. Accordingly, OSC Factual Issue *bl* is irrelevant to our consideration of whether the Staff's January 1993 order should be sustained and is, therefore, dismissed.¹³

2. *Applicability of 10 C.F.R. Part 35, Subpart G*

In our July 15 order, we also referenced a category of OSC issues regarding the applicability of the requirements of 10 C.F.R. Part 35, Subpart G, which

statements about the scope of the proceeding detailed above, in the absence of a statement in the order providing some detail about what are the "appropriate corrective actions," we do not consider these declarations sufficient to authorize us to delve into whether the Staff has abused its discretion in failing to modify or rescind the January 1993 order in light of OSC's postsuspension corrective actions.

¹¹ The fact that the suspension order here was made immediately effective and continues to be effective does not affect this authority. The immediate effectiveness provision in the Commission's regulations states that the only grounds for contesting effectiveness are that "the order is not based on adequate evidence but on mere suspicion, unfounded allegations, or error." 10 C.F.R. § 2.202(c)(1)(2)(i). Under this provision, the focus remains on the stated bases for the order, not subsequent licensee actions in response to the suspension.

¹² This question of the presiding officer's authority to consider whether the Staff *should act* to revise or withdraw a challenged suspension order can be distinguished from instances in which the Staff *actually has acted* (1) to modify or suspend a previously issued order during the pendency of an adjudicatory proceeding regarding that order, or (2) to enter into an agreement to take such actions to settle a proceeding. In both instances, agency rules provide that the Staff's action is subject to scrutiny by the presiding officer. *See* 10 C.F.R. §§ 2.203, 2.717(b). It also is not apparent whether, at some point, Staff inaction on modifying or lifting a suspension order in the face of licensee corrective actions effectively may become a type of action that would give the Board authority under section 2.717(b) to consider the sufficiency of those corrective actions.

¹³ The issue of patient "need" may well be relevant to the question of whether to grant a request to delay a proceeding. *See* LBP-93-6, 37 NRC at 216-20. At present, however, that is not a matter in controversy in this case. *See supra* note 1.

concerns the use of sources for brachytherapy. See July 15, 1993 Order at 6-7. In response to our November 17 memorandum and order, the Staff now seeks dismissal of two of these matters — OSC Legal Issues *c* and *d*. See Staff Response to November 17, 1993 Order at 6. These issues were detailed by OSC as follows:

OSC Legal Issue c. Whether the regulations in 10 C.F.R. Part 35 Subpart G “Sources for Brachytherapy” apply to the use of Iridium-192 as a sealed source in a brachytherapy remote afterloader for the High Dose Radiation treatment of humans (“HDR”)?

OSC Legal Issue d. If the regulations in 10 C.F.R. Part 35 Subpart G “Sources for Brachytherapy” apply to the use of Iridium-192 as a sealed source in a brachytherapy remote afterloader for the treatment of humans (HDR) then whether the specific survey requirement of 10 C.F.R. § 35.404(a) applies to Iridium-192 HDR?

Prehearing Report at 2.

The Staff argues that these issues should be dismissed as irrelevant because the January 1993 suspension order was not based upon any violation of 10 C.F.R. Part 35. See Staff Motion to Dismiss at 20-21. OSC contends that these issues are relevant because its compliance with Part 35 would satisfy any survey requirement under 10 C.F.R. Part 20, including section 20.201 that is cited in the order. It also maintains that, even if Part 35 is not applicable, the Staff’s own uncertainty about whether the requirements of Part 35 are germane to HDR use is evidence that NRC never communicated with licensees properly about the applicable requirements and is relevant to demonstrating that the November 1992 IRCC incident was rooted in a “regulatory failure” rather than an OSC management breakdown. See OSC Response to Staff Motion to Dismiss at 15-16.

As worded, these issues are a poor delineation of the matters OSC evidentially wants to contest, at least as outlined in its response. The question of alternative compliance is already raised much more clearly in OSC Legal Issues *e* and *f*, which the Staff does not contend are subject to definitive resolution at this time. See Staff Response to November 17, 1993 Order at 8. By the same token, OSC Legal Issues *a*, *ac*, and *ad*, which are not among the twelve issues specified by the Staff, are much more to the point regarding any “regulatory failure” concern that OSC may wish to pursue.

OSC is responsible for spelling out the matters it wishes to litigate with sufficient specificity. Given the Staff’s acknowledgment that 10 C.F.R. Part 35 was not a basis for the January 1992 order, these two issues require too much “reading between the lines” to link them to the particular concerns OSC now contends it wants to present. We thus dismiss these two issues.

3. Omnitron 2000 HDR Remote Afterloader Issues

The third category of issues we identified were those relating to the Omnitron 2000 HDR remote afterloader that was in use at OSC's IRCC facility during the November 1992 incident. *See* July 15, 1993 Order at 7. Among these are issues regarding defects or deficiencies in that device, or in the training, instructions, and emergency procedures provided by the manufacturer regarding that device, and questions about OSC employee compliance with and reliance upon Omnitron training and procedures.

The Staff indicated in its November 17 filing that three of these issues now are subject to dismissal. *See* Staff Response to November 17, 1993 Order at 7. They provide as follows:

OSC Factual Issue z. Whether the Omnitron 2000 HDR unit was defective?

OSC Factual Issue ab. Whether despite Omnitron's knowledge of deterioration of the source wire due to a chemical reaction resulting from its packaging, Omnitron failed to notify OSC of the defect and OSC was not otherwise informed of the possibility of deterioration?

OSC Factual Issue ad. Whether any of the Omnitron 2000 design, manufacturing and/or warning defects was a cause of the November 16, 1992 incident?

See Prehearing Report at 11-12.

The Staff's position regarding all three of these issues is the same: Under the factual circumstances described in the suspension order relative to the November 1992 IRCC incident, OSC had a regulatory obligation pursuant to Condition 17 of its license and 10 C.F.R. § 20.201(b) to perform a survey of the patient that would not be excused by any alleged defects in the Omnitron 2000. *See* Staff Motion to Dismiss at 22. OSC asserts that under the terms of the January 1993 order, a central question is whether its actions relating to taking a survey were, in the words of the January 1993 order, "reasonable under the circumstances to evaluate the extent of radiation hazards that may be present." 58 Fed. Reg. at 6825. Further, according to OSC, any assessment of the reasonableness of its action can only be made after determining whether the Omnitron 2000 was defective, whether that defect was the cause of the November 1992 IRCC incident, and whether the machine's manufacturer knew of and failed to inform OSC about that defect. *See* OSC Response to Staff Motion to Dismiss at 14-15.

We agree with OSC that as to the issue of its personnel's compliance with section 20.201(b), a central question is whether its actions relating to a survey were "reasonable under the circumstances." We disagree, however, that its proposed concerns regarding defects in the Omnitron 2000 as embodied in Factual Issues *z*, *ab*, and *ad* have any relevance in answering that question.

In this context, the relevant “circumstances” are those that existed at the time of the incident. Undoubtedly, an important aspect of those circumstances is what pertinent OSC management and operating personnel knew about the Omnitron afterloader and any possible defects or problems, as garnered from such things as their operational experience or any information they were privy to as a result of training or instruction manuals. Consequently, a relevant area for litigation is the state of knowledge of OSC personnel about Omnitron afterloader defects and problems *at the time of the incident*.¹⁴

This is not, however, what these three “defect” issues seek to explore. As we understand it, OSC contends that at the time of the incident it did not know of any defect in the operation of the afterloader or its safety systems that could cause the metal drive wire to break and leave the iridium-192 source lodged in a patient without alerting the operator. See OSC Summary Disposition Motion at 3-4. If this indeed was the state of knowledge of OSC personnel at that time, then inquiry into whether the Omnitron machine actually was defective so as to be a cause of the November 1992 IRCC incident or whether the manufacturer should have told OSC about problems with the machine based upon some alleged duty to discover and disclose defects will not shed any light on the central question of what OSC personnel knew at the time of the incident. Indeed, for purposes of this action, even if it is assumed that the answers to each of these three “defect” issues is “yes,” we would be no closer to resolving the focal issue of whether the actions of OSC personnel regarding a survey were “reasonable under the circumstances.”

Accordingly, we dismiss OSC Legal Issues *z*, *ab*, and *ad* as not relevant to this proceeding.

III. CONCLUSION

Based upon our review of the parties’ filings, we conclude that in this instance the Staff’s reliance on matters that apparently do not constitute a violation of any specific pre-existing rule, order, license condition, or technical specification as a basis for its January 1993 suspension order did not constitute an abuse of discretion so as to warrant summary disposition in favor of licensee OSC relative to those matters. We will, however, grant the Staff’s request that OSC Legal Issues *n*, *s*, and *x* asserting such Staff reliance was improper be dismissed from this proceeding.

¹⁴ Other OSC issues raise questions about such matters. See, e.g., Prehearing Report at 10 (OSC Factual Issue *n* (Omnitron training regarding source wire breakage)); *id.* at 11 (OSC Factual Issue *u* (use of emergency procedures in the Omnitron manual)); *id.* at 12 (OSC Factual Issue *ag* (user reliance on Omnitron procedures)).

In addition, we conclude that OSC Factual Issues *bk* and *bl* should be dismissed, the former for seeking consideration of irrelevant postsuspension activities and the latter for attempting to introduce the extraneous factor of "patient need." We also dismiss OSC Legal Issues *c* and *d* for failing to delineate the matters OSC apparently wishes to litigate under those issues.

Finally, we find that the allegations about whether the Omnitron 2000 afterloader involved in the November 1992 IRCC incident was defective and a cause of the incident are irrelevant to the matters at issue here — in particular, the focal question of whether the actions of OSC personnel regarding taking a survey during the November 1992 IRCC incident were "reasonable under the circumstances." We thus dismiss OSC Factual Issues *z*, *ab*, and *ad* as well.

For the foregoing reasons, it is this 19th day of January 1994, ORDERED, that

1. OSC's August 16, 1993 motion for summary disposition is *denied*.
2. The Staff's August 16, 1993 motion to dismiss is *granted* as to OSC Legal Issues *c* and *d* and OSC Factual Issues *z*, *ab*, *ad*, *bk*, and *bl*.
3. The Staff's September 16, 1993 motion to dismiss is *granted* as to OSC Legal Issues *n*, *s*, and *x* and is denied as to OSC Legal Issues *t* and *v*.¹⁵

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Bethesda, Maryland
January 24, 1994

¹⁵ Copies of the memorandum and order are being sent this date to OSC counsel by facsimile transmission and to Staff counsel by E-Mail transmission through the agency's wide area network system.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

**B. Paul Cotter, Jr., Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam**

In the Matter of

**Docket No. 50-458-OLA
(ASLBP No. 93-680-04-OLA)**

**GULF STATES UTILITIES
COMPANY, *et al.*
(River Bend Station, Unit 1)**

January 27, 1994

In this Decision, the Licensing Board grants a petition to intervene and request for a hearing. Standing was granted on the basis that the property interest of a petitioner in a nuclear facility, who was a co-owner of the facility, might be jeopardized by potential unsafe operation of the facility caused by underfunding. The Board accepted one of seven contentions. The accepted contention was based on potential unsafe operation of the facility caused by a lack of funding.

IMMEDIATE EFFECTIVE ORDERS

License amendments can be made immediately effective solely at the discretion of NRC Staff, following a determination by Staff that there are no significant hazards considerations involved. Immediate effectiveness findings are not subject to review by licensing boards.

STANDING: STANDING BASED ON PROPERTY INTERESTS

In past NRC cases, standing based on injury to property has been denied because the property interests in question were too far removed from the purpose of the underlying statutes governing those proceedings. Those cases

primarily involved economic interests of ratepayers and taxpayers or general concerns about a facility's impact on local utility rates and the local economy. Notwithstanding the ratepayer/taxpayer line of cases, property interests can confer standing since the Atomic Energy Act affords radiological protection for *both* human life and property. There is standing in this proceeding since the Petitioner's stated interest is to protect its property, the nuclear facility, from radiological hazards arising from the facility's unsafe operation.

STANDING: INJURY IN FACT

Injury-in-fact in this proceeding was based upon potential damage to a co-owner's property interest in a nuclear facility. Potential property damage included loss of the co-owner's share of the facility, loss of plant power and revenue, and potential liability to third parties from radiological accidents.

STANDING: SPECULATIVE INJURY

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.

STANDING: FINANCIAL QUALIFICATIONS

Licensee's argument that a lack of funding could not adversely affect plant safety because the plant would be safely shut down is rejected by the board. This argument contradicts the rationale of 10 C.F.R. § 50.33(f) (1993) requiring applicants for operating licenses to demonstrate that they possess reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the licenses.

FINANCIAL QUALIFICATIONS

Although an electric utility's financial qualification usually cannot be the subject of litigation in NRC operating license proceedings, this exemption does not apply to operators of a nuclear facility that are not electric utilities.

CONTRACTUAL DISPUTES BETWEEN CO-OWNERS OF NUCLEAR FACILITIES

Absent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license conditions, contractual disputes between

co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court.

JURISDICTION OF LICENSING BOARDS: MATTERS WITHIN THE JURISDICTION OF THE FEDERAL ENERGY REGULATORY COMMISSION

Contractual disputes among electric utilities regarding interconnection and transmission provisions, rates for electric power and services, cost-sharing agreements, long-term and short-term planning functions, and similar, utility-related operational agreements are matters that fall within the jurisdiction of FERC or appropriate state agencies that regulate electric utilities.

ENFORCEMENT ACTIONS: ENFORCEMENT OF NRC LICENSE CONDITIONS

Licensing boards have no jurisdiction to enforce license conditions unless they are the subject of an enforcement action initiated pursuant to 10 C.F.R. § 2.202a (1993). The petitioner's only recourse in this instance is to request enforcement action by the Staff pursuant to 10 C.F.R. § 2.206 (1993).

MEMORANDUM AND ORDER

(On Petition to Intervene)

I. INTRODUCTION

Petitioner Cajun Electric Power Cooperative, Inc. (Cajun), seeks to intervene in Gulf States Utilities Company's (Gulf States) applications to amend the River Bend Station facility operating license. The amendments (1) authorize Gulf States to become a wholly owned subsidiary of Entergy Corporation (Entergy); and (2) include Entergy Operations Inc. (EOI) on the license as a new licensee to operate, manage, and maintain River Bend. The petition was filed in response to a July 7, 1993 "Notice of Consideration of Issuance of Amendments to Facility Operating License, Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing." 58 Fed. Reg. 36,423, 36,435-36 (1993).

The River Bend Station, a 940-MWe, single-unit, boiling water reactor, is located in Feliciana Parish, Louisiana. The facility is owned jointly by Gulf States and Cajun.

Cajun seeks two forms of relief in this proceeding. First, Cajun seeks to have additional conditions imposed on the license amendments to protect the

financial underpinning for River Bend operations and to preserve Cajun's rights and interests in River Bend. Second, Cajun requests the enforcement of two existing license conditions.¹

II. THE PARTIES

Cajun is an electricity generation and transmission company supplying twelve rural Louisiana electric cooperatives serving approximately one million people. Cajun and its twelve members are nonprofit cooperatives under the Rural Electrification Act of 1936, 7 U.S.C.A. §§ 901, *et seq.* (1980). In addition to other generating facilities, Cajun owns 30% of the River Bend station, an interest Cajun values at approximately \$1.6 billion.

Gulf States, a Texas corporation headquartered in Beaumont, owns the remaining 70% of River Bend which Gulf States operates for itself and Cajun under a joint agreement the two entered into in 1979. Under that joint agreement, both companies share proportionately the costs, benefits, and expenses of the facility. At the time the petition at issue here was filed, Gulf States was the operator for River Bend.

Entergy Operations Inc. (EOI) is a wholly owned subsidiary of Entergy Corporation. EOI operates nuclear units for four subsidiary companies owned by Entergy, its parent. EOI will operate River Bend in place of Gulf States under the terms of the proposed new Gulf States/EOI River Bend Station Operating Agreement.

Entergy Corporation will be the parent corporation of Gulf States if the merger is approved. Entergy is the parent corporation of EOI and several mid-south regional electric utilities including Arkansas Power & Light Co., Louisiana Power & Light Co., Mississippi Power & Light Co., and New Orleans Public Service, Inc.

III. REQUIREMENTS FOR INTERVENTION

As a threshold matter, Cajun must satisfy the NRC's requirements for intervention. Those requirements are set forth at 10 C.F.R. § 2.714(a)(2) (1993) which requires the statement of a cognizable interest in the proceeding, how that

¹At the outset of this proceeding, Cajun also had claimed that a hearing should be held to decide whether these license amendments should have been made immediately effective. However, 10 C.F.R. § 50.91 (1993) of the Commission's rules makes clear that license amendments can be made immediately effective solely at the discretion of NRC Staff, following a determination by Staff that there are no significant hazards considerations involved. At the prehearing conference, counsel for Cajun conceded that immediate effectiveness findings are not subject to review by licensing boards, and he withdrew this issue from the proceeding. Tr. 8-9.

interest would be affected, the reasons why intervention should be allowed, and the specific subject matter as to which intervention is sought.

A. The Legal Standard for Standing

Judicial tests of standing are applied in NRC proceedings to determine whether a petitioner has sufficient interests to be entitled to intervene. These judicial tests require a petitioner to show that: (1) the proposal will cause "injury in fact" to the petitioner and (2) the injury is arguably within the zone of interests to be protected by the statutes governing the proceeding. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993); *Public Service Co. of Indiana* (Marble Hill Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). In addition to these two elements of standing, the asserted injury must be redressable in the instant proceeding. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 267 (1991).

B. The Positions of the Parties Regarding Standing

1. Cajun

Cajun contends that its ownership interest in the River Bend facility in and of itself confers standing in this proceeding. Among other things, it claims that the license amendments may cause unsafe operation of the plant because EOI (the new operating company resulting from the merger) will be thinly capitalized and may have insufficient operating funds due to pending legal actions against Gulf States. It also claims that safety will be jeopardized because the new arrangement (using EOI as operator rather than Gulf States) will foreclose Cajun from dealing directly with the plant's operator, thus preventing Cajun from confirming that the plant is being operated safely and from being able to influence its safe operation. Cajun contends that unsafe operations can jeopardize Cajun's ownership property interest in the plant and increase the potential for third-party liability resulting from accidents.

Cajun also makes the procedural argument that Gulf States does not have the right under state law to make changes that directly threaten Cajun's ownership in the plant and that Cajun should be allowed standing in this proceeding, as a co-owner, to contest whether Gulf States has the right to jeopardize this interest.

2. Gulf States

Gulf States opposes Cajun's standing primarily on the basis that Cajun's alleged injury is purely economic and therefore not within the zone of interests

protected by the Atomic Energy Act which is confined to radiological health and safety matters. Gulf States also argues that the scenario relied upon by Cajun to establish standing (i.e., safety concerns at the plant caused by a lack of funding) is illusory since the plant can be safely shutdown even if these concerns occur. Moreover, it claims that the same lack of funding alleged by Cajun would result without the license amendments because the responsibility for the cost of operating the plant will remain with Gulf States and Cajun even if the amendments are not granted. Gulf States additionally states that Cajun's argument concerning insufficient resources for safe operation is too speculative to be the basis for intervention. Finally, Gulf States contends that, to the extent that Cajun has attempted to gain standing by identifying injury to its member rural electric utility cooperatives, it has failed to do so in three respects. First, Cajun has failed to demonstrate that it has the authority to represent those persons who are members of those cooperatives. Second, Cajun has failed to show specific injury to them. Third, in any event, those persons are not members of Cajun but members of Cajun's members.

Gulf States additionally makes the procedural argument that there are two separate license amendments involved in this case and therefore two proceedings — one involving Gulf States' merger application with Entergy Corporation and the other involving the replacement of Gulf States with EOI as the operator of the River Bend plant. Gulf States maintains that the board must find standing for each of these proceedings.

3. *Staff*

Staff supports Cajun's standing to intervene. According to Staff, injury-in-fact by the amendments has been established because Cajun has shown it will suffer concrete and particularized harm traceable to the license amendment if the proposed new plant operator does not have the resources to safely maintain and operate River Bend or if the proposed amendment would cause a lessening of Cajun's influence, as an owner, to see that the plant is safely maintained and operated. Staff also states that Cajun has shown that it might sustain an actual injury if Gulf States lacks the authority to file the application on its behalf and that the grant of the application might adversely affect rights Cajun has under the present license. Staff additionally notes that Cajun has established that the alleged harm might be redressed in this proceeding by denying the amendment and keeping Gulf States primarily responsible for the safe operation of River Bend, or by granting the amendment with appropriate license conditions to protect Cajun's interests.

Staff concludes that Cajun's petition is within the zone of interests protected by the governing statute because the Atomic Energy Act states that the Commission shall provide for the protection of property, as well as of life, from

radiological hazards. As authority, it cites sections 103b, 42 U.S.C.A. § 2133(b) (1973), and 161b, 42 U.S.C.A. § 2201(b) (West Supp. 1974-1993) of the Act providing that licenses may be issued to those who will observe standards to “minimize danger to life and property” and it cites section 170 providing for the indemnification of damages caused by radiological accidents. As additional authority, it cites section 2f of the Act where Congress found that the use and control of atomic energy is necessary “for protection against possible interstate damage” occurring from the operation of nuclear facilities in interstate commerce. 42 U.S.C.A. § 2012(f) (1973).

C. Analysis of Standing

At the outset, we do not agree as a practical matter with Gulf States’ argument that two proceedings are involved here — the merger proceeding and the operator proceeding — and that separate standing must be established for both. Although there were two *Federal Register* notices on July 7, 1993, regarding Gulf States’ license amendments, one pertaining to the merger and one pertaining to the designation of an operator for the facility, the two amendments appear to be different facets of the same undertaking and do not require separate findings. That is, there is one nuclear power plant, one license being amended, and one part owner of that plant seeking to intervene. Gulf States’ view of the matter could double the litigation burden and costs, an unhappy result this agency normally seeks to avoid.

Aside from this procedural issue, the issue here is whether the property interest of Cajun in River Bend is sufficient to confer standing in this license amendment proceeding. We conclude that it is.

There are a limited number of NRC cases involving standing that involve property interests. Most have held that the property interests involved were insufficient to confer standing since they were outside the zone of interests designed to be protected by the Atomic Energy Act — namely, interests related to health, safety, and radiological matters. The property interests in those cases primarily involved economic interests of ratepayers and taxpayers or general concerns about a facility’s impact on local utility rates and the local economy. See *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 (1977); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977).

Notwithstanding the ratepayer/taxpayer line of cases, property interests can confer standing. The ratepayer/taxpayer cases failed to find standing because the property interests were too far removed from the purpose of the underlying statutes governing those proceedings. Cajun’s stated interest in this proceeding,

on the other hand, is to protect its property, River Bend, from radiological hazards arising from unsafe plant operation. Cajun's asserted interest in avoiding damage to property from nuclear-related accidents coincides with the Atomic Energy Act's stated purpose of affording protection from radiological hazards. As Staff correctly points out, radiological protection under the Act is afforded for *both* human life and property. In fact, the protection of property is specifically mentioned in the Atomic Energy Act in several places, including sections 103b and 161b which speak of minimizing "danger to life or property." 42 U.S.C.A. §§ 2133(b) and 2201(b) (West Supp. 1974-1993). Cajun's property interest in River Bend thus clearly meets the zone of interests requirement for standing.²

Both license amendments found in the July 7, 1993 *Federal Register* Notice play a role in the potential radiological hazards that Cajun has alleged in this proceeding. The amendment naming a new plant operator will install an allegedly underfunded operator whose lack of funding may jeopardize the safe operation of River Bend. According to Cajun, potential underfunding stems from multiple legal actions against Gulf States that could cause considerable financial difficulty, including bankruptcy. The merger amendment to permit Gulf States to become a subsidiary of Entergy Corporation also can cause unsafe operations since the terms of the merger agreement allegedly allow for underfunding at the plant. Thus, both amendments play a part in this proceeding and both are contributors to Cajun's standing arguments.

Cajun also has demonstrated injury-in-fact sufficient to confer standing. Because it is a co-owner of River Bend, it arguably can suffer substantial damage to its property interest from the plant's unsafe operation, including loss of its share of the plant, loss of plant power and revenue, and potential liability to third parties from radiological accidents.³

We reject Gulf States' argument that the alleged injury to Cajun is too speculative to be the basis for intervention. 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. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 104-05 (1976). In this case, Cajun has supplied information to establish that safety at the plant may be jeopardized by potential plant underfunding and a lack of oversight by Cajun. It has specifically alleged in this regard that only Gulf

² We note that standing arguably may be granted for property interests other than those associated with physical damage from radiological hazards. See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316-17 (1985). However, we see no need in this case for us to determine whether standing may be granted for property interests that do not directly pertain to radiological hazards.

³ Cajun has not specifically claimed standing based upon potential personal injury to individuals. However, it has listed various rural electric distribution cooperatives that are Cajun members whose service areas include individual members who are living adjacent to the River Bend facility. We agree with Gulf States that Cajun cannot obtain standing through those individuals who are members of these member cooperatives because it has neither demonstrated authority to represent them nor has it alleged any specific injury to them.

States will be responsible for funding the plant under the current terms of the merger agreement and that Gulf States' officials have conceded the potential for bankruptcy to Gulf States from pending litigation. We view these allegations as adequate to establish the necessary injury in fact.

We also reject Gulf States' argument that a lack of funding could not adversely affect plant safety. This argument clearly contradicts the rationale of 10 C.F.R. § 50.33(f) (1993) requiring applicants for operating licenses to demonstrate that they possess reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the licenses. The regulatory basis for section 50.33(f) would include numerous safety factors including a consideration that insufficient funding might cause licensees to cut corners on operating or maintenance expenses. Even though, as Gulf States asserts, the plant could be safely shut down if funds are lacking, under section 50.33(f) financial assurances would still have to be provided.⁴ We note that even during shutdown there are accident risks associated with a nuclear reactor. *See generally*, NUREG-0933, "A Prioritization of Generic Safety Issues" (1991).

Finally, we reject Gulf States' argument that the license conditions are immaterial to Cajun's property interests since the responsibility for operating costs at River Bend will still rest with Gulf States and Cajun, just as they did before the merger. This claim is controverted in Cajun's petition where Cajun asserts that the new Operating Agreement runs only between Gulf States and EOI and, therefore, Gulf States has the full obligation to compensate EOI for River Bend operation and EOI cannot look to Cajun for payment. Gulf States' argument also fails to recognize that license conditions could arguably be imposed that would help alleviate Cajun's financial concerns.

For the reasons explained in this section, we conclude that the potential injury to Cajun's property interest in River Bend establishes the requisite "injury in fact" for standing in this proceeding and that the potential injury to this interest is within the zone of interests protected by the Atomic Energy Act.⁵

⁴ Although an electric utility's financial qualification usually cannot be the subject of litigation in NRC operating license proceedings (*see* 10 C.F.R. § 50.33(f); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231 (1989)), the matter here concerns the financial viability of the operating company, EOI, which is not an electric utility. (For a more detailed analysis of this question, see discussion for Contention 2, *infra*.)

⁵ Our ruling does not reach Cajun's argument that standing can also be derived from its rights as a co-owner of River Bend alone. Cajun appears to argue that co-owners and co-licensees of nuclear facilities should be allowed to contest license amendments that are contrary to their ownership interests (especially where, as here, state law does not allow a joint ownership agreement to be amended in the manner proposed) regardless of the subject matter at issue. Our subject matter jurisdiction is limited by statute, and we find Cajun's contractual property interest at issue here inappropriate to confer standing. Absent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license conditions, contractual disputes between co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court. Contract disputes are not within the scope of this proceeding and will not be addressed by this board.

IV. CAJUN'S CONTENTIONS

To be admitted as a party in this proceeding, Cajun must not only establish standing, but also must proffer at least one admissible contention. The standards for admissible contentions are set out in 10 C.F.R. §2.714(b)(2) and (d)(2) (1993). These regulations require that Cajun's contentions include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contentions, and a concise statement of the alleged facts or expert opinion which support the contentions, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contentions. In addition, section 2.714 (b)(2)(iii) requires that Cajun present sufficient information to show that a genuine dispute exists on a material issue of law or fact. And, of course, Cajun's contentions must fall within the scope of the issues set forth in the notice of the proposed licensing action. *See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-316, 3 NRC 167, 170-71 (1976).

Cajun has listed the following seven contentions for litigation in this proceeding. *See "Cajun Electric Power Cooperative Inc.'s Amendment and Supplement to Petition for Leave to Intervene Comments and Request for Hearing,"* dated August 31, 1993, at 7-22. Gulf States and Staff oppose these contentions on the basis that they are economic in nature and outside of the scope of health and safety issues in this proceeding, that they fail to have a sufficient basis, and that they would not entitle Cajun to relief even if proven.

Contention 1. The Proposed Amendments Fail to Reflect the Public Interest and Interests of Co-owners, Wholesale Customers and Customers That May Be Affected by the Outcome of the Cajun and Texas Litigation

Cajun contends that the NRC should consider the adverse financial impact that Gulf States, Entergy, and EOI would experience from a judgment or settlement resulting from presently pending litigation against Gulf States. These cases include *Cajun Electric Power Cooperative, Inc. v. Gulf States Utilities Co.*, No. 89-474-B, United States District Court for the Middle District of Louisiana, and *Southwest Louisiana Electric Membership Corp. v. Gulf States Utilities Co.*, No. 92-2129, United States District Court for the Western District of Louisiana. The case brought by Cajun involves an attempt by Cajun to rescind the River Bend Operating Agreement and collect damages of over \$1.6 billion for alleged misrepresentation by Gulf States regarding Cajun's ownership purchase in River Bend. Cajun cites statements of Michael J. Hamilton of Price Waterhouse to establish that a decision in this litigation in favor of Cajun could bankrupt Gulf States and reduce the present net earnings of Gulf States/Entergy from

\$2.20 per share to a loss of \$3.34 per share. Cajun further claims Entergy will not protect Gulf States in the event of these litigation losses since the Entergy/Cajun Reorganization Plan allows Entergy to withdraw from the merger if Cajun prevails.

Contention 1, insofar as its allegations may establish the potential for unsafe operation of River Bend, does not directly refer to safety concerns but, in fact, is an integral part of Contention 2 which does refer to safety. In essence, Contention 1 states a basis for Contention 2 since the allegations in Contention 1 regarding the Gulf States litigation are an element in proving the allegation of underfunding and reduced safety in Contention 2. In fact, Cajun asserts the Contention 1 allegations concerning financial damage resultant from litigation as a basis for Contention 2. See Item (c) under Contention 2, below, and related discussion. Accordingly, for all the foregoing reasons, Contention 1 is denied.

Contention 2. The Proposed License Amendments May Result in a Significant Reduction in the Margin of Safety at River Bend

Cajun's claim in this contention is that safety at River Bend will be jeopardized because the proposed new operator, EOI, will be underfunded. It asserts, as bases for this contention, that:

- (a) The proposed River Bend Operating Agreement runs only between Gulf States and EOI. Therefore, Gulf States has the full obligation under the Operating Agreement to compensate EOI for River Bend operation and EOI cannot look to Entergy or Cajun for payment. (These allegations are based on provisions in the River Bend Operating Agreement and the statements of Edwin Lupberger, Chief Executive Officer of Entergy, and Donald Hintz, Chief Executive Office of EOI.)
- (b) EOI is very thinly capitalized. If Gulf States ceases to make its Operating Agreement payments, EOI has no other sources of funds to maintain safe and reliable River Bend operation. (Cajun cites the proposed Operating Agreement as the source for this allegation.)
- (c) Gulf States faces severe financial exposure from litigation with Cajun and from certain Texas regulatory proceedings which could render Gulf States bankrupt and unable to make adequate payments to EOI to maintain safe and reliable River Bend operation. (To support this allegation, Cajun has provided the specific information described above in Contention 1.)
- (d) Entergy views its obligations to support EOI in the event of lack of funding from Gulf States to be very limited. Officials of Entergy and EOI have admitted that EOI would be forced to shut down River Bend if EOI lacked adequate funds. (Cajun has cited the testimony of Edwin Lupberger and Donald Hintz in a Federal Energy Regulatory Commission (FERC) proceeding as a source for these allegations.)

See Cajun Amendment and Supplement at 11-13 and references therein.

We find these bases adequate to satisfy the contention requirements of this proceeding. Cajun, of course, is not obliged to prove its entire case at this time. See discussion in *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 205-06 (1993).

In its opposition to Contentions 1 and 2, Gulf States primarily argues that both contentions are contrary to the Commission's "financial qualification" rule which exempts electric utilities from demonstrating financial qualification. However, this reliance is misplaced since the exemption in 10 C.F.R. § 50.33(f) applies only to electric utilities, and EOI is not an electric utility. Contentions 1 and 2 concern EOI's, and not Gulf States', financial qualifications. EOI will be the facility's operator and it is EOI's underfunding that allegedly will cause safety concerns at River Bend.

Clearly, EOI is not an electric utility. EOI's sole function will be to operate and maintain the plant. An electric utility, as defined in 10 C.F.R. § 2.4 (1993), is an "entity that generates or distributes electricity and which recovers the costs of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority." Gulf States will be the entity functioning as an electric utility with respect to River Bend since it will continue to distribute and sell the River Bend power and will be the entity responsible for recovering its costs.

Other arguments Gulf States makes in opposing Contention 2 are the same arguments it made for opposing Cajun's standing. These include Gulf States' allegations that the responsibility for funding plant operations will remain with Gulf States and Cajun, that the economic injury that Cajun asserts is too speculative to be a basis for a contention, and that the plant could safely shut down if funds were lacking. We have found these arguments wanting in the standing section of this decision and they are wanting here. For all the foregoing reasons, Contention 2 is accepted.

Contention 3. The Proposed License Amendment Cannot Be Approved Without Cajun's Consent

In this contention, Cajun contends that the proposed license amendment requests were not properly made on Cajun's behalf and that the amendments are contrary to Cajun's ownership interest in the facility. We reject this contention for the reasons set out in our discussion regarding standing. Cajun has contracted with Gulf States to have Gulf States operate River Bend. That authority included the power to seek license amendments. When antitrust and radiological health and safety concerns are not involved, contractual disputes between co-owners in a nuclear facility should not be resolved by the NRC. Such questions should be handled by appropriate state, local, or federal courts.

Contention 4. The Proposed License Amendments Will Adversely Affect Cajun's Rights Regarding the Operation of River Bend

Cajun contends that the transfer of ownership and operation of River Bend violates Cajun/Gulf States contracts and that NRC approval of these transfers must be conditioned to protect Cajun's rights as a 30% co-owner of River Bend. Cajun claims in this regard that operational decisions for River Bend will no longer be made to protect the interests of Gulf States and Cajun, but rather will be made on behalf of the entire Entergy System which consists of a number of other electric utilities. Cajun also claims that the transfers to EOI will destroy Cajun's contractual privity with the plant's operator, which in turn will adversely affect River Bend safety by preventing Cajun from sharing plant operational information and participating in plant decisionmaking.

Just as for Contention 3, we reject this contention because it involves non-safety-related contractual matters between co-owners of a nuclear facility. Jurisdiction for such issues lies in other forums, not this one. No significant health or safety concern has been presented here since Cajun has not asserted or shown any basis to establish that a safety problem would exist without its oversight at River Bend.

Contention 5. The Proposed License Amendments Cannot Be Approved Without Certain License Conditions

In this contention, Cajun lists seven license conditions which it alleges will alleviate the problems caused by the license amendments. On their face, these contentions appear related only to contractual disputes between the co-owners of River Bend, and they do not appear necessary for the plant's safe operation.⁶ Consequently, we reject these conditions with the proviso that Cajun can later request license conditions for Contention 2 that include aspects of these proposed conditions if Cajun can demonstrate their safety significance.

Contention 6. The Proposed Ownership Amendment Should Be Approved Only with Conditions Adequate to Remedy Its Adverse Impacts on the Cajun/Gulf States Interconnection Agreement

In this contention, Cajun alleges that the proposed Gulf States merger will adversely impact the Cajun/Gulf States interconnection agreements to

⁶ Cajun requests conditions that: (1) require a tripartite agreement among Gulf States, EOI, and Cajun; (2) require EOI to be the direct agent of Cajun; (3) require EOI to be directly liable to Cajun; (4) allow Cajun to have input into River Bend decisions regarding maintenance, fuel outages, budgets, and capital improvements; (5) allow Cajun to have access to EOI records and River Bend operational data; (6) require EOI to submit River Bend cost management and regulatory reports to Cajun; and (7) allow Cajun to attend Institute for Nuclear Power Operation (INPO) meetings and have access to INPO documents.

the economic detriment of Cajun and its consumers. According to Cajun, these agreements include, among other things, interconnection and transmission provisions, rates for electric power and services, cost-sharing agreements, long-term and short-term planning functions, and similar, utility-related, operational agreements. This contention describes utility functions that clearly lie within the jurisdiction of FERC or appropriate state agencies that regulate electric utilities. See 42 U.S.C.A. § 2019.

Moreover, to the extent that Cajun's interconnection agreement concerns relate to Cajun's antitrust license conditions in the River Bend NRC license, they have been evaluated by Staff as part of a Staff antitrust review involving the Gulf States' merger. See 58 Fed. Reg. 16,246 (1993). Antitrust matters were not included in the notices governing this proceeding and this board has no jurisdiction over them. Accordingly, the contention is denied.

Contention 7. The River Bend License Conditions Must Be Enforced

In this contention, Cajun requests that Gulf States and EOI be required to comply with the current River Bend license conditions. Cajun alleges that Gulf States is violating Condition 10 (by seeking to void a transmission contract between Gulf States and Cajun) and Condition 12 (by refusing to provide certain delivery points for electric power). We reject this contention since licensing boards have no jurisdiction to enforce license conditions unless they are the subject of an enforcement action initiated pursuant to 10 C.F.R. § 2.202a (1993). Cajun's only recourse to enforce these conditions is to request enforcement action by the Staff pursuant to 10 C.F.R. § 2.206 (1993).⁷

V. CONCLUSION

Cajun's Contention 2 regarding a potential safety risk caused by underfunding of the plant's operator is accepted. The remaining contentions are rejected because they do not concern health and safety matters or any other basis for Licensing Board jurisdiction. They involve contractual disputes and disagreements between co-owners of nuclear facilities, which are not within the jurisdiction of this forum. Matters argued by the parties but not addressed herein were not considered material to the decision reached.

⁷We note that the license conditions to which Cajun refers are the River Bend antitrust license conditions which were inserted in the River Bend license to alleviate antitrust concerns and ensure competition among utilities in Gulf States' service area. As discussed regarding Contention 6, *supra*, the antitrust aspects of the Gulf States' merger were the subject of a separate antitrust review conducted by NRC Staff and were not included in the notices governing this proceeding.

We conclude that Cajun has met the requirements for standing. It has proffered one viable contention, demonstrated an "injury in fact," and alleged an injury that falls within the zones of interest sought to be protected by the governing statutes. Cajun's petition to intervene is therefore granted, and a hearing is hereby ordered in this proceeding.

VI. APPEAL RIGHTS

In accordance with 10 C.F.R. § 2.714a (1993), Gulf States or Staff may seek appeal on the question of whether the petition and request for a hearing should have been wholly denied. Cajun may not appeal this Order because it does not wholly deny its petition.

An appeal to the Commission may be sought by filing a petition for review, pursuant to 10 C.F.R. § 2.714a(a) (1993), within 10 days after service of this Order. Any other party to the proceeding may, within 10 days after service of the appeal, file an answer supporting or opposing the appeal.

VII. DISCOVERY AND SCHEDULING

Discovery shall begin immediately. The parties shall commence negotiation concerning appropriate trial schedules and file a report with suggested scheduling by March 1, 1994.

THE ATOMIC SAFETY AND
LICENSING BOARD

B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Bethesda, Maryland,
January 27, 1994.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ivan W. Smith, Presiding Officer
Dr. Peter S. Lam, Special Assistant

In the Matter of

Docket No. 70-364-ML-Ren
(ASLBP No. 94-687-01-ML-Ren)
(Materials License No. SNM-414)

BABCOCK AND WILCOX COMPANY
(Pennsylvania Nuclear Services Operations,
Parks Township, Pennsylvania)

February 2, 1994

MEMORANDUM AND ORDER
(Authorizing Amendment to Hearing Request)

I. BACKGROUND

The NRC is considering the application for the renewal of the special nuclear materials license issued to the Babcock and Wilcox Company Pennsylvania Nuclear Service Operation (B&W or Applicant) for its facility located in Parks Township, Armstrong County, Pennsylvania (Parks Township facility). In a *Federal Register* notice of November 3, 1993 (58 Fed. Reg. 58,711), the Commission published the required notice of the license renewal consideration. The notice generally described the operations at the Parks Township facility and provided an opportunity for any person whose interest may be affected to file a request for hearing on B&W's application. The notice also stated that any request for hearing must comply with 10 C.F.R. Part 2, Subpart L, which specifies the informal hearing procedures for adjudications in materials licensing proceedings.

On January 5, 1994, Citizens Action for a Safe Environment (CASE), by Patricia J. Ameno, and Kiski Valley Coalition to Save Our Children (the Coalition), by John Bologna, filed a timely joint request for a hearing.¹

A B&W official opposes the request for hearing, stating only that the requestors' "letter does not satisfy any of the requirements for requesting a hearing identified in 10 CFR Part 2, Subpart L."²

On January 24, 1994, the NRC Staff filed its notice that it desires to participate as a party to the adjudication and answered the joint request. The Staff opposes any hearing on the grounds that the Petitioners have not satisfied NRC requirements regarding standing to intervene and have not demonstrated how the areas of their concerns are germane to the subject matter of the proceeding.

II. DISCUSSION

A. Novel Situation — Insufficient Information

This proceeding, in that it involves a general license renewal of the particular activities under the Parks Township facility license, is novel as it pertains to the issue of standing to intervene.

At the outset, the requestors, Staff, and the Applicant should be aware that, except for the description of the Parks Township facility contained in the *Federal Register* notice and allusions to it in the hearing request, Judge Lam and I know virtually nothing about the facility. The requestors apparently assume, incorrectly, that their request for a hearing will be assessed by us in the context of the NRC's broad, institutional information about the facility. The Staff's response and B&W's terse letter opposing the hearing request provide no factual background against which we may evaluate the request.³

The requestors have the burden of demonstrating that their request should be granted. They have not shown in necessary detail that they have standing to intervene in this proceeding. *See, generally*, Staff Response at 3-9. On the other hand, one can fairly surmise from the request and *Federal Register* notice that the requestors may actually have standing, but are unversed in NRC standing rules.

Were this a formal proceeding under Subpart G of Part 2, persons seeking to intervene would be permitted to amend their intervention petitions without

¹ Pursuant to the Petitioners' request, on December 17, 1993, the Secretary of the Commission extended the time to request a hearing until January 6, 1994.

² Letter dated January 13, 1994, from B.L. Haertjens, B&W Nuclear Environmental Services to ASLBP Chief Judge B. Paul Cotter.

³ Although their answering pleadings could have been more helpful, neither the Staff nor B&W is required now to provide a factual background in opposing the request. The Staff will not be required to provide a hearing file until and unless a hearing is ordered.

leave of the presiding officer before a final ruling on their standing. 10 C.F.R. § 2.714(a)(3). Thus, under Subpart G, Petitioners have a valuable opportunity to cure defects in their initial petitions after the defects have been disclosed in preliminary pleadings and rulings. There is no parallel opportunity under the informal rules of Subpart L.

Subpart L rules, by their very definition, are intended to be informal. My primary duty at this stage of the proceeding is to treat the hearing request fairly. If the hearing request is otherwise meritorious — and it appears here that the requestors have a good chance of establishing their standing — I may excuse unskilled pleading and inexperience and provide another opportunity to have their worries and concerns heard.

Therefore, as a matter of discretion, I am exercising the general powers of a presiding officer in Subpart L proceedings (10 C.F.R. § 2.1209) to provide the requestors the opportunity to amend their request in accordance with the terms of the following order and discussion.⁴

B. Standing to Intervene

Subpart L requires that the person requesting a hearing meet judicial standards for standing. 10 C.F.R. § 2.1205(g). This rule is simply a restatement of long-standing Commission requirements that a prospective intervenor, who believes that his or her interests may be affected by a proceeding, must, as if in a court of law, show “a concrete and particularized injury that is fairly traceable to the challenged action.” *Transnuclear Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5 (1994), citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). This injury, known as “injury-in-fact” in legal discussions, must be actual but can include threatened injury, and must be arguably within the “zone of interest” of the statutes governing this proceeding: the Atomic Energy Act and the National Environmental Policy Act (as administered by the NRC). *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). For example, petitioners in NRC proceedings may not intervene on the grounds that the challenged action would injure their interests as local taxpayers.

⁴In exercising this discretion, I am following the precedents set in at least two earlier Subpart L proceedings. In *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149 (1992), Judge Bollwerk granted the petitioners leave to supplement their petitions on issues of standing and areas of concerns “germane” to the proceeding. In the *Apollo* proceeding, B&W acknowledged that the presiding officer has such discretion. *Id.* at 151-52. See also *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 312-17 (1989).

CASE and the Coalition state that they request a hearing on behalf of the citizens of the Kiski Valley, especially the elderly and invalids, and they seek to protect "property values and the health and safety of the remaining general population." As laudable as such concern might be, the requestors may not undertake to represent the general public as if they were private attorneys general. They must establish "injury-in-fact" and standing, either as an organization whose *organizational* interests may be affected and injured by the proposed license renewal, or demonstrate that one or more of their members are affected and injured by the proposed license renewal. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646 (1979).

Almost always in NRC proceedings, intervening organizations derive standing to intervene from the standing of their members. To establish standing from the standing of its members, an organization must show that one or more of its members "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" *Id.* at 647, citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

Normally an organization who wishes to represent its members in an NRC proceeding must identify one or more members by name and address and demonstrate that the named members have authorized the petitioning organization to represent their interests in the proceeding.⁵ The organization must specify how the proposed action (in this case the facility license renewal) would cause or threaten "injury-in-fact" to the members who have authorized the intervention on their behalf.

In most cases in NRC practice, whether a petitioner (or petitioner's member) would sustain an "injury-in-fact" as a result of a proposed licensing action has been determined by whether the individual lives or engages in activities near the nuclear facility in question. Thus, a petitioner may demonstrate the potential for injury if the petitioner, or its members, live, work, or play, for example, in an area that might be affected by the release of nuclear radiation from a large commercial nuclear power plant. In *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56-57 (1979), the Appeal Board would not rule out, as a matter of law, derivative standing where a member of the petitioning organization lived about 35 miles from the facility,

⁵ In a very limited number of situations, the authorization by the members to be represented in a specific proceeding may be presumed if the organization is specifically empowered by its members to represent their interests in all matters similar to the proceeding at bar. *E.g.*, *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140-41 (1991). The prudent approach, however, would be to demonstrate that the member or members whose interests are to be represented by the petitioning organization have specifically authorized the organization to represent them in the very proceeding at bar.

and where another member lived 45 miles away but engaged in canoeing in close proximity to the plant. *Id.* at 57.

Also, in *North Anna*, the Appeal Board noted that it had *never required* a petitioner in close proximity to a facility in question to specify the:

causal relationship between injury to an interest of a petitioner and the possible results of the proceeding. Rather, close proximity has always been deemed to be enough, standing alone, to establish the requisite interest.

Id. at 56 (footnote omitted), citing, *e.g.*, *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 223-24 (1974), and cases there cited. See also *Armed Forces Radiology Research Institute (Cobalt-60 Storage Facility)*, ALAB-682, 16 NRC 150, 154 (1982).

More recently, however, NRC proceedings have involved rather narrow factual situations as contrasted with the general operation of a nuclear power facility. In *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989), the Commission explained:

It is true that in the past, we have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool. See, *e.g.*, *Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2)*, ALAB-522, 9 NRC 54 (1979). However, those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences. See, *e.g.*, *Gulf States Utilities Co. (River Bend Station, Units 1 and 2)*, ALAB-183, 8 AEC 222, 226 (1974). Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific "injury in fact" that will result from the action taken. . . .

We learn from the foregoing decisions that, in some cases, standing and injury-in-fact can be inferred from proximity to the facility in question. In other cases, those without obvious offsite implications, the petitioner must, as the *St. Lucie* decision held, allege the specific injury complained of.

In the case of the Park Township facility, the Applicant seeks a renewal of the license for full operation, as contrasted to a narrow amendment to the license. On the other hand the facility, I assume, does not present the same potential for offsite releases as would a commercial nuclear power reactor.

Requestors allege the threat of offsite releases of radioactivity — in fact, they allege that such releases have already occurred. The *Federal Register* notice also notes that very small releases of radioactivity are expected from the operations through air, water, and food pathways. 58 Fed. Reg. at 58,712.

If CASE and the Coalition choose to supplement their requests to address the issue of their standing to intervene, they should: (1) explain in detail whether

the threatened injury to their named members should be inferred from their proximity to the facility itself; or (2) allege in detail a specific injury or threat of injury to the health, safety, or property of their named members from the continued operation of the facility; or (3) both.

The Staff and B&W may of course respond to the requestors' amended request. Since the potential for offsite releases from the Parks Township facility is not generally known, the allegations and answers pertaining to standing must be supported by statements of fact. *For the purpose of standing only*, factual statements may, if necessary, be supported by documentation provided to us and to the parties.⁶ Maps of the area showing the relative distances of physical aspects of the amended request would be helpful.

C. Requestors' Areas of Concerns

Requests for a hearing must describe in detail the requestor's areas of concern about the licensing activity subject to the hearing. 10 C.F.R. § 2.1205(c)(3). However, requestors need not set forth all of their concerns until they have been given access to the hearing file. They need only identify the *areas* of concerns germane to the proceeding they wish to raise. This statement of concerns need not be extensive but must fall generally within the scope of the hearing.⁷

The Staff argues that in every case the requestors have failed to adequately specify their areas of concern. Although I will defer final ruling on the "areas-of-concern" aspects until the requestors have filed their amended request, I wish to note that, as a general matter, I believe that the Staff's arguments are overly technical. These arguments are better suited to a criticism of specific concerns that need not be specified until later in the proceeding. As noted, requestors now need to establish only that their areas of concern are germane or relevant to the licensing action. Some of the requestors' statements clearly express an area of concern. For example, paragraphs on the second page unmistakably express worries about the threat of offsite radiological contamination from the Parks Township facility. On the other hand, I remind the requestors that Judge Lam and I know only what is stated in the *Federal Register* notice and the hearing request letter. For example, requestors' reference to the "Shot Blasting Process" is not clear to us.

I will permit CASE and the Coalition to amend their request to better explain the "areas of concern." However the requestors are not, *by this order*, authorized

⁶ Standing to intervene, unlike the merits of contentions, may be the subject of a limited evidentiary inquiry before intervention is granted. *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978), citing *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-78-12, 7 NRC 939, 948-49 (1978).

⁷ See Statement of Considerations, Informal Hearing Procedures for Materials Licensing Adjudication, 54 Fed. Reg. 8269, 2-SC-22, 25 (Feb. 28, 1989).

to add new areas of concern; they are limited to explaining those areas already specified.⁸

D. Additional Guidance

In the foregoing sections, I have discussed in separate categories the legal concepts of standing to intervene (including "injury-in-fact") and "areas of concern germane to the proceeding." NRC practice can be daunting even for experienced lawyers. Recognizing that the requestors are inexperienced and are not represented by legal counsel, it might be helpful for them to understand that "injury-in-fact" and "areas of concern germane to the proceeding" are not necessarily different factual concepts. Logically, the two legal concepts are often factually one and the same. For example, if the requestors assert as "injury-in-fact" the threat of offsite radiological contamination from the facility and their "areas of concern" is the same threat, they may simply explain that situation.

Further, I urge the requestors to study very carefully the foregoing discussion of standing to intervene. If the amended request depends upon standing derived from its members, it must expressly address every element of derivative standing: (1) Who are the members? (2) Where do they live, work, play, go to school, etc.? (3) How far from the facility do these activities take place? (4) Have they authorized CASE and the Coalition to represent them? If so, prove it. (5) Exactly how are the members or their property injured or threatened with injury from radiation releases from the facility?

III. ORDER

In accordance with the foregoing discussion:

1. Requestors CASE and the Coalition may amend their request for hearing within 20 days following the service of this order.
2. The Applicant may answer any amended request within ten days following service thereof.
3. The NRC Staff may answer within 15 days following service of any amended requests.

Ivan W. Smith, Presiding Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland
February 2, 1994

⁸ An amended petition containing new areas of concern would have to satisfy the provisions of 10 C.F.R. §2.1205(k)(1) and (2) pertaining to untimely requests for a hearing.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III
Thomas D. Murphy, Alternate Board Member

In the Matter of

Docket No. 40-8027-EA
(ASLBP No. 94-684-01-EA)
(Source Material License
No. SUB-1010)

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site Decontamination
and Decommissioning Funding)

February 24, 1994

In this proceeding concerning a Staff enforcement order issued in accordance with 10 C.F.R. § 2.202, the Licensing Board grants a petition for leave to intervene, concluding that (1) intervention in support of a Staff enforcement order is permitted; (2) the Petitioner established its standing to intervene in this particular proceeding; and (3) the intervention motion was timely filed. Additionally, the Licensing Board refers its ruling on the first matter to the Commission for its review.

**ENFORCEMENT ACTIONS: INTERVENTION SUPPORTING
ENFORCEMENT ORDER**

**RULES OF PRACTICE: STANDING TO INTERVENE
(ENFORCEMENT ACTIONS)**

Once a party to whom a Staff enforcement order is directed requests a hearing, a person favoring the order is presented with the likelihood that an adjudicatory proceeding would be conducted that could have two possible outcomes: the presiding officer would fully sustain the order or it would not, either because the presiding officer would reject the order in whole or in part or because the order would be modified or withdrawn by some unilateral Staff action or by a settlement between the Staff and the parties contesting the order. Given these two possible outcomes, only if the person supporting the enforcement order is permitted to participate in the proceeding can it protect its interest in seeing that the order and the requirements the order imposes are sustained. Therefore, if the person supporting the order also can establish a particularized injury that it or its members will suffer in the event the order is not sustained, it is entitled to intervene as of right as a "person whose interest may be affected by the proceeding" under section 189a(1) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a)(1), and/or 10 C.F.R. § 2.714(a)(1).

LICENSING BOARDS: JURISDICTION (STAFF ORDERS)

**RULES OF PRACTICE: REVIEW OF NRC STAFF'S ACTIONS;
SETTLEMENT OF CONTESTED PROCEEDINGS**

A Staff action to relax or rescind the conditions in an enforcement order that is the subject of an ongoing adjudication would be subject to review by the presiding officer with input from all parties to the proceeding. *See Oncology Services Corp.*, LBP-94-2, 39 NRC 11, 26 n.12 (1994).

**RULES OF PRACTICE: SETTLEMENT OF CONTESTED
PROCEEDINGS**

Pursuant to 10 C.F.R. § 2.203, any settlement between the Staff and any of the parties subject to an enforcement order must be reviewed and approved by the presiding officer. In such a circumstance, a participant intervening in support of the order would have an opportunity to vindicate its interest in having the order sustained fully by demonstrating why the settlement proposal would not be in the public interest.

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

In assessing whether an intervenor has made the necessary showing of particularized injury to establish its right to intervene in a proceeding, the presiding officer is constrained to apply contemporaneous judicial concepts of standing. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). This requires that the presiding officer assess whether the intervenor will suffer any “injury in fact” relative to its interests in the proceeding and whether those alleged interests are within the “zone of interests” protected by the pertinent statutes and regulations under which the petitioner seeks to participate in the proceeding. *See id.*

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

To establish the requisite injury in fact, a petitioner must allege a concrete and particularized injury that is fairly traceable to the action at issue and is likely to be redressed by a favorable decision in the proceeding. *See Perry*, CLI-93-21, 38 NRC at 92.

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

In reviewing affidavits on the issue of whether a petitioner has established its injury in fact so as to have standing to intervene, the presiding officer must bear in mind the often-repeated admonition to avoid “the familiar trap of confusing the standing determination with the assessment of petitioner’s case on the merits.” *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted).

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

If, on the basis of the presentations by the participants, the presiding officer is unable to conclude relative to an intervenor’s property that there is “no potential for offsite consequences” from contamination from a licensee’s site, *see Perry*, CLI-93-21, 38 NRC at 95, then there has been a sufficient demonstration of injury in fact to provide standing to intervene as of right in a proceeding.

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS

Although 10 C.F.R. § 2.714(a)(1) has been interpreted to require that the late-filed factors be addressed in the initial late intervention petition, it is within a presiding officer's discretion to permit an intervenor to make a belated lateness showing. *See Boston Edison Co. (Pilgrim Nuclear Power Station)*, ALAB-816, 22 NRC 461, 466-68 (1985).

REGULATIONS: INTERPRETATION AND APPLICATION

STATUTORY CONSTRUCTION OR INTERPRETATION: GENERAL RULES

In interpreting a statute or regulation, the usual inference is that different language is intended to mean different things. *See United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1186 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984).

REGULATIONS: INTERPRETATION AND APPLICATION

STATUTORY CONSTRUCTION OR INTERPRETATION: GENERAL RULES

The inference regarding differing meanings for differing language might be negated by a showing that the purpose or history behind the language demonstrates that no difference was intended. *See Stauffer Chemical Co.*, 684 F.2d at 1186.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.202(a)(3); 10 C.F.R. § 2.714(a)(1))

RULES OF PRACTICE: INTERVENTION PETITIONS (FILING DEADLINE IN PROCEEDING ON ENFORCEMENT ORDER)

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 interests. Therefore, the language of 10 C.F.R. § 2.202(a)(3) establishing a 20-day deadline for hearing requests by any person "adversely affected by the order" is not applicable to such a petitioner. Instead, the petitioner's intervention is governed by the terms of 10 C.F.R. § 2.714(a)(1), which is applicable to "[a]ny person whose interest may be affected by a

proceeding,” and is subject to any time limits that are established in accordance with that section.

RULES OF PRACTICE: INTERVENTION PETITIONS (FILING DEADLINE IN PROCEEDING ON ENFORCEMENT ORDER)

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 C.F.R. § 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.

INTERVENTION: ACTUAL NOTICE (ENFORCEMENT PROCEEDING)

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. *See* 54 Fed. Reg. 8269, 8272 (1989).

INTERVENTION: ACTUAL NOTICE (ENFORCEMENT PROCEEDING)

Because it is their interest in the “proceeding” rather than the “order” that is relevant for a person wishing to intervene in support of a Staff enforcement order, the pertinent actual notice was that affording the intervenor knowledge that an adjudicatory proceeding would be commenced. Receipt of the hearing request of a person adversely affected by the order constitutes such notice. By filing an intervention motion within 10 days after receipt of such a hearing request, an intervenor acts seasonably relative to that actual notice. *Compare* 10 C.F.R. § 2.1205(c)(2)(i) (hearing request must be filed within 30 days of actual notice).

RULES OF PRACTICE: APPELLATE REVIEW (INTERVENTION RULINGS); INTERLOCUTORY APPEALS (INTERVENTION ORDERS)

Until a determination is made that an intervenor has proffered a litigable contention, a presiding officer’s ruling that the petitioner has established its standing is not final so as to be appealable pursuant to 10 C.F.R. § 2.714a. *See*

Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 864-65 (1980).

RULES OF PRACTICE: INTERLOCUTORY APPEALS (REFERRAL OF RULINGS); REFERRAL OF RULING TO COMMISSION

Because the question of whether intervention as of right exists for a petitioner that wants to enter a 10 C.F.R. § 2.202 enforcement order proceeding to support the Staff's order is of some moment for the structure of this proceeding, as well as the Commission's adjudicatory process generally, and in order to alleviate any delay in Commission consideration of this matter pending the Licensing Board's determination regarding the admissibility of the intervenor's contentions, in accordance with 10 C.F.R. § 2.730(f) it is appropriate for the Board to refer its ruling on the petitioner's right to intervene to the Commission for its immediate review. *Cf. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981)* (in licensing hearings, licensing boards should seek Commission guidance on significant legal or policy questions and should do so in a manner that will avoid delay in the proceeding).

**MEMORANDUM AND ORDER
(Granting Intervention Motion;
Referring Ruling to the Commission)**

This proceeding is before us to consider the challenge of Sequoyah Fuels Corporation (SFC) and General Atomics (GA), SFC's parent company, to an October 15, 1993 NRC Staff order. Among other things, the order makes SFC and GA jointly and severally responsible for providing financial assurance for the decommissioning of SFC's facility near Gore, Oklahoma. *See* 58 Fed. Reg. 55,087 (1993). In a January 25, 1994 memorandum and order, the Board advised the participants that it was granting a motion for leave to intervene filed by petitioner Native Americans for a Clean Environment (NACE) and that a written order detailing its reasons would follow. *See* Memorandum and Order (Petition for Intervention) (Jan. 25, 1994) at 1-2 (unpublished) [hereinafter January 25 Memorandum and Order]. This memorandum and order sets forth the grounds for that ruling.

The NACE motion confronts the Board with the issue of whether, in an adjudicatory hearing convened pursuant to 10 C.F.R. § 2.202 to litigate the validity of a Staff enforcement order, someone wishing to appear in support of the order can intervene in the proceeding. For the reasons detailed below, we have concluded that (1) as a general matter intervention as of right is

available to such a petitioner; (2) petitioner NACE has demonstrated that it possesses the requisite interest establishing its standing in this instance; and (3) NACE's intervention motion was timely filed. Additionally, because of the sui generis nature of our determination that in a proceeding on a section 2.202 Staff enforcement order a petitioner can intervene in support of the order, pursuant to 10 C.F.R. § 2.730(f) we refer that ruling to the Commission for its review.

I. BACKGROUND

Until last summer, SFC operated the Gore facility pursuant to a 10 C.F.R. Part 40 license permitting the use of source material for the production of uranium hexafluoride (UF₆) and depleted uranium tetrafluoride (DUF₄). SFC now is moving forward with plans to decommission the facility. Present SFC estimates put the cost of this decommissioning effort at some 86 million dollars. *See* 58 Fed. Reg. at 55,089.

In accordance with 10 C.F.R. § 2.202(a)(3), the October 1993 Staff order at issue here provided that SFC, GA, and "any other person adversely affected by this Order" had until November 4, 1993, to file an answer to, and request a hearing regarding, the order. 58 Fed. Reg. at 55,092. The order also states that the issue in any hearing will be "whether this Order should be sustained." *Id.* SFC and GA filed timely answers and hearing requests on November 2 and 3, 1993, respectively. *See* [SFC's] Answer and Request for Hearing (Nov. 2, 1993); [GA's] Answer and Request for Hearing (Nov. 3, 1993). On November 18, 1993, the Secretary of the Commission referred these requests to the Chief Judge of the Atomic Safety and Licensing Board Panel for the appointment of a presiding officer, who subsequently appointed this Board to preside over the requested adjudication. *See* 58 Fed. Reg. 63,406 (1993). *See also* 59 Fed. Reg. 3382 (1994) (reconstituting Board to add Murphy, J., as alternate member). Also on November 18, petitioner NACE filed a motion for leave to intervene in the proceeding.

NACE describes itself as an Indian-controlled and staffed citizens' environmental organization that endeavors to educate the public about environmental issues, with an emphasis on the nuclear industry. In its motion, NACE states that the organization and its members who live, work, and travel near the Gore facility "would be adversely affected if the October 15 order were reversed or weakened." Motion for Leave to Intervene in Proceeding Regarding [SFC's] and [GA's] Appeal of [NRC's] October 15, 1993, Order (Nov. 18, 1993) at 1 [hereinafter NACE Intervention Motion]. Included with the motion is the affidavit of Ed Henshaw, who declares that he is a NACE member and that NACE is authorized to help represent his interests. In his affidavit, Mr. Henshaw asserts that his home is adjacent to the Gore facility and that his health and safety,

economic, and social interests will be adversely impacted if the October 1993 order with its directives regarding decommissioning funding is not sustained. See Nov. 23, 1993 Letter from Diane Curran, NACE Counsel, to Samuel J. Chilk, Secretary of the Commission, Affidavit of Ed Henshaw at 1 [hereinafter Henshaw Affidavit].

On December 6, 1993, both SFC and GA filed responses opposing the NACE intervention petition, with GA simply adopting the arguments made by SFC. See [SFC's] Answer in Opposition to NACE's Motion to Intervene (Dec. 6, 1993) [hereinafter SFC Intervention Answer]; [GA's] Answer in Opposition to the Motion to Intervene of [NACE] (Dec. 6, 1993). Included with the SFC filing is the affidavit of its Technical Services Vice President, John S. Dietrich. Mr. Dietrich indicates that Mr. Henshaw's property is more than one mile southeast of the SFC industrial site and more than six-tenths of a mile southeast from some SFC fertilizer ponds that also are to be decommissioned. See SFC Intervention Answer, encl. 2, at 1, ¶5. See also *id.*, attach. 2. Further, referencing hydrogeological studies done between 1990 and 1992, Mr. Dietrich states that the groundwater flow paths from the SFC industrial facility and the ponds are "generally" westward and away from Mr. Henshaw's property. *Id.* at 2, ¶8. Additionally, citing the topographic features of the area, Mr. Dietrich concludes that it is "impossible" for surface water from SFC's industrial facility and the ponds to drain onto Mr. Henshaw's property. *Id.* at 3, ¶12.

In contrast, in a response filed December 13, 1993, the Staff declared that because it was conceivable NACE might be adversely affected if the October 1993 order is not sustained, it did not oppose NACE's intervention request, subject to NACE's submission of a valid contention. See NRC Staff's Response to NACE's Motion for Leave to Intervene (Dec. 13, 1993) at 4-5 [hereinafter Staff Intervention Response].

By order dated December 17, 1993, the Board permitted NACE to file a reply to the SFC, GA, and Staff responses to its intervention petition. See Order (Reply to Intervention Motion Responses; Prehearing Conference) (Dec. 17, 1993) at 1 (unpublished). NACE responded to this order by filing a December 30, 1993 reply to SFC's response. See [NACE's] Reply to [SFC's] Answer in Opposition to NACE's Motion to Intervene (Dec. 30, 1993) [hereinafter NACE Reply to SFC Intervention Answer]. Included with this reply is the affidavit of hydrogeologist Timothy P. Brown who asserts there is the potential for groundwater contamination to the Henshaw property from the SFC facility, including the industrial site, the nearby pond areas, and outlying agricultural fields on which fertilizer made from raffinate produced at the Gore facility has been spread. See *id.*, attach. C. Among other things, Mr. Brown declares that the available data suggest that groundwater flows in the area are "variable and complex" and may flow in directions other than westward. *Id.* ¶9. Mr. Brown

also states that airborne contamination of the Henshaw property from the SFC site is a possibility. *See id.* ¶ 12.

SFC subsequently obtained permission to file an additional pleading addressing what it asserts were new factual allegations and arguments in NACE's December 30 reply. *See* Memorandum and Order (Memorializing Rulings on Pending Motions; Prehearing Conference Agenda) (Jan. 6, 1994) at 2-3 (unpublished). As part of its January 11, 1994 submission, SFC includes the affidavits of hydrogeologists Bert J. Smith and Kenneth H. Schlag, who contest Mr. Brown's assertions regarding groundwater contamination, and radiation protection consultant Thomas E. Potter, who disputes Mr. Brown's statements regarding airborne contamination. *See* [SFC's] Reply to [NACE's] Supplemental Factual Allegations, New Arguments, and Request for Discretionary Intervention (Jan. 11, 1994), encls. 1-3 [hereinafter SFC Reply to NACE Reply].

NACE, in turn, has submitted an additional affidavit by Mr. Brown.¹ *See* [NACE's] Motion for Leave to File Reply Affidavit (Jan. 19, 1994), Reply Affidavit of Timothy B. Brown [hereinafter NACE Reply Affidavit Motion]. In his reply affidavit, Mr. Brown contests portions of the Smith and Schlag affidavits, attempting to counter their position that groundwater flow from the SFC site will not carry contamination to the Henshaw property.

On January 19, 1994, the Board conducted a prehearing conference during which it provided the participants an opportunity to address various legal questions it had regarding NACE's intervention request. As was noted previously, in a January 25, 1994 memorandum and order, the Board advised the parties that it was granting NACE's intervention request, with a written order detailing its reasons to follow. *See* January 25 Memorandum and Order at 1-2.²

¹ Both SFC and GA contest NACE's request to file this January 19 submission, asserting that NACE should not be given another opportunity to meet the burden that it should have sustained in its first two intervention filings. *See* [SFC] Response to NACE's Motion for Leave to File Reply Affidavit (Jan. 21, 1994) at 2-3; [GA's] Response to NACE's Motion for Leave to File Reply Affidavit (Jan. 21, 1994) at 1. As we note below, it is not apparent that, left uncontested, NACE's initial showing would have been insufficient to meet its burden on standing. *See infra* pp. 67-68. Moreover, in granting NACE an opportunity to make a second filing to reply to SFC's response, we contemplated that it would have the last word on the subject of standing. SFC, however, was afforded another opportunity to file without opposition from NACE. *See* Tr. at 6-7. Although we are not particularly enamored of the "eleventh hour" nature of NACE's filing — coming as it did on the morning of the prehearing conference scheduled to discuss NACE's standing — because NACE's filing deals with matters that were not the subject of discussion at the conference, it is appropriate that NACE be given the opportunity to respond to SFC's additional filing.

² The Board's January 25 directive also gave NACE until February 8, 1994, to submit its contentions in accordance with 10 C.F.R. § 2.714(b). *See* January 25 Memorandum and Order at 2. NACE has filed two contentions, which are currently under scrutiny to determine whether they constitute litigable issues. *See* [NACE's] Supplemental Petition to Intervene (Feb. 8, 1994).

II. ANALYSIS

Relative to NACE's intervention request, the participants have raised a variety of concerns about both the general principles governing standing in NRC adjudicatory proceedings and the specific circumstances surrounding NACE's petition. These fall into three categories: (1) in an NRC proceeding involving a challenge to a Staff enforcement order issued under 10 C.F.R. § 2.202, does a person like NACE who wishes to support the Staff's action have a right to intervene; (2) has NACE made a sufficient showing in this instance to establish its standing as of right; and (3) was NACE's November 18, 1993 intervention motion timely. We deal with each of these issues in turn.

A. Availability of Intervention as of Right to Support a Staff Enforcement Order

As a threshold matter,³ the NACE intervention request requires that we determine whether, for one supporting rather than challenging an enforcement order, the existing statutory and regulatory framework sanctions intervention as of right in a 10 C.F.R. § 2.202 proceeding. NACE and the Staff assert that intervention as of right is available. NACE Intervention Motion at 3-5; Staff Intervention Response at 4-5. SFC disagrees. It contends that, consistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), only those who oppose an NRC enforcement order are persons "whose interest may be affected by the proceeding" so as to qualify for a hearing upon request under section 189a(1) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2239(a)(1), the AEA's hearing provision, and 10 C.F.R. § 2.714(a), the regulation governing intervention in all formal adjudications conducted pursuant to 10 C.F.R. Part 2, Subpart G.⁴ See SFC Reply to NACE Reply at 12. According to SFC, in affirming the Commission's determination that it appropriately could limit the

³ SFC asserts that the initial matter before the Board is whether NACE's intervention motion is timely. See SFC Intervention Answer at 7-8. Because of the somewhat novel nature of the NACE request, we find it appropriate to explore initially the question of whether there is a statutory or regulatory basis for its intervention in this proceeding.

⁴ As part of its attack on NACE's standing in this proceeding, SFC declares that the intervention right afforded by AEA section 189a(1) is not applicable because the October 1993 order issued to SFC and GA does not involve one of the types of licensing actions specified in that provision, i.e., "the granting, suspending, revoking, or amending of any license." See SFC Intervention Answer at 13-15. The Staff agrees with SFC's assertion. See Tr. at 21. NACE, however, maintains that the order "alters a binding norm" so as to constitute a license amendment that comes under the rubric of section 189a(1). See NACE Reply to SFC Intervention Answer at 11-13.

We need not decide this question here, for, as SFC and the Staff also suggest, see Tr. at 21, 24, 33, this issue has no practical impact in these circumstances. This is because the Commission's regulations, 10 C.F.R. § 2.714(a), in language identical to that in AEA section 189a(1), provide for intervention in any 10 C.F.R. Part 2, Subpart G adjudicatory proceeding, including a proceeding initiated under 10 C.F.R. § 2.202, see *id.* § 2.700.

enforcement order proceeding to whether the order "should be sustained," the court in *Bellotti* noted that "[a]s [the Commission] interpret[s] it, this language limits possible intervenors to those who think the Order should *not* be sustained, thereby precluding from intervention persons such as petitioner who do not object to the Order but might seek further corrective measures." See SFC Intervention Answer at 20 (quoting *Bellotti*, 725 F.2d at 1382 n.2 (emphasis added)). This, SFC maintains, is at least an implicit judicial endorsement of the Commission's intent to preclude anyone who wants to support an enforcement order from participating in any adjudication on the order. See SFC Reply to NACE Reply at 13.

We do not read *Bellotti* so broadly.⁵ The issues before the court in *Bellotti* were (1) did the Commission have the authority under AEA section 189a to define the scope of the proceeding, and (2) did it abuse that authority by limiting the proceeding's scope to whether the order should be sustained. See 725 F.2d at 1381-82. The court held that the Commission did have that authority under section 189a and that it did not abuse its discretion by so defining the scope of a proceeding, even though this precluded intervention by a person championing corrective measures going beyond those in an enforcement order. Indeed, *Bellotti* is of little or no assistance here because the court simply did not reach the issue now before us.⁶

In resolving that issue, we find much more instructive the Appeal Board decision in *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 (1978). In *Sheffield*, citing *Allied-General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976), the Appeal Board found that the attempt of two groups to intervene in support of a pending license renewal application was inadequate because their claim by which they wished to vindicate "broad

⁵ None of the participants has contested the continuing validity of the *Bellotti* decision despite the fact that one of the supporting grounds of that decision — the availability to the petitioner of a judicially reviewable request for additional enforcement action under 10 C.F.R. § 2.206, see 725 F.2d at 1382-83 — is no longer operative. See, e.g., *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169, 1178 (D.C. Cir. 1992) (en banc) (in line with Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), courts have treated section 2.206 petitions as presumptively unreviewable).

⁶ Although we generally would not find it necessary to delve into the parties' arguments in a judicial case that were not addressed in the court's decision, given SFC's substantial reliance on what it understands was the Commission's position in the *Bellotti* case regarding intervention by anyone supporting an enforcement order, a review of the source of that position does not seem untoward. In its brief to the *Bellotti* court, in discussing the issue of standing, the Commission declared:

In this instance, in line with the scope of the [order at issue], petitioner *Bellotti* stands to suffer no harm adverse to his interests by the outcome of the proceeding. Of the two possible outcomes of any hearing, only one — recession of the Staff's order requiring the preparation and implementation of the [corrective] plan — would have been adverse to his professed interests; that outcome, however, will not occur because the licensee has not requested a hearing to contest the order.

Brief for Respondents at 34, *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983) (No. 82-1932) (footnote omitted) [hereinafter *NRC Bellotti Brief*]. In the present instance, of course, the Licensee has requested a hearing, raising the specter of the adverse outcome alluded to in the Commission's brief.

public interests” was insufficient to establish the particularized injury needed for intervention as of right. 7 NRC at 741-42. The Appeal Board went on to observe:

It need be added only that we perceive no good reason why any different rule [regarding the need to establish a particularized injury] should apply to the petitioners here merely because, unlike the *Barnwell* petitioners, they favor rather than oppose the proposal under consideration. Standing to intervene hinges neither upon the litigating posture the petitioner would assume if allowed to participate nor on the merits of the case. Rather, the test is whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another. And, to repeat, no such interest is to be presumed. There must be a concrete demonstration that harm to the petitioner (or those it represents) will or could flow from a result unfavorable to it — whatever that result might be. In this instance, if in fact the outright denial of the *Sheffield* application or the imposition of license conditions would pose a threat of injury to petitioners or their members, it should have been easy enough to have provided a bill of particulars on that score. In short, contrary to petitioners’ claim on the appeal, to conclude (as we do) that their standing to intervene as of right has not been established is not perforce to foreclose all attempts at intervention in support of an application.

Id. at 743 (citation and footnote omitted). The Appeal Board then remanded the case for further consideration of whether the groups qualified for discretionary intervention. *See id.* at 743-45.

SFC contends that the *Sheffield* case has limited value because it was not an enforcement proceeding like this one.⁷ *See* Tr. at 51. Nonetheless, in line with the directive in 10 C.F.R. § 2.714(d)(1)(iii) that a pertinent consideration in intervention rulings is “[t]he possible effect of any order that may be entered in the proceeding on the petitioner’s interest,” we think that decision provides valuable guidance in resolving the issue now before us.

Once SFC and GA requested a hearing relative to the Staff’s October 1993 order, as the Appeal Board’s analysis in *Sheffield* suggests, NACE was presented with the likelihood that an adjudicatory proceeding would be conducted that could have two possible outcomes: The Board would fully sustain the Staff’s

⁷ SFC also asserts that the *Sheffield* decision should be ignored because the case is a pre-*Bellotti* determination, because the discussion quoted above is dicta, and because a later Appeal Board in the *Shoreham* proceeding declined to rule on the issue of whether intervention to support a license application is permissible. *See* Tr. at 51-52. We do not find the pre-*Bellotti* status of the *Sheffield* decision particularly telling in light of our conclusion that *Bellotti* really did not address the central issue now before us. Further, it is not apparent that the discussion quoted above is dicta given the Appeal Board’s further determination to remand the proceeding to consider the availability of discretionary standing, several of the standards for which are “[t]he nature and extent of the petitioner’s property, financial, or other interest in the proceeding” and “[t]he possible effect of any order which may be entered in the proceeding on the petitioner’s interest.” *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Finally, the fact that a divided Appeal Board in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.4 (1983), chose to affirm the dismissal of an intervention petition supporting an application on the grounds of lateness without reaching the question of whether the intervenor had standing does not have any negative impact upon the validity of the analysis put forth in the earlier *Sheffield* decision.

order or it would not, either because the Board would reject the order in whole or in part or because the order would be modified or withdrawn by some unilateral Staff action or by a settlement between the Staff and the parties contesting the order.⁸ NACE has indicated that, given these two possible outcomes, only if it is permitted to participate in this proceeding can it protect its interest in seeing that the October 1993 order and the requirements it imposes for decommissioning funding are sustained. See NACE Intervention Motion at 3-4. Therefore, consistent with *Sheffield*, if NACE can also establish a particularized injury that it or its members will suffer in the event the order is not sustained, it is entitled to standing as of right as a "person whose interest may be affected by the proceeding."⁹

B. NACE's Particularized Injury

In assessing whether NACE has made the necessary showing of particularized injury to establish its right to intervene in this proceeding, we are constrained to apply contemporaneous judicial concepts of standing. See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87,

⁸ SFC also suggests that NACE's interest in maintaining the terms of the October 1993 order is too illusory to provide NACE with a basis to intervene because of the order's provision permitting the Staff to "relax or rescind" any of its conditions upon a demonstration of "good cause." See SFC Intervention Answer at 22-24, 32-33 (citing 58 Fed. Reg. at 55,092). We cannot agree. As the Staff notes, under 10 C.F.R. § 2.717(b), any Staff action of that kind would be subject to review by the Board with input from all parties to the proceeding. See Tr. at 91-92. See also *Oncology Services Corp.*, LBP-94-2, 39 NRC 11, 26 n.12 (1994). In addition, pursuant to 10 C.F.R. § 2.203, any settlement between the Staff and any of the parties subject to an enforcement order must be reviewed and approved by the Board. In such a circumstance, a participant like NACE would have an opportunity to vindicate its interest in having the order sustained fully by demonstrating why the settlement proposal would not be in the public interest.

⁹ We also see this determination as consistent with the pre-*Bellotti* Licensing Board decision in *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367 (1980), a case that has been the subject of considerable controversy among the participants before us.

Dairyland was decided under a regulatory enforcement scheme that is different from the current section 2.202, which was adopted in 1991. See 56 Fed. Reg. 40,664 (1991). Rather than placing a requirement on the person subject to the order, as is now done, the Staff at that time would issue an order directing the subject to "show cause" why corrective measures proposed by the Staff should not be required. The order also provided an opportunity for a hearing on the Staff's proposed action. In *Dairyland*, the licensee sought a hearing on a Staff order requiring it to show cause why certain facility changes should not be made. An individual and a group sought to intervene in the proceeding to support imposition of the proposed changes. Thereafter, the Staff reversed its position regarding the need for the changes and the licensee moved to dismiss the intervention petitions and terminate the hearing. The Licensing Board concluded that the Staff's change in position did not affect the ability of the petitioners to obtain a hearing to champion their assertion that the Staff's original show-cause proposal was correct and should be maintained. See 12 NRC at 370-72.

SFC seeks to distinguish *Dairyland* as a pre-*Bellotti* decision. See SFC Intervention Answer at 21. As we have stated previously, we do not see that case as controlling the matter before us. Rather, the *Dairyland* Board's explanation regarding the nature of the petitioners' interests relative to the possible outcomes of the proceeding supports a similar result here. See also NRC *Bellotti* Brief at 34 n.21 ("The order modifying [license at issue in this case] was made immediately effective and was not contested by the licensee. These factors distinguish the instant case from cases like [*Dairyland*]. In *Dairyland*, after a matter was contested and referred to a [Licensing] Board for resolution, intervention within the scope of the proposed enforcement action may be permitted because the petitioners could show an adverse effect from a later Staff decision not to require the proposed action." (emphasis in original)).

92 (1993). This requires that we assess whether the intervenor will suffer any “injury in fact” relative to its interests in the proceeding and whether those alleged interests are within the “zone of interests” protected by the pertinent statutes and regulations under which the petitioner seeks to participate in the proceeding. *See id.*

NACE asserts that its interest in this proceeding is to act, on behalf of itself and its members living near the Gore facility, as an advocate for the legal authority and reasonableness of the October 1993 order that it believes must be sustained to provide funding that will be adequate to ensure the safe cleanup of the SFC site. *See* NACE Intervention Motion at 3-4. We have no trouble concluding that the interest of intervenor NACE in seeing that the Staff’s decommissioning funding order is sustained falls within the zone of interests protected by the AEA. Further, for the reasons detailed below, we find that NACE has shown “injury in fact” sufficient to establish its representational standing in this proceeding.¹⁰

To establish the requisite injury in fact, a petitioner must allege a concrete and particularized injury that is fairly traceable to the action at issue.¹¹ *See Perry*, CLI-93-21, 38 NRC at 92. To fulfill the requirement for alleging a particularized injury, NACE initially presented the Henshaw affidavit described earlier. That affidavit establishes NACE’s authority to represent Mr. Henshaw’s interests. In the affidavit, Mr. Henshaw also asserts that his home is adjacent to the radiologically and chemically contaminated Gore facility, which raises the possibility that contaminated groundwater and surface water will migrate onto his property. Because of this, he maintains that a failure to decontaminate the facility properly will have detrimental health and safety, economic, and social impacts upon him and his family and that a failure of SFC and GA to provide funding in line with the October 1993 order will jeopardize proper decommissioning of the facility. *See Henshaw Affidavit* at 1.

Standing alone, this affidavit likely would be sufficient to establish a concrete and particularized injury to Mr. Henshaw’s AEA-protected health and safety interests that is fairly traceable to the action at issue in this proceeding.¹²

¹⁰ In its intervention motion, NACE alleges injury both to itself and its members, *see* NACE Intervention Motion at 3-4, seemingly suggesting that it can be granted standing either on its own as an organization or as a representative of its members. SFC contends, however, that NACE has not made a showing that will sustain a finding of organizational standing, *see* SFC Intervention Answer at 16-18, an assertion that NACE does not challenge, *see* NACE Reply to SFC Intervention Answer at 13-23. We thus assess its intervention petition only under the standards governing representational standing.

¹¹ As the *Perry* decision also indicates, the injury must be likely to be redressed by a favorable decision in the proceeding. *See* CLI-93-21, 38 NRC at 92. As we noted above, this will in fact be the case in this proceeding. *See supra* note 8 and accompanying text.

¹² As noted above, Mr. Henshaw’s affidavit also expresses a concern about “the social and economic impacts of living near a *de facto* nuclear waste dump,” albeit without further elaboration. *Henshaw Affidavit* at 1. It is not apparent that these types of interests (as opposed to health and safety concerns) are cognizable in this proceeding.

(Continued)

See *Perry*, CLI-93-21, 38 NRC at 93. Yet, as we have described above, SFC controverts this affidavit with a series of affidavits from management and technical personnel.

In reviewing these affidavits, we must bear in mind the often-repeated admonition to avoid "the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits." *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted). To be sure, the merits of the litigation here generally concern the question of responsibility for funding the decommissioning of the Gore facility rather than the extent of the contamination involved and the SFC actions necessary to deal with that contamination. Nonetheless, decommissioning funding and the nature and extent of site characterization and decommissioning activities bear a relationship to those issues that warrants some care in addressing the various factual allegations regarding NACE's asserted bases for its standing.

In fact, the Commission's recent *Perry* decision appears to reflect a similar concern about reaching the merits prematurely. In that proceeding, a local intervenor group and an individual living near the Perry nuclear plant sought to challenge a proposed license amendment transferring a particular reactor vessel maintenance schedule from the facility's technical specifications to its safety analysis report. The intervenors declared that they would suffer injury by reason of the fact that once the safety-related vessel maintenance schedule was removed from the technical specifications, which can only be changed by license amendment, they no longer would have notice of changes to that schedule or an opportunity to contest those changes in an AEA section 189a(1) hearing. In reversing the Licensing Board's ruling that the intervenors had not established their standing,¹³ the Commission found, consistent with its prior precedent linking standing injury with the potential for consequences for those living near a facility from a safety-related licensing action, "[a]t this stage in deciding threshold standing, we cannot conclude that no potential for offsite consequences is posed by the loss of notice and opportunity for a hearing to challenge future changes to the [maintenance] schedule." CLI-93-21, 38 NRC at 95-96.

As the Staff's October 1993 enforcement order makes clear, there is uranium contamination of the soil and groundwater on the SFC main processing facility

See *Perry*, CLI-93-21, 38 NRC at 95 n.10 (standing requires more than general interests in the cultural, historical, and economic resources of a geographic area). Yet, even assuming they are, this statement is insufficient to identify the type of concrete and particularized injury needed to support intervention.

¹³ The Commission reached this conclusion despite the Licensing Board's determination that the intervenors "ha[d] failed to identify the chain of circumstances culminating in 'offsite consequences' that must be linked to those future changes" *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 123 n.45 (1992), *rev'd*, CLI-93-21, 38 NRC 87 (1993).

and the nearby pond areas with sufficient safety significance to warrant remediation before the property can be released for unrestricted use. *See* 58 Fed. Reg. at 55,087. What the Dietrich, Brown, Smith, and Schlag affidavits contain are various claims and counter-claims about the potential impact upon the Henshaw property of groundwater flow from that contaminated site.¹⁴ In line with the Commission's *Perry* decision, we must review those affidavits to determine whether there is "no potential" for consequences to Mr. Henshaw's property from groundwater flow relative to the contamination at the Gore facility. And to answer this question on the basis of the record before us, we find we need focus only on the matter of the direction and depth of groundwater flow.¹⁵

Based upon groundwater flow studies relating to the SFC processing facility and the pond areas lying south of the facility, including a July 1991 facility environmental investigation (FEI) report and a May 1992 addendum to the FEI report, Mr. Dietrich (who is not a hydrogeologist) concludes in the initial SFC affidavit that the groundwater flow from the processing site and the ponds is "generally" westward and away from the Henshaw property. SFC Intervention Answer, encl. 2, at 2, ¶8. In his first affidavit on behalf of NACE, Mr. Brown declares that Mr. Dietrich's statement about groundwater flow being to the west does not account sufficiently for the complex geology underneath the entire area around the SFC site, which could have significant impacts on flow direction. *See* NACE Reply to SFC Intervention Answer, attach. C., ¶9. Mr. Brown finds particularly important a faulted zone that lies about sixth-tenths of a mile east of the SFC facility and runs diagonally from the northeast to the southwest, going under the Henshaw property. *See id.* ¶7(b). Also of concern, according to Mr. Brown, is the fact that the hydrogeology studies relied upon by Mr. Dietrich focused only on the upper groundwater zones and so did not address the not uncommon phenomenon of deeper groundwater levels moving in a different direction from upper level flow. *See id.* ¶7(d).

Responding on behalf of SFC, Mr. Smith asserts that the groundwater flow under the SFC site area is well understood and is representative of the adjacent

¹⁴ In contrast to the debate about groundwater flow, SFC's challenge to Mr. Henshaw's otherwise unexplicated concern about surface water is never really addressed by NACE. In the face of an analysis in the Dietrich affidavit indicating that the surrounding topography makes surface water flow to the Henshaw property from the SFC facility "impossible," SFC Intervention Answer, encl. 2, at 3, NACE fails to make any rejoinder, *see* NACE Reply to SFC Intervention Answer at 19-23. The same is true regarding Mr. Brown's assertion in his affidavit that there is the possibility of airborne contamination. *See id.* attach. C, ¶12. Besides the fact that Mr. Brown's opinion concerning airborne contamination is well outside the bounds of his expertise as a hydrogeologist, we have the detailed, un rebutted response to his claims in the affidavit of SFC radiation consultant Potter. *See* SFC Reply to NACE Reply, encl. 3. *See also* NACE Reply Affidavit Motion at 3 n.3 (NACE unable to conduct technical analyses to rebut Potter affidavit in time to make filing). Based on the record now before us, we can only conclude that there is insufficient support for a finding of injury in fact to the Henshaw property from surface water or airborne contamination.

¹⁵ In contrast to its showing in the Schlag affidavit regarding the raffinate spreading fields, *see* SFC Reply to NACE Reply, encl. 2, on the issue of NACE's injury in fact from processing site and the pond area groundwater migration, SFC has not made any explicit assertion about the impact of the level of contaminants.

areas. See SFC Reply to NACE Reply, encl. 1, at 2, ¶9. Mr. Smith also maintains that the geology of the site is not overly complex. See *id.* at 3, ¶10. Further, while not challenging Mr. Brown's assertion that the nearby fault zone running under the Henshaw property could have a significant impact on flow patterns, Mr. Smith nonetheless discounts the relevance of the zone by declaring that "information developed in the FEI shows that groundwater in [the processing and pond areas] will *not* flow in the direction of that fault, and therefore will not be affected by that fault." *Id.* at 3, ¶12 (emphasis in original). Finally, while not contesting Mr. Brown's opinion about the potential for upper and lower groundwater levels to have different flow directions, Mr. Smith declares that his concerns about deeper flow direction are untoward because information in the 1991 FEI report and the 1992 addendum "was sufficient to convince the investigators that the possibility of significant contamination in even lower zones was unlikely and investigation to deeper zones was unnecessary." *Id.* at 4, ¶13.

Based on the record before us, we are unable to conclude that, as the Commission stated in *Perry*, there is "no potential for offsite consequences" relative to the Henshaw property from SFC site contamination migrating by groundwater flow. SFC's attempt to undercut the significance of the faulted zone as a groundwater path by declaring that groundwater will not flow toward the fault is itself undermined by the FEI report. As FEI charts attached to Mr. Brown's second affidavit indicate, groundwater from the processing site does move south in the direction of the fault. See NACE Reply Affidavit Motion, Reply Affidavit of Timothy B. Brown, attachs. 1-2. At a minimum, this supports Mr. Brown's assertion that the groundwater flow patterns are "variable and complex" and leaves us unable to conclude that there is "no potential" for contaminated groundwater to flow towards the Henshaw property via the faulted zone (or some other pathway).¹⁶ In addition, SFC itself described the results of the FEI report for the Staff by stating that deeper flow systems are "expected." SFC Reply to NACE Reply, encl. 1, attach. A-2, at HYD 5-2. As Mr. Brown indicated, the potential for upper- and lower-level flows carries with it the possibility of differing flow directions. Having failed to measure the direction of these "expected" deeper flows, SFC is in no position to show that there is "no potential for offsite consequences" relative to the Henshaw property from such deeper flow patterns.¹⁷

¹⁶ Our conclusion in this regard is not affected by the fact that the pond area lies to the south between the processing site and the Henshaw property and that the groundwater flow chart for the pond area shows a generally westerly flow. The difference between the groundwater flows in the processing and pond areas only serves to emphasize that, at least on the basis of the information now before us, the groundwater flows in the area apparently are sufficiently complex that we cannot conclude that there is "no potential for offsite consequences" relative to the Henshaw property. See *Perry*, CLI-93-21, 38 NRC at 95.

¹⁷ The validity of SFC's decision not to do such studies based on a judgment that the possibility for significant lower-level flow contamination was "unlikely," SFC Reply to NACE Reply, encl. 1, at 4, ¶13, may well be

(Continued)

In sum, on the basis of the NACE and SFC presentations before us, like the Commission in *Perry* we “cannot conclude that no potential for offsite consequences” exists for the Henshaw property relative to the contamination on the SFC site. Accordingly, we find that there is a sufficient demonstration of injury in fact by NACE to provide standing to intervene as of right in this proceeding.

C. Timeliness of NACE’s Intervention Request

With the legal basis for its standing thus established, NACE nonetheless faces an additional hurdle to its admission to this proceeding: the timeliness of its intervention motion. The Staff’s October 15, 1993 order specified that within twenty days of its issuance, hearing requests had to be filed by those “adversely affected by this Order.” 58 Fed. Reg. at 55,092. Acknowledging that it filed its November 18, 1993 intervention motion 2 weeks past that date, NACE maintains that because it was not adversely affected by the order, the 20-day deadline in the order did not apply to it. According to NACE, consistent with the scope of this proceeding as defined by the *Bellotti* decision, it suffered an adverse impact entitling it to intervention only when SFC or GA (or some other person adversely affected by the order) requested a hearing. The timeliness of its hearing request thus must be gauged in relation to the filing of those hearing requests. See NACE Intervention Motion at 2-3. Finally, NACE contends that even if its intervention motion is untimely, a balancing of the five factors for late-filed petitions set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) supports admission of its filing.¹⁸ See NACE Reply to SFC Intervention Answer at 5-10 & attach. A (resume of Arjun Makhijani).

Not unexpectedly, SFC argues that, consistent with 10 C.F.R. § 2.202(a)(3) and the language of the Staff’s order, NACE’s intervention request was untimely. See SFC Intervention Answer at 8-10. SFC also asserts that NACE is unable to make the required showing under the section 2.714(a)(1) five-factor test for late-

sustainable relative to the merits of any future determination about the adequacy of the FEI report or SFC’s decommissioning activities generally. In the context of our “no potential for offsite consequences” standing determination here, however, it is insufficient to compel a finding of no injury in fact against NACE. The same can be said for SFC’s statement in its description of the FEI report that there is a “low potential” for groundwater movement between the upper-level flow systems and the deeper systems. See *id.*, encl. 1, attach. A-2, at HYD 5-2.

¹⁸Section 2.714(a)(1) has been interpreted to require that the late-filed factors be addressed in the initial late petition. See *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466-68 (1985). NACE, however, first addressed the late-filed factors in NACE’s reply to SFC’s response to NACE’s intervention motion. See NACE Reply to SFC Intervention Answer at 5-10. Acknowledging that we have the discretion to permit an intervenor to make such a belated lateness showing, see *Pilgrim*, ALAB-816, 22 NRC at 468, SFC asserts that the familiarity of NACE counsel with NRC proceedings establishes there is no good cause for NACE’s failure to discuss those factors in its initial motion. See SFC Reply to NACE Reply at 2-3. We conclude, however, that NACE’s assertion that its petition was not late at all was made in good faith so as to provide good cause for permitting it to address the late-filing factors for the first time in its reply pleading.

filed intervention petitions. See SFC Intervention Answer at 10-13; SFC Reply to NACE Reply at 2-10. In its filing in response to the NACE intervention motion, the Staff seemingly agrees that NACE's request was untimely, but declares that given the short period of time involved, it does not oppose granting the motion. See Staff Intervention Response at 2 n.5. During its presentation at the January 19 prehearing conference, however, the Staff expressed support for NACE's position that its motion was not untimely because it was not "adversely affected" under the terms of the order. See Tr. at 65-66.

The timeliness issue presented by NACE's filing requires that we explore the meaning of, and relationship between, two agency regulations. One is 10 C.F.R. § 2.202(a)(3), which requires that an enforcement order inform any person "adversely affected by the order" of his or her right to request a hearing within 20 days of issuance of the order. The other is 10 C.F.R. § 2.714(a)(1), the intervention provision that applies to all 10 C.F.R. Part 2, Subpart G proceedings, including section 2.202 enforcement order proceedings. See *supra* note 4. By its terms it permits "[a]ny person whose interest may be affected by a proceeding" to seek party status subject to any time limits that may be established in an appropriate notice.

If, as NACE (and apparently the Staff) contend, section 2.202(a)(3) does not apply to a petitioner like NACE who wants to intervene in support of the order, the October 1993 order with its "adversely affected by the order" language did not provide NACE with notice of when it had to file a request for intervention. The timing of NACE's intervention request then would be subject to any notice issued in conformity with section 2.714(a)(1) to those "whose interest may be affected by the proceeding." On the other hand, if the "adversely affected by the order" language of section 2.202(a)(3) and the language of section 2.714(a)(1) providing an intervention opportunity to persons "whose interest may be affected by the proceeding" are coextensive, as SFC maintains, then the deadline specified in the October 1993 order was applicable to NACE and its petition is untimely.

A principal problem with the latter interpretation is that it runs contrary to the usual inference that different language is intended to mean different things. See *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1186 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984). The difference in language is readily apparent here. Section 2.202(a)(3) concerns those who suffer adverse effects from the "order"; section 2.714 (in imitation of AEA section 189a) refers to those whose interests may be affected by the "proceeding." Further, as this case illustrates, as between the "order" and the "proceeding," there is a real distinction in terms of the impact on the petitioner's interests.

As we noted in section II.A above, an intervenor may become a party to a hearing to protect its interest in seeing that a Staff enforcement order challenged in the proceeding is sustained. Accordingly, the matter that adversely affects

this 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 its interests. The differing language in section 2.202(a)(3) and section 2.714(a)(1) mirrors this distinction flawlessly.¹⁹

We thus conclude that the NACE (and the Staff) reading of these regulations is the correct one. The language of section 2.202(a)(3) establishing a 20-day deadline for hearing requests, as echoed in the order, was not applicable to NACE.²⁰ Instead, its intervention is governed by section 2.714(a)(1) and any time limits that are established in accordance with that section.

As it is applicable to govern intervention by NACE in this proceeding, section 2.714(a) states that an intervention petition "shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the petition and/or [hearing] request . . ." Here, the only agency issuance providing constructive notice of a filing deadline has been the Staff's enforcement order that, as we already have found, was not applicable to NACE. It thus appears that there has not been any agency notice of hearing (or opportunity for hearing) that specifies a time limit for persons, such as NACE, who wish to intervene to protect an interest in having the order sustained.²¹ NACE's petition,

¹⁹ Of course, the inference regarding differing meanings for differing language might be negated by a showing that the purpose or regulatory history behind the language demonstrates that no difference was intended. See *Stauffer Chemical Co.*, 684 F.2d at 1186. We are unable to find any such a purpose or history here. Instead, the regulatory history of the recently adopted section 2.202 shows that its central purpose was to make clear the agency's authority over both licensees and nonlicensees who are the targets of the enforcement action taken in the order. See 56 Fed. Reg. at 40,664-65. These are the persons to whom the "adversely affected by the order" language in section 2.202(a)(3) obviously was directed. This same intent is reflected in the language of the other provisions of section 2.202, which consistently refer to the same type of persons. See 10 C.F.R. § 2.202(a)(1) (order must allege charges against "the licensee or other person subject to the jurisdiction of the Commission"); *id.* § 2.202(a)(2) ("licensee or other person" must file an answer within 20 days of order); *id.* § 2.202(b) ("licensee or other person to whom the Commission has issued an order" must respond with an answer that is to deny or admit each charge and may demand a hearing).

²⁰ SFC also seeks to rely upon a letter written by one of this Board's members in another section 2.202 enforcement order proceeding as support for the proposition that NACE's intervention is subject to the 20-day time limit specified in section 2.202(a)(3). See SFC Intervention Answer at 9-10. The letter in question was written in response to an inquiry from counsel for a medical clinic concerning the timing for its intervention in a 4-month-old proceeding in which a clinic employee had filed a timely hearing request regarding an order modifying the clinic's license to prohibit him from performing activities under that license. In pertinent part, the letter stated:

Further, once the time specified in the enforcement order for filing a hearing request has expired, an interested person who wishes to obtain party status in an adjudicatory proceeding regarding the order is obliged to petition for late-intervention. Among other things, a late intervention petition must address the factors set forth in 10 C.F.R. § 2.714(a)(1).

Id., encl. 1. In the context of that proceeding, in which the clinic clearly was a person adversely affected by the order that had failed to meet the section 2.202(a)(3) deadline, the letter's statement about the applicability of the section 2.714(a)(1) factors no doubt was correct. See *infra* note 22. Nonetheless, in light of our determination here about the timeliness of NACE's petition, the use in the letter of the term "interested person" was inaccurate.

²¹ It stands to reason that without a constructive notice of the deadline for filing a hearing request for these other potential intervenors, there is no apparent point at which the agency can reject a hearing request from such a person as untimely. The administrative inefficiency of such a circumstance is apparent and cries out for some remedy.

(Continued)

therefore, cannot be deemed untimely for failing to meet an appropriately noticed filing deadline.

Yet, even in the absence of any constructive notice, the possibility remains that NACE had actual notice of the pendency of this enforcement proceeding and failed to make a timely intervention request following that notice. *See* 54 Fed. Reg. 8269, 8272 (1989). NACE asserts that the first time it was given any actual notice relevant to its intervention in this proceeding was on November 8, 1993, when it received service of the SFC and GA answers requesting a hearing on the October 1993 order. *See* NACE Intervention Motion at 2. NACE maintains that it acted reasonably thereafter by filing its intervention motion on November 18, 1993. *See id.* at 3. SFC argues, however, that NACE had actual notice earlier but failed to act promptly to file its intervention petition. According to SFC, because SFC's and GA's February 1993 responses to a Staff demand for information made it apparent that they disagreed with the Staff's approach to decommissioning funding liability, NACE had actual notice that there would be a proceeding when it received the October 1993 Staff enforcement order, which the agency served on NACE. *See* SFC Intervention Answer at 11.

Given our previous finding that it is NACE's interest in the "proceeding" rather than the "order" that is relevant here, the pertinent actual notice was that affording NACE knowledge that this adjudicatory proceeding would be commenced. The SFC and GA hearing requests received by NACE on November 8 constituted such a notice. And, by filing its intervention motion within 10 days thereafter, NACE acted seasonably relative to that actual notice. *Compare* 10 C.F.R. § 2.1205(c)(2)(i) (hearing request must be filed within 30 days of actual notice).

We thus conclude that, under the circumstances here, NACE's November 18, 1993 intervention motion was timely filed.²²

Fortunately, Commission guidance on how to handle this problem already exists in the agency's rules governing informal adjudications in materials and operator licensing cases. It is agency practice to provide notice of only some of the material licensing actions to which AEA section 189a(1) hearing rights attach. *See* 54 Fed. Reg. 8269, 8270-71 (1989). As the Commission has acknowledged, this can create a situation in which a hearing will be convened at the request of an interested person who finds out about the licensing action, while others similarly situated have no notice of their right to request and participate in such a proceeding. To rectify the potential inefficiencies (not to mention unfairness) in this situation, the informal hearing rules provide that once an intervenor's hearing request is granted regarding a previously unnoticed action, a notice is to be published in the *Federal Register* that advises all other interested persons of the proceeding and sets a specific deadline for them to file intervention petitions. *See* 10 C.F.R. § 2.1205(c)(2)(i)(4).

Consistent with this Commission guidance, in the event we find NACE has presented a litigable contention so as to be fully admitted as a party to this proceeding, pursuant to the Board's authority under section 2.714(a)(1), we will issue a notice of hearing that invites all other persons whose interest may be affected by this proceeding to intervene by a date certain.

²² Our conclusion that NACE's intervention motion is timely obviates the need to determine whether its petition can be admitted as untimely. We nonetheless observe that, even if its intervention motion was subject to the 20-day filing date specified in the October 1993 order, NACE has made a sufficient showing to excuse its failure to act by that deadline.

(Continued)

III. CONCLUSION

For the reasons stated herein, we find that intervenor NACE's stated interest in protecting the health and safety of its members by ensuring that the Staff enforcement order contested in this proceeding is sustained is cognizable under the agency's statutory and regulatory provisions permitting intervention by those "whose interest may be affected by the proceeding." Further, we conclude that NACE has established its standing to participate in this proceeding by making a sufficient demonstration that the health and safety interests of its members are within the AEA-protected zone of interests and that injury in fact may accrue to those interests that is traceable to the challenged order.²³ We also find NACE's intervention motion was timely filed in accordance with 10 C.F.R. § 2.714(a)(1). Finally, because we perceive the question of whether intervention

As an initial matter, it seems apparent that the agency's procedural rules do not have a provision that explicitly governs an untimely section 2.202(a)(3) answer/hearing request. The five late-filed factors in section 2.714(a)(1) seemingly provide the appropriate guidance for considering such a filing, however.

Applying those standards relative to the NACE and SFC arguments concerning timeliness, *see supra* pp. 71-72, we are of the opinion that four of the factors clearly are in NACE's favor. We agree with NACE that under factor one, "good cause" did exist for late filing in light of what we consider to be NACE's good-faith argument that the section 2.202(a)(3) filing deadline was not applicable to one supporting the Staff's order. In that context, NACE's intervention filing within 10 days of receiving notice of the SFC and GA requests to begin this proceeding was reasonably prompt. Regarding factor two — the availability of other means to protect NACE's interests — we cannot agree with SFC that NACE's right to file a petition seeking Staff action under 10 C.F.R. § 2.206 is an adequate alternative to an adjudicatory proceeding. *See Washington Public Power Supply System (WPPSS Nuclear Project No. 3)*, ALAB-747, 18 NRC 1167, 1175-76 (1983). As NACE suggests, this is particularly true when the Staff-initiated action under consideration came about after a process that is the same as that which would result from a successful section 2.206 petition. We also cannot accept SFC's assertion that the presence of the Staff weighs against NACE relative to the fourth factor concerning the representation of the petitioner's interest by other parties. Prior cases have emphasized the potential for a divergence of interests between the Staff and private parties, *see id.* at 1174-75 & n.22, a consideration that seems especially relevant here given NACE's assertion that any Staff action in this proceeding to modify or withdraw the October 1993 order would be inimicable to its interest in seeing that the order is fully sustained, *see supra* note 8. Finally, as to factor five, because the scope of this proceeding under *Bellotti* precludes NACE from advocating measures going beyond those set forth in the order, NACE's admission at this very early stage of the proceeding is not reasonably likely either to delay this proceeding or to broaden the issues before the Board.

The only element for which NACE's showing may be wanting is factor three — the petitioner's assistance in developing a sound record. In support of this factor, NACE proffers the resume of Dr. Arjun Makhijani and asserts that his expertise in nuclear engineering, including technologies and costs associated with nuclear waste containment and disposal, and his familiarity with decommissioning issues regarding the SFC facility, will ensure that NACE can make a valuable contribution to record development. As SFC points out, however, it is not apparent how that asserted proficiency provides any help in addressing the issues of liability and funding adequacy that are central to this proceeding. Although we are troubled by NACE's failure to make explicit any link between Dr. Makhijani's purported expertise and these issues, ultimately we do not give this shortcoming much weight. In light of Dr. Makhijani's apparent expertise, we see this as a pleading deficiency rather than the proffer of a witness who manifestly cannot assist in developing a sound record. Because the other four factors so clearly support NACE's participation, we ultimately conclude that this failing is insufficient to tip the balance against permitting late-filed intervention.

²³ Having determined that NACE is entitled to intervention as of right, we do not have to reach its alternative assertion that it should be afforded discretionary intervention pursuant to the balancing test established in *Pebble Springs*, CLI-76-27, 4 NRC at 616. Nonetheless, assuming such intervention is available in a proceeding regarding a section 2.202 order, it is apparent that petitioner NACE has made a sufficient showing under the *Pebble Springs* factors.

(Continued)

as of right exists for a petitioner that wants to enter a section 2.202 enforcement order proceeding to support the Staff's order addressed in this memorandum and order is of some moment for the structure of this proceeding, as well as the Commission's adjudicatory process generally, and in order to alleviate any delay in Commission consideration of this matter pending our determination regarding the admissibility of NACE's contentions,²⁴ in accordance with 10 C.F.R. § 2.730(f), we refer our ruling on this matter to the Commission for its immediate review. Cf. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 456-57 (1981) (in licensing hearings, licensing boards should seek Commission guidance on significant legal or policy questions and should do so in a manner that will avoid delay in the proceeding).

For the foregoing reasons, it is this 24 day of February 1994, ORDERED that:

1. The January 19, 1994 motion of petitioner NACE for leave to file reply affidavit is *granted*.

2. In accordance with the Board's memorandum and order of January 25, 1994, the November 18, 1993 motion of petitioner NACE for leave to intervene is *granted*.

3. Pursuant to 10 C.F.R. § 2.730(f), the Board refers to the Commission for its review the Board's ruling in section II.A above that in a proceeding on

Four of the six factors — assistance in record development, availability of other means to protect the petitioner's interests, representation of the petitioner's interests by other parties, and broadening or delaying the proceeding — are essentially identical to items we already have addressed relative to the admission of NACE's petition as late-filed. See *supra* note 22. As we indicated there, only one of those factors — assistance in record development — weighs against NACE, although not substantially so. Indeed, in the context of discretionary intervention, the negative impact of that factor is further dissipated by the fact that there will be a proceeding even absent intervention by NACE. Compare *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977) (need for strong showing on potential record contribution factor is pressing where, absent discretionary intervention, no hearing will be held).

Concerning the other two factors — nature and extent of petitioner's interest in the proceeding and possible effect of any order in the proceeding on that interest — for the reasons we have outlined in sections II.A and II.B above regarding NACE's standing, we think that the impact of the possible outcomes of this proceeding on the legitimate health and safety interests of NACE's members is apparent and that, with at least one representative of the organization living within approximately a mile of the facility, there is a cognizable potential for adverse impacts flowing from the possible inadequate funding of decommissioning activities that the Staff's order is intended to forestall. Balancing these two factors weighing in favor of NACE's participation along with the four discussed above, it seems apparent that NACE should be afforded discretionary intervention in this proceeding.

We note further in this regard that we do not find especially relevant to any determination on NACE's discretionary intervention statements made by Commissioners during a November 8, 1993 briefing on the agency's site decommissioning management plan that are included as Attachment E to NACE's Reply to SFC's Intervention Answer. We thus see no need to strike the attachment, as SFC requests.

²⁴Until a determination is made that an intervenor has proffered a litigable contention, a licensing board's ruling on an intervenor's party status is not final. Our rulings in this memorandum and order thus are not yet appealable pursuant to 10 C.F.R. § 2.714a. See *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 864-65 (1980).

a 10 C.F.R. § 2.202 Staff enforcement order, there is no prohibition against an otherwise qualified petitioner intervening as of right in support of the order.

**THE ATOMIC SAFETY
AND LICENSING BOARD**

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

**G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE**

**Thomas D. Murphy
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
February 24, 1994**



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket No. 50-423

**NORTHEAST NUCLEAR ENERGY
COMPANY**

February 9, 1994

The Director, Office of Enforcement, denies a Petition filed by Paul M. Blanch (Petitioner) pursuant to 10 C.F.R. § 2.206. The Petition requested that the NRC take enforcement action, in addition to that taken in a May 4, 1993 enforcement action, against Northeast Nuclear Energy Company for certain activities that he alleged constituted violations of 10 C.F.R. §§ 50.7 and 50.5.

**ENFORCEMENT POLICY: REOPENING ENFORCEMENT
ACTIONS**

In view of the NRC's limited resources, it is normally more appropriate to focus on new enforcement actions, rather than reopen closed actions.

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

I. INTRODUCTION

On August 2, 1993, Mr. Paul M. Blanch (Petitioner) filed a letter with the Executive Director for Operations of the U.S. Nuclear Regulatory Commission (NRC). The letter requests, pursuant to 10 C.F.R. § 2.206, that the NRC take enforcement action, in addition to that taken in a May 4, 1993 enforcement action issued to Northeast Nuclear Energy Company (Licensee), for certain activities that he alleges constitute violations of 10 C.F.R. §§ 50.7 and 50.5. The letter has been referred to me for response. By letter dated August 23, 1993, this Office

acknowledged receipt of the Petitioner's request and indicated that a response would be provided in a reasonable time.

II. BACKGROUND

On December 18, 1989, the Region I Administrator requested that the NRC's Office of Investigations (OI) conduct an investigation into allegations that, among other things, Petitioner had been subjected to harassment, intimidation, and discrimination (HI&D) by his Northeast Utilities (NU) management after raising safety concerns. Pursuant to this request, OI conducted an extensive investigation and, on August 31, 1992, issued a Report of Investigation in which it found that:

[Petitioner] who raised the Rosemont transmitter safety concern . . . was the victim of various incidents of HI&D and attempted HI&D as a result of his stand on this issue. OI identified those responsible . . . either directly or indirectly, as the [Petitioner's] manager (the systems manager of Electrical Engineering . . .); the director of the [Petitioner's] department (the director of Engineering . . .); the vice president of that department (Generation Engineering & Construction; since retired), the vice president of Nuclear and Environmental Engineering . . . and the then senior vice president of NE&O (since resigned).

To assess the OI Report and reach a judgment on enforcement action, the NRC Staff formed a review team that included representatives from Region I, the Office of Nuclear Reactor Regulation, the Office of the General Counsel and the Office of Enforcement. After review and consideration of the OI Report, the staff team arrived at conclusions on a course of action for enforcement. The enforcement action was based in part on a violation of 10 C.F.R. § 50.7. The Staff determined that the Licensee subjected the Petitioner to HI&D by the creation and tolerance of a hostile work environment for raising safety issues. The violation was considered particularly significant due to the direct involvement of a senior-level corporate official and because other senior-level corporate officials either knew, or should have known, of the HI&D, but failed to act in an effective manner to correct the situation, and, therefore, was categorized at a Severity Level II. On May 4, 1993, after consultation with, and approval by, the Commission, the Staff issued a Notice of Violation (NOV) with a \$100,000 civil penalty for the Severity Level II violation. A civil penalty of \$100,000 is the largest authorized by the Atomic Energy Act for a single violation. The Staff noted in the letter transmitting the Notice of Violation to the Licensee that the base civil penalty for a Severity Level II violation is \$80,000 but that, in this case, the civil penalty was increased to \$100,000 because of the significant management involvement in the violation. In addition, the Staff issued a Demand for Information (DFI) requiring the Licensee to explain (a)

why the NRC should have confidence that the Licensee will ensure that there is a work environment free of HI&D with the two supervisors who were found to have discriminated against the Petitioner still involved in safety-related activities; and (b) why, after four senior corporate officials became aware of the harassment and intimidation concerns involving Petitioner, the Licensee was ineffective in promptly terminating the hostile work environment to which the Petitioner was subjected. This action was taken only after extensive and careful review of the OI Report and all of the associated evidence.

Petitioner now requests that the NRC reopen, reconsider, and modify this enforcement action. As grounds for this request, the Petitioner asserts that a letter he received from me, dated July 15, 1993 (responding to his letter of June 4, 1993, in which he stated that many specifics were not addressed in the enforcement action taken against the Licensee), was unresponsive. Specifically, the Petitioner requests that: (1) enforcement action be taken against Dr. Charles F. Sears, former Licensee Vice President of Nuclear and Environmental Engineering, identified by OI as one of those responsible for HI&D against the Petitioner, for willful violation of section 50.7 and deliberate misconduct as defined by 10 C.F.R. § 50.5; (2) a Severity Level I violation be imposed upon the Licensee corporate officer responsible for directing action against two of the Petitioner's former subordinates, which the Petitioner alleges was a retaliatory action in violation of section 50.7 and deliberate misconduct as defined by section 50.5; (3) three Severity Level I violations be imposed upon three Licensee corporate officers that OI concluded were responsible for HI&D against the Petitioner for violations of section 50.7 and deliberate misconduct as defined by section 50.5; (4) a Severity Level I violation be issued for actions by Mr. Edward Richters, Licensee attorney, and a Severity Level II violation be issued to Mr. Thomas Schaffer, Licensee manager, for threatening certain individuals with letters of reprimand if they did not talk with Licensee contract attorneys prior to being interviewed by the OI, for violation of section 50.5; and (5) a minimum of a Severity Level II violation be issued for actions in violation of sections 50.7 and 50.5 by Mr. Allen Pollack, Licensee Manager of Internal Auditing, who allegedly was aware that an audit of Petitioner's engineering group was in retaliation for Petitioner's engaging in protected activity, for auditing Petitioner's group using falsified credentials, and coming to invalid conclusions based on invalid documentation. Each of these requests is addressed below.

III. DISCUSSION

In essence, Petitioner requests that the NRC reopen, reconsider, and modify the enforcement action that NRC has taken against the Licensee for its discriminatory action against the Petitioner. In view of the NRC's limited resources, it

is normally more appropriate to focus on new enforcement actions, rather than reopen closed actions. The NRC's Enforcement Policy in 10 C.F.R. Part 2, Appendix C, addresses the matter of reopening enforcement actions. Specifically, section XIII of the Enforcement Policy provides that:

[I]f significant new information is received or obtained by NRC which indicates that an enforcement sanction was incorrectly applied, consideration may be given, dependent on the circumstances, to reopening a closed enforcement action to increase or decrease the severity of a sanction or to correct the record. [Emphasis added.]

Petitioner's requests will be judged against this standard.

1. Request for Enforcement Action Against Former Vice President Charles Sears

From its review of the OI Report and the associated evidence, the NRC Staff was fully aware of OI's conclusion, and the evidence related thereto, that Dr. Sears contributed to the discriminatory use of the Licensee's internal audit process by his involvement in the initiation or conduct of the audits of Petitioner's activities and that Dr. Sears was either directly or indirectly responsible for the HI&D of Petitioner. Petitioner has presented no new evidence or information with regard to Dr. Sears' involvement in these matters.

2. Request That a Severity Level I Violation Be Imposed Upon the Licensee Corporate Officer Who Allegedly Was Responsible for Improper Action Against Petitioner's Subordinates

From its review of the OI Report and the associated evidence, the NRC Staff was fully aware of OI's conclusion, and the evidence related thereto, that the Licensee's Vice President—Generation Engineering and Construction, Vice President—Nuclear and Environmental Engineering, and a Senior Vice President contributed to the discriminatory use of the Licensee's internal audit process by their involvement in the initiation and/or conduct of audits of Petitioner's subordinates. The NRC Staff was also aware of, and carefully evaluated, OI's conclusion that one of these officials improperly attempted to influence the audit report. In addition, the Staff reviewed the evidence indicating that two of Petitioner's subordinates were suspended as a result of the audit. All of that information was considered by the Staff when it formulated the original enforcement action in this case.

3. *Request That Three Severity Level I Violations Be Imposed Upon Three Licensee Corporate Officers Responsible for HI&D Against Petitioner*

From its review of the OI Report and the associated evidence, the NRC Staff was fully aware of OI's conclusion that the Licensee's Vice President—Generation Engineering & Construction, Vice President—Nuclear and Environmental Engineering, and a Senior Vice President contributed to, and were directly or indirectly involved in, discrimination against the Petitioner. In addition, from its review of the evidence in the case, the Staff viewed the problem as being particularly significant due to the direct involvement of one of the vice presidents and because other very senior-level corporate officials — the CEO, the President, the Executive Vice President, and a Senior Vice President — either knew, or should have known, of the HI&D but failed to act in an effective manner to correct it. These matters were considered and factored into the Staff's formulation of the original enforcement action.

4. *Request That a Severity Level I Violation Be Issued for Actions by Licensee Attorney Edward Richter and a Severity Level II Violation Be Issued to Licensee Manager Thomas Shaffer for Threats to Employees to Be Interviewed by OI*

As indicated in the May 4, 1993 letter transmitting the enforcement action to the Licensee, the NRC was fully aware of the fact that Messrs. Richters and Shaffer indicated to several individuals that letters of reprimand would be issued if the individuals did not talk with Licensee attorneys prior to being interviewed by OI. The Staff was also aware of the fact that this position was changed after an employee complained to a consultant of the Licensee who brought the matter to high-level Licensee management attention. See letter from James Sneizek to Northeast Nuclear Energy Company, May 4, 1993, at 4. These matters were factored into the Staff's formulation of the original enforcement action in this case.

5. *Request That a Severity Level II Violation Be Issued for Actions by Licensee's Manager of Internal Auditing, Allen Pollack, for Auditing Petitioner's Engineering Group Using Falsified Credentials and Coming to Invalid Conclusions Based on Invalid Documentation*

From its review of the OI Report and the associated evidence, the NRC Staff was fully aware of evidence indicating that the audits of Petitioner and his subordinates, conducted under the authority of Licensee's Manager of Internal Auditing, were biased by their reliance on data that should have been known to be unreliable, by the failure of the auditors to properly review or follow up

on the explanations given by the Petitioner and his subordinates, and by other irregularities in the conduct and process of the audits as described in the NOV issued on May 4, 1993. The Staff was also well aware that the Petitioner viewed the audit as a vehicle to discredit him. Indeed, the Staff viewed the use of the Licensee's internal audit process in this case as contributing to the creation of a hostile work environment which formed, in part, the basis for the Notice of Violation and civil penalty that were issued in this case.

On each of the above matters, the NRC Staff carefully evaluated and considered the evidence in arriving at its judgment on the appropriate enforcement action in the case. Although the Petitioner may disagree with the Staff's judgment, Petitioner has provided no new evidence or information that would warrant reopening the enforcement action.

Summary

In sum, apart from requesting action pursuant to 10 C.F.R. § 2.206, the Petitioner's letter of August 2, 1993, merely restates a number of the points previously made in his June 4, 1993 letter. As explained in my July 15, 1993 letter, the NRC arrived at its enforcement decision within the latitude afforded by the NRC Enforcement Policy. To reiterate, with regard to that enforcement action, the related OI Report and all the associated evidence were reviewed in considerable detail by the NRC Staff, representatives from Region I, the Office of Nuclear Reactor Regulation, the Office of the General Counsel, and the Office of Enforcement. It was only after careful consideration of all that evidence, including the evidence related to the specific matters that Petitioner has cited in his petition, that the Staff arrived at its conclusion and decided on a course of action. Further, in the case at issue, the Commission approved the NRC Staff's proposed action. The Petitioner has provided no new information, facts, or allegations that differ from what the Staff considered when it formulated that enforcement action and has provided no justification for reconsideration of that action.

IV. CONCLUSION

In accordance with Commission policy, absent significant new information, closed cases normally are not reconsidered. In conclusion, I deny the petition in this instance because the enforcement action previously taken by the NRC on this matter was based on an extensive review of, and considered judgment on, the facts of the case, was within the guidance of the Enforcement Policy, and was approved by the Commission, and the Petitioner has failed to provide

information not previously considered in arriving at the enforcement decision in this matter.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by that regulation, the Decision will constitute final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the decision within that time.

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**James Lieberman, Director
Office of Enforcement**

**Dated at Rockville, Maryland,
this 9th day of February 1994.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

U.S. DEPARTMENT OF ENERGY
(Hanford Site)

February 22, 1994

The Director, Office of Nuclear Material Safety and Safeguards, denies a Petition filed by F. Robert Cook requesting that the Director of the Office of Nuclear Material Safety and Safeguards exercise his authority to require a license application from the U.S. Department of Energy with respect to certain high-level radioactive wastes, consisting of spent nuclear fuel generated at Nuclear Regulatory Commission-licensed nuclear reactors, stored in hot cells and the 200 Area Burial Ground at the Hanford Site in the State of Washington. As basis for this request, the Petitioner asserts that the hot cells and 200 Area at the Hanford Site are storage facilities for high-level radioactive wastes subject to section 202(3) of the Energy Reorganization Act of 1974 and the regulatory authority of the Nuclear Regulatory Commission (NRC).

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

Research and development, rather than receipt and storage of high-level radioactive waste, is the primary use of hot cells in Buildings 324, 325, and 327 at the Pacific Northwest Laboratory (PNL) with respect to NRC-license-generated materials. Accordingly, these PNL buildings are not subject to regulation by the NRC pursuant to section 202(3) of the Energy Reorganization Act of 1974.

ENERGY REORGANIZATION ACT: NRC LICENSING OF DOE FACILITIES

Neither the Hanford 200 Area Burial Ground nor either of its subareas (200 East and 200 West) is used primarily for receipt and storage of high-level radioactive waste from NRC-licensed activities. Accordingly, these facilities are not subject to regulation by the NRC pursuant to section 202(3) of the Energy Reorganization Act of 1974.

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

INTRODUCTION

By Petition dated July 25, 1991 (Petition), F. Robert Cook (Petitioner) filed a request pursuant to 10 C.F.R. § 2.206 that the Director of the Office of Nuclear Material Safety and Safeguards exercise his authority to require a license application from the U.S. Department of Energy (DOE) with respect to certain high-level radioactive wastes (HLW), consisting of spent nuclear fuel generated at Nuclear Regulatory Commission-licensed nuclear reactors, stored at locations at the Hanford Site in the State of Washington.

By letter to Mr. F. Robert Cook, dated September 3, 1991, I acknowledged receipt of the Petition. Notice of receipt was published in the *Federal Register* on September 12, 1991 (56 Fed. Reg. 46,449). I subsequently determined that additional information was needed concerning DOE activities at Hanford, and on August 19, 1992, I wrote to DOE to request such information. A copy of this letter was sent to Mr. Cook. DOE provided its response on April 2, 1993.¹ Based on the information obtained from DOE, and for the reasons given below, I have now concluded that the Petitioner's request should be denied.

BACKGROUND

The Petition addresses spent nuclear fuel, generated in licensed activities, that is alleged to be located in certain burial trenches and hot cells at Hanford. The issue that I must resolve is whether such spent fuel is in fact so located at any of the facilities at Hanford and, if so, whether those facilities are subject to regulation by the Nuclear Regulatory Commission (NRC). The Petitioner

¹ Letter dated April 2, 1993, from Jill E. Lytle, Deputy Assistant Secretary for Waste Management, Environmental Restoration and Waste Management, Department of Energy, to Robert M. Bernero, Director, Office of Nuclear Material Safety and Safeguards, NRC.

has identified, as the applicable provision of law, section 202 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5842, which reads in part as follows:

Sec. 202. . . . the Nuclear Regulatory Commission shall . . . have licensing and related regulatory authority pursuant to chapter 6, 7, 8, and 10 of the Atomic Energy Act of 1954, as amended, as to the following facilities of the [Department of Energy]:

. . . .
(3) Facilities used primarily for the receipt and storage of high-level radioactive wastes resulting from activities licensed under such Act.

I agree with the Petitioner that this is the applicable statutory provision and I will proceed, therefore, to consider whether any or all of the activities, of the types identified by the Petitioner, at Hanford are within the scope of this law.

DISCUSSION

DOE has advised me that over the years it has acquired certain spent fuel and fuel materials from NRC-licensed reactors for use in research and development activities. DOE has described the R&D activity as being work "that supports the R&D activities and projects of the Materials Characterization Center, the West Valley Demonstration Project, the Hanford Waste Vitrification Project, the MK-42 Processing Project, and the Federal Republic of Germany heat sources."² There are also studies of stored spent fuel behavior and canister fabrication. These materials are maintained primarily in hot cells of Building 324 at the Pacific Northwest Laboratory (PNL) with lesser amounts located in Buildings 325 and 327 at PNL. After undergoing destructive examination, the remnants, or amounts exceeding the test requirements, are retained temporarily in one of these PNL Buildings' hot cells or at the Hanford 200 Area low-level waste (LLW) burial ground (which consists of the 200 East Area and the 200 West Area) pending disposal. The question presented by the Petition is whether, under section 202(3) of the Energy Reorganization Act, those facilities are subject to the licensing and related regulatory authority of the NRC. Based on the information obtained from DOE³ and an NRC site visit⁴ that included PNL Buildings 324, 325, and 327, I conclude that research and development, rather than receipt and storage of HLW, is the primary use of these PNL Buildings with respect to NRC-licensee-generated materials and that the PNL Buildings are not subject to licensing and related regulatory authority of the Commission.

² *Ibid.*

³ *Ibid.*

⁴ NRC "Trip Report — Site Visit of Pacific Northwest Laboratory and Department of Energy Hanford 200 Area," dated January 21, 1994.

As indicated above, it appears that certain wastes generated in the course of licensed activities are now located in the Hanford 200 Area Burial Ground. I will assume, for purposes of this review, that those wastes are "high-level radioactive waste" within the meaning of the Energy Reorganization Act. Even so, I find that the Commission has no jurisdiction with respect to the 200 Area, since neither the 200 Area, nor either of its subareas (200 East and 200 West) is being used "primarily" for the purpose of receipt and storage of the commercially generated wastes.

DOE has explained that:

The Hanford 200 Area Burial Ground is a single facility, consisting of a number of trenches intended for the disposal of DOE-owned low-level waste. The 1,700-acre active part of the facility holds approximately 400,000 cubic meters of low-level wastes, approximately 1,100 cubic meters of which is of NRC-licensed reactor origin . . . [T]he latter represents materials not used or consumed in the tests at the PNL facilities, which is held here temporarily, pending disposition. An overwhelming percentage of the materials at this site are low-level wastes resulting from DOE's nuclear-materials production operations or operations of the DOE reactors that are not subject to NRC licensing.⁵

The presence of licensee-generated wastes does not in and of itself dictate that NRC exercise regulatory authority. The Commission's jurisdiction exists only if the facility in which those wastes are stored is used "primarily" for the purpose of such storage. DOE's need for the Hanford 200 Area Burial Ground arises out of defense-related programmatic requirements, in particular "the disposal of DOE-owned low-level waste." Serving that need is clearly the primary purpose for which the burial ground has been established. The material from NRC-licensed activities is commingled with greater amounts of unrelated materials, and there is no discrete area set aside for the materials from NRC-licensed activities. Also based on the site visit of November 9 and 10, 1993,⁶ NRC has been informed that the health and safety controls of the employees and the security for the 200 Area are under one management plan covering all radioactive materials, including NRC-licensee-generated spent fuel and fuel materials. I conclude that neither the Hanford 200 Area nor either of its subareas (200 East and 200 West) is used primarily for receipt and storage of HLW from NRC-licensed activities. Accordingly, these areas are not subject to regulation by NRC.

⁵ Letter from Jill Lytle, April 2, 1993, *supra* note 1.

⁶ NRC Trip Report, *supra* note 4.

CONCLUSION

In summary, neither the PNL Buildings 324, 325, and 327 nor the Hanford "200 Area" LLW burial ground (or either of its subareas, 200 East and 200 West) is used primarily for the receipt and storage of HLW from NRC-licensed activities. Accordingly, these facilities are not subject to regulation by the NRC. Therefore, the Petitioner's request for action under 10 C.F.R. § 2.206 is denied.

**FOR THE NUCLEAR
REGULATORY COMMISSION**

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

**Dated at Rockville, Maryland,
this 22d day of February 1994.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

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

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

March 1, 1994

The Commission denies Sacramento Municipal Utility District's petition for review and motion for directed certification of LBP-93-23, 38 NRC 200 (1993), in which the Atomic Safety and Licensing Board, *inter alia*, admitted a contention filed by Environmental and Resources Conservation Organization.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Although interlocutory review is disfavored and generally is not allowed as of right under our rules of practice (*see* 10 C.F.R. § 2.730(f)), the criteria in section 2.786(g) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review pursuant to section 2.786(g)(2).

MEMORANDUM AND ORDER

The Commission has before it a petition for review and motion for directed certification filed by Sacramento Municipal Utility District (SMUD) pursuant to 10 C.F.R. § 2.786(g). SMUD seeks review in the form of directed certification of certain issues arising out of an interlocutory order (LBP-93-23, 38 NRC 200), dated November 30, 1993, in which the presiding Atomic Safety and Licensing Board, *inter alia*, admitted a contention filed by Environmental and Resources Conservation Organization (ECO) concerning the adequacy of SMUD's plan for funding the decommissioning of the Rancho Seco Nuclear Generating Station. SMUD argues that the Licensing Board's acceptance of certain bases for the contention affects the basic structure of the proceeding in a pervasive and unusual manner so as to warrant interlocutory review. For the reasons stated in this Order, we deny SMUD's petition and motion.

BACKGROUND

This proceeding involves ECO's challenge to the Nuclear Regulatory Commission (NRC) Staff's proposed order approving of a decommissioning plan for, and authorizing decommissioning of, Rancho Seco. In CLI-93-3, the Commission granted intervention to ECO (as a matter of discretion) and permitted ECO to amend its funding plan contention. 37 NRC 135, 149, *reconsideration denied*, CLI-93-12, 37 NRC 355 (1993).

ECO filed an amended funding plan contention which was supported by 14 bases. In LBP-93-23, the Licensing Board accepted six of the fourteen bases as a foundation for admitting the contention. LBP-93-23, 38 NRC at 210-19. SMUD objects to the acceptance of all but one of the bases.

SMUD does not object to acceptance of Basis 13 concerning the rate of growth of the decommissioning fund through interest earnings. SMUD objects to the acceptance of Bases 1, 5, and 11 which relate to financial assurance because, according to SMUD, ECO failed to demonstrate the materiality of the issues raised and, thus, these bases do not meet the criteria for admissibility of contentions in 10 C.F.R. § 2.714(b)(2)(iii). In this respect, SMUD argues that ECO did not reference the parts of the funding plan with which it disagreed and did not address relevant matters in the funding plan that, according to SMUD, weigh against admission of these bases. Licensee's Petition for Review of Second Prehearing Conference Order and Motion for Directed Certification at 4-6 (December 15, 1993) (hereinafter SMUD Petition).

SMUD also objects to the acceptance of Bases 2 and 14. SMUD argues that these matters are beyond the scope of this proceeding because they relate to the cost of SMUD's planned Independent Spent Fuel Storage Installation (ISFSI). In

support of its position SMUD argues that funding of spent fuel storage costs is not required to be addressed in a licensee's decommissioning plan, but is instead subject to a separate planning requirement in 10 C.F.R. § 50.54(bb). SMUD Petition at 6. SMUD maintains that licensing of the ISFSI was a separately noticed proceeding in which ECO did not choose to petition for intervention.

ANALYSIS

SMUD filed its petition and motion pursuant to 10 C.F.R. § 2.786(g).¹ Although interlocutory review is disfavored and generally is not allowed as of right under our rules of practice (*see* 10 C.F.R. § 2.730(f)), the criteria in section 2.786(g) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding. These criteria are a codification of the case-law standard that the Atomic Safety and Licensing Appeal Board developed under our former appellate structure. The Appeal Board applied these criteria in deciding as a matter of discretion whether to review interlocutory orders in response either to a presiding officer's referral of a ruling or certified question or to a party's motion for "directed certification." *See Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992). Under our present appellate system, we have entertained petitions for review of an otherwise interlocutory order — akin to a motion for directed certification — if the petitioner can satisfy one of the criteria under section 2.786(g). *See Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 420-21 (1993).

SMUD argues that it meets the standard for review in section 2.786(g)(2) because the Board's rulings affect the basic structure of the proceeding in a pervasive and unusual manner, by subjecting SMUD to a broad inquiry into matters without any direct relationship to its decommissioning plan. SMUD maintains that the Board's rulings also establish a precedent affecting other decommissioning funding proposals and certifications as well as the NRC's own regulation establishing certification amounts, because such certifications and plans are not intended to include spent fuel storage costs. SMUD also believes that because the hearing was granted as a matter of discretion, the Commission should grant review as a matter of fairness to SMUD and provide instructions to keep the proceeding within appropriate bounds. SMUD Petition at 8-9. The Staff makes essentially the same arguments as SMUD. ECO did not file a reply.

SMUD has failed to demonstrate that review at this time is necessary. The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant

¹ The Licensing Board's order was not subject to appeal under 10 C.F.R. § 2.714a(c).

interlocutory review. *Safety Light Corp.*, 35 NRC at 159 (citations omitted). Although SMUD argues that the Licensing Board failed to apply the proper criteria for admissibility of contentions and incorrectly interpreted Commission regulations, these reasons have not been adequate in practice to demonstrate that the structure of a proceeding has been affected in a pervasive or unusual way, where the ultimate result is that the Licensing Board simply admits or rejects particular issues for consideration. In discussing the standards for granting interlocutory review, the Appeal Board stated:

The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceeding in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987) (citations omitted).

Although we are declining review at this time, we make no judgment on the soundness of the Licensing Board's determinations on the particular issues. Our decision here today is largely influenced by our reluctance to take interlocutory review except in extraordinary situations. The Licensee argues that this case requires special attention because intervention was granted as a matter of discretion. However, this fact alone does not provide adequate support for departing from past practice and taking the unusual step of granting interlocutory review at this time. Neither SMUD nor the Staff has adequately explained why these matters cannot await final appellate review.

CONCLUSION

For the reasons stated herein, SMUD's petition and motion are *denied*. It is so ORDERED.

For the Commission

JOHN C. HOYLE
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 1st day of March 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-29

**YANKEE ATOMIC ELECTRIC
COMPANY**
(Yankee Nuclear Power Station)

March 18, 1994

The Commission denies the request of Petitioner, Environmentalists, Inc., for an adjudicatory hearing regarding decommissioning plans for the Yankee Nuclear Power Station. The Commission finds that the Petitioner has failed to identify any action taken by the NRC that requires the offer of a hearing. The Commission notes that even if Petitioner had identified such an action, it has failed to allege an interest to justify intervention in such a proceeding; and that, furthermore, Petitioner has not demonstrated that a discretionary hearing is warranted.

RULES OF PRACTICE: INJUNCTIVE RELIEF

The Commission will decline a grant of a petitioner's request to halt decommissioning activities where a petitioner has failed to address, much less satisfy, the four traditional criteria for injunctive relief: (1) irreparable injury, (2) probability of success on the merits, (3) lack of injury to others, and (4) the public interest. Any request for emergency relief should address those criteria.

ATOMIC ENERGY ACT (AEA): HEARING RIGHT

The only "right" to an opportunity for a hearing under section 189 of the Atomic Energy Act exists for those actions that are identified in section 189.

RULES OF PRACTICE: DECOMMISSIONING (NOTICE)

NRC regulations explicitly provide only for notice to be given to the public regarding Commission approval of a proposed decommissioning plan. 10 C.F.R. § 50.82(e).

OPERATING LICENSE: CHANGES TO FACILITY

RULES OF PRACTICE: DECOMMISSIONING

Under NRC regulations, a licensee may make changes to its facility without prior Commission approval if those changes do not involve an unreviewed safety question or do not violate the terms of the license. 10 C.F.R. § 50.59(a)(1).

**RULES OF PRACTICE: INSTITUTION OF PROCEEDING
(REQUEST UNDER 10 C.F.R. § 2.206)**

OPERATING LICENSE: CHANGES TO FACILITY

A member of the public may challenge an action taken under 10 C.F.R. § 50.59 (changes to a facility) only by means of a petition under 10 C.F.R. § 2.206.

MATERIALS TRANSPORTATION: GENERAL LICENSE

Under 10 C.F.R. § 71.12, an NRC licensee is given a general license to ship or transport material that is subject to NRC license in an NRC-approved package without approval by the Commission.

**NUCLEAR REGULATORY COMMISSION (OR NRC):
JURISDICTION**

Concerns regarding acceptance by a low-level waste facility regulated by an Agreement State Program of materials removed from a nuclear power plant must be directed to the state in which the facility resides, not the NRC.

MATERIALS LICENSE UNDER PART 70: WASTE DISPOSAL

A low-level waste facility can accept special nuclear material (SNM) for disposal only under an NRC license that it holds, not under a state license under which the facility has accepted reactor materials and components removed from a nuclear power plant site.

RULES OF PRACTICE: INTERVENTION PETITIONS

Assuming there exists an NRC proceeding on the issues of concern to a petitioner, that petitioner must satisfy the minimum requirements of 10 C.F.R. § 2.714 which governs intervention in NRC proceedings.

RULES OF PRACTICE: INTERVENTION PETITIONS

In order to satisfy the criteria for grant of a petition for intervention, a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. 10 C.F.R. § 2.714(a)(2).

RULES OF PRACTICE: STANDING (ORGANIZATIONAL)

In order to meet the test for 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, the Energy Reorganization Act (ERA), or the National Environmental Policy Act (NEPA).

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

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.

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

Where a petitioner's organizational address is farther than 50 miles from a nuclear power plant site, it is outside even the radius within which the NRC normally presumes standing for those actions that may have significant offsite consequences at plants that are operating at full power.

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

A hearing petition or supplementary petition that does not 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, fails to demonstrate any "injury in fact."

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

A hearing petition or supplementary petition that alleges only that petitioner's members live "close" to transportation routes that will be used for shipments of reactor materials and components to a low-level waste facility and does not identify those routes or explain how "close" to those routes the petitioner's members actually live, fails to demonstrate "injury in fact."

NUCLEAR REGULATORY COMMISSION (OR NRC): DISCRETION TO INSTITUTE PROCEEDING

Under section 161(c) of the AEA, the Commission has the inherent discretion to institute a proceeding even where none is required by law.

NUCLEAR REGULATORY COMMISSION (OR NRC): DISCRETION TO INSTITUTE PROCEEDING

The institution of a proceeding where one is not required is appropriate only where substantial health and safety issues have been identified.

MEMORANDUM AND ORDER

I. INTRODUCTION

On November 15, 1993, Environmentalists, Inc. ("Petitioner"), filed a petition seeking an adjudicatory hearing regarding the "plans to decommission and dismantle" the Yankee Nuclear Power Station ("Yankee NPS"), including plans to ship radioactive components of the plant to the Barnwell waste disposal facility located in Barnwell, South Carolina.¹ Yankee Atomic Energy Company ("YAEC"), the Licensee, and the NRC Staff responded to the petition in filings dated November 23 and November 30, 1993, respectively. YAEC and the Staff both oppose the petition on the ground that there is no proceeding in existence in which an adjudicatory hearing may be held and that, in any event, Petitioner's filings are insufficient to obtain intervention even if a hearing were to be held. The Staff argues, in addition, that there are no grounds for the Commission to grant a discretionary hearing. After due consideration, we deny the petition for the reasons stated below.

II. BACKGROUND

The Commission's regulations governing the decommissioning process require the establishment of an adequate decommissioning funding mechanism, 10 C.F.R. § 50.75, and establish requirements for the termination of a license, 10 C.F.R. § 50.82. These regulations require, *inter alia*, that the licensee submit, within 2 years of the permanent cessation of operations, an application for termination of a license together with (or preceded by) a proposed decommissioning plan, 10 C.F.R. § 50.82(a), and that the Commission provide notice of the plan prior to approving it and issuing an order authorizing the decommissioning, 10 C.F.R. § 50.82(e).

The regulations do not specify what decommissioning activities the licensee may undertake prior to submission of its decommissioning plan. However, the Commission issued new guidance on this subject in January 1993. Under this guidance, the licensee may undertake preliminary decommissioning activities that do not (1) foreclose future release of the site for unrestricted use, (2) significantly increase decommissioning costs, (3) cause a significant environmental impact that has not been previously reviewed, or (4) violate the terms of either

¹On December 16, 1993, Petitioner filed a supplement to the petition containing, *inter alia*, the names and addresses of four members of its organization living in South Carolina.

the existing license or 10 C.F.R. § 50.59.² In addition, the licensee may use its decommissioning funds for these activities. See Memorandum from Samuel J. Chilk to William C. Parler and James M. Taylor, January 14, 1993.³

By letter dated February 27, 1992, YAEC informed the NRC that it had ceased operations at Yankee NPS permanently. On August 5, 1992, the NRC Staff issued a "possession-only" amendment to the Yankee NPS license, removing YAEC's right to operate the facility. See 57 Fed. Reg. 37,579 (Aug. 19, 1992). Pursuant to the Commission's guidance described above, YAEC initiated the Component Removal Program ("CRP") under which it planned to remove the four steam generators, the pressurizer, and some reactor internals for shipment to the Barnwell low-level waste facility.⁴ Shipments of this material began on November 17, 1993, and are continuing.

III. DISCUSSION⁵

A. There Is No Action Pending Concerning Yankee NPS That Gives Rise to Any Hearing Rights Under Section 189 of the Atomic Energy Act

Section 189a(1) of the Atomic Energy Act ("AEA") provides, in pertinent part:

²This guidance substantially modified our previous position on this issue. See, e.g., *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207 n.3 (1990); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 61 n.7 (1992). Under 10 C.F.R. § 50.59, a licensee may make changes to its facility as described in the Final Safety Analysis Report ("FSAR") without prior Commission approval if the change does not involve (1) a change in the facility's technical specifications or (2) an unreviewed safety question.

³Subsequently, the Commission determined that, in the context of a decommissioning plan review, any decommissioning activities that can be undertaken pursuant to the above criteria are not subject to further review or approval by the NRC Staff. See Memorandum to William C. Parler and James M. Taylor from Samuel J. Chilk, June 30, 1993. Both this memorandum and the memorandum of January 14, 1993, are available in the NRC's Public Document Room.

In addition, the Commission has issued a Draft Policy Statement requesting comments on the question of when licensees should be allowed to use the money in their decommissioning funds before approval of a decommissioning plan. See 59 Fed. Reg. 5216 (Feb. 3, 1994). The comment period expires April 19, 1994.

⁴By letter of July 15, 1993, the NRC Staff informed YAEC that the Staff had concluded that YAEC had suitable procedures in place, or in preparation, to ensure compliance with the Commission's guidance and that the Staff had no objection to the CRP activities.

⁵We have declined to grant Petitioner's request that we halt YAEC's implementation of the CRP and other decommissioning activities. First, the Petitioner did not address, much less satisfy, the traditional criteria for injunctive relief: (1) irreparable injury, (2) probability of success on the merits, (3) lack of injury to others, and (4) the public interest. Any request for emergency relief should address those criteria. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986). Cf. 10 C.F.R. § 2.788 (listing factors to be addressed when requesting a stay of a Licensing Board decision pending appeal). Second, we have reviewed the Petitioner's pleadings and find that they present no public health and safety reason to stay YAEC's decommissioning activities.

In addition, while the Staff's December 22d filing indicates that YAEC appears to have substantially completed the CRP, that same filing also indicates that YAEC intends to remove additional material that will then be shipped to the Barnwell facility for disposal during another CRP. Thus, the case before us does not appear to be "moot."

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a)(1). The Supreme Court has noted that “[this] hearing requirement was tailored to the scope of proceedings authorized under the licensing Subchapter.” *Florida Power & Light v. Lorion*, 470 U.S. 729, 739 (1985). In other words, the only “right” to an opportunity for a hearing under section 189 exists for those actions that are identified in section 189. In this case, the Petitioner has not identified any action or proposed action taken to this date in connection with the decommissioning and dismantling of Yankee NPS that constitutes an action identified in section 189a of the AEA for which an opportunity for a hearing is required. Nor do NRC regulations provide an opportunity for a hearing regarding the decommissioning actions that are the subject of the petition.⁶

Petitioner’s concerns focus on three distinct types of decommissioning activities that are currently under way at Yankee NPS: (1) dismantlement activities that the licensee may undertake without the need for any NRC approval because they fall within the criteria of the Commission’s guidance, *supra*; (2) transportation activities associated with transporting radioactive components from the Yankee NPS to the place of burial; and (3) activities associated with the burial of this material at the Barnwell low-level waste facility.

The dismantling and decommissioning activities currently being conducted by YAEC — the Component Removal Program — are being undertaken pursuant to 10 C.F.R. § 50.59, which allows a licensee to make changes to its facility without prior NRC approval if those changes do not involve an unreviewed safety question or do not violate the terms of the license.⁷ Under 10 C.F.R. § 71.12, an NRC licensee is given a general license to ship or transport material subject to NRC license in an NRC-approved package without approval by the

⁶ In fact, our regulations explicitly provide only for notice to be given to the public regarding a proposed decommissioning plan.

If the decommissioning plan demonstrates that the decommissioning will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public, and after notice to interested persons, the Commission will approve the plan subject to such conditions and limitations as it deems appropriate and necessary and issue an order authorizing the decommissioning.

10 C.F.R. § 50.82(e). By a letter dated December 20, 1993, after this petition was submitted, YAEC filed its decommissioning plan which is presently under review by the Staff. The Staff will issue a *Federal Register* Notice that will advise members of the public where they can review the plan and how they can submit comments on the plan. In addition, the Staff will hold a public meeting near the Yankee facility in order to receive public comments on the proposed decommissioning plan. The Staff will then issue an order that will either approve or disapprove adoption and implementation of the proposed plan.

⁷ A member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206.

Commission. See, e.g., *State of New Jersey*, CLI-93-25, 36 NRC 289, 293-94 (1993).⁸ All that is then required is that the licensee transport the materials in compliance with applicable DOT regulations. Finally, the Barnwell low-level waste facility is licensed to accept low-level waste from the Yankee NPS CRP by the State of South Carolina, not the NRC. Therefore, concerns regarding acceptance of the CRP materials by the Barnwell facility must be directed to the State of South Carolina, not the NRC.⁹

In summary, the activities that are the subject of the petition are not activities that invoke NRC actions that implicate the hearing rights afforded by section 189a.¹⁰

⁸ On October 28, 1993, the NRC Staff issued Certificate of Compliance No. 9256 to YAEC, approving the package in which YAEC proposed to ship the CRP material to the Barnwell facility. We do not read the petition as alleging that there is a defect in the shipping package and asking for a hearing regarding that defect. E.g., *State of New Jersey*, CLI-93-25, 38 NRC at 294.

⁹ We are informed that the materials shipped to Barnwell did not include any Special Nuclear Material ("SNM"). The Barnwell facility can accept SNM for disposal only under a separate NRC license that it also holds, not under the South Carolina license under which it has accepted the CRP materials from Yankee NPS.

¹⁰ Even if there were to be a proceeding on the issues of concern to the Petitioner, it is clear that the petition fails to satisfy the minimum requirements of 10 C.F.R. § 2.714 which governs intervention in NRC proceedings. That regulation requires that a petition for leave to intervene

shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, . . . and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

10 C.F.R. § 2.714(a)(2). As we recently noted in applying this standard, "[a] petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (citing cases). The petition here identifies a number of "rights" that it alleges would be endangered by "releases of radioactive waste materials into the atmosphere, water or environs[.]" However, the Petitioner did not allege that YAEC's actions or NRC's lack of objection to those actions would have the effect of causing a release of radioactive waste materials. Such an allegation would be necessary to establish the Petitioner's interest in any proceeding challenging YAEC's actions.

Nor does the petition meet the test for 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 that (2) that injury is within the "zone of interests" protected by either the AEA, the Energy Reorganization Act ("ERA"), or the National Environmental Policy Act ("NEPA"). See, e.g., *Florida Power and Light Co.* (Turkey Point Nuclear Generating Station, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). In this case, the Petitioner has identified (in its supplement) four members whose interests have allegedly been injured or might be injured. However, those members live near the Barnwell facility, not near the Yankee NPS facility. As we noted above, the NRC does not regulate the disposal of low-level waste at Barnwell; instead that activity is regulated by the State of South Carolina as an Agreement State. In addition, the Petitioner's organizational address is further than 50 miles from the Yankee NPS site and thus outside even the radius within which we normally presume standing for those actions that may have significant offsite consequences at plants that are operating at full power.

The Petitioner also challenges the transportation of the CRP materials to Barnwell; however, neither the petition nor the supplement alleges any concrete or particularized injury that would occur as a result of the transportation. Furthermore, while the supplement alleges that Petitioner's members live "close" to transportation routes that will be used for the Barnwell shipments, the supplement does not identify those routes or explain how "close" to those routes the Petitioner's members actually live. In sum, the Petitioner has failed to identify any organizational interest within the zone of interests protected by either the AEA, the ERA, or NEPA.

B. A Discretionary Hearing Is Not Warranted

Under section 161(c) of the AEA, the Commission has the inherent discretion to institute a proceeding even where none is required by law. See 42 U.S.C. § 2201(c). And our jurisprudence has long provided for discretionary intervention in any proceeding before the Commission. *Portland General Electric Co.* (Pebble Springs Nuclear Plant), CLI-76-27, 4 NRC 610, 614-17 (1976). However, we have also held that the institution of a proceeding where one is not required is appropriate only where substantial health and safety issues have been identified. Cf. *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975) (establishing criteria for instituting hearings in response to petitions under 10 C.F.R. § 2.206). The Petitioner has not raised such issues here. While the petition raises broad questions about health and safety matters inherent in the decommissioning process, the petition makes no allegations that the activities actually being conducted pose any unusual unexamined issues significant enough to warrant the grant of a discretionary hearing. In addition, the Petitioner has not even attempted to address the standards governing discretionary intervention. See *Pebble Springs*, CLI-76-27, 4 NRC at 614-17. Therefore, we find that a discretionary hearing is not warranted in this case.¹¹

IV. CONCLUSION

In summary, the Petitioner has failed to identify any action taken by the Commission that requires the offer of a hearing and our review reveals that no such action has been taken. Even if such an action had been identified, the Petitioner has failed to allege an interest to justify intervention in such a proceeding. Finally, the Petitioner has failed to demonstrate that a discretionary hearing is warranted in this case. Therefore, the Petitioner's request for an adjudicatory hearing is denied.

¹¹ We have directed the holding of a discretionary hearing in another case involving the general topic of decommissioning. However, that case involved Commission approval of a proposed decommissioning plan. Moreover, the NRC Staff issued a Notice of Opportunity for a Hearing when considering the plan; the only petition filed in response to that Notice raised a significant question about the standing of the persons who actually lived near the Rancho Seco facility; and the petition presented at least one litigable contention. Accordingly, we directed that the petitioner in that case be granted discretionary intervention. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 141 (1993); CLI-93-12, 37 NRC 355, 358 (1993).

It is so ORDERED.

For the Commission¹²

JOHN C. HOYLE
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 18th day of March 1994.

¹² Commissioner Remick was not present for the affirmation of this Order; if he had been present he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

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

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

March 3, 1994

**RULES OF PRACTICE: DISCOVERY OF STAFF; INVESTIGATION
COMPLETED**

Factual information contained in a completed investigation report will be segregated and released if there is no specific allegation of how the release would hurt a future enforcement action or deter future predecisional communications within the Staff of the Commission.

The Board reviewed the Rules of Practice, 10 C.F.R. § 2.790(a)(5) and (a)(7) as well as the "Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings," 49 Fed. Reg. 36,032-34 (1984). It concluded that both documents required the release both of factual information and of the Staff's opinions in the Office of Investigation Report. The Board was heavily influenced by: (1) the failure to allege any specific adverse implications for an enforcement action; and (2) the Staff's decision to release the Office of Investigation Report, thus narrowing the effect of an immediate release of requested information. The

Board reasoned that since the report would be released anyway, there would be little adverse impact on the Staff from releasing it now.

**RULES OF PRACTICE: DISCOVERY OF STAFF DOCUMENTS;
10 C.F.R. § 2.790(a)5 AND (a)(7)**

Discovery of Staff documents may be appropriate when there is no specific allegation of an adverse impact either on a future enforcement action or on intra-Staff discussions.

**RULES OF PRACTICE: DISCOVERY OF STAFF DOCUMENTS;
STATEMENT OF POLICY**

The "Statement of Policy: Investigations, Inspections and Adjudicatory Procedure" requires the release of Staff documents after an investigation is complete and during the period of Staff evaluation of that investigation. Contrary language found in the Statement is by way of preliminary explanation and is not as significant as the operative language, which excludes any exemption from releasing Staff documents during a time that investigation results are being evaluated.

**RULES OF PRACTICE: DISCOVERY OF STAFF DOCUMENTS;
PROTECTIVE ORDER**

When the Staff of the Commission requests that documents be treated as privileged, the Board may exercise its authority as presiding officer and may release documents. However, it should limit its ruling to what is necessary to fairly adjudicate the pending case, and it may require release pursuant to a protective order in order to satisfy a Staff request to avoid publicity during a continuing process of evaluating the results of an investigation.

**MEMORANDUM AND ORDER
(Discovery Related to Office of Investigation Report)**

Before us is the "NRC Staff Motion to Defer Certain Prehearing Activities Until the Staff Has Formulated a Position," January 24, 1994 (Staff Motion). The principal question is whether we should order the Staff of the Nuclear Regulatory Commission (Staff) — before it has decided whether to take possible enforcement action — to produce for discovery all or part of a report of the

Office of Investigation concerning the Mosbaugh allegations that are the kernel of this case.

The Staff of the Nuclear Regulatory Commission claims that the document sought is a privileged predecisional document. Tr. 172; Staff Motion at 1; *see* 10 C.F.R. § 2.790(a)(5) (Exemption 5 to the Freedom of Information Act). It does not claim that the document is exempt pursuant to 10 C.F.R. § 2.790(a)(7) (Exemption 7 to the FOIA), which protects information compiled for law enforcement purposes.

On January 3, 1994, the Office of Nuclear Reactor Regulation issued Board Notification No. 94-01, stating that the investigation of the Mosbaugh Allegations had been completed. The Staff stated that on December 17, 1993, the NRC Office of Investigation (OI) issued its report on OI Case No. 2-90-020R. In addition, the Staff withheld the report from public release, citing consistency with the Commission's Statement of Policy on Investigations.

Staff argues:

The Staff is still reviewing Office of Investigations (OI) Report, Case No. 2-90-020R. The Staff requests that the proceeding be delayed and that no further Staff documents be produced so that the Staff, with the advice of the Commission, may determine whether to institute enforcement proceedings without the premature disclosure of the OI report or other aspects of the matter. Public disclosure of the OI Report and its supporting documentation, at this time, and any disclosure of contemporary internal Staff predecisional views *could adversely affect the Commission's deliberative process in determining whether to institute an enforcement action*. . . . The Commission's rules do not directly apply to the stay requested by the Staff here.¹ [Emphasis added.]

The claim of a predecisional privilege in this case is affected by the Staff's representation to us that the OI Report (Case No. 2-90-020R) has been produced by the Office of Investigations after extensive investigative work. Based on our knowledge of similar reports, we are confident that this Office of Investigation report is carefully prepared and is extensive in its documentation. It is a report that the Staff has already decided is destined to be released. Tr. 169.

THE LAW²

Under the NRC's Rules of Practice, if a document is relevant and not covered by an exemption under 10 C.F.R. § 2.790 and is not otherwise privileged, it must be produced. Further, even if the document is covered by an exemption, it must be produced if necessary to a proper decision in the proceeding. 10 C.F.R.

¹ Staff Motion at 1-2.

² We have borrowed language for this section from "Georgia Power Company's Brief Concerning NRC Staff Release of Certain Investigatory Material," February 4, 1994 (GP Brief), at 2-5.

§ 2.744(d). Thus, the applicability of an exemption must be weighed against a litigant's need, and is equivalent to traditional privilege in civil proceedings. *Consumers Power Co.* (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 119-20 (1980).

In our Rules, there is a deliberative process exemption, which protects from disclosure intragency memoranda "which would not be available by law to a party other than an agency in litigation with the Commission." See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984). The U.S. Supreme Court has observed the purposes of the exemption:

The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decision" and "policies formulated" would be the poorer as a result. S. Rep No. 813, p. 9. See also HR Rep No. 1497, p. 10; *EPA v. Mink*, [410 U.S. 73, 87, 93 S. Ct. 827 (1973)]. As lower courts have pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," *Ackerly v. Ley*, 137 US App DC 133, 138, 420 F2d 1336, 1341 (1969), and as we have said in an analogous context, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process."

United States v. Nixon, 418 US 683, 705, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) (emphasis added).

The deliberative process privilege is not absolute:

The [deliberative process] privilege may be invoked in NRC proceedings. It is a qualified privilege, however, which can be overcome by an appropriate showing of need. A balancing test must be applied to determine whether a litigant's demonstrated need for the documents outweighs the asserted interest in confidentiality. In this respect, the government agency bears the burden of demonstrating that the privilege is properly invoked, but the party seeking the withheld information has the burden of showing that there is an overriding need for its release.

Shoreham, supra, ALAB-773, 19 NRC at 1341 (citations omitted).

It is settled law that factual material "must be segregated and released unless 'inextricably intertwined' with privileged communications, or the disclosure of such factual material would reveal the agency's decisionmaking process." *Id.* at 1342 (citations omitted).

In determining the need of a litigant seeking the production of documents covered by the [deliberative process] privilege, an objective balancing test is employed, weighing the importance of the 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, 1164-65 (1982), citing *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658-59 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

The Staff seems to think that the "Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings," 49 Fed. Reg. 36,032-34 (1984), provides some support for its position. However, the relevant portion of that document states, at p. 36,033:

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 parties *unless it believes that unrestricted disclosure would prejudice an ongoing inspection or investigation, or reveal confidential sources.*³ [Emphasis added.]

CONCLUSIONS

The OI Report is central to the resolution of this case because it reflects the most exhaustive investigation that has been conducted and is highly likely to help to bring the light of truth into our deliberations. This report, and the factual information contained in it, is important to this Board. It is likewise essential that each of the parties sees this document, use it in discovery activities, and ascertain its relevance to their cases.

There is no privilege covering factual information contained in this document and not inextricably intertwined with privileged communications. This principle is settled law. We expected that the Staff would voluntarily release this factual, unprivileged information. If this had been a Freedom of Information Act case, rather than a discovery case, the Staff would have been operating under statutory deadlines to release this factual information. Its delay in not releasing this information seems to have delayed the litigation of this case unnecessarily.⁴

We also would not follow the Staff's suggestion that we apply the intraagency communication exemption to the opinions found in the Office of Investigation Report. Tr. 172. The opinions of the people who wrote the OI Report already are destined to see the light of day. Releasing them now to the parties, under protective order, would have no additional detrimental impact on discussion in the agency. Senior officials such as direct the Office of Investigation are

³The cited text appears near the bottom of the Statement of Policy, following a paragraph that begins: "Until completion of the rulemaking [that the Commission directed the Staff to commence], the following will control the procedure to be followed . . ." The quoted language differs somewhat from the following earlier language — which appears to be in the nature of a preamble and not to be operative language — in the Statement of Policy:

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.* [Emphasis added.]

⁴Georgia Power also expected the Staff to decide to release the factual information. GP Brief at 5.

performing a public function and understand, from the outset, that their work will be carefully scrutinized by their superiors and the public. Scrutiny of their work is highly unlikely to embarrass anyone or to interfere with agency deliberative processes.

What the Staff is really asserting here seems to us to be a privilege not covered by the FOIA or by the Statement of Policy. Staff does not claim that disclosure "would prejudice an ongoing inspection or investigation, or reveal confidential sources." There is no ongoing investigation.

Staff is asking for a delay in publicity to permit it to make its decision before this matter reaches the press, the public, or the Congress. Tr. 171. The Staff, in short, is asking to be able to deliberate privately about this important enforcement matter.

Since the Staff seeks this privilege and it is consistent with a fair trial of this case, we need not deny its claim. In this instance, we are able to offer some protection from public influence by requiring the production of the OI Report subject to a protective order. That order will require the parties to hold the information in confidence and will shelter the Staff (and the Commission) from the public pressures it seeks to avoid. It is our opinion that each of the parties is trustworthy and that the protective order is highly likely to be observed.

We have weighed the factors set forth in our Memorandum and Order (Motion to Compel Production of Documents by the Staff), August 31, 1993.⁵ At this point, the Staff is requesting about 1 month in which to determine whether or not to take an enforcement action. After that, there is an indeterminate period of time within which the Commission may act on this same question. The reason for the delay at this time stems from the extended time consumed in a complex investigation that has been ongoing for almost 4 years. On the other side of the ledger, there is a need for a prompt determination of this proceeding. Intervenor is prepared to conduct depositions during the first week of April. The Report of the Office of Investigation could be relevant to those depositions.

After balancing these factors, we have determined that the harm to Mr. Allen L. Mosbaugh and to Georgia Power from delaying the release of the requested information is tangible. On the other hand, the harm to the Staff has never been explicitly stated so that we can understand it and can consider it to be tangible. In consequence, we have decided that, on balance, the requested information should be released. The factual information in the OI Report should be released promptly, not subject to protective order. The release of the allegedly privileged opinion portions of the OI Report shall be required by April 4, 1994,⁶ thus giving

⁵ Staff Response at 2.

⁶ James M. Taylor, Executive Director for Operations of the NRC, in his affidavit of February 4, 1994, attached to "NRC Brief on Release of OI Report Requested in Licensing Board Order of February 1, 1994" (at 3),

(Continued)

the Staff an opportunity for internal deliberations before production (subject to protective order) shall occur.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 2d day of March 1993, ORDERED that:

1. The Staff of the Nuclear Regulatory Commission (Staff) shall promptly release to Georgia Power and Allen L. Mosbaugh all of the easy-to-separate⁷ factual information that is contained in the Office of Investigation's Report in Case No. 2-90-020R and that is not inextricably intertwined with privileged material.

2. On April 4, 1994, the Staff shall release the remainder of the Office of Investigation's Report, subject to protective order.

3. The Staff shall promptly serve a proposed form of protective order on the parties and the Board. The parties shall sign the protective order, either as drafted by the Staff or as amended by this Board. The release provided for in ¶2 shall not occur until the signed protective orders have been served.

THE ATOMIC SAFETY AND LICENSING BOARD

James H. Carpenter (by PBB)
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

estimated that the Staff would make its recommendations to the Commission by the end of March 1994. Our Order accommodates this estimate. If the Staff schedule is delayed, it may show cause why the estimate has been exceeded and a further extension should be granted.

⁷ Since the whole report will be released, the Staff should review it and release portions that they can reasonably determine to be factual, without extensive editing and redacting.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8681-MLA-2
(ASLBP No. 94-688-01-MLA-2)
(Source Materials License
No. SUA-1358)

UMETCO MINERALS CORPORATION

March 4, 1994

MEMORANDUM AND ORDER
(Request for Hearing)

This Order deals with the January 13, 1994 request of Envirocare of Utah, Inc. (Envirocare), for an informal hearing on a license amendment approved by the Nuclear Regulatory Commission Staff on August 2, 1993. The amendment, to a source materials license possessed by the UMETCO Minerals Corporation (UMETCO), authorizes that organization to receive byproduct materials from other licensed *in situ* operations and dispose of them at its White Mesa Mill near Blanding, Utah. UMETCO and the Staff oppose Envirocare's hearing request on timeliness and standing grounds.¹

¹UMETCO Response to Request for Hearing, January 24, 1994; NRC Staff Response to Request for Hearing, February 14, 1994. In addition to opposition based on an alleged failure to meet timeliness requirements, the Staff also argues that allegations by Envirocare of economic injury as a result of the license amendment are beyond the zone of interests protected by the Atomic Energy Act.

TIMELINESS

Under the Commission's informal hearing rules, where no notice of opportunity for hearing has been published in the *Federal Register*, 10 C.F.R. § 2.1205(c)(2) provides that requests for hearing must be filed the earlier of:

- (i) Thirty (30) days after the requestor receives actual notice of a pending application or an agency action granting an application; or
- (ii) One hundred and eighty (180) days after agency action granting an application.

The following subsection, 10 C.F.R § 2.1205(d)(4), requires the request for hearing to describe in detail:

- (4) The circumstances establishing that the request for a hearing is timely in accordance with paragraph (c) of this section.

The objective of timely filings for hearing requests is to facilitate the resolution of concerns on pending license applications in a timely manner.²

The posture of the hearing petition in this proceeding evidences a time lapse of over 5 months occurring between the NRC license amendment approval and the filing of the hearing petition request. In these circumstances, any Envirocare explanation for the timing of the filing of its hearing request must be evaluated. Here, however, Envirocare has not submitted an explanation; rather, the Petitioner merely maintains that its filing is timely. Envirocare's position is untenable.

Envirocare's petition states that "in late 1993," it became aware that NRC's Field Office, in the late summer or early fall, approved the UMETCO license amendment. The petition included, as exhibits, a copy of an Envirocare letter dated December 16, 1993, and a December 27, 1993 NRC response from the Director of NRC's Field Office. The pertinent part of Envirocare's December 16th letter requested "information on action apparently taken by NRC's Regional Office in Denver, Colorado, to authorize UMETCO Minerals Corporation to dispose of byproduct material generated at its White Mesa Mill near Blanding, Utah." The NRC Staff Director noted in his December 27th reply that, based on discussions with a Mr. Semnani (who is subsequently identified in the pleadings as Envirocare President), a copy of an October 1, 1993 UMETCO license amendment was being forwarded in response to Envirocare's request. This exchange discloses nothing relative to the license amendment of August 2, 1993 — the only matter at issue here. More relevant to the

²The Commission views the filing of hearing requests in the context of "the earliest possible resolution of safety issues." See Proposed Rule on Informal Hearing Procedures for Materials Licensing Adjudications, 55 Fed. Reg. 50,858 (Jan. 29, 1993).

question, of when Envirocare first had knowledge of the August 2, 1993 license amendment, are the exhibits filed with UMETCO's opposition to Envirocare's hearing request. These exhibits, each with a notarized certification by the custodian of the records maintained by the Utah Division of Radiation Control, reveal that among the subjects discussed in meetings between Utah officials and Envirocare representatives, including Mr. Semnani, was information concerning NRC license amendments prior to the date of the discussions. The exhibits appears to indicate that Envirocare had actual knowledge of the August 2 amendment at least some time prior to November 10, 1993 — the date of the initial meeting with the State of Utah's representatives. This is some 64 days prior to the filing of Envirocare's hearing request.³

Importantly, Envirocare's response does not rebut these exhibits or in any way challenge the exhibits referencing such knowledge. Rather, Envirocare supports the timeliness of its hearing request by referring to a January 12, 1994 letter to UMETCO from the Director of NRC's Field Office.⁴ This communication indicates that a 30-day period from the date of the Staff's letter was available for the October 1, 1993 license amendment but that the 180-day regulatory time period for filing hearing requests was running out on the August 1993 amendment. The UMETCO reply (which attached the January 12th NRC letter as an exhibit), as well as the Staff's response, make evident the unfounded basis for Envirocare's position. *See* UMETCO Reply, February 1, 1994, at 4 and Staff Response, February 14, 1994, at 14 n.14. The 30-day time period referred to in the NRC Director's (Hall) January 12, 1994 letter was addressed to the October 1 license amendment. As Envirocare's hearing request concerns the August 1993 license amendment, the subsequent amendment is not at issue in this proceeding. In connection with the 180-day time period mentioned in the NRC Director's letter, there is no indication in the letter that the Director was aware of Envirocare's prior actual notice of the August 2, 1993 license amendment. If the Director had such knowledge, his statement regarding the 180-day filing period would have been merely erroneous but it would not authorize Envirocare to ignore the plain dictates of 10 C.F.R. § 2.1205(c)(2). It is evident that the requestor has failed to meet the timeliness requirements of section 2.1205(c)(2) and, as a consequence, its request for a hearing is denied.

STANDING

Inasmuch as the timeliness requirement is fatal to Envirocare's petition, it is unnecessary to determine the validity of Petitioner's contention that the

³ *See* Memoranda, Sinclair to Envirocare file (November 16, 24, and December 6, 1993), UMETCO Response to Request for Informal Hearings, January 24, 1994.

⁴ Although Envirocare's Response, dated January 28, 1993, indicated the letter was attached as Exhibit A, it was not included in the Petitioner's pleading.

unfair application of NRC's regulatory requirements is a basis for standing in this proceeding. The charge is that NRC Staff permitted UMETCO to conform its operations to less stringent environmental standards than Envirocare, thus providing a significant economic advantage to a competitor. From this foundation, Envirocare argues that it has a "real stake" in the outcome of this proceeding and is within the "zone of interests" protected by section 189(a) of the Atomic Energy Act.⁵

In order to satisfy judicial standing in the Agency's adjudicative processes, a petitioner must demonstrate that its interests are protected by the statute under which intervention is sought.⁶ It has been held in a number of NRC cases that economic considerations are not included in the zone of interests encompassed by the Atomic Energy Act, although these cases are generally tied to rate-paying in the electric utility industry.⁷ Economic interests have been recognized under the National Environmental Policy Act (NEPA) in instances where the harm is environmentally related.⁸ Although no claim of environmental damage is made by Envirocare, economic competitive disadvantages as a foundation for standing, grounded on NRC's noncompliance with regulatory standards, has not to this Presiding Officer's knowledge been tested in NRC litigation.⁹ In any event, that issue cannot be evaluated here due to the Petitioner's failure in meeting regulatory timing prerequisites.

In accordance with 10 C.F.R. § 2.714a (1993), Envirocare may seek appeal on the question of whether its request for a hearing should have been wholly denied.

An appeal to the Commission may be sought by filing a petition for review, pursuant to 10 C.F.R. § 2.714a (1993), within 10 days after service of this Order.

IT IS SO ORDERED.

James P. Gleason, Presiding
Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 4, 1994

⁵ See Envirocare Request for an Informal Hearing at 7.

⁶ See *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1) CLI-91-14, 34 NRC 261, 266 (1991).

⁷ See Staff's Response to Hearing Request at 9.

⁸ See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992).

⁹ It is noted that the introduction to Appendix A in 10 C.F.R. Part 40 calls for a consideration of the economic costs involved in licensing decisions affecting the disposition of tailings and wastes.

expert opinion supporting the contention on which the petitioner intends to rely in proving the contention at any hearing; and (4) sufficient information to show that a genuine dispute exists on a material issue of law or fact. *See* 10 C.F.R. §2.714(b)(2). A failure to comply with any of these requirements is grounds for dismissing the contention.

NACE has submitted the following two contentions:

1. The NRC has enforcement authority over General Atomics.
2. Guaranteed decommissioning financing by GA is required by NRC regulations, and is necessary to provide adequate protection to public health and safety.²

The other parties to the proceeding — SFC, GA, and the Staff — raise no objections to NACE's first contention but oppose the second.³

SFC, GA, and the Staff raise essentially identical challenges to the second contention in asserting that the bases proposed fail to support NACE's claim: The bases for the contention by the Petitioner are alleged SFC deficiencies in meeting regulatory requirements, but the contention is directed against GA, not SFC. In this view, by merely detailing SFC's alleged inadequacies, NACE has not provided facts to support a claim or establish the existence of a dispute with GA on a material issue of law or fact.

CONTENTIONS

NACE offers a number of bases in support of its first contention regarding NRC's alleged enforcement authority over GA. These include a showing that the agency's regulatory authority extends to nonlicensees; that oversight and other management responsibilities concerning SFC were exercised by GA; and that GA allegedly consented to guarantee decommissioning funding in exchange for resuming suspended SFC operations. According to NACE, as a result of GA's close working relationship with the licensee, NRC was entitled to claim jurisdiction and authority over GA. In addition, in support of its allegations, NACE references certain documents including a 1988 Safety Evaluation Report, SFC's license, and a previous Staff enforcement order. Based on all these items, it is evident that NACE's first contention meets the procedural requirements of the agency's regulations and, accordingly, is admitted for litigation.

In contrast, because the foundations for NACE's second contention have not been set forth with as much clarity, it is not so apparent that they establish a

²[NACE] Supplemental Petition to Intervene, February 8, 1994 [hereinafter NACE Supplemental Petition].

³[SFC's] Answer to [NACE's] Supplemental Petition to Intervene, February 18, 1994 [hereinafter SFC Answer]; [GA's] Answer to [NACE's] Supplemental Petition to Intervene, February 18, 1994; NRC Staff's Response to [NACE's] Supplemental Petition to Intervene, February 23, 1994.

genuine dispute warranting further consideration in this proceeding. NACE has, however, filed a motion for leave to reply to the responses from the parties opposing admission of this contention and an accompanying reply in which it attempts to provide some further explanation about the bases for the contention.⁴

Agency precedent suggests that a contention's proponent must be afforded the opportunity to be heard in response to objections to the contention.⁵ While we are disturbed by an otherwise experienced counsel's lack of clarity in formulating this contention initially, this authority makes it clear that proposed contentions must be dealt with fairly. This, in conjunction with the lack of any substantive opposition to NACE's reply arguments,⁶ convinces us that consideration of NACE's reply is warranted. Accordingly, we grant NACE's motion for leave to file a reply.

The basis for Petitioner's second contention is that SFC has failed to meet NRC's regulatory requirements in 10 C.F.R. §§ 40.36 and 40.42(c)(2)(iii)(D) that call for the submission of a decommissioning financing plan. NACE recites that GA has denied that SFC has any responsibility to comply with the first of these regulations and that GA alleges that SFC has complied with the second. *See* NACE Supplemental Petition at 11. Pointing to a number of purported deficiencies in the proposed costs and revenue estimates in SFC's preliminary plan for decommissioning (*id.* at 11-15) and GA's denial of the inadequacy of these revenues ([GA's] Answer and Request for Hearing, November 2, 1993, at 8 [hereinafter GA Request for Hearing]), NACE contends that GA must be held to guarantee and supplement such funding shortages. *See* NACE Reply at 2.

Inasmuch as GA denies any obligation for providing financial decommissioning assurance (GA Request for Hearing at 7), it cannot be realistically argued that NACE has failed to establish the foundation for a genuine dispute on a material issue. Because the Petitioner's first admitted contention sets forth NACE's proposition that the NRC has enforcement authority over GA, the fact that NACE omits repeating this support for its second contention should not be considered fatal to its admission. Moreover, from a reading of the allegations made by the Petitioner concerning both contentions, it is clear, although not emphatically stated, that NACE is arguing that GA must be responsible for the decommissioning funding requirements because the license holder SFC does not meet them.

⁴ *See* [NACE's] Motion for Leave to Reply to [SFC's], [GA's], and NRC Staff's Responses to NACE's Supplemental Petition to Intervene, March 2, 1994; [NACE's] Reply to [SFC's], [GA's], and NRC Staff's Responses to NACE's Supplemental Petition to Intervene, March 2, 1994 [hereinafter NACE Reply].

⁵ *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

⁶ *See* Response of [SFC] to [NACE's] Motion for Leave to File Reply to [SFC's], [GA's], and NRC Staff's Response to NACE's Supplemental Petition to Intervene, March 4, 1994; Response of [GA] to [NACE's] Motion for Leave to Reply to [SFC's], [GA's], and NRC Staff's Responses to NACE's Supplemental Petition to Intervene, March 7, 1994. For its part, the Staff did not file an objection.

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.⁷ This suggests that NACE's identification of a legitimate issue should not be negated because of its use of somewhat imperfect phraseology. NACE's second contention is accordingly admitted to the proceeding.

One remaining matter deserves comment here. In its response, SFC argues that even if part of Contention 2 is admitted, NACE should not be permitted to contest the adequacy of SFC's \$86 million cost estimate for decommissioning of the Gore site. *See* SFC Answer at 2. NACE in its reply asserts that SFC has placed this matter in contention by denying a Staff allegation that there was uncertainty concerning SFC's projected decommissioning costs. NACE Reply at 3-4. It is not apparent that there is an issue here for the Board to resolve, however, because the controversy before us involves whether the Staff Order will be sustained and that Order does not call for more financing than the current SFC decommissioning costs of \$86 million. In fact, NACE's supplemental petition, even though citing that figure as the bare minimum that should be set aside for decommissioning, concludes that the measures called for by the Staff Order are required to satisfy NRC's decommissioning financing regulations. *See* NACE Supplemental Petition at 15.

For the foregoing reasons, it is, this 22d day of March 1994, ORDERED that:

1. NACE's March 2, 1994 motion for leave to file reply to SFC's, GA's, and the Staff's responses is *granted*.
2. Contentions 1 and 2 in NACE's February 8, 1994 supplemental intervention petition are *admitted*.
3. In accordance with the provisions of 10 C.F.R. §2.714a(a), as this Memorandum and Order and the Board's February 24, 1994 Memorandum and Order, LBP-94-5, 39 NRC 54 (1994), rule upon an intervention petition,

⁷ *See Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979).

these rulings may be appealed to the Commission within 10 days after this Memorandum and Order is served.

**THE ATOMIC SAFETY AND
LICENSING BOARD***

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

**G. Paul Bollwerk, III (by JPG)
ADMINISTRATIVE JUDGE**

**Thomas D. Murphy
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
March 22, 1994**

*Judge Klein, a Member of this Board, due to an illness, did not participate in this Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

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

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

March 23, 1994

The Licensing Board denies Intervenor's motion to reopen the evidentiary record based on an inspection report raising new unresolved items concerning implementation of the maintenance/surveillance program (an issue in the proceeding). The Board premised its ruling on an affidavit by the NRC inspector (upon whose statements the Intervenor relied) that none of the unresolved items would conflict with or undermine his prior testimony. The denial is without prejudice to the later filing of a motion to reopen by Intervenor based on any such unresolved items that are demonstrated as significant and possessing substantive implications with respect to implementation of the maintenance/surveillance program.

MEMORANDUM AND ORDER (Ruling Upon Motion to Reopen Record)

On February 25, 1994, the San Luis Obispo Mothers for Peace (MFP), an intervenor in this construction permit recapture proceeding, filed a motion to reopen the evidentiary record, which had been closed following hearings in August 1993. On March 7, 1994, Pacific Gas and Electric Company (PG&E or Applicant) filed a timely response opposing any reopening of the record. On March 14, 1994, the NRC Staff filed a timely response likewise opposing reopening of the record. For reasons set forth herein, we are denying the motion at this time, without prejudice to its being reasserted at a later date under certain circumstances.

A. Background

The motion is based solely on NRC Inspection Report 50-275/93-36 and 50-323/93-36 ("IR 93-36"), covering an inspection conducted on December 13-17, 1993, and apparently issued on January 12, 1994. An officer of MFP was mailed a copy of this report.¹ The inspection was performed by Mr. Paul P. Narbut, Regional Team Leader, NRC Region V, who also appeared as a Staff witness in this proceeding. It involved, *inter alia*, some apparent deficiencies in the maintenance/surveillance program that is the subject of one of the contentions in this proceeding. Some of the statements in IR 93-36 (and the accompanying transmittal letter to PG&E) seem on their face to undercut (based on new information) the testimony earlier provided by Mr. Narbut.

B. Applicable Standards

For the record to be reopened, stringent criteria must be satisfied. The Commission's regulations (10 C.F.R. § 2.734) provide, in pertinent part, that a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

- (a)(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
- (2) The motion must address a significant safety . . . issue.
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

¹ We are not certain when the report, dated January 14, 1994, was in fact mailed to MFP. It was not entered into the NUDOCS system until February 2, 1994, when it clearly became a publicly available document. Thus, absent any direct information, we are unsure of when MFP actually received its copy.

(b) The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.743(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. . . .

C. PG&E Response

In its response, PG&E claims that none of the four criteria are satisfied. It claims — correctly — that we may take account of its response to IR 93-36 in reaching our conclusion about the significance of the matters for which the record is sought to be reopened. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989); *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 n.15 (1984). It asserts that the so-called “open items” upon which MFP in large part relies cannot serve as a basis for reopening. Further, it asserts that its March 15, 1994 response to the Staff (which it provided) explained and resolved all the “open items” raised by IR 93-36.

D. Staff Response

For its part, the Staff likewise asserts that MFP has fulfilled none of the bases for reopening the record. The Staff relies primarily upon the affidavit of Mr. Narbut, the NRC inspector responsible for IR 93-36. Mr. Narbut explained that none of the items in the report would conflict with or undermine his prior testimony in the proceeding and that many of MFP's references were to “unresolved items” that had not as yet been evaluated as to their severity.

E. Licensing Board Evaluation

We need not explore each of the reopening criteria to conclude that MFP's motion cannot be granted at this time;² for we have determined that the standard for changing the course of the proceeding could not be currently satisfied, particularly given the status in IR 93-36 of many items as no more than unresolved items. In its motion, MFP places explicit reliance on the expertise of the Staff inspector, Mr. Narbut, who by affidavit has stated that the inferences

² Given the ambiguities of when MFP actually was served with IR 93-36, we are not basing this ruling on timeliness or lack thereof. In that connection, we raise a serious question whether a matter as apparently significant as this one should not have initially been the subject of a Board Notification. A followup inspection (IR 94-08) was the subject of Board Notification 94-06, dated March 17, 1994.

drawn by MFP from some of his statements are inaccurate or unwarranted. For that reason, we are *denying* MFP's motion based on the record currently before us.

We note, however, that various unresolved items must some day become resolved. Indeed, by virtue of Inspection Report 94-08, dated March 16, 1994, transmitted to us by Board Notification 94-06, dated March 17, 1994, it appears that some former unresolved items have been escalated to the status of apparent violations. To the extent that resolution may have implications with respect to the implementation of the maintenance/surveillance program (especially to the extent that it might potentially warrant license conditions), our denial of MFP's motion is *without prejudice* to MFP's later filing of a motion to reopen based on matters that have been demonstrated as significant and possessing substantive implications with respect to implementation of the maintenance/surveillance program.³ In that connection, for purposes of reopening the record for new information, the scope of the program should be viewed broadly — e.g., in the context of the definition appearing in INPO-90-008 (Rev. 1, March 1990), MFP Exhibit 4.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
March 23, 1994

³ We note from IR 94-08 that certain of PG&E's activities identified in IR 93-36 are to be subject to an Enforcement Conference on March 23, 1994. The Board thus has properly been informed by Board Notification concerning this conference.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Harry Foreman
Ernest E. Hill

In the Matter of

Docket No. 30-16055-CivP-R
(ASLBP No. 93-682-01-CivP-R)
(Civil Penalty)

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

March 31, 1994

ORDER
APPROVING AND INCORPORATING STIPULATION FOR
SETTLEMENT OF PROCEEDING AND SETTLING AND
TERMINATING THE PROCEEDING

Upon consideration of the Joint Motion for Order Approving and Incorporating Stipulation for Settlement of Proceeding and Settling and Terminating the Proceeding, and upon consideration of the Stipulation for Settlement of the Proceeding executed by the NRC Staff and Advanced Medical Systems, Inc. (*see* Attachment), we find that settlement of this matter as proposed by the parties is in the public interest and should be approved. Accordingly, before the presentation of any testimony at trial or further adjudication of any issue of fact or law regarding Violation 2, or the amount of civil penalty, or the classification of the Severity Level contained in the NRC Staff's May 30, 1989 Order Imposing Civil Monetary Penalty Issued to AMS, and upon the consent of the parties, the Stipulation for Settlement of Proceeding is hereby approved and incorporated

into this Order, pursuant to section 81 and subsections (b) and (o) of section 161 of the Atomic Energy Act, as amended, 42 U.S.C. §§ 2111, 2201(b), and 2201(o) and is subject to the enforcement provisions of the Commission's regulations and chapter 18 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2271, *et seq.* This proceeding is hereby terminated.

IT IS SO ORDERED.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE**

**Harry Foreman
ADMINISTRATIVE JUDGE**

**Ernest E. Hill
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
March 31, 1994**

ATTACHMENT

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

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

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

STIPULATION FOR SETTLEMENT OF THE PROCEEDING

I.

On May 30, 1989, the NRC Staff (Staff) issued to Advanced Medical Systems, Inc. (AMS), an "Order Imposing Civil Monetary Penalties" (Order) in the amount of \$6,250.00, for four violations of NRC regulations, set out in a "Notice of Violation and Proposed Imposition of Civil Penalties" dated June 28, 1985. AMS requested a hearing on the Staff's Order on June 20, 1989. By Memorandum and Order dated March 19, 1991, the Atomic Safety and Licensing Board (Licensing Board) granted the Staff's motion for summary disposition of the proceeding and sustained the Staff's Order. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH), LBP-91-9, 33 NRC 212 (1991). AMS appealed the Board's decision on April 26, 1991. By Memorandum and Order dated September 30, 1993, the Commission affirmed in part, and reversed and remanded in part, the Board's decision. *Id.*, CLI-93-22, 38 NRC 98 (1993). In its decision, the Commission directed the Board to give further consideration to the evidence concerning Violation 2 (inadequate survey) and to reconsider the severity level and civil penalty imposed by the May 30, 1989 Order. Following the Commission's denial of motions for reconsideration filed by the Staff and AMS, the Licensing Board issued an order dated December 14, 1993, in accordance with the Commission's direction, requiring the Staff

to file a "motion regarding the adequacy of the AMS survey and the possible termination of this proceeding." *Id.* at 3.

In December 1993 and January 1994, the Staff and representatives for AMS discussed the possibility of reaching an agreement concerning the civil penalty order and settlement of the proceeding. These discussions resulted in a verbal agreement between the parties that AMS would pay \$1800.00 in full settlement of the May 30, 1989 Order; and AMS does not admit or deny Violations 1-3 or the Severity Level classification in the Order and the "Notice of Violation and Proposed Imposition of Civil Penalties" dated June 28, 1985.

The parties have entered into this Stipulation for settlement of this proceeding, subject to the approval of the Atomic Safety and Licensing Board, in lieu of presenting testimony at trial and further adjudication of any issue of fact or law regarding Violation 2, the amount of civil penalty, or the Severity Level classification contained in the Staff's May 30, 1989 Order. The parties acknowledge that the terms and provisions of this Stipulation, once approved by the Atomic Safety and Licensing Board, shall be incorporated by reference into an order, as that term is used in subsections (b) and (c) of section 161 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations.

II.

NOW THEREFORE, IT IS STIPULATED AND AGREED by and between the NRC Staff and Advanced Medical Systems, Inc. as follows:

1. Payment by Advanced Medical Systems, Inc., of a civil penalty of \$1800.00, in accordance with paragraph 2 below, shall constitute full satisfaction of the "Order Imposing Civil Monetary Penalty" issued to AMS on May 30, 1989.

2. Within 30 days of the date of approval of this Stipulation by the Atomic Safety and Licensing Board, Advanced Medical Systems, Inc., shall pay a civil penalty in the amount of \$1800.00, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States. Payment by mail shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

3. Advanced Medical Systems, Inc., does not admit or deny Violations 1-3 or the Severity Level classification in the "Order Imposing Civil Monetary Penalties" dated May 30, 1989, and "Notice of Violation and Proposed Imposition of Civil Penalties" dated June 28, 1985.

4. The NRC Staff and Advanced Medical Systems, Inc., waive their rights to further hearings concerning Violation 2, the civil penalty, and the Severity Level classification described in the Staff's May 30, 1989 "Order Imposing

Civil Monetary Penalties," and waive any right to contest or otherwise appeal this Stipulation in any administrative or judicial forum, once approved by the Atomic Safety and Licensing Board.

FOR THE NRC STAFF:

FOR ADVANCED MEDICAL
SYSTEMS, INC.:

Colleen P. Woodhead 2/ /94
Counsel for NRC Staff

Sherry J. Stein 2/4/94
Counsel for AMS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Law Judge:

Morton B. Margulies

In the Matter of

Docket No. 93-01-PF
(ASLBP No. 93-673-01-PF)

LLOYD P. ZERR

March 9, 1994

APPEARANCES

Roger K. Davis, Esq., and Daryl M. Shapiro, Esq., Rockville, Maryland, for the U.S. Nuclear Regulatory Commission, Complainant.

Timothy E. Clarke, Esq., Rockville, Maryland, for Lloyd P. Zerr, Defendant.

INITIAL DECISION

Before me for decision is a civil complaint filed by the U.S. Nuclear Regulatory Commission (NRC or Complainant) on December 10, 1992, alleging that its former employee, Defendant Lloyd P. Zerr, submitted 23 false claims, in order to obtain monies from the government to which he was not entitled, in violation of 31 U.S.C. § 3802(a)(1). The NRC seeks penalties and assessments totaling \$132,771.50. Defendant, in an answer served February 22, 1993, denied the allegations.

The proceeding is within the jurisdiction of the Administrative Law Judge as prescribed by the Civil Fraud Remedies Act of 1986 (31 U.S.C. §§ 3801-3812) and Title 10, Part 13 — Program Fraud Civil Remedies, of the *Code of Federal Regulations* (10 C.F.R. §§ 13.1-13.47). The parties were served with a Notice

of Hearing on March 16, 1993, pursuant to 31 U.S.C. § 3803(g)(2)(a) and 10 C.F.R. § 13.12, informing them of the hearing issues.

On August 16, 1993, Defendant filed a motion to dismiss the proceeding on the grounds that it constitutes double jeopardy in violation of the Fifth Amendment of the United States Constitution and because the institution of the proceeding violates agreements reached with the United States government. The motion was denied by Order of September 20, 1993. ALJ-93-1, 38 NRC 151 (1993).

Hearing in the proceeding was held at Bethesda, Maryland, on November 16 through November 19, 1993.

Posthearing briefs were filed by the parties on January 10, 1994. Defendant, in his brief, renewed a pretrial motion to dismiss this proceeding on the grounds that it constitutes double jeopardy in violation of the Fifth Amendment of the United States Constitution and denies him due process. The motion will be considered below. NRC, on February 7, 1994, filed an optional reply to Defendant's posthearing brief. Defendant did not file an optional reply to Complainant's posthearing brief.

All of the proposed findings of fact and conclusions of law in the pleadings have been considered. Any such findings of fact or conclusions of law not incorporated directly or inferentially in the Initial Decision are rejected as unsupported in fact or law or unnecessary to the rendering of this Decision.

The Motion to Dismiss

Defendant, in renewing his motion to dismiss on double jeopardy grounds, relies on the previous argument that he has already been subject to a criminal sanction and that this action is identical to the criminal proceeding that resulted in a dismissal of the criminal matter under a plea agreement involving a pretrial diversion.

The record in the original motion shows that Defendant was indicted for activities charged in the subject complaint and that, under a pretrial diversion agreement, prosecution was deferred, the indictment was dismissed, and restitution was made as agreed upon. ALJ-93-1, 38 NRC at 152.

The original motion was dismissed because Defendant had never been placed in jeopardy by the prior criminal process. An essential element was lacking for successfully claiming the constitutional protection. *Id.* at 155. Even had jeopardy attached, unless the civil penalty imposed for filing false claims with the government bears no rational relationship to the government's loss, there is no double jeopardy. *Id.*

Defendant has submitted nothing in his renewed motion to cause a different result from that reached previously. Defendant's claim of double jeopardy is without merit.

In his renewed motion to dismiss, Defendant contends that the legislative intent of the Program Fraud Civil Remedies Act of 1986 was clearly intended to be applicable when no criminal proceeding takes place. He claims that the reason for the enactment of the statute was the "inability or unwillingness to criminally prosecute these changes and that therefore, this civil remedy was made available as an alternative."

The legislative history and the statute are to the contrary. The Program Fraud Civil Remedies Act is in addition to the other remedies. In the Congressional Statement of Findings and Declaration of Purposes, Pub. L. No. 99-509, § 6102, Congress did find that "present civil and criminal remedies for such claims and statements are not sufficiently responsive." To correct the situation it added a remedy "to provide Federal agencies which are the victims of false, fictitious, and fraudulent claims and statements with an administrative remedy to recompense such agencies for losses resulting from such claims and statements. . . ."

Section 3802(a)(2)(C) provides that the presenter of a false claim shall be subject to a civil penalty of \$5000 for each statement, "in addition to any other remedy that may be prescribed by law." It has long been established that Congress may impose both a criminal and a civil sanction in respect to the same act or omission. ALJ-93-1, 38 NRC at 155.

Defendant's renewed motion is not meritorious and is therefore denied.

I. INTRODUCTION

In 1989, Defendant was employed as a Technical Intern, Office of Nuclear Reactor Regulation, at NRC's headquarters in Rockville, Maryland. He was a mid-level employee with educational and work experience in nuclear engineering.¹ During the summer of 1989, he was selected for a 13-month rotational assignment at the NRC Region II office in Atlanta, Georgia. Mr. Zerr proceeded in August to Atlanta where he worked for 7 months. He was then reassigned, from April 1, 1990, through September 30, 1990, as a Resident Inspector Intern at the Hatch Nuclear Power Plant (Hatch), in Baxley, Georgia.

Complainant alleges that, in connection with this 13-month regional assignment, Defendant submitted 23 false vouchers to the NRC for reimbursement for overtime, house rental, furniture rental, car rental, and meals and incidental expenses for monies to which he was not entitled. Payments by the government for the alleged false claims were stated to total \$8885. Defendant has denied

¹ At the time of hearing, he testified that he held a Bachelor of Science in Nuclear Engineering, a Bachelor of Science in Management, and a Master of Business Administration. Tr. 500.

each of the allegations. Attached and made part hereof is Appendix 1 which contains a table summarizing the alleged false claims and their amounts.

Applicable Law

Law applicable to false claims includes the following:

A false claim occurs when any person makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know — (a) is false, fictitious, or fraudulent; (b) includes or is supported by any written statement that asserts a material fact that is false, fictitious, or fraudulent; (c) includes or is supported by any written statement that — (i) omits a material fact, (ii) is false, fictitious, or fraudulent as a result of such omission, and (iii) is a statement on which the person making, presenting, or submitting such statement has a duty to include such material fact; or (d) is payment for the provision of property or services that the person has not provided as claimed. 31 U.S.C. § 3802(a)(1); 10 C.F.R. § 13.3(a)(1).

A claim is defined, in part, under 31 U.S.C. § 3801(a)(3)(A) and 10 C.F.R. § 13.2 as any request, demand, or submission made to an authority for property, services, or money.

“Know or has reason to know,” as contained in 31 U.S.C. § 3802(a)(1) and 10 C.F.R. § 13.3(a)(1), means that a person, with respect to a claim or statement (a) has actual knowledge that the claim or statement is false, fictitious or fraudulent; (b) acts in deliberate ignorance of the truth or falsity of the claim or statement; or (c) acts in reckless disregard of the truth or falsity of the claim or statement, and no proof of specific intent to defraud is required. 31 U.S.C. § 3801(5); 10 C.F.R. §§ 13.2, 13.3(a)(5)(c).

Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim. 31 U.S.C. § 3801(9)(b)(1); 10 C.F.R. § 13.3(a)(2). Each claim is subject to these legal requirements regardless of whether such property, services, or money is actually delivered or paid. It is considered made when such claim is made to an agent, fiscal intermediary, or other entity acting for or on behalf of the authority. 31 U.S.C. § 3801(9)(b)(2), (3); 10 C.F.R. § 13.3(a)(3), (4).

The complainant must prove defendant’s liability and the amount of any civil penalty or assessment by a preponderance of the evidence. 31 U.S.C. § 3803(f); 10 C.F.R. § 13.30(b).

The preponderance of the evidence with respect to the burden of proof in administrative and civil actions “means the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it.” A definition that may be used provides that it is “[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter as asserted is more

likely to be true than not true.” *Hale v. Department of Transportation, Federal Aviation Administration*, 722 F.2d 882, 885 (1985).

II. THE CLAIMS

A. Claims for Overtime

Counts I, II, and III of the complaint allege that Defendant submitted false claims for overtime work, which he did not perform, and for which he was paid.

Count I covers Pay Period 9, the 2-week pay period April 8 through April 21, 1990, for which 48 hours of overtime were claimed beyond the 80 hours for regular work. Complainant alleges that the 48 hours for which Defendant was paid \$938.88 constituted a false claim.

Count II covers Pay Period 10, the 2-week pay period April 22 through May 5, 1990, for which 51 hours of overtime were claimed beyond 80 hours for regular work. Complainant alleges that 33.75 hours of the overtime, for which he was paid \$660.15, constituted a false claim.

Count III covers Pay Period 11, the 2-week pay period May 6 through May 19, 1990, for which 50 hours of overtime were claimed beyond 80 hours for regular work. Complainant alleges that 27 hours of the overtime, for which Mr. Zerr was paid \$528.12, constituted a false claim.

Defendant was paid by the government for the overtime work he claimed. NRC Exhs. 3, 5, 7.

To determine whether the overtime claims were false it is necessary to consider the nature of Defendant’s employment, its requirements, and its performance.

Mr. Zerr’s assignment to Region II was to broaden his knowledge and experience in regional operations. The assignment to the Hatch facility was to permit him to get an overview of operations at a commercial nuclear power plant, to learn the agency’s regulatory requirements, and how they were implemented. Tr. 680-82 (Brockman). Although not a requirement, Defendant decided that he wanted to be certified as a resident inspector during his assignment. Tr. 683 (Brockman); Tr. 843 (Merschhoff). A certified resident inspector is someone who is regularly assigned to the site by the agency and conducts inspections of the licensee’s operations for regulatory compliance.

Kenneth C. Brockman, Section Chief in the Division of Reactor Projects, Region II, Mr. Zerr’s superior in Atlanta, considered Defendant’s interest in becoming certified as a resident inspector in the time he was to be at Hatch to be rather ambitious. He authorized overtime to assist in meeting the goal. Tr. 682 (Brockman).

When Defendant reported for work at Hatch in the beginning of April 1990, there was a Senior Resident Inspector, John Menning, who left his assignment

at that location on April 20, 1990. Tr. 306 (Menning). The Resident Inspector, Randall Musser, left on military leave for 2 weeks in April, leaving no resident inspector at Hatch during the last week of April. Tr. 231 (Musser); Tr. 323 (Menning).

Mr. Zerr was not under the supervision of the resident inspectors. His superiors were in Atlanta at the regional headquarters. Defendant worked along with the resident inspectors in learning about the various plant systems and how to conduct inspections of them. Tr. 324-25, 327 (Menning); Tr. 289-90 (Musser); Tr. 712-13 (Brockman).

As part of his internship, Mr. Zerr had a manual or journal that outlined a program for learning the regulatory requirements of the agency, their application to plant operations, and determining compliance with them. The program was self-directed. A supervisor would sign off on a chapter when it was completed. Tr. 610-11 (Herdt). The end of the process required a candidate to be examined by a board. A successful candidate before the board would then be certified as a resident inspector. Tr. 651 (Herdt); Tr. 850-51 (Merschhoff).

Defendant was assigned to a first-forty work schedule. It permitted him to work 40 hours per week without a set daily limit on the hours worked. After 40 hours were worked within a week, he earned overtime for any additional hours worked during that week. Tr. 237 (Musser); Tr. 614 (Herdt).

Following Mr. Zerr's submittal of his claim for 48 hours of overtime for Pay Period 9, his supervisor, Mr. Brockman, became concerned that he would burn himself out from working such long hours. He notified Defendant of this and he was assured by Defendant that it would not happen. Tr. 687-88 (Brockman).

After the submittal of a claim for 50 hours of overtime for the following pay period, Mr. Brockman again raised the matter and was advised that Mr. Zerr was basically working 12 hour days during the week starting at 6:00 a.m. or 6:30 a.m. and on weekends to observe backshift operations. Tr. 689-90 (Brockman). Backshift operations are those performed beyond plant normal weekday working hours and on weekends. The observation of backshift operations requires working in the protected area. Tr. 239-40 (Musser); Tr. 318 (Menning). Mr. Brockman certified to the hours claimed to have been worked by Mr. Zerr on the basis of Mr. Zerr's signature. Tr. 714 (Brockman).

On Friday, May 18, 1990, Leonard Wirt, who was scheduled to become the Senior Resident Inspector at Hatch several months later, visited the plant. He voiced concern to Mr. Brockman that Defendant was not working the hours he claimed after seeing him arrive after 7:00 a.m. and not seeing his car after 1:00 p.m. at the NRC parking location. Tr. 341, 344 (Wert).

The location for parking NRC vehicles on site is in front of the Simulator Building. Tr. 240 (Musser). It houses a training simulator for Hatch employees and the offices of plant management staff including the licensing compliance department. Tr. 349 (Wert). The building is outside of the protected area. The

protected area is the place where significant plant operations are conducted and is contained within a perimeter fence. Tr. 207-08 (Edge). The offices of the NRC personnel are in a trailer located within the protected area. The NRC parking spaces are outside of the protected area and visible from the trailer. Tr. 344 (Wert).

Entrance and egress from the protected area is done through a security building. Tr. 208-10 (Edge). A security system using security guards, identification cards, and card readers identify the individual each time the protected area is entered and exited. The times are recorded. Tr. 208-12 (Edge). The system was reliable and accurate during the relevant period. Tr. 211-12, 217-18 (Edge).

Following Mr. Wert's report, Mr. Brockman obtained a printout of Mr. Zerr's record of entering and exiting the protected area. Tr. 692 (Brockman). As will be discussed later, the times of the first entrance into the protected area and the last exit regularly marked the beginning and ending of the daily work period for NRC personnel at Hatch.

Mr. Brockman's supervisor, Alan Herdt, Branch Chief, Division of Reactor Projects, Region II, prepared a chart comparing Mr. Zerr's claims of time worked to the recorded times of his first entering and last exiting of the protected area and found material discrepancies between the two. Tr. 578-79 (Herdt).

Attached and made part hereof as Appendix 2 is a table showing, for each of the relevant days in the three pay periods, the recorded first entry and last exit of the protected area by Mr. Zerr, the amount of elapsed time, the elapsed time minus the time for the prescribed lunch hour and the number of hours claimed to have been worked for which he was paid.

Major differences between the times Mr. Zerr claims to have worked and his recorded first entry and last exit of the protected area include:

- (a) 12 hours claimed for Friday, April 13, for which there was a recorded 7 hours and 14 minutes in the protected area.
- (b) 10 hours claimed for Sunday, April 15, for which there was no recorded time in the protected area.
- (c) 10 hours claimed for Sunday, April 22, for which there was no recorded time in the protected area.
- (d) 10 hours claimed for Friday, April 27, for which there was a recorded 5 hours and 40 minutes in the protected area.
- (e) 8 hours claimed for Sunday, April 29, for which there was a recorded 2 hours and 32 minutes in the protected area.
- (f) 8 hours claimed for Friday, May 11, for which there was a recorded 4 hours and 39 minutes in the protected area.
- (g) 10 hours claimed for Sunday, May 13, for which there was a recorded 4 hours and 29 minutes in the protected area.
- (h) Discrepancies of more than 3 hours for the days of April 11, 12, 16, 17, 18, and 20.

Although not a requirement, the layout of the site and the nature of the NRC inspection work cause NRC employees to begin their workday with their first entry into the security building and ending it with the last exit out of the building.

Mr. Wert best described why this was the case as follows:

The significant majority of time that an NRC inspector spends on site, whether he's qualifying or inspecting, would be within the protected area boundaries . . . where all the activities that we are tasked to observe occur . . . [T]he resident inspectors' trailer is your home office. . . . That's where you keep your hard hat, you put your dosimetry, notebooks. . . . I can't envision a scenario in which [an inspector] wouldn't go to the trailer at the beginning of the day and at the end of the day you go to that trailer and then badge out of the protected area.

Tr. 342-43.

The evidence of record is convincing that, like the inspectors, Mr. Zerr's workday began with the time of his first entry into the protected area and was completed at the last exit and that no significant work was performed by him before or after for which he could legitimately claim compensation.

The Hatch resident inspectors' basic workdays were 7:15 a.m. to 4:00 p.m. Tr. 307 (Menning); Tr. 237 (Musser). They followed the practice as described by Wert above. Tr. 245 (Musser); Tr. 309 (Menning).

During Pay Period 9 the recorded time of Defendant's first entrance and last exit generally coincided with that of the resident inspectors working a basic 7:00 a.m. to 4:00 p.m. shift. For the next two pay periods he was shown to have generally made his first entrance into the protected area within an hour before 7:00 a.m. and to depart within two hours after 4:00 p.m. (Fridays were an exception when the recorded departure times were prior to 4:00 p.m.)

Inspectors saw and had lunch with Defendant on a daily basis. Defendant would accompany the inspectors on some system checks. Tr. 265 (Musser). The day would begin with Mr. Zerr obtaining licensee operator logs from within the protected area. They would then be reviewed and discussed. A daily meeting was held in the NRC trailer with plant management. Tr. 253-54 (Musser).

Materials for use on inspections were obtained invariably from within the NRC trailer or Documentary Control, which was within the protected area. Tr. 263-68 (Musser). Although some of the material would also have been available in the Simulator Building it was not as convenient to obtain. Tr. 346 (Wert). Further, the updated official copies were kept at Document Control. Tr. 346 (Wert); Tr. 266-68 (Musser).

Mr. Zerr kept his standard materials, training, and qualification manuals within the trailer. Tr. 261 (Musser); Tr. 311 (Menning). Materials that would have been helpful for Mr. Zerr's studies to be a resident inspector were within the protected area. Tr. 265 (Musser); Tr. 345-46 (Wert). He routinely studied in the NRC trailer. Tr. 261 (Musser).

The inspectors estimated that between 90 and 98% of their time was spent in the protected area. Tr. 232, 248, 270 (Musser); Tr. 312 (Menning).

Occasionally, inspectors would attend meetings with licensee staff personnel in the Simulator Building outside of the protected area. Tr. 232 (Musser). Hatch staff personnel in the Simulator Building regularly worked between 7:00 a.m. and 4:00 p.m. Tr. 243 (Musser). Meetings would start after 9:00 a.m. Tr. 313 (Menning); Tr. 347 (Wert). They would be of very short duration. Tr. 232 (Musser). Very infrequently, operator training was observed in the Simulator Building. Inspectors from the Region (Atlanta) had responsibility for that activity. Tr. 273-74 (Musser).

Mr. Zerr, in late April, became involved in a project concerning Licensee's regulatory compliance in the area of surveillance testing. Tr. 729 (Brockman). It required many discussions with Hatch regulatory compliance engineers. Tr. 734 (Brockman). The project consumed 40 to 60 hours over a 4- to 6-week period. Tr. 735 (Brockman). It could all be accomplished in the NRC trailer rather than in the staff regulatory compliance offices. Tr. 734 (Brockman). There was no probative evidence in the record to show that this project was worked on by Defendant outside of the 7:00 a.m. to 4:00 p.m. work schedule that was followed by Licensee staff.

The NRC does not dispute that Defendant may have performed some work outside of the protected area such as on the above project. The NRC's evidence shows that Defendant did exit the protected area on many days between his first recorded entry and last recorded exit. The basis of the complaint is that no work was done by Mr. Zerr before his first entrance into the protected area and after his last exit.

Defendant was called to a meeting in Atlanta on May 30, 1990, by supervisors Brockman and Herdt to account for the differences between the recorded time and the time claimed to have been worked. Tr. 694-95 (Brockman). The meeting was held within 2 weeks of the last of the relevant pay periods. Mr. Zerr offered very little in the way of specifics to justify the discrepancies. He stated that he charged the 45-minute lunch hour to hours worked because he discussed work or was doing work during the lunch hour. He also stated that he charged for the time it took him to travel from his "temporary quarters" in Vidalia, Georgia, to the plant and to return. Tr. 696 (Brockman). Travel time between Vidalia and the plant site is approximately one-half hour in each direction. When Mr. Zerr worked in Atlanta, he did not claim commuting time from his residence to his Atlanta workplace and return. It was less than 10 minutes in each direction. Tr. 472 (Zerr).

Defendant indicated that he could have done work outside of the protected area at the Simulator Building and administration building on the project involving surveillance testing discussed above. Tr. 697-98 (Brockman). Mr. Zerr was asked to review his records to determine what his specific activities

were and to advise Mr. Brockman of them during the following week. Tr. 698 (Brockman). During the following week Mr. Zerr advised Mr. Brockman that the days were running together and that he could not remember any specifics regarding individual blocks of time. He reiterated that he could remember no days when he had gone to the site and had not entered the protected area. Tr. 699 (Brockman).

Defendant's testimony on hearing was equally vague. Mr. Zerr was asked two questions by his counsel as to his activities at Hatch. The questions and answers follow:

Q When you were at Hatch did you ever perform any resident inspector intern duties and were outside of the protected area?

A Yes, I did.

* * *

Q Did you ever do work outside of the protected area?

A Yes, I did. There was a lot of activity going on when I was there, or when I arrived, because of the outage. There was a lot of contractors that were located outside of the protected area, as well as all of the engineering facilities and the licensing department. All of the training was done outside of the protected area. Tr. 500.

Defendant presented no evidence that would link any work that might be performed outside of the protected area to the disputed work time that was claimed.

Mr. Zerr provided no rational explanation as to why he chose to consider his work day to begin when he left his residence and to end when he returned rather than using the plant site for that purpose. NRC does permit employees to claim time in travel status as hours of employment only for those hours "actually spent travelling between the official duty station and the point of destination or between two temporary duty points, and for usual waiting time which interrupts such travel. . . ." NRC Exh. 70 at 1837. It would not apply to him. Vidalia, Georgia, was not a duty point.

Contrary to Defendant's claim of working lunches, Mr. Musser testified that he usually ate lunch with Mr. Zerr in the NRC trailer, that various topics were discussed, and that there were no frequent interruptions for work purposes. Tr. 261-62 (Musser).

Mr. Menning, who departed the facility on April 20, 1990, frequently ate lunch with Mr. Zerr. Generally, there was no attempt to do work at the lunches and he kept away from discussing work at lunch time. Tr. 315-16 (Menning). The prescribed lunch period for a workday was 45 minutes. Tr. 237-38 (Musser).

Mr. Musser testified that during an outage, as when Defendant arrived, there was more to see in the control room (within the protected area). Tr. 270. He further testified that when he observed the work of the contractors it was at the

plant. Mr. Musser could not recall any contractors outside of the plant. Tr. 270. His testimony was supported by Mr. Menning who testified that he did not recall offices or facilities of contract personnel outside of the protected area and that they were primarily craft personnel. Tr. 314-15. He also testified that he worked on April 15, 1990, Easter Sunday, and that he did not see Mr. Zerr or his car that day. Tr. 315.

Ellis Wesley Merschoff, Deputy Director, Division of Reactor Safety, Region II, served as Defendant's coordinator for assignments in Region II. When Mr. Zerr reported to Atlanta, Mr. Merschoff reviewed job requirements with him. As part of his discussion with new employees, Mr. Merschoff advises them that in the areas of time, telephone, and travel abuse, the office will not stand behind an employee and the abuse will very easily get the employee fired. He could not specifically recall having the conversation with Mr. Zerr but he would have been surprised if he did not. Tr. 837.

Frank Gillespie was the supervisor of the Reactor Intern Program, Office of Nuclear Reactor Regulation. Tr. 919-20 (Gillespie). The program provided an orientation to interns on time and attendance requirements when Mr. Zerr entered the program. The interns all had at least 1 year's prior experience in working for the agency. The Intern Coordinator spent days with each intern individually to ensure that the travel arrangements for their assignments went smoothly. This included review of the travel regulation requirements. Tr. 921-22 (Gillespie).

Defendant denied that Messrs. Merschoff and Gillespie had ever gone over the travel regulations with him. Tr. 495-96.

Discussion and Conclusions

Complainant has presented convincing evidence that Defendant submitted false claims for overtime work that he did not perform, in the manner alleged in Counts I, II, and III. Defendant's evidence failed to rebut the showing that false claims were knowingly made by him.

NRC established through credible witnesses that its inspectors at the Hatch plant regularly began their workday when they first entered the protected area and ended it when they last exited it to end the work period. The witnesses further established that from the nature of Mr. Zerr's duties and how they were performed it also held true for him. This conclusion was bolstered by Defendant's recorded first entries and last exits from the protected area, which except for Fridays and Sundays, mainly tracked the working time of the resident inspectors.

It was Defendant's contention that the first entry into the protected area and the last exit from it did not mark the beginning and ending of his workday; that he performed additional work. Not at issue was the accuracy and reliability of

the system recording the time and identity of an employee entering and exiting the protected area, which was established.

For Defendant to prevail, it was incumbent on him to go forward and rebut Complainant's proof that he did not work the overtime he had claimed. He was bound to produce evidence to show that he was working those much longer hours. In many instances they exceeded 3 hours a workday and extended to up to 10 hours on Sundays when he showed no time in the protected area. Many of the major discrepancies occurred on Fridays and Sundays thus forming a pattern in conjunction with the weekend.

Mr. Zerr's explanation of the additional work he claims to have performed was wanting and unconvincing. When he was initially confronted with the issue, which was close in time to when the work was purportedly performed, he gave only vague allusions as to what he might have been doing outside of the protected area. He never specifically identified the work he indicated he may have done nor did he identify it with any time period. The NRC never disputed the fact that limited work was done outside of the protected area between the time of the first entry into the protected area and the last exit out of it. Defendant's explanation for the disputed work hours was void of substance. He gave similarly vague testimony at the hearing.

Following Pay Period 10, Mr. Zerr advised Mr. Brockman that he worked weekends to observe backshift operations. The observation of backshift operations requires working in the protected area. Yet, on two Sundays for which overtime claims were made of 10 hours each day, Defendant was not recorded to have been in the protected area. Discrepancies between recorded and claimed times on two other Sundays exceeded more than 5 hours each day. Because the observation of backshift operations occurs within the protected area, there should not have been any discrepancies if the work was performed. Mr. Zerr's statement that he could remember no days when he had gone to the site and had not entered the protected area does nothing to account for the differences.

Similarly lacking was a rational explanation as to why Defendant would charge commuting time to working. Mr. Zerr was not a new government employee when he went on the regional assignment. He was apprised of the need to adhere to agency time and attendance as well as the travel regulations. The testimony of Messrs. Merschoff and Gillespie was worthy of belief.

As to Mr. Zerr's claim that he charged working lunches as work time, setting aside the question of its permissibility, the credible evidence was that the lunches did not fall within that category. Two resident inspectors, with no apparent self-interest, gave corroborating testimony that they were not working lunches.

Considering the amounts of excess overtime claimed, the period of time over which it occurred, and the lack of a convincing explanation, I conclude that the claims were known by Defendant to be false when made. No proof of specific intent to defraud is required under the applicable law. 31 U.S.C. § 3801(5);

10 C.F.R. § 13.3(a)(5)(c). The record in this proceeding shows that the false overtime claims are but one area in which Mr. Zerr made false claims during his 13-month rotational assignment.

Complainant has proven Counts I, II, and III by a preponderance of the evidence.

B. Claims for Travel Expenses

The remaining counts in the complaint, Counts IV through XXIII, allege false claims for travel expenses that occurred in connection with Defendant's 13-month rotational assignment at the NRC Region II office in Atlanta, Georgia, and at Hatch in Baxley, Georgia. False claims were alleged to have been made for expenses in the areas of furniture, car and house rental, for the use of a personal vehicle for official government travel, and over claiming and doubly claiming for meals and incidental expenses. Each category of expenses, claimed to have been falsely made, will be individually reviewed.

1. Furniture Rental

Counts IV through XI exclusively pertain to alleged false claims for furniture rental. Counts XII, XIII, and XIV, in addition to furniture rental, allege false claims in regard to other expenses.

Complainant alleges that, for each of the counts, Defendant falsely claimed on vouchers reimbursement for furniture rented from Cort Furniture Rental (Cort) after he had returned the furniture to Cort and did not rent any other furniture from it.

When Mr. Zerr went on extended travel to Georgia, he was authorized travel expenses under the lodging-plus system, a system he understood. Tr. 404 (Zerr). Under the system he was permitted to claim allowable expenses actually incurred for lodging up to a predetermined limit and was entitled to a flat daily subsistence rate for meals and incidental expenses (M&IE). Tr. 403-04 (Zerr); Tr. 790-92 (Miller); Tr. 542-43 (Corvelli).

He rented an unfurnished apartment in Atlanta for \$875, which left him a maximum of \$535 for other lodging expenses. Tr. 396, 404-06 (Zerr).

On August 26, 1989, Defendant rented furniture from Cort at a monthly rate of \$535.83. NRC Exhs. 10, 11, 13, 15; Tr. 397-98 (Zerr). He paid initial charges of \$1,006.90 which included the first month's rental and a security deposit. NRC Exh. 11. He was given a receipt for the payment on a Cort receipt form which contained his name and account number. For monthly payments to Cort he was furnished with serially numbered coupons that were to be sent with the payments. Tr. 398 (Zerr).

Within the first month of the rental, Defendant cancelled his contract with Cort and on September 19, 1989, returned to it all of the furniture he had rented. NRC Exh. 11, Tr. 399-400 (Zerr). Defendant received a partial refund. NRC Exhs. 14, 15. The reason he gave for cancellation of the rental agreement was that the furniture was of substandard quality and not what he had ordered. Tr. 399, 482. He no longer rented any furniture from Cort or anyone else thereafter. NRC Exhs. 11, 14, 15; Tr. 400 (Zerr). Mr. Zerr purchased furniture for his use at his own expense and never advised any NRC official that he was no longer renting furniture. Tr. 401 (Zerr).

Defendant submitted 11 vouchers to the NRC, between September 28, 1989, and December 25, 1990, claiming reimbursement for lodging at the maximum authorized rate. NRC Exhs. 9, 16-23, 25, 30; Tr. 402 (Zerr). Each voucher is the respective subject of Counts IV through XIV.

For each month the vouchers contained supporting documentation showing an expenditure of \$535.83 for furniture rental from Cort. This was done by using payment documents provided to Mr. Zerr by Cort. He had never returned the unused payment coupons to Cort when he cancelled the rental agreement in September 1989. Tr. 399 (Zerr).

Defendant supported each voucher with a photocopy of the August 29, 1989 Cort receipt for \$1006.90 which had the name "Cort Furniture Rental" on it. He also attached to each voucher a Cort payment coupon (or coupons for multi-month vouchers) each in the amount of \$535.83. The coupons themselves did not contain the Cort name. However, the documents related to each other in that each contained Mr. Zerr's name and Cort account number. NRC Exhs. 9, 16-23, 25, 30.

The NRC paid all of Defendant's claims for rental furniture except for the last voucher, dated December 24, 1990, which was not paid because of the NRC's inquiry into Defendant's claims. NRC Exhs. 9, 16-23, 25, 30. At the end of his assignment in Georgia, Mr. Zerr attempted to have the NRC reimburse him for moving his furniture back to his home in Maryland. NRC Exh. 30 at 178.

Defendant's explanation for the furniture rental claims was based on a telephone conversation he said he had with someone in the NRC headquarters travel office. Tr. 405-06. He said he called the travel office to inquire whether he could purchase pots, pans, and linens instead of renting them because of what were outrageous rental costs. Tr. 405, 410, 482-83. Defendant stated that he was advised by someone in the office that he could purchase the items instead of renting them and to prorate the cost over the period that he would be on extended travel. Tr. 406, 482-83. He reasoned that if it could be done for pots, pans, and linens it could be done for furniture which he purchased. Tr. 410.

Mr. Zerr testified that he never separately prorated the purchase costs on the vouchers, that the costs were rolled over into the \$535 figure and that he spent

in excess of that amount, but that was all that he was authorized to claim. Tr. 406-07, 411.

At the hearing, Defendant testified that he thought that the conversation on the pots, pans, and linens was with Pat Corvelli. Tr. 405. Ms. Corvelli knew Mr. Zerr as someone who came into the travel office. Tr. 556, 558 (Corvelli). He seemed to be knowledgeable in regard to the travel regulations. Tr. 544 (Corvelli). She could not recall any telephone conversation with him in 1989. Tr. 545-46 (Corvelli). She did testify that if she had been asked a question of whether items could be purchased instead of rented, her answer would have been "no." She considered this not to be a difficult question because the government travel regulations are clear on this point. Tr. 547.

Discussion and Conclusion

By a preponderance of the evidence, the NRC has proven that Defendant submitted false claims for furniture rental as part of his lodging expenses, which he did not incur.

Defendant used fraudulent documentation to mislead the government into paying for lodging expenses, i.e., furniture rental from Cort, which was not provided and for which the government would not have paid if the truth were known.

The supporting documentation submitted by Mr. Zerr was wholly deceptive. Despite the fact that he was no longer renting furniture from Cort, for a period of more than a year he used obsolete receipt and payment forms to make it appear that he continued to rent the furniture. The government paid the false claims until such time as it began an inquiry into the practice. Defendant was never authorized by the NRC to purchase furniture as he did but only to rent it as part of his lodging expenses.

Defendant's explanation as to why he submitted the claims in the manner that he did is not credible. He stated that he had prorated the cost of the furniture as he had done with the pots, pans, and linens and that they were rolled over into the \$535 amount. Yet all the vouchers he submitted failed to disclose this. Reasonably, if he believed he was authorized to purchase the items and to prorate the costs, it would be expected that he would make known the purchases and the prorating of costs in his expense vouchers. To the contrary, rather than exposing a practice for which no reimbursement would be made, if known, he concealed it with a contrived false claim for rental furniture.

The argument was made by Defendant that the government benefited from the purchase arrangement. If the purchase was made for the government's benefit, there would have been no need for the machinations in which Defendant engaged. Defendant had engaged in this practice to benefit himself. Had he been successful, he would have had the government pay for the furniture which he

would have kept. This is another instance of where Mr. Zerr falsely overstated claims for expenses on his rotational assignment.

Complainant has proven by a preponderance of the evidence Counts IV through XIV as they allege the filing of false claims for rental furniture.

2. *Car Rental*

Counts XII, XIII, and XIV contain allegations that the Defendant submitted false claims to the NRC for car rental expenses. Complainant contends that Defendant falsely claimed monthly car rental expenses in the amount of \$659.77 (\$686.16 including tax) instead of the actual monthly rate of \$549.77 (\$577.26 including tax), in the period March through September 1990.

Defendant was authorized to rent a car for his entire rotational assignment. NRC Exh. 8 at 63; NRC Exh. 30 at 173. He rented an automobile from a Hertz Corporation location in Gaithersburg, Maryland, on August 25, 1989. NRC Exh. 24 at 852, 854. The beginning monthly rate was \$659.77 plus tax. *Id.*

Because a long-term rental was involved, Defendant qualified for Hertz's Multi-Month Program in which each successive month's rental rate was reduced. NRC Exh. 24 at 245-46, 854; Tr. 511-14 (Wallis). Whereas the first month's rental was \$659.77 plus tax, the rate was reduced by \$20.00 per month until it reached \$599.77 at which point it became fixed until the expiration of the rental agreement on February 27, 1990. NRC Exh. 24 at 245-46. Then, a new rental agreement was to be executed if the car was to be retained. Tr. 517 (Wallis).

The multi-month contract requires that it be guaranteed by a credit card. The arrangement is accomplished via the Hertz reservation 800 system and entails a 48-hour wait. Tr. 530-32 (Wallis). Hertz's business practice was to explain all terms and conditions contained in rental agreements. Tr. 515-16 (Wallis).

Hertz had sent a confirmation letter dated August 28, 1989, to Defendant's home address in Gaithersburg, Maryland, detailing the declining monthly charge under the original multi-month contract. NRC Exh. 24 at 245. Mr. Zerr denied seeing the confirmation letter. He testified that it would have arrived at his apartment after he had departed Gaithersburg, Maryland, and that he did not leave a forwarding address. Tr. 438. As to his being billed by the credit card company for the monthly rental, he testified that he would remit payments to the credit card company without seeing the bills. He stated that he would make minimum payments, if he had purchased anything he would send in something, or he would have called to find out the amount of the charges owing. Tr. 440.

On February 20, 1990, Defendant entered into a second rental agreement with Hertz renting a different car at a monthly rate of \$549.77 plus tax, which was to be billed directly to his credit card account. NRC Exh. 24 at LS868; Tr. 522-23 (Wallis). Defendant signed this rental contract below the following language: "You represent to have read and understand the above and all terms

and conditions contained in paragraphs 1 through 14 of this agreement and that you agree to them." NRC Exh. 24 at LS868.

On March 27, 1990, Defendant exchanged the vehicle rented on February 20, 1990, from Hertz for a replacement vehicle and signed a replacement agreement containing the monthly rental price of \$549.77. NRC Exh. 24 at LS866, Tr. 24-25 (Wallis). On July 20, 1990, Defendant exchanged the vehicle received on March 27, 1990, from Hertz for a replacement vehicle and signed a second replacement agreement containing the monthly rental price of \$549.77. NRC Exh. 24 at LS865; Tr. 524-25 (Wallis).

Defendant's credit card bills for the time period, starting with his second rental contract with Hertz, reflect that Hertz charged him \$577.26 monthly (this figure represents \$549.77 plus tax). NRC Exh. 42 at 417-22.

Defendant claimed on his vouchers for March 1990, April 1990, and May through September 1990 monthly reimbursement for car rental at the highest rate under the multi-month contract, \$659.77 plus tax, which was in effect in August 1989. He attached a copy of the first rental agreement that showed this amount. The amount he paid during the subject period, which was after the second contract became effective, was \$549.77, a difference in the area of \$100 per month. NRC Exhs. 23 at 144, 25 at 161, 30 at 175-78.

Defendant, on his voucher of April 2, 1990, which underlies, in part, Count XII, was overpaid \$91.63 for car rental expenses for March 1990, which he did not incur. NRC Exh. 23.

Defendant, on his voucher of May 1, 1990, which underlies, in part, Count XIII, was overpaid \$108.90 for car rental expenses for April 1990, which he did not incur. NRC Exh. 24.

Defendant, on his voucher of December 24, 1990, which underlies in part Count XIV, overcharged 108.10 per month for monthly car rental expenses for the months of May, June, July, August, and September 1990 (\$540.50) that he did not incur and for which he was not paid. NRC Exh. 30.

Discussion and Conclusion

The NRC has proven by a preponderance of the evidence that Defendant submitted false claims for car rental expenses that he did not incur.

Even if one were to accept Defendant's explanation that he was ignorant of the fact that the expenses for car rental were less than he claimed, it still must be concluded that he had reason to know that the car rental claims were false. A definition of "know" or "has reason to know," in the applicable law, means that a person with respect to a claim or statement acts in deliberate ignorance of the truth or falsity of the claim or statement. 31 U.S.C. § 3801(5)(B); 10 C.F.R. § 13.3(a)(5)(c). Defendant's self-described actions at the very least show a studied, deliberate attempt of not learning the cost of the monthly car rental.

This extended from not seeing the credit card billing under the original rental agreement, which he paid, to the signing of a second rental agreement and the signing of two replacement agreements, which charged him at a lesser rate.

However, there is more to Defendant's conduct in filing false claims for car rental expenses than acting in deliberate ignorance of the truth or falsity of the claims. As in the case of his filing false claims for furniture rental expenses, he used fraudulent documentation to support the claims. In this case it was the original rental agreement that was no longer effective. He had actual knowledge of this as evidenced by his signing a second agreement on February 20, 1990, for a different car. Yet he continued to claim expenses for another 7 months using an outdated contract that contained a higher rental charge than he was paying.

Complainant has proven by a preponderance of the evidence the allegations pertaining to false claims for car rental expenses contained in Counts XII, XIII, and XIV.

3. House Rental

Counts XIII and XIV include allegations that the Defendant submitted false claims to the NRC for house rental expenses. In August 1989, upon arriving in Region II for his rotational assignment, Defendant rented an unfurnished apartment in Atlanta, Georgia, at a monthly rate of \$875.00. NRC Exh. 9 at 68S-69S; Tr. 418 (Zerr). His lease on this property expired on March 31, 1990. NRC Exh. 9 at 68S-69S. As of April 1, 1990, Defendant was reassigned to serve as a resident inspector intern at the Hatch plant in Baxley, Georgia. Tr. 411, 415 (Zerr). The assignment necessitated that the Defendant obtain new lodgings. Tr. 412 (Zerr).

Beginning April 1, 1990, Defendant entered into a 6-month rental agreement for a four-bedroom, single-family residence with an in-ground swimming pool located in Vidalia, Georgia. NRC Exh. 26 at 300-02; Tr. 412-13 (Zerr). The monthly rental rate in the lease was \$600.00. NRC Exh. 26 at 300-02.

During the 6 months that Defendant rented this house, he submitted two vouchers to the government, one dated May 1, 1990, for the period April 1, 1990, to April 30, 1990, and another dated December 24, 1990, for the period May 1, 1990, to September 30, 1990. NRC Exhs. 25, 30. The vouchers respectively underlie Counts XIII and XIV.

The voucher for the period April 1, 1990, to April 30, 1990, contained a \$875 claim for rent. It was supported by a copy of a portion of the expired lease agreement for the apartment in Atlanta, Georgia, rented to Defendant at a monthly rate of \$875. The portion of the copy submitted omitted the identification of the property rented in Atlanta but included the monthly rental amount of \$875. NRC Exh. 25 at 162-63. Defendant did not live in Atlanta

during this time period; he resided in Vidalia, Georgia, at the house he was renting for \$600 per month. Tr. 415 (Zerr). Mr. Zerr was paid for the claimed \$875. NRC Exhs. 50 at 10, 51 at 9.

In support of his voucher for the period May 1, 1990, to September 30, 1990, in which he claimed \$875 per month for rental expenses, he submitted a copy of the lease he signed for the Vidalia house but altered the rental amount in the lease from \$600 a month to \$875 a month. NRC Exh. 30 at 175-79, 185-87; Tr. 421-24 (Zerr). Defendant admitted that he altered the copy of the lease. Tr. 425 (Zerr). During the time period, Defendant paid to the rental agent of the property \$600 rent for each month relevant to the voucher. NRC Exh. 27; Tr. 416 (Zerr).

Defendant's explanation was that because he was incurring expenses for obligations he had relating to the house rental in addition to rent, such as lawn care, extermination, and maintenance, he altered the lease amount to \$850 per month, which represented his total expenses. He claimed that he received no money from the NRC in excess of that to which he was entitled. Tr. 423, 425 (Zerr).

His explanation was inconsistent with his claim for the month of May 1990, which not only claimed rental expenses of \$875 but additional expenses for extermination service of \$15 and for lawn care for \$35. NRC Exh. 30 at 175; Tr. 426-27 (Zerr).

Investigation by Senior Criminal Investigator Ronald G. Fields disclosed an oral agreement between Defendant and the realtor handling the Vidalia house. Under the agreement, Mr. Zerr was responsible for grass-cutting services, swimming pool maintenance, and extermination services. The investigator was able to establish payments by Mr. Zerr in the amount of \$350 for grass-cutting services, \$255 for swimming pool maintenance, and \$45 for extermination services. NRC Exh. 60, Tr. 880-84 (Fields).

Defendant testified that the reason he prepared a single voucher to cover the 5-month period May 1, 1990, to September 30, 1990, was that he was advised that unless he submitted a voucher by December 24, 1990, the travel funds advanced to him would be taken out of his salary. He did not testify as to why he was so many months behind in submitting vouchers. Defendant testified that he did not rely on calendars, day timers, or receipt books to complete the voucher. He stated that he followed the practice that he used throughout the rotational assignment of duplicating in format the first voucher that successfully passed through the NRC travel office examination. He would itemize successive vouchers in the same manner. Tr. 491-92.

Discussion and Conclusions

By a preponderance of the evidence, the NRC has established that the Defendant submitted false claims for house rental expenses he did not incur.

Again Defendant used false documentation to support the false claims. For the false claim in Count XIII it was an expired lease for another location. That the lease was for another location was concealed. For the false claims in Count XIV, Defendant altered the amount of the monthly rental in the lease by increasing it by \$275.

Although Defendant claimed that \$275 was paid by him monthly for other expenses in connection with the 6-month rental for a total of \$1650, there is no convincing probative evidence of record that he spent more than \$650 for such expenses, as established by the investigator. Indeed, if Defendant had incurred \$1650 in authorized expenses, there would have been no reason for him to falsify the supporting documentation. He could have submitted evidence of the \$600 a month rental payments and the additional expenses incurred. Evidently, he could not justify the claim for an additional \$1000 and instead relied on false documents to obtain it.

Defendant's explanation that his current situation arose in part from relying on and following previously submitted vouchers is disingenuous. There was legitimacy to some initial claims, but it is apparent the followups were false because of changed circumstances that Defendant was aware of and concealed.

Defendant initially rented furniture from Cort but continued to file vouchers for furniture rental after he stopped renting. Defendant initially rented a car from Hertz for a monthly charge of \$659 but continued to file vouchers for that amount after contracting for and paying a \$557 rate. Defendant initially rented housing for \$875 a month but continued to file vouchers in that amount after leasing for less.

Complainant has proven by a preponderance of the evidence the allegations pertaining to false claims for house rental contained in Counts XIII and XIV except to the extent in Count XIV that the amount of the false claim for house rental shall be reduced from \$1375 to \$725 to give Defendant credit for \$650 in expenses for grass-cutting services, swimming pool maintenance, and exterminating services that he did incur.

4. Meals and Incidental Expenses

Counts XIII and XIV include allegations that the Defendant submitted false claims to the NRC for meals and incidental expenses (M&IE). The federal government pays to its employees who are on official travel a daily subsistence rate in lieu of requiring its employees to submit individual receipts for food and other expenses. Tr. 543 (Corvelli); Tr. 791-92 (Miller). This

rate varies according to the city to which an employee travels and is published in government travel regulations kept in each NRC office. It is reduced for employees on extended travel. Tr. 791-93, 798, 821 (Miller).

Having been on official government travel several times before starting his rotational assignment in Georgia, Defendant was familiar with the system's varying per diem rates among cities. Tr. 452-56 (Zerr). When Defendant began his rotational assignment he claimed on his vouchers the \$27 M&IE rate (reduced due to long-term travel) for Atlanta, Georgia. *See, e.g.*, NRC Exhs. 8 at 54, 9 at 62. Defendant, however, upon moving from Atlanta to Vidalia, Georgia, which had a \$26 rate, nor continued to claim and was paid the higher Atlanta rate even though he resided in a lower M&IE rate city. NRC Exhs. 25 at 161, 30 at 175-79, 56 at 395, 69 at 2209. No reduced rate was ever calculated for Vidalia because by the time the NRC discovered that Defendant was residing in a different city his rotation had ended. NRC Exh. 56 at 395.

Discussion and Conclusions

The NRC has failed to establish by a preponderance of the evidence that the Defendant submitted false claims for M&IE because he charged \$27 a day instead of \$26 on two vouchers. The difference of \$1 a day is so small that it could have been overlooked. The evidence is not convincing that it was not more than mere negligence, which is not chargeable under the Program Fraud Civil Remedies Act.

Counts XIII and XIV were not proven insofar as they allege the filing of false claims for M&IE, where the authorized rate was \$26 a day and Defendant charged \$27.

5. Use of a Personal Car and Double Billing

Counts XV through XXIII each allege that Defendant submitted false claims to the NRC in charging mileage expenses for the use of a personal vehicle that he never provided and for billing for M&IE for which he had been paid.

While on rotational assignment at Region II in Atlanta, Georgia, Defendant made trips on official travel to such places as Tennessee, South Carolina, and Florida. He submitted nine travel vouchers to cover the period September 1989 to March 1990 when he made the trips. The vouchers respectively underlie Counts XV through XXIII. They were submitted to the NRC at Region II in Atlanta and he was paid for mileage for the use of a "POA" (privately owned automobile) and for the M&IE as claimed. NRC Exhs. 31-39.

Defendant acknowledged that the only vehicle he employed for the subject transportation was the rented vehicle from Hertz for which he was reimbursed by

NRC Headquarters at Rockville, Maryland. He testified that he did not possess a personal vehicle while on rotation in Atlanta although he filed vouchers for such use. Tr. 457-59.

For the same days he submitted travel expense claims for M&IE to Region II in Atlanta, for which he was paid, he had submitted claims for M&IE to NRC Headquarters at Rockville, Maryland, for which he was also paid. Tr. 459; NRC Exhs. 8, 9, 16-25, 31-39.

Defendant's explanation for what occurred was that he was told that for accounting arrangements he was to keep regional travel expenses separate from Headquarters travel. Tr. 497. He did not consider that he had twice billed the government for M&IE and car use. He stated that the claims for the regional travel were for mileage which he equated to merely being a cost for gasoline. He claimed not to have billed Headquarters for the same gasoline. Tr. 498-99.

In conjunction with the use of the Hertz rental car, Defendant regularly claimed expenses for the cost of additional gasoline. NRC Exhs. 8, 9, 16-23. For his claimed mileage for the alleged POA he was paid in excess of 20 cents per mile. NRC Exhs. 31-39.

Discussion and Conclusions

By a preponderance of the evidence, the NRC has established that the Defendant submitted false claims for mileage expenses and for M&IE that he did not incur.

Any accounting requirement to separate regional and Headquarters travel expenses is not a license to bill both for the same M&IE expenses and to pocket the payments from both accounts. The requirement to separate the expenses means just that, an allocation of the same expenses between the two accounts. Defendant's interpretation that he could charge each for the same expenses is not rational or credible. He seized the opportunity to bill and be paid by both.

His explanation that he did not twice bill the government for car use is similarly not credible. Defendant's claim for mileage for a POA was a complete fabrication that misled the government into paying for the use of a vehicle that it was already providing. Had Defendant factually reported that he was using the Hertz rental vehicle for transportation, no payment for mileage would have been made to him.

Defendant disingenuously equated mileage expenses to gasoline costs. If Defendant believed that they were of equivalent value, as he claims, there would have been no need for him to prevaricate that he provided his own vehicle for the transportation.

Complainant has proven by a preponderance of the evidence the allegations pertaining to false claims for mileage expenses and for M&IE contained in Counts XV through XXIII.

III. ULTIMATE FINDINGS AND CONCLUSIONS ON THE FALSE CLAIMS

Complainant has proven by a preponderance of the evidence that Defendant submitted false claims to the government for expenses he did not incur, as set forth in Appendix 1, except to the extent that (1) no false claim was established for M&IE for Count XIII (in the amount of \$30) and for Count XIV (in the amount of \$153); and (2) the amount of the false claim for housing rental in Count XIV shall be reduced to \$725 giving credit to Defendant for \$650 in additional expenses.

The total amount of the false claims proven is \$12,800.33. The total amount of false claims paid was \$8855.68. The false claim proven in Count XIV, in the amount of \$3944.65, was not paid by the government.

Defendant knew at the time he submitted the false claims that they were false, fictitious, or fraudulent. The false claims violate 31 U.S.C. § 3802(a)(1) and 10 C.F.R. § 13.3(a)(1).

IV. CIVIL PENALTY AND ASSESSMENT TO BE IMPOSED

The law provides that for a false claim a defendant shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than \$5000 for each such claim. 31 U.S.C. § 3802(a)(1); 10 C.F.R. § 13.3(a)(1). Additionally, if the Government has made any payment on a claim, a person subject to a civil penalty shall also be subject to an assessment of not more than twice the amount of such claim or that portion that is believed to be in violation of the Act. 31 U.S.C. § 3802(a)(1), (3); 10 C.F.R. § 13.3(a)(5). The NRC's implementing regulations provide that, ordinarily, double damages and a significant civil penalty should be imposed. 10 C.F.R. § 13.31(a). They also contain sixteen factors that may influence the Judge in determining the amount of penalties and assessments to be imposed. 10 C.F.R. § 13.31(b).

Complainant's Position

Complainant seeks the maximum civil penalty and assessment in this proceeding. It works out to \$115,000 in civil penalties (\$5000 on each of the 23 counts) and \$17,711 in assessments (two times the \$8855.68 in false claims paid to Defendant by the NRC). Complainant seeks a grand total of \$132,711. No payment was made to Defendant on the false claim found in Count XIV in the amount of \$3944.65 so that it is not subject to an assessment. 31 U.S.C. § 3802(a)(1), (3); 10 C.F.R. § 13.31(a)(5).

Complainant would reduce the \$132,711 by \$7454.57 which represents the monies that it has recovered from Defendant. NRC Exh. 65; Tr. 785-88 (Miller). The restitution resulted from the pretrial diversion in connection with the disposition of *United States v. Zerr*, Indictment No. 291-018, Southern District of Georgia. NRC Exhs. 58, 59, 61; Tr. 894-95 (Fields).

Complainant relies on a number of the factors under 10 C.F.R. § 13.31(b) in calling for the maximum in penalties and assessments.

(a) The Number, Time Period, and Amount of the Claims

See 10 C.F.R. § 13.31(b)(1), (2), (4). NRC points to the fact that there were 23 false claims, supported by fraudulent documents, involving thousands of dollars that were submitted over a 16-month period.

(b) The Degree of Culpability, the Pattern of Such Conduct, and the Concealment of the False Claims

See 10 C.F.R. § 13.31(b)(3), (8), (9). Complainant characterizes Defendant's activities as a well-thought-out program of illegal salary supplementation that was cleverly disguised. NRC states that Defendant took every opportunity to enrich himself through false claims that constitute a pattern of the same or similar misconduct. It points to the deliberate concealment of the truth by using an expired lease for an apartment rental in Atlanta as a basis to claim higher rental costs for a house in Vidalia, the retention of payment coupons for furniture no longer rented and the submission of such coupons with travel vouchers over a period of 15 months, and the routine submission of the initial Hertz document as evidence of the payment of charges in excess of those incurred.

(c) The Complexity of the Program and Degree of Defendant's Sophistication

See 10 C.F.R. § 13.31(b)(14). Complainant asserts that Defendant's argument that, at most, he made some mistakes is wholly without merit. The NRC's position is that it was not a mistake considering Defendant's education, the responsible position he held, his experience in performing travel, and that the matters at issue were not complex. The matters at issue were posed as a question of whether Defendant incurred the expenses and worked the hours he claimed or he did not. Complainant asserts that Defendant's fraudulent scheme in filing the false claims was complex and displayed sophistication on Defendant's part.

(d) The Actual Loss, Including the Cost of Investigation

See 10 C.F.R. § 13.31(b)(5). It is Complainant's position that the amount of the actual payments of false claims to the Defendant and the cost of the government's investigation also support the imposition of a double assessment and substantial penalties.

The NRC placed the cost of the investigation, covering a 3-year period, at \$28,514.04. It represents the hours of work and cost of travel of Ronald G. Fields, Senior Criminal Investigator of the Office of the Inspector General at the NRC. The total of \$28,514.04 was broken down into \$24,693.18 for wages and \$3,830.86 for Mr. Field's travel. The figures were derived from the investigator's time reports, logs, and travel vouchers. Some of the expenses involved estimates in that a single trip by the investigator could involve as many as three separate investigations. NRC Exhs. 44, 47, 73-74; Tr. 747, 751-56, 867-69, 872-74, 879 (Fields).

(e) The Need for Deterrence and the Potential Impact on Government Programs

See 10 C.F.R. § 13.31(b)(16). Complainant argues that, if there is nothing more imposed than a small penalty in addition to restitution, there would be no real penalty for flagrant misconduct. It calls for a substantial penalty to deter other NRC employees who may be similarly tempted.

Complainant is concerned that false claims and the cost of their investigation deplete agency funds that can be better used for agency programs.

It considers the filing of false claims to be such misconduct that diminishes the credibility and integrity of the resident inspection program. Complainant stated that the program relies heavily on the reliability of the word of its inspectors. It states that a significant penalty will give notice to those in the resident inspector program that the independence and responsibility associated with the positions may not be abused without certain and strong sanction. NRC asserts that a maximum sanction would foster public confidence in the agency's efforts to control waste, fraud, and abuse.

(f) The Relationship of the NRC's Loss to the Potential Penalty

See 10 C.F.R. § 13.31(a), (b)(6). Complainant argues that the imposition of the maximum sanction, which would be more than three times the NRC direct losses, is reasonable because (1) the maximum sanction is "ordinarily" warranted where liability is shown, and (2) the applicable factors strongly favor imposition of the maximum penalties.

Defendant's Position

Defendant in his posthearing brief does not focus on the issue of penalties and assessments. The focus is on Defendant's position that he never filed false claims and that he was not engaged in any wrongdoing. The defenses are repeated that he lacked knowledge of the travel regulations, that he had limited experience in the travel area and had to fend for himself under difficult circumstances on a new assignment. He contends that he never intended to defraud anyone, that there was no failure on his part to disclose information, that he attempted to save the government money and that it got full value for the expenses claimed.

Defendant attributes part of his problem to being told on December 24, 1990, that he had only that day to complete a voucher covering the period May 1, 1990, through September 30, 1990, and that he had to put together 6 months of travel documentation to the best of his ability.

Defendant, in his brief, stated that he had suffered immensely and enough over this matter. He contended that he had never been paid for hours he had worked and was never reimbursed for expenses he incurred. Mr. Zerr claims to be owed substantial sums by the government.

Other matters to be considered in determining an appropriate sanction include the following:

In Defendant's original motion seeking dismissal of this proceeding on the grounds of double jeopardy he argued that the subject complaint is punitive in nature in seeking restitution and monetary penalties. 38 NRC at 152. He based this on the May 1992 "Agreement for Pretrial Diversion" with the United States Attorney for the Southern District of Georgia which provided for the prosecution to be deferred for 18 months, the dismissal of the indictment on meeting the agreement's conditions and making restitution in the amount of \$7454.57. *Id.* NRC Exh. 60, 61; Tr. 898-900 (Fields). Defendant also relies on his leaving of government employment in lieu of other action, which was the equivalent of being discharged. 38 NRC at 152, 157.

Defendant, in making restitution under the pretrial diversion agreement, was credited with the time he claimed for travel between his residence and Hatch. The value was calculated at \$645.48 (33 hours × \$19.56 per hour). NRC Exh. 60.

Discussion and Conclusions

The purpose of the Program Fraud Civil Remedies Act of 1986 is: (1) to provide federal agencies that are the victims of false claims with an administrative remedy to recompense such agencies for losses resulting from such claims, (2) to deter the making and presenting of such claims in the future, and (3) to provide due process protection to all persons who are subject to the adminis-

trative adjudication. Congressional Statement of Findings and Declaration of Purposes, Pub. L. No. 99-509, § 6102.

The NRC's implementing regulations provide that "ordinarily double damages and a significant civil penalty should be imposed." The regulations do provide that in determining an appropriate amount of civil penalties and assessments the Judge should evaluate any circumstances that mitigate or aggravate the violation. 10 C.F.R. § 13.31(a). The regulations provide a nonexhaustive list of sixteen factors that may influence the determination. 10 C.F.R. § 13.31(b). However, they do not limit the Judge from considering any other factors that may mitigate or aggravate the offense for which sanctions are imposed. 10 C.F.R. § 13.31(c).

Complainant, in seeking the maximum sanction, correctly characterized the nature of the offenses, that Defendant seized all opportunities to inflate his overtime and travel expenses throughout his 13-month rotational assignment and employed various deceptive means to accomplish his purpose.

The Act provides for recompense to the agency and the imposition of a sufficient sanction to deter any such future conduct. The NRC relates the maximum sanction to the cost of the investigation which it places at \$28,514. I find this sum to have been established by the preponderance of the evidence. Although estimates had to be made to arrive at the figure, the evidence was sufficient to conclude that the figure is more likely to be true than not true.

In determining the appropriate penalty and assessment to be imposed, Complainant's position must be weighed with Defendant's that he has already been sanctioned for the acts cited in the Complaint. Defendant was indicted. He was subject to the criminal justice system for a period of time. He made restitution in the amount of \$7454.57 and he lost his position with the NRC.²

Although the sanction in the criminal matter was not of a type that enabled Defendant to claim successfully the constitutional protection against double jeopardy it must be considered in arriving at a civil penalty and assessment that accomplishes the purposes of the law and is fair and just.

Based on all of the record, I find that a proper sanction that is proportional to what occurred requires that Defendant pay a civil penalty of \$4000 on Count XIV, which is not otherwise subject to an assessment because the \$3944 false claim was not paid by the government. A penalty is in order whether or not the false claim succeeds. Defendant should pay on the remaining 22 counts a double assessment of the \$8855.68 in false claims paid by the government. The \$17,711 assessment should be reduced by the \$7454.57 in restitution, leaving a sum of \$10,256. The combined civil penalty and net assessment that should be paid total \$14,256.

²In making restitution, Defendant was not charged for the time he claimed for commuting between Vidalia and Baxley, Georgia. The record in this proceeding warranted a different result.

The amount is less than the government's investigation costs. However, Defendant has paid significantly otherwise. A price has been established for such conduct that should deter others from filing false claims.

The civil penalty and assessments were supported by a preponderance of the evidence.

V. ORDER

Based upon the entire record, it is hereby ordered that Defendant shall pay to the Complainant \$14,254, for a civil penalty and assessments for filing false claims with the government, as hereinbefore found.

Pursuant to 10 C.F.R. § 13.37(c), notice is hereby given that unless this Initial Decision is timely appealed to the authority head, or a motion for reconsideration of the Initial Decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the Administrative Law Judge. 10 C.F.R. § 13.37(d).

Defendant may file a motion for reconsideration of the Initial Decision within 20 days of the receipt of the Initial Decision. If service was made by mail, receipt will be presumed to be 5 days from the date of mailing in the absence of contrary proof. 10 C.F.R. § 13.38(a).

Defendant may appeal the initial decision to the authority head by filing a notice of appeal with the authority head in accordance with 10 C.F.R. § 13.39. A notice of appeal may be filed at any time within 30 days after the Administrative Law Judge issues the initial decision. 10 C.F.R. § 13.39(a) and (b)(1).

If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the Administrative Law Judge denies the motion or issues a revised initial decision, whichever applies. 10 C.F.R. § 13.39(b)(2).

Morton B. Margulies
CHIEF ADMINISTRATIVE LAW
JUDGE

March 9, 1994
Bethesda, Maryland

APPENDIX 1

TABLE SUMMARIZING ALLEGED FALSE CLAIMS

Count	Date of Claim	Voucher	Subject of Claim	Amount of Claim (\$)
I	04 20 90	Form 145	Overtime	938.88
II	05 05 90	Form 145	Overtime	660.15
III	05 19 90	Form 145	Overtime	528.12
IV	09 28 89	R905842	Furniture rental	154.33
V	10 12 89	R000002	Furniture rental	267.91
VI	11 01 89	R000002	Furniture rental	267.92
VII	11 08 89	R000002	Furniture rental	267.91
VIII	11 29 89	R000002	Furniture rental	267.92
IX	12 13 89	R000002	Furniture rental	267.91
X	01 01 90	R000002	Furniture rental	267.92
XI	03 21 90	R000002	Furniture rental	1089.52
XII	04 02 90	R002305	Furniture rental	517.90
			Car rental	91.63
XIII	05 01 90	R002305	Furniture rental	535.83
			Car rental	108.90
			Housing rental	275.00
			Meals & incidental expenses (M&IE)	30.00
XIV	12 24 90	R002305	Furniture rental	2679.15
			Car rental	540.50
			Housing rental	1375.00
			M&IE	153.00
XV	01 02 90	R9B3154	M&IE	123.50
			Mileage for personal vehicle use	155.25
XVI	01 02 90	R0B0011	M&IE	130.00
			Mileage for personal vehicle use	218.40
XVII	01 02 90	R0B0027	M&IE	221.00
			Mileage for personal vehicle use	261.60
XVIII	01 02 90	R0B0393	M&IE	102.00
			Mileage for personal vehicle use	12.00
XIX	01 02 90	R0B0656	M&IE	123.50
			Mileage for personal vehicle use	12.00
XX	01 16 90	R0B0841	M&IE	123.50
			Mileage for personal vehicle use	208.80

Count	Date of Claim	Voucher	Subject of Claim	Amount of Claim (\$)
XXI	01 29 90	R0B0993	M&IE	117.00
			Mileage for personal vehicle use	12.00
XXII	02 12 90	R0B1098	M&IE	123.50
			Mileage for personal vehicle use	216.00
XXIII	04 02 90	R0B1505	M&IE	65.00
			Mileage for personal vehicle use	122.88

APPENDIX 2

COMPARISON OF THE RECORDED TIME OF THE FIRST ENTRY AND LAST EXIT OF THE PROTECTED AREA BY DEFENDANT

PAY PERIOD 9

Date		First Entry/Last Exit	Time Span	Less Lunch	Hours Claimed
4/9	(Mon)	7:39 a.m. - 4:46 p.m.	9:07	8:22	12
4/10	(Tue)	7:25 a.m. - 4:58 p.m.	9:33	8:48	12
4/11	(Wed)	7:56 a.m. - 4:21 p.m.	8:48	8:03	12
4/12	(Thu)	7:56 a.m. - 4:21 p.m.	8:25	7:40	12
4/13	(Fri)	8:03 a.m. - 3:18 p.m.	7:14	6:30	12
		TOTAL	43:08	39:23	60
4/15	(Sun)	NONE			
4/16	(Mon)	7:26 a.m. - 4:02 p.m.	8:36	7:51	12
4/17	(Tue)	7:15 a.m. - 3:54 p.m.	8:39	7:54	12
4/18	(Wed)	7:52 a.m. - 4:12 p.m.	8:20	7:35	12
4/19	(Thu)	7:43 a.m. - 5:41 p.m.	9:58	9:13	12
4/20	(Fri)	7:31 a.m. - 2:03 p.m.	6:32	5:47	10
		TOTAL	42:05	38:20	68

PAY PERIOD 10

Date	First Entry/Last Exit	Time Span	Less Lunch	Hours Claimed
4/22 (Sun)	NONE			
4/23 (Mon)	7:05 a.m. – 4:26 p.m.	9:21	8:36	12
4/24 (Tue)	6:37 a.m. – 6:48 p.m.	12:11	11:26	12
4/25 (Wed)	6:49 a.m. – 6:30 p.m.	11:41	10:56	12
4/26 (Thu)	6:48 a.m. – 5:44 p.m.	10:56	10:11	12
4/27 (Fri)	6:56 a.m. – 12:36 p.m.	5:40	—	10
	TOTAL	49:49	46:49	68
4/29 (Sun)	3:02 p.m. – 5:34 p.m.	2:32	—	8
4/30 (Mon)	6:31 a.m. – 5:51 p.m.	11:20	10:35	12
5/1 (Tue)	6:39 a.m. – 5:30 p.m.	10:51	10:06	12
5/2 (Wed)	6:49 a.m. – 5:50 p.m.	11:01	10:16	12
5/3 (Thu)	6:43 a.m. – 5:28 p.m.	10:45	10:00	12
5/4 (Fri)	3:56 a.m. – 11:34 a.m.	7:38	6:53	7
	TOTAL	54:07	50:22	63

PAY PERIOD 11

Date	First Entry/Last Exit	Time Span	Less Lunch	Hours Claimed
5/6 (Sun)	12:27 p.m. – 5:52 p.m.	5:25	—	8
5/7 (Mon)	6:03 a.m. – 5:32 p.m.	11:29	10:44	12
5/8 (Tue)	6:43 a.m. – 5:49 p.m.	11:06	10:21	12
5/9 (Wed)	6:05 a.m. – 5:39 p.m.	11:34	10:49	12
5/10 (Thu)	6:30 a.m. – 4:34 p.m.	10:04	9:19	12
5/11 (Fri)	7:02 a.m. – 11:41 a.m.	4:39	—	8
	TOTAL	54:17	51:17	64
5/13 (Sun)	2:40 p.m. – 7:09 p.m.	4:29	—	10
5/14 (Mon)	6:46 a.m. – 6:01 p.m.	11:15	10:30	12
5/15 (Tue)	6:55 a.m. – 5:44 p.m.	10:49	10:04	12
5/16 (Wed)	7:03 a.m. – 5:50 p.m.	10:47	10:02	12
5/17 (Thu)	6:15 a.m. – 6:09 p.m.	11:54	11:09	12
5/18 (Fri)	7:32 a.m. – 12:55 p.m.	5:23	—	8
	TOTAL	54:37	51:37	66



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 50-289

GENERAL PUBLIC UTILITIES
NUCLEAR CORPORATION
(Three Mile Island Nuclear
Station, Unit 1)

March 31, 1994

The Director of the Office of Nuclear Reactor Regulation denies a Petition dated July 10, 1992, filed with the Nuclear Regulatory Commission (NRC) by Robert Gary, on behalf of the Pennsylvania Institute for Clean Air (PICA), requesting that the NRC take action with respect to GPU Nuclear Corporation (GPUN). The Petitioner alleged discrepancies in the Dauphin County Radiological Emergency Response Plan (RERP) and that the Pennsylvania Emergency Management Agency (PEMA) and the Dauphin County RERPs fail to provide for the use of military vehicles in the event of a radiological emergency, and requested that the NRC order GPUN to "power down" Three Mile Island Nuclear Station Unit 1 (TMI-1) until a workable emergency evacuation plan is in place. In various supplements to the Petition, the Petitioner alleged additional deficiencies in emergency preparedness planning and drills, and requested that the 10-mile plume exposure pathway for TMI-1 be expanded to include the City of Harrisburg, that the NRC conduct an independent *de novo* investigation of Petitioner's concerns, that the NRC require GPUN to remit \$1 million per year to the Commonwealth of Pennsylvania for emergency planning around TMI-1, or in the alternative that the NRC federalize the collection and distribution of emergency preparedness funds, and that the NRC require that the RERP for Dauphin County be limited to 100 pages, tabbed, waterproofed, color-coded, and in large type for ease of use in an emergency, and include all implementing procedures. After an evaluation of the PEMA and Dauphin County RERPs by the Federal Emergency Management Agency, the Director concludes that Pe-

tioner raised no substantial public health or safety concerns and that there is reasonable assurance that adequate offsite protective measures can and will be taken to protect the health and safety of the public in the event of a radiological emergency at TMI-1.

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

I. INTRODUCTION

By letter dated July 10, 1992, Robert Gary, on behalf of the Pennsylvania Institute for Clean Air (Petitioner or PICA), submitted a Petition pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206) to Ivan Selin, Chairman, U.S. Nuclear Regulatory Commission (NRC or staff), requesting that the NRC take action with respect to General Public Utilities Nuclear Corporation (GPUN or Licensee). The Petitioner requested that as soon as possible (preferably within 5 working days) (1) the Federal Emergency Management Agency (FEMA) examine certain alleged transportation-related discrepancies in the Dauphin County Radiological Emergency Response Plan (RERP), and (2) the NRC order GPUN to "power down" Three Mile Island Nuclear Station Unit 1 (TMI-1) and not permit the plant to generate power until the discrepancies are corrected and a valid, workable emergency evacuation plan is in place. Dauphin County is one of five risk counties that lie partially or wholly within the 10-mile plume exposure pathway emergency planning zone (EPZ) for TMI-1.

The Petition alleged a number of deficiencies in the Dauphin County RERP. The Petitioner raised three major areas of concern, as follows:

1. The Dauphin County emergency operations center (EOC) fails to adequately maintain letters of intent for the county's transportation providers.
2. The Dauphin County RERP lists out-of-date names and telephone numbers for the bus providers and lacks after-hours telephone numbers for those providers, and fails to account for approximately 60 of the 450 required buses.
3. The Pennsylvania Emergency Management Agency (PEMA) and the Dauphin County RERPs fail to provide for the use of military vehicles in the event of a radiological emergency.

II. BACKGROUND

Because the concerns raised by the Petitioner relate to state and local emergency response plans, the Staff requested assistance from FEMA in a letter

dated July 22, 1993, in accordance with 10 C.F.R. § 50.47(a)(2), as well as the memorandum of understanding (MOU) between the NRC and FEMA, as updated on June 17, 1993, *see Federal Register* at 58 Fed. Reg. 47,996 (Sept. 14, 1993). FEMA is the federal agency with primary responsibility for offsite emergency planning for nuclear power plants. Exec. Order No. 13,657 (*see* 53 Fed. Reg. 47,513), *reprinted in* 50 U.S.C.A. § 2251, app. at 199 (1988).

By letter dated August 5, 1992, to Mr. Gary, the Staff acknowledged receipt of the Petition and informed the Petitioner of the NRC's request for assistance from FEMA.

Mr. Gary submitted information supplementing the Petition in letters to the NRC dated December 2, 1992, January 15, 1993, February 14, 1993, and October 7, 1993. Mr. Gary also provided supplemental information in a telephone call to the Staff on July 10, 1992, as documented in a letter to Mr. Gary dated October 28, 1992. The Staff forwarded this correspondence to FEMA to consider in evaluating the concerns raised in the Petition.

In two letters to the NRC, one undated letter received on July 18, 1993, and one dated January 6, 1994, the Petitioner submitted additional information supplementing the Petition, which did not require further assistance from FEMA to evaluate, and which has been considered in this Decision.

On February 2, 1994, Mr. Gary made additional requests on behalf of PICA at a public meeting with the NRC Staff.

FEMA Interim Report

By letter dated October 27, 1992, FEMA provided the NRC with an interim report of the actions that FEMA had taken to date in response to the Petition. On September 4, 1992, FEMA Region III Staff met with representatives of FEMA and the Dauphin County Emergency Management Agency to discuss the issues raised by the Petitioner. As a result of the meeting and FEMA's initial review of the Dauphin County plans, FEMA found that:

1. The letters of intent at the Dauphin County emergency operations center were not current. However, in early August 1992, Dauphin County sent out new letters of intent to the county transportation providers for their signatures. FEMA reviewed the content of these letters and determined that they did not include pertinent information on the number and capacity of transportation vehicles available. Amended letters requesting the number and capacity of vehicles were sent to these transportation providers, but these letters had not yet been signed and returned.
2. A review of the Dauphin County RERP indicated that all groups (general and special populations) requiring transportation had been identified and were current as of September 1992. However, there were discrepancies between sections of the Dauphin County RERP that concerned the

number of buses available for general population evacuation. PEMA and Dauphin County were revising the Dauphin County RERP to include more accurate, up-to-date numbers concerning buses.

3. Both the State and Dauphin County RERPs contained provisions for the deployment of the Pennsylvania Army National Guard (PAARNG) to Dauphin County, if necessary, during a radiological emergency. However, FEMA requested further information from PEMA regarding (a) the general type and amount of resources that are available to the county through the PAARNG during such an emergency, and (b) the extent to which PAARNG personnel have been trained and exercised in responding to radiological emergencies.

FEMA informed the NRC that additional time would be required to (1) give PEMA and Dauphin County adequate time to complete the activities that were undertaken to address the Petitioner's concerns, and (2) allow FEMA time to review the plan revisions, signed letters of intent, and other materials to ensure that the Petitioner's concerns had been adequately addressed and alleviated.

By letter dated November 24, 1992, the NRC forwarded FEMA's initial findings to Mr. Gary.

Letter from R. Gary to T. Murley, Director, Office of Nuclear Reactor Regulation, Dated December 2, 1992

By letter dated December 2, 1992, to the NRC, the Petitioner acknowledged receipt of FEMA's interim report and submitted the following additional questions:

- If there is a plan for use of the PAARNG to evacuate people using military trucks, where is it?
- What are the names and telephone numbers of the PAARNG Commanding Officers or Duty Officers who would be called to activate the evacuation trucks? On what page of the Dauphin County RERP can that information be found?
- What military units are tasked with responding to an evacuation need involving those trucks? Are there designated drivers and company commanders? What kind of briefings have these people had? Where is a list of their names?
- Are there any particular military trucks that are designated for the task of evacuating Harrisburg or any other area of Dauphin County?
- Are there routes and staging areas for these trucks? Does deployment of the PAARNG intend an evacuation procedure or a law-and-order-keeping mission?
- What about coordination between the PAARNG and local officials?

Licensee Response

By letter dated December 30, 1992, the Licensee responded to the Petition. GPUN contends that PICA failed to proffer any evidence of a violation of NRC regulations or of a substantial health and safety issue warranting institution of an enforcement proceeding against GPUN. Additionally, GPUN asserts that the relevant issue for the NRC is whether there is reasonable assurance that adequate protective steps can and will be taken in the event of a radiological emergency, not whether continued improvements in offsite emergency planning could be made.

In addition, GPUN contests three of the Petitioner's allegations. GPUN disputes that emergency preparedness in Dauphin County is substandard because of a lack of letters of agreement with transportation providers. GPUN states that three bus companies have participated in biennial emergency preparedness exercises which FEMA has consistently approved, and GPUN submitted "Statements of Understanding" between the Dauphin County Emergency Management Agency and the Capital Area Transit Bus Company, the Hegins Valley Lines, Inc., Bus Company, and the Capitol Bus Company, all executed in September and October 1992. Secondly, GPUN disagrees that the name and telephone numbers of contact personnel at the bus companies must be in the Dauphin County RERP (the plan). GPUN states that the names and telephone numbers of contact personnel are in the implementing procedures, which is the appropriate location, and that the names and telephone numbers are updated quarterly. Thirdly, GPUN contends that although PEMA has the authority to use military vehicles in radiological emergencies, PEMA does not presently contemplate doing so because of the excessive time required to mobilize military vehicles.

Letter from R. Gary to I. Selin, Chairman, U.S. Nuclear Regulatory Commission, Dated January 15, 1993

By letter dated January 15, 1993, to the NRC, the Petitioner provided a "rejoinder" to the Licensee's response to the Petition and expressed the following concerns:

- PICA's position is that scheduled bus drills show only that walkie-talkies work and that people can be directed to go through a choreography when everyone has been notified prior to the drill. These bus drills would not meet military standards.
- Names and phone numbers of emergency response personnel and organizations should be placed in the RERP for ease of reference by responders in an emergency. Placing this information in implementing procedures may take it out of the public domain in which it could be reviewed by public-interest organizations.

- In addition, the Petitioner posed several questions directed at PEMA:
 - Why aren't the letters of intent for private bus companies on file at PEMA where they are supposed to be?
 - What is PEMA doing to supervise the counties and to ensure that they are in compliance with standard procedures for emergency readiness?
 - Why does PEMA feel that its role is confined to communications, coordination, and liaison?
 - Is PEMA in violation of its founding statute which calls for it to:
 - (a) backstop the counties,
 - (b) build two warehouses and stock them with emergency supplies?
 - What are the names and telephone numbers of current executives at the bus companies and are there any other deficiencies in the county plans that PEMA doesn't know about, and if there are such deficiencies, what steps are being taken to screen these plans for adequacy?
 - Why is Dauphin County 50 school buses short?
 - Why hasn't PEMA aggressively sought more resources from the Pennsylvania General Assembly? Why doesn't PEMA obtain more resources from the General Assembly or the nuclear utility licensees to make distributions to the counties that would be commensurate with their task in the event an evacuation was required?
 - Does the Dauphin County RERP meet the standards in terms of its goal of evacuating those persons within the 10-mile EPZ?
 - Is a 10-mile EPZ reasonable for Three Mile Island, considering that a highly populated area, the City of Harrisburg, is just outside the 10-mile limit and is, therefore, excluded from PEMA's evacuation plans?
 - Are school bus drills, conducted in the middle of workdays when everyone involved has been put on notice ahead of time, adequate tests of emergency preparedness? What standard does PEMA seek to meet its emergency preparedness drills? Are the drills purporting to test the equipment or the emergency responders? If the drills are to test the responders, then they should be unannounced and held at various times of the day and night and, therefore, more closely approximate an actual emergency event.

Letter from R. Gary to I. Selin, Chairman, U.S. Nuclear Regulatory Commission, Dated February 14, 1993

By letter dated February 14, 1993, to the NRC, the Petitioner supplemented his rejoinder of the Licensee's response to the Petition. This supplement included a letter from Stephen R. Reed, Mayor, City of Harrisburg, Pennsylvania, to Mr. Gary, dated February 8, 1993. The following concerns were presented or reiterated in Mr. Gary's and Mayor Reed's letters:

- PEMA should request more funding from the General Assembly, at least \$5 million dollars per year, not \$500,000, to protect all the citizens in the Commonwealth of Pennsylvania in the event of a radiological emergency.
- It is appropriate to use Department of Defense (DOD) equipment to evacuate people from the EPZ, and from the other 90% of Harrisburg as well.
- Mayor Reed states that the City of Harrisburg "remains of the strong view" that the Dauphin County Emergency Management Plan must include specific details for the use of military vehicles from the New Cumberland Army Depot and Indiantown Gap and vehicles and personnel from Mechanicsburg Ships Parts and Control Center.
- The City of Harrisburg opposes the removal of "critical operational data" from the Dauphin County RERP. The data referred to are the names and phone numbers of emergency response personnel and organizations that appear in the implementing procedures.
- Mayor Reed's position is that the entire City of Harrisburg should be included in the 10-mile EPZ around Three Mile Island.

PEMA's Response

By letter dated July 12, 1993, from Mr. Joseph LaFleur, Director, PEMA, to Mr. Robert Adamcik, Chief, Natural and Technological Hazards Division, FEMA Region III, PEMA provided its response to FEMA regarding the concerns raised in the Petition and supplements to the Petition. PEMA has also engaged in direct dialogue and correspondence with Mr. Gary to answer his questions and concerns. PEMA's response is discussed below in addressing Petitioner's concerns.

Letter from R. Gary to I. Selin, Chairman, U.S. Nuclear Regulatory Commission, Received July 18, 1993 (Undated)

The NRC received a letter from the Petitioner (undated) on July 18, 1993, requesting, "at a minimum, . . . the NRC to take over the investigation and complete it with dispatch" due to the length of time that had expired since

submittal of the original Petition. The Petitioner's request for the NRC and/or independent counsel or commission to conduct an independent investigation of the concerns raised in the Petition was reiterated in letters to the NRC dated October 7, 1993, and January 6, 1994. The Petitioner also made this request during a February 2, 1994 meeting with NRC and FEMA staff.

Letter from R. Gary to I. Selin, Dated October 7, 1993

By letter dated October 7, 1993, to the NRC, the Petitioner reiterated several concerns that had been forwarded to the NRC in previous correspondence. Specifically:

- It makes sense to include the residents of Harrisburg in the 10-mile EPZ around Three Mile Island because they would have to evacuate anyway.
- The use of trains and military trucks from New Cumberland and Indiantown Gap should be fully integrated into the county, state, and federal plans for evacuation of the population around TMI-1.
- Emergency preparedness drills should be conducted on an unscheduled basis.
- The evacuation plan based on school buses and private buses is 50 buses short.

FEMA's Final Report

FEMA issued its final report evaluating the State of Pennsylvania and Dauphin County RERPs on December 16, 1993, in response to the concerns raised in the Petition and the supplements to the Petition. FEMA's December 16, 1993 report is discussed below in addressing the Petitioner's concerns.

Letter from R. Gary to I. Selin, Chairman, U.S. Nuclear Regulatory Commission, Dated January 6, 1994

By letter dated January 6, 1994, to the NRC, the Petitioner commented on FEMA's findings and requested that the comments be considered as a supplement to the Petition. The Petitioner's comments are as follows:

- Military vehicles could be activated much faster than buses and much more reliably. The NRC should obtain a "certificate" from the PAARNG stating that they could not respond in less than 6 hours. The NRC should also confirm that there are no other military forces of any kind that could contribute to an emergency evacuation of Harrisburg. A "certificate" from the Secretary of Defense would be appropriate evidence to indicate

that DOD has no forces that could respond in less than 6 hours. 'A military unit that can respond in 1 hour should be found.

- NRC should determine whether PEMA has complied with Pennsylvania law by stockpiling emergency supplies at Torrence State Hospital and Pike Center, rather than building two warehouses. Lack of funds is not an excuse for PEMA's failure to comply.
- PEMA's conclusion that \$500,000 per year is adequate for radiological emergency preparedness for the entire State of Pennsylvania is unjustified. The NRC should determine the needs and resources for emergency preparedness.
- The NRC should investigate PEMA assertions of the availability of emergency supplies at Torrence State Hospital and Pike Center. The NRC should inventory those stockpiles and prepare a "certificate" stating that PEMA is in compliance with Pennsylvania statutory requirements regarding emergency supplies.
- Both PICA and the Mayor of Harrisburg propose that the size of the plume exposure pathway EPZ for Three Mile Island be 20 miles in radius, rather than 10 miles.
- Congress relied on witnesses who promised military standards of preparedness in authorizing the civilian nuclear power program. PEMA's use of unannounced drills only once every 6 years does not meet military standards.
- Although no deficiencies were identified during the May 19, 1993 full-participation exercise for Three Mile Island, it cannot be said that there are no deficiencies in overall emergency preparedness; TMI was cited by the NRC for a delay in staffing of their emergency response facilities during an unauthorized intrusion event on February 7, 1993.

Meeting with Mr. Gary on February 2, 1994

At the request of the Petitioner, the NRC and FEMA held a meeting with the Petitioner on February 2, 1994. This meeting was open to the public and was attended by representatives from GPUN, PEMA, the Nuclear Management and Resources Council, the Union of Concerned Scientists, and the Associated Press. Mr. Gary discussed four concerns at the meeting and stated that he believed that all "other matters raised by PICA are either dependent on these . . . main issues, or they have already been satisfactorily dealt with" The four issues were:

- Evacuation planning for the City of Harrisburg should be in place. To this end, a contingency planning area (CPA) could be established for Harrisburg that would allow for a layered response if the City would be required to be evacuated.

- Use of military vehicles to evacuate the EPZ and the balance of Harrisburg is an option and should not be rejected without a study on its efficacy.
- The \$500,000 per year budget for the state and local radiological emergency preparedness programs is inadequate. The Petitioner believes \$5 million to be a more appropriate amount, or an assessment of \$1 million per year for each nuclear power facility in the state.
- The RERP for Dauphin County should be limited to 100 pages, tabbed, waterproofed, color-coded, and in large type for ease of use in an emergency. Additionally, the RERP should include the implementing procedures.

Petitioner requested that the NRC perform a *de novo* investigation to resolve these issues. Specifically, Petitioner requested that the NRC should contact the appropriate military authorities and investigate the availability and type of military vehicles and personnel, and military response times. Petitioner also suggested a survey of county executives and mayors to determine the level of funding appropriate to meet their emergency preparedness needs.

III. DISCUSSION

The Commission's regulation governing emergency plans for nuclear power reactor applicants seeking operating licenses states in 10 C.F.R. § 50.47(a)(1) that no operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. In accordance with 10 C.F.R. § 50.47(a)(2), the NRC will base its finding, in part, on a review of FEMA's findings and determinations as to whether state and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented. FEMA, in making its determinations, evaluates the state and local plans against the criteria established in NUREG-0654/FEMA-REP-1, Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (November 1980), in accordance with 44 C.F.R. § 350.5(a).

By memoranda to the NRC, dated June 16, 1981, and September 18, 1981, FEMA provided its interim findings and determinations relating to the status of state and local emergency preparedness around Three Mile Island. FEMA concluded that state and local plans possess an adequate "capability to protect the public in the event of a radiological emergency."

For operating reactors, the conditions of the license are delineated in 10 C.F.R. § 50.54. Concerning emergency planning and preparedness, 10 C.F.R. § 50.54(s)(2)(ii) in part, requires the following:

If . . . the NRC finds that the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency . . . and if the deficiencies . . . are not corrected within four months of that finding, the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate. In determining whether a shutdown or other enforcement action is appropriate, the Commission shall take into account, among other factors, whether the licensee can demonstrate to the Commission's satisfaction that the deficiencies in the plan are not significant for the plant in question, or that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons for continued operation.

In accordance with 10 C.F.R. § 50.54(s)(3), the NRC will base this finding, in part, on a review of FEMA's findings and determinations as to whether state and local emergency plans are adequate and capable of being implemented. In accordance with 44 C.F.R. § 350.13(a), FEMA may withdraw its approval of state or local emergency plans if it finds that the state or local plan is no longer adequate to protect public health and safety by providing reasonable assurance that appropriate protective measures can be taken, or is no longer capable of being implemented. The basis for FEMA's withdrawal of approval is the same basis used for making its initial determinations, i.e., the criteria in NUREG-0654/FEMA-REP-1. Subsequent to its interim findings of June and September 1981, FEMA has continued to confirm, through exercise observations and plan reviews, its reasonable assurance finding for the offsite emergency plans and preparedness around Three Mile Island.

A. The July 10, 1992 Petition

Summarized below for each of the three major areas of concern raised in the original Petition is NRC's evaluation of those concerns, based upon FEMA's final report dated December 16, 1993, and PEMA's response to FEMA in a letter dated July 12, 1993.

1. The Dauphin County EOC failed to maintain letters of intent for the county's transportation providers.

PEMA has begun to place more emphasis on such documentation and to obtain letters of intent, in the form of statements of understanding (SOU), from their resource providers. PEMA provided FEMA with SOUs dated September 1992 and October 1992 between Dauphin County and the three bus transportation providers. FEMA finds that these SOUs meet the requirement of demonstrating the provider's intent to respond to emergencies.

In subsequent correspondence the Petitioner questioned why these SOUs were not on file at PEMA. In a letter to Mr. Gary, dated July 15, 1992, PEMA answered this by stating that the SOUs are negotiated and maintained by the

cognizant risk county where the resources are to be used. There is no federal requirement to maintain copies of agreements between local governmental jurisdictions and private resource providers at the state level. Accordingly, Petitioner has neither raised a substantial safety concern, nor demonstrated that the RERP fails to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

2. The Dauphin County RERP lists out-of-date names and telephone numbers for the bus providers, lacks after-hours telephone numbers for those providers, and does not account for some buses required by the RERP.

The Dauphin County RERP has been revised as of February 1993. Contact names and telephone numbers for bus providers have been updated. Because telephone numbers are not needed or intended to be shown in the Dauphin County RERP, PEMA moved them to the standard operating procedures (SOPs) for the applicable county staff personnel.

FEMA Region III staff telephoned the three bus providers listed for Dauphin County and verified the names and telephone numbers of the contacts, including the phone numbers for off-hours. The FEMA Region III staff subsequently reviewed this information in the SOPs and verified its accuracy. In addition, during the May 1993 exercise, FEMA observed the Dauphin County transportation staff make actual telephone calls to the three bus companies. The FEMA staff ascertained the number of buses available from these companies and notified the municipalities that their unmet needs would be met. According to the plan, 56 buses would be needed to fill the municipalities' unmet needs, in addition to the 96 buses already available from county resources. PEMA was apprised of the county's unmet need of 56 buses and demonstrated that 56 buses could be supplied from state resources.

In subsequent correspondence the Petitioner questioned the removal of contact names and phone numbers from the Dauphin County RERP and their relocation into the SOPs; thus, according to the Petitioner, taking them out of the public domain. The Petitioner also presented a letter from Mayor Reed of Harrisburg supporting the position that this type of information should remain in the RERP.

The Dauphin County RERP is intended to provide a broad perspective of its objectives and of the organization's concept of operations, including a description of the emergency response organization, facilities, responsibilities and authorities, and interorganizational relationships. It is not intended to contain details that are subject to change, such as names, phone numbers, step-by-step procedures, etc. These details are maintained in procedures (SOPs) that are used by specific response organization personnel to implement the plan objectives. Therefore, it is reasonable and appropriate to place information such as names and phone numbers in the applicable SOPs.

Petitioner has not raised a substantial safety concern or demonstrated that the RERP fails to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

3. *The PEMA and the Dauphin County RERPs fail to provide for the use of military vehicles for evacuation in the event of a radiological emergency.*

In a letter to Mr. Gary dated September 23, 1992, Stephen R. Reed, Mayor of Harrisburg, Pennsylvania, supported the "view that military vehicles, of which there are plenty in the immediate Harrisburg area, be a part of the Dauphin County Plan." In subsequent correspondence with the NRC, the Petitioner submits that military trucks could also be used to evacuate the balance of Harrisburg that is outside the established 10-mile EPZ.

PEMA states in its letter dated July 12, 1993, that Pennsylvania's emergency response plans do not rely upon military vehicles for the initial response during an emergency, because to do so would be more time-consuming than the process currently outlined in emergency response plans. Rather, the PAARNG will support counties on a contingency basis for radiological and other emergencies. The PAARNG provides a battalion to assist each risk and support county. Dauphin County is actually supported by one primary battalion with backup, as necessary, by a second specified battalion. The units are directed to forward assembly areas (to be determined 2 hours after notification). Each battalion takes approximately 6 hours to assemble and be prepared to move from their armories. The specific tasks of each battalion will be determined when the units become available and the needs of the county emergency management agency are solidified in light of the events as they unfold. The PAARNG is equipped with combat, combat support, combat service support vehicles, and aircraft that do not lend themselves to the safe and orderly movement of civilians. According to PEMA, the depots referenced by the Petitioner and Mayor Reed do not have assigned to them Table of Organization and Equipment truck companies. Instead, they rely primarily on commercial trucking companies and, occasionally, U.S. Army Reserve truck companies using flatbed trailers. Therefore, PEMA does not plan to utilize National Guard trucks to evacuate civilians. Moreover, PEMA states that it has identified sufficient civilian bus assets to evacuate that portion of the population that may not have a method of personal transportation.

The NRC has no requirements that specify the precise means and methods to be used in carrying out prompt protective actions for the public, including evacuation, in the event of a radiological emergency. The choice of such means and methods is at the discretion of the cognizant state and local authorities. Once such means and methods have been selected and proceduralized, FEMA will review and evaluate their adequacy. FEMA's evaluation of the state and local plans is based upon the criteria established in NUREG-0654/FEMA-REP-1, in accordance with 44 C.F.R. § 350.5. FEMA has evaluated the offsite

emergency plans for the 10-mile EPZ surrounding Three Mile Island Nuclear Station, including the provisions for evacuating the EPZ, and found them to be adequate. Accordingly, Petitioner has failed to raise a substantial safety concern or to provide evidence that offsite emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

B. Additional Questions Raised by Mr. Gary

As discussed in Section II, *supra*, Mr. Gary supplemented the July 10, 1992 Petition in subsequent correspondence to the NRC. The NRC forwarded this supplemental information to FEMA for its consideration in reviewing Mr. Gary's concerns. FEMA provided its response in a report to the NRC, dated December 16, 1993.

1. *Why is Dauphin County 50 school buses short and what does this mean for the affected residents?*

The February 1993 Dauphin County plan reflects an overall unmet need for 56 buses. The county plan states that unmet county needs will be reported to PEMA. The state plan requires the Pennsylvania Department of Transportation to develop and maintain an inventory of statewide transportation assets for use in evacuating risk counties. PEMA states that information about transportation providers is maintained in computerized data banks at the state EOC and that procedures for meeting the unmet county needs are part of the state and county SOPs. During the May 19, 1993 biennial radiological emergency preparedness (REP) exercise, FEMA observed that the procedures for reporting and meeting the unmet county transportation needs for Dauphin County were successfully exercised. Accordingly, Petitioner has neither raised a substantial safety concern, nor demonstrated that the RERP fails to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

2. *What are the telephone numbers of the PAARNG commanding officer and/or duty officers who would be called to activate the evacuation trucks? Where in the Dauphin County RERP can this information be found? Which military units are tasked with supplying vehicles for evacuation? Are designated drivers and company commanders designated by name? What type of briefings have these personnel received? Have specific trucks been designated for use in evacuating Harrisburg or other Dauphin County jurisdictions? Have staging area locations and evacuation routes for these trucks been delineated on Dauphin County maps?*

PEMA concluded that since Pennsylvania plans rely entirely upon civilian vehicles for evacuation in the event of a radiological emergency, and military vehicles are only used if the PAARNG has been activated and evacuation assistance is specifically requested, it is not necessary for the Dauphin County plan to include this type of information. FEMA agrees.

With concern to training, PEMA concluded that due to the PAARNG's limited mission in radiological emergency response, their full training schedule, and turnover rate, PAARNG personnel need not receive "civilian radiological" training beyond that provided in their Army annual training program. FEMA agrees. This training satisfies NRC requirements for radiological emergency response training of personnel who may be called upon to assist in an emergency. *See* 10 C.F.R. § 50.47(b)(15).

Accordingly, Petitioner has not raised a substantial safety concern or demonstrated that there is a lack of reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

3. Has a mechanism been set up to coordinate the activation and use of the PAARNG with local officials?

FEMA's review of the state plan identified two different procedures to be followed when a county requests PAARNG's assistance; however, the plan fails to clearly identify the circumstances for triggering each procedure. In addition, the Dauphin County plan does not reference a specific procedure to be followed by the County when requesting PAARNG assistance. The state plan calls for a Department of Military Affairs (DMA) representative to be dispatched to each of the risk counties to coordinate requests for PAARNG assistance. However, the Dauphin County plan does not reiterate this requirement. Instead, the County plan specifies that, after PAARNG activation, the PAARNG will send liaison personnel to the County EOC. FEMA concluded that the Dauphin County RERP should be revised to specify greater detail regarding county requests for PAARNG assistance and PAARNG response.

While FEMA continues to work with PEMA in resolving this issue, FEMA has concluded that the state and county plans are adequate and continue to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

In view of the above, the NRC Staff concludes that the state and county plans make adequate provision for coordinating with the PAARNG, and provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

4. Are there any maps that indicate that the PAARNG will be activated for evacuation purposes, rather than for peace-keeping purposes?

FEMA reports that Appendix 8 of the February 1993 Dauphin County plan states that the PAARNG, once activated, will provide direct support to Dauphin County by performing a variety of radiological emergency response missions as a supplement to the County's resources. Most of these missions, such as traffic control, emergency transportation, emergency fuel on evacuation routes, and emergency clearing of roads, are evacuation-related, not peace-keeping, missions. A specific PAARNG battalion is assigned to Dauphin County for these potential missions.

5. *What is PEMA doing to supervise the counties and to ensure that they are in compliance with standard procedures for emergency readiness? Is PEMA in violation of its founding statute (Title 35, Pennsylvania Consolidated Statutes, § 101) which calls for PEMA to backstop the counties and build two warehouses and stock them with emergency supplies?*

PEMA's letter dated July 12, 1993, states that during an October 2, 1992 meeting attended by Mr. Gary, Senator Schumaker of the Pennsylvania General Assembly, Commissioner Scheaffer (Chairman of the Dauphin County Board of Commissioners), and Mr. Joseph LaFleur, (Director of PEMA), the level of supervision by PEMA of the counties, and PEMA's actions to provide supplies and equipment to the counties during emergencies, were discussed with Mr. Gary.

In a letter to Mr. Gary, dated July 15, 1992, PEMA's General Counsel stated that the legislature had not allocated funds for the construction and stockpiling of two regional warehouses, and that such expensive facilities would be ill-advised because PEMA has adequate stockpiles of emergency supplies at other departmental facilities located at Torrence State Hospital and Pike Center. Although Petitioner requested that the NRC examine stockpiles at Torrence State Hospital and Pike Center, Petitioner presented no evidence to question the validity of PEMA's conclusion regarding the adequacy of those stockpiles. Accordingly, Petitioner's request for an NRC audit of emergency stockpiles at Torrence State Hospital and Pike Center is denied. The NRC requires that emergency response plans provide for maintenance of adequate emergency equipment and supplies. See 10 C.F.R. § 50.47(b)(8). Based upon FEMA's review of emergency stockpiles maintained by Dauphin County and the Commonwealth of Pennsylvania, the NRC Staff concludes that the offsite emergency response plans for TMI-1 are in compliance with section 50.47(b)(8), and that offsite emergency plans and preparedness for TMI-1 provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

In regard to Petitioner's concern as to whether PEMA is in compliance with Pennsylvania State law, the NRC and FEMA do not make determinations of

compliance by state and local emergency response plans with state requirements. This is a matter Petitioner must raise with appropriate state authorities.

6. Are there deficiencies in the county plans, similar to the failure to maintain current information on bus company contacts, that PEMA does not know about? If there might be such deficiencies, what steps are being taken to review these plans for adequacy?

As a result of the Petitioner's inquiries, FEMA reviewed the February 1993 Dauphin County plan and identified some omissions and discrepancies with respect to the plan's transportation and ambulance resource numbers. However, given the nature of emergency plans as living documents that are continuously being revised and updated, FEMA concluded that these discrepancies do not adversely impact the adequacy of the county plan.

PEMA explained the cycle of plan reviews and updates to Mr. Gary at the October 2, 1992 meeting. FEMA also reviews annual plan revisions to identify areas of required and recommended plan improvements. In addition, FEMA will thoroughly review all the plans related to TMI-1, including the Dauphin County RERP, when they are submitted to FEMA for formal plan review and administrative approval under 44 C.F.R. Part 350.

7. In order to assist the counties in planning for and executing evacuation logistics, why does PEMA not obtain more resources from the General Assembly or nuclear licensees and make distributions of these resources to the counties?

At the October 2, 1992, meeting, the Director of PEMA explained to Mr. Gary that there is insufficient justification from the counties to ask the utility ratepayers to assume the cost of the total \$5 million annual expenditure advocated by Mr. Gary to support county radiological emergency response activities. Senator Schumaker of the Pennsylvania General Assembly, also in attendance at the meeting, stated that he would not place such a burden on the ratepayers due to the state's economic situation.

Mr. Gary, in subsequent correspondence with the NRC, and at the February 2, 1994 meeting with representatives of the NRC and FEMA, reaffirmed his claim that additional monies to support offsite emergency planning are necessary. During the February 2, 1994 meeting, the Petitioner proposed that the NRC require that GPUN remit \$1 million per year to the Commonwealth of Pennsylvania to be earmarked for emergency planning around TMI-1. The Petitioner requested that in the alternative the NRC federalize the collection and distribution of these funds.

The NRC has no requirements concerning the size and allocation of budgets for offsite emergency response organizations. Since FEMA has evaluated offsite planning and preparedness for TMI-1 and concluded that they are adequate, there is no basis under NRC regulations to address the funding of state and local

radiological emergency preparedness programs. Moreover, the Petitioner has not presented any information to demonstrate that current funding is inadequate. Accordingly, Petitioner's request for NRC action to require additional funding through the Commonwealth of Pennsylvania's statutory mechanism or a federal scheme is denied.

8. *Is a strictly delineated 10-mile emergency planning zone (EPZ) reasonable for Three Mile Island, considering that a highly populated area, the capital city of Harrisburg, is just outside the 10-mile limit?*

In PEMA's letter dated July 12, 1993, PEMA states that the 10-mile EPZ for TMI-1 is based upon NRC and EPA studies in NUREG-0396, "Planning Basis for the Development of state and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants," December 1978. When evacuation is called for, the Commonwealth of Pennsylvania will direct the immediate evacuation of the entire 10-mile EPZ. PEMA also states that the emergency response organization within 10 miles of TMI-1 can be expanded beyond 10 miles if conditions warrant. FEMA is in agreement with PEMA's interpretation of the requirements governing the size of the 10-mile EPZ.

In a letter from Stephen R. Reed, Mayor of Harrisburg, to Mr. Gary, dated February 8, 1993, Mayor Reed agreed with Mr. Gary's concern that the City of Harrisburg should be included in evacuation plans for TMI-1. To this end the Mayor noted that although the city is not "officially recognized" as part of the 10-mile EPZ, the city has identified, and would be able to mobilize, sufficient resources to support evacuation of both Harrisburg's portion of the 10-mile EPZ and the contiguous areas of Harrisburg to the north.

In the February 2, 1994 meeting, Mr. Gary suggested that a "contingency planning area" could be established for the City of Harrisburg to provide for a preplanned layered response that would not require rulemaking for an expansion of the established EPZ around TMI-1. Mr. Gary did not explain how a contingency planning area differs from expansion of the 10-mile EPZ, nor is any difference apparent.

The size of the EPZ for a commercial nuclear power plant is established by the NRC in 10 C.F.R. § 50.33(g) and Appendix E to 10 C.F.R. Part 50. The choice of the size of the EPZs (about 10 miles in radius for the plume exposure pathway and about 50 miles in radius for the ingestion pathway), as discussed in NUREG-0396, represents a judgment that a 10-mile EPZ provides sufficiently detailed planning that must be performed to ensure an adequate emergency response. In a particular emergency, protective actions might well be restricted to a small part of the planning zones. On the other hand, the response measures established for the 10-mile and 50-mile EPZs can and will be expanded if the conditions of a particular accident warrant it. Although an

EPZ is generally circular in shape, the actual shape is established based on local factors such as demography, topography, access routes, and governmental jurisdictional boundaries.

The Commission reaffirmed the reasonableness of the 10-mile EPZ in 1989. The Commission stated:

Implicit in the concept of "adequate protective measures" is the fact that emergency planning will not eliminate, in every conceivable accident, the possibility of serious harm to the public. Emergency planning can, however, be expected to reduce any public harm in the event of a serious but highly unlikely accident. Given these circumstances, it is entirely reasonable and appropriate for the Commission to hold that the rule precludes adjustments on safety grounds to the size of an EPZ that is "about 10 miles in radius." In the Commission's view, the proper interpretation of the rule would call for adjustment to the exact size of the EPZ on the basis of such straightforward administrative considerations as avoiding EPZ boundaries that run through the middle of schools or hospitals, or that arbitrarily carve out small portions of governmental jurisdictions. The goal is merely planning simplicity and avoidance of ambiguity as to the location of the boundaries.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 384-85 (1987).

The 10-mile EPZ for the TMI-1 facility has been determined to satisfy NRC requirements. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-81-59, 14 NRC 1211, 1553-69 (1981), *aff'd*, ALAB-697, 16 NRC 1265 (1982), *aff'd*, CLI-83-22, 18 NRC 299 (1983). Moreover, the City of Harrisburg, Pennsylvania, filed a petition under 10 C.F.R. § 2.206 on May 30, 1984, to include the city in evacuation plans for TMI-1. The Director's Decision in response to that petition concluded that "the currently configured plume exposure pathway EPZ is in conformance with emergency planning requirements and is adequate to provide a basis for emergency response efforts including evacuation in the event of an emergency at the TMI-1 facility," and denied the request to include the City of Harrisburg in the 10-mile EPZ. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), DD-84-18, 20 NRC 243 (1984). Petitioner has presented no information to justify disturbing these decisions.

9. *What standard does PEMA seek to meet in its emergency preparedness drills? Are the drills purporting to test the equipment or the emergency responders? If the drills are to test the responders, then they should be unannounced and held at various times of the day and night and, therefore, more closely approximate an actual event.*

FEMA-REP-14, "Radiological Emergency Preparedness Exercise Manual," and FEMA-REP-15, "Radiological Emergency Preparedness Exercise Evaluation Methodology," outline the standards that should be met by state and local emergency response organizations, including PEMA, during full-scale emer-

gency preparedness exercises. Those standards apply to personnel and equipment.

During an October 2, 1992 meeting, PEMA explained to Mr. Gary that, due to funding limitations, the state relies heavily on volunteers to staff the county and municipal EOCs, and schedules the biennial REP exercises in the late afternoon to accommodate these volunteers. Although the volunteers would be willing to respond to an actual emergency at any time, they cannot afford to leave their regularly scheduled work activities for an exercise. In its July 12, 1993 letter to FEMA Region III, PEMA states that military standards, as suggested by the Petitioner, cannot be applied to a civilian system that relies to any significant degree on volunteers. FEMA agrees with the reasonableness of PEMA's position and notes that under FEMA-REP-14, all offsite response organizations are required to demonstrate their emergency response capabilities in an unannounced mode and in an off-hours mode once every 6 years through an unannounced and off-hours exercise or drill. TMI-1 last conducted an unannounced, off-hours exercise with state and local participation on June 26, 1991.

Petitioner has presented no evidence to contradict FEMA's conclusion that the scheduled biennial REP exercise and the unannounced drill or exercise every 6 years are adequate and provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. The NRC Staff concludes that the Petitioner has presented no evidence that the standard of 10 C.F.R. § 50.47(b)(14) is not being met. Accordingly, Petitioner has not demonstrated any substantial safety concern.

10. *PICA requests an inquiry to DOD about the use of military vehicles. Is it possible? What would be the response time? How many people could be moved? What other services could be provided?*

The DOD is a participating agency in the Federal Radiological Emergency Response Plan (FRERP). The FRERP was developed by FEMA and eleven other federal agencies, including DOD, pursuant to Executive Order 12241, for use in responding to peacetime radiological emergencies. The FRERP outlines the federal government's concept of operations and responsibilities for providing assistance to state and local governments with jurisdiction in an emergency. Under the FRERP, DOD will provide assistance in accordance with DOD policies subject to essential operational requirements. DOD may provide assistance in the form of manpower, logistics, and telecommunications, including airlift services. However, DOD is not intended to be a first responder and, therefore, would not be called upon for such immediate protective measures as evacuation of the 10-mile EPZ. Further information on the FRERP is provided at 50 Fed. Reg. 46,559 (Nov. 8, 1985). Petitioner has presented no evidence

to justify disturbing this multiagency federal scheme for emergency response. (See also Section III.A.3, *supra*.)

11. *The population numbers in the Dauphin County plan do not reflect current (1990 census data) population figures.*

The Dauphin County plan was updated with 1990 census data in February 1993.

12. *Evacuation time estimates have not been revised since the early 1980s.*

Revised evacuation time estimates, based upon 1990 census data, were recently completed by a contractor to the Licensee and have been approved by PEMA. The new evacuation time estimates will be incorporated in the 1994 update of the TMI-1 plans and procedures.

13. *It is misleading to cite the success of the May 19, 1993 exercise and conclude that the plant is in great shape. TMI was given a violation based on taking too long to mobilize its emergency response organization during a security event in early 1993.*

A notice of violation was issued to the Licensee following the security event of February 7, 1993, specifically relating to onsite planning and preparedness, and is unrelated to the issues raised by the Petitioner concerning offsite emergency preparedness. The violation does not in any way demonstrate any inadequacy in offsite emergency preparedness. Additionally, the Severity Level III violation was issued to the Licensee due to a delay in staffing of its emergency response facilities, and the violation was self-identified by the Licensee, and prompt corrective actions were taken. The NRC did not conclude, as a result of this enforcement action, that the Licensee's onsite emergency response plans were inadequate.

14. *Petitioner requested an independent investigation of Petitioner's concerns by the NRC Staff, or an independent commission, rather than reliance upon FEMA.*

NRC regulations require that the NRC will base its finding of whether offsite emergency planning and preparedness provide reasonable assurance that adequate protective measure can and will be taken in the event of a radiological emergency upon a review of the FEMA findings concerning offsite emergency planning and preparedness. See 10 C.F.R. § 50.47(a)(2) and 10 C.F.R. § 50.54(s)(3). Moreover, although Petitioner has claimed in various submissions that FEMA is either biased or unable to conduct an adequate review, Petitioner has presented no evidence to warrant such a conclusion. Accordingly, Petitioner's request for an investigation by some entity other than FEMA is denied. The NRC, however, is not precluded from considering information in

addition to the FEMA review, before reaching a decision regarding the adequacy of offsite emergency planning and preparedness for TMI-1, and the NRC has considered the additional information submitted by Petitioner.

15. *Petitioner requested that the NRC require that the RERP for Dauphin County be limited to 100 pages, tabbed, waterproofed, color-coded, and in large type for ease of use in an emergency. Additionally, Petitioner requested that the RERP should physically include all implementing procedures and that implementing procedures should be publicly available.*

There are no NRC requirements concerning the size, organization, typeface, tabbing, or impermeability of offsite emergency response plans. Nor are there any requirements concerning physical organization of implementing procedures for offsite emergency response plans.

The RERP is a publicly available document providing a broad overview of the emergency response organization's concept of operations. The implementing procedures provide detailed instructions to emergency response personnel who need not and do not use the publicly available RERP. Accordingly, there is no reason to require offsite emergency response organizations to maintain the RERP and implementing procedures together physically. Additionally, NRC regulations require that the Licensee submit the emergency response plans of cognizant state and local entities. See 10 C.F.R. § 50.33(g). There is no NRC requirement to submit implementing procedures for offsite emergency plans or to make them publicly available. Accordingly, Petitioner's requests are denied.

FEMA's Findings and Conclusions

Recognizing that (1) RERPs are dynamic, living documents that are always being changed and updated through the annual review process to reflect changes in the EPZ, emergency management policies, and organizational relationships, and (2) PEMA is actively engaged in the development and refinement of RERPs for all of its sites in compliance with established FEMA/NRC planning standards, FEMA reports that the offsite emergency planning issues raised by Mr. Gary are being satisfactorily addressed. FEMA concluded in its report, dated December 16, 1993, that "the offsite radiological emergency response plans and preparedness for TMI-1 are adequate to provide reasonable assurance that appropriate measures can be taken offsite to protect the public health and safety." FEMA based its conclusion on the following factors:

1. PEMA's continuing efforts in the development, revision, and refinement of the RERPs for TMI-1,
2. FEMA's review of the concerns identified in the 10 C.F.R. § 2.206 Petition, related correspondence, and PEMA's response to those concerns, and

3. the results of the May 19, 1993, TMI-1 exercise in which FEMA did not identify any deficiencies but did identify some areas recommended for improvement, areas requiring corrective action, and planning issues that were unrelated to the concerns raised by the Petition. The Commonwealth of Pennsylvania received a copy of the FEMA draft report for the May 19, 1993, exercise and responded to the inadequacies identified in the report. FEMA Region III staff will monitor the state and local governments' correction of all exercise inadequacies.

Petitioner has presented no evidence to prevent the NRC from concluding, as did FEMA, that the offsite emergency response plans and preparedness for TMI-1 provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

IV. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only if substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that has been applied to the concerns raised by the Petitioner to determine whether the action requested by the Petitioner, or other enforcement action, is warranted.

FEMA, as the federal agency primarily responsible for oversight of offsite emergency planning for nuclear power plants, has evaluated the concerns raised by the Petitioner and concluded, for the reasons discussed above, that the emergency response plans for the Commonwealth of Pennsylvania and Dauphin County continue to be adequate and that there is reasonable assurance that adequate protective measures can and will be taken offsite in the event of a radiological emergency at TMI-1.

Based upon the above, the NRC Staff concludes that Petitioner has not raised any substantial health or safety concern. After review of FEMA's findings and conclusions and the material submitted by the Petitioner, the NRC Staff also concludes that there is reasonable assurance that adequate offsite protective measures can and will be taken to protect the health and safety of the public in the event of a radiological emergency at TMI-1. Accordingly, based on the above, Petitioner's requests for an independent *de novo* investigation of Petitioner's concerns, for a shutdown of TMI-1, for the inclusion of the City of Harrisburg in the 10-mile EPZ or its addition to the 10-mile EPZ as a contingency planning area, for NRC action to require \$5 million annual expenditure for radiological emergency preparedness in the Commonwealth of Pennsylvania or to determine the needs and resources of the Commonwealth regarding emergency planning,

for NRC to impose specifications upon the physical characteristics and length of the Dauphin County RERP, and for inclusion of implementing procedures in the publicly available RERP are denied.

A copy of this Decision will be filed with the Secretary for the Commission to review as provided in 10 C.F.R. § 2.206(c). The Decision will become the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 31st day of March 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

**Docket No. 40-08027-MLA
(Source Material License
No. SUB-1010)**

SEQUOYAH FUELS CORPORATION

April 1, 1994

The Commission grants the Native Americans for a Clean Environment and Cherokee Nation's petition for review of the presiding officer's order, LBP-93-25, 38 NRC 304 (1993), which allowed the Sequoyah Fuels Corporation to withdraw its license renewal application and terminated the proceeding. The Commission sets the issues and a schedule for review.

ORDER

The Native Americans for a Clean Environment and the Cherokee Nation (Petitioners) have filed a petition before the Commission, pursuant to 10 C.F.R. § 2.786(b), for review of the presiding officer's Memorandum and Order, LBP-93-25, which allowed the Sequoyah Fuels Corporation (SFC) to withdraw its license renewal application and terminated the proceeding. 38 NRC 304 (1993). The NRC Staff and SFC oppose Commission review. The Petitioners also have filed a motion for leave to reply to the NRC Staff's and SFC's responses to the petition for review.

In accordance with section 2.786(d), the Commission has decided to grant review of LBP-93-25.¹ The parties to the review proceeding shall be the Petitioners, SFC, and the NRC Staff. In reviewing LBP-93-25, the Commission is particularly interested in the parties' arguments on the following matters, which should be addressed in their briefs:

- (1) What is the basis for the presiding officer's jurisdiction over decommissioning activities in a license renewal proceeding in which the licensee requests to withdraw its renewal application?
- (2) Faced with a request to withdraw an application under 10 C.F.R. § 2.107(a), what actions may the presiding officer in a license renewal proceeding take? May a presiding officer deny the withdrawal of an application?
- (3) Was a determination of the Licensee's compliance with 10 C.F.R. § 40.42(b) and (c) necessary to the presiding officer's decision on whether to permit the withdrawal of the renewal application? If so, has the Licensee satisfied the requirements of those regulations?
- (4) Upon withdrawal of the license renewal application, does 10 C.F.R. § 40.42(e) maintain SFC's license in effect?
- (5) What prejudice, if any, occurs to the intervenors' hearing rights under the Atomic Energy Act from the presiding officer's approval of the withdrawal of the renewal application?

In addressing these questions, the Petitioners' brief must clearly identify the errors of fact or law in LBP-93-25 on which the Petitioners rely, with appropriate citations to the portion of the record relied upon to support each assertion of error. The Petitioners' brief must be limited to those issues the Petitioners placed or sought to place in controversy in the proceeding. Responsive briefs must contain a reference to the portion of the record that supports each factual assertion made.

A brief in excess of 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Briefs must not exceed 30 pages, exclusive of pages containing the table of contents, table of citations, and any addendum containing statutes, rules,

¹ We have accepted the Petitioners' reply for filing; however, our decision to take review of LBP-93-25 does not turn on the acceptance of their reply. Although much of the reply appears merely to reinforce arguments made in their initial petition for review, the Petitioners arguably raise some issues for the first time in their reply. Although we will not bar the Petitioners from pursuing in their brief filed in response to this Order arguments made in their reply, we caution that we expect Petitioners to provide in their original petition their full statement of reasons for why Commission review is warranted. SFC has asked for an opportunity to reply to the Petitioners' motion. We deny that request. To the extent that the Petitioners pursue arguments in their brief that are derived from their reply, SFC will suffer no prejudice, because SFC will have a full opportunity to rebut those arguments in its responsive brief. See *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992).

regulations, etc. A brief that fails to comply with the provisions of this Order may be stricken, either on motion of a party or by the Commission on its own initiative.

Within 30 days after service of this Order, the Petitioners may file their brief. Within 30 days after service of the Petitioners' brief, Staff and SFC may file a response. Within 15 days after service of the responsive briefs, the Petitioners may file a reply. If the Petitioners choose to reply, their reply brief shall be limited to 15 pages.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 1st day of April 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

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

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

April 7, 1994

The Commission reviews a licensing board decision, LBP-94-6, 39 NRC 105 (1994), which ordered the release of an investigation report prepared by the Nuclear Regulatory Commission (NRC) Office of Investigations (OI). Based upon the deliberative process privilege, the NRC Staff had sought to prevent discovery of the report and its factual exhibits until after an agency decision on possible enforcement action against the Licensee, the target of the investigation. The Commission affirms in part and reverses in part the licensing board's order in LBP-94-6. The Commission finds the evaluative opinion portions of the report protected by the deliberative process privilege, but concurs with the licensing board that purely factual exhibits that do not reveal deliberative analyses are not protected.

RULES OF PRACTICE: INTERLOCUTORY REVIEW
(DISCOVERY ORDERS)

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.

RULES OF PRACTICE: DISCOVERY

Pursuant to 10 C.F.R. § 2.744, NRC documents must be produced if they are relevant to a proceeding and are not exempt from production under the listed exemptions found under 10 C.F.R. § 2.790(a). Even if a relevant document is exempt from disclosure pursuant section 2.790(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.

RULES OF PRACTICE: PRIVILEGE (DELIBERATIVE PROCESS)

The deliberative process privilege protects inter- and intraagency communications reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. The privilege may be invoked in NRC proceedings.

RULES OF PRACTICE: PRIVILEGE (DELIBERATIVE PROCESS)

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.

RULES OF PRACTICE: PRIVILEGE (DELIBERATIVE PROCESS)

Factual material that does not reveal the deliberative process is not shielded by the deliberative process privilege. However, if facts are inextricably intertwined with the opinion portion, or otherwise would reveal the deliberative process of the agency, the facts may be exempt from disclosure.

RULES OF PRACTICE: PRIVILEGE (DELIBERATIVE PROCESS)

In a litigation context, the deliberative process privilege is a qualified, not absolute, privilege. The government's interest in confidentiality is balanced against the litigant's need for the information. The government agency bears the initial burden of showing that the privilege should be invoked. Once the applicability of the privilege has been established, the litigant seeking the information must demonstrate an overriding need for the material.

RULES OF PRACTICE: PRIVILEGE (INVESTIGATORY MATERIAL)

Documents compiled in investigations and inspections whose production could reasonably be expected to interfere with enforcement proceedings may be exempt from disclosure under 10 C.F.R. § 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.

MEMORANDUM AND ORDER

I. INTRODUCTION

In this decision the Commission decides the controversy among the parties over the disclosure of an investigation report prepared by the Nuclear Regulatory Commission (NRC) Office of Investigations (OI). The parties do not dispute that the OI report is relevant to the matters at issue in this license transfer proceeding. However, the NRC Staff has resisted disclosure of the entire report, including the underlying factual information, pending the outcome of the agency's deliberations on possible enforcement action to be taken as a consequence of the investigative results. In LBP-94-6, 39 NRC 105 (1994), the Atomic Safety and Licensing Board denied the Staff's request to delay disclosure and instead ordered prompt release of the easy-to-separate factual information in the report and release of the remainder of the report under a protective order.

This controversy is before the Commission on the "NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigations Report," filed on March 14, 1994, and the Staff's subsequent "Petition for Review of LBP-94-6 and/or Motion for Directed Certification," which was filed on March 24, 1994. On March 18, 1994, the Commission *sua sponte* entered a temporary stay of the Licensing Board's order. In Orders dated March 16 and 25, respectively, the Secretary of the Commission established a schedule for filing answers to the Staff's stay motion and to the Staff's petition for review.¹ We have received answers to both Staff filings from the Licensee, Georgia Power Company (GPC), and the Intervenor, Allen L. Mosbaugh. Both parties oppose the Staff's position with respect to the withholding of factual material appended

¹ In order to expedite our resolution of this controversy, the parties were permitted in their answers to the petition for review to provide arguments on both the question of whether review of LBP-94-6 should be granted and the question of whether LBP-94-6 should be sustained on its merits.

to the OI report. In a March 15 motion, Mr. Mosbaugh has also moved to strike the Staff's stay motion.

Upon consideration of the parties' filings and the record of this proceeding, the Commission hereby grants the Staff's petition for review and, for the reasons stated in this Order, the Commission affirms in part and reverses in part the Licensing Board's order in LBP-94-6. Because the Commission is rendering a decision on the merits of the controversy, we need not rule on the Staff's stay motion and we dismiss it as moot. We also dismiss Mr. Mosbaugh's motion to strike the Staff's motion for a stay. As a consequence of these rulings, we are ordering the Staff to release the exhibits to the OI report within the time specified in section VII of this Order, and to release the OI report itself at the time of issuance of any enforcement action. The only information to be withheld, if any, is privacy information or the identity of any confidential sources.

II. PRELIMINARY PROCEDURAL MATTERS

A. The Staff's Petition for Review

Although the Licensing Board's order is interlocutory by nature, we have permitted limited exceptions to the general proscription against interlocutory appeals in 10 C.F.R. § 2.730(f) if a party can demonstrate that review is appropriate under one of the criteria in 10 C.F.R. § 2.786(g)(1)-(2). See *Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 420-21 (1993). The Staff has shown that review of LBP-94-6 is warranted under the first criterion in section 2.786(g).

At the heart of the Staff's objection to the Licensing Board's order to release the OI report is the Staff's concern that premature release will adversely affect the agency's ongoing deliberation concerning possible enforcement action. Because the adverse impact of that release would occur *now*, the alleged harm is immediate. The impact of the order to release a report that would otherwise be held in confidence is irreparable and could not be alleviated through future review of a final decision of the Licensing Board. Unlike most discovery orders, the instant order must be reviewed now or not at all.

B. Staff's Motion for Stay and Mr. Mosbaugh's Motion to Strike

The Commission is dismissing the Staff's March 14 motion for a stay as moot. A stay motion under section 2.788 is intended as a means of obtaining interim relief pending a final determination of a petition for review. Because we are prepared to resolve the merits of the controversy over the release of the OI report and the Licensing Board's order in LBP-94-6, a decision on the Staff's

motion for a stay is unnecessary. In view of our dismissal of the Staff's stay motion, Mr. Mosbaugh's March 15 motion to strike the Staff's motion may also be dismissed.

One last comment is warranted about the Staff's stay motion. Although that motion was timely under our rules of practice, the Staff waited 10 days after service of the Licensing Board's order to file its motion with the Commission. During this time the Staff was under an obligation pursuant to the Licensing Board's order to begin releasing factual material contained in or appended to the OI report. Under these circumstances, and in the absence of any delay imposed by the Licensing Board with respect to the effectiveness of its order, the Staff should have initiated more promptly its request for a stay of the Licensing Board's order, if only to seek an emergency temporary stay under 10 C.F.R. § 2.788(f) to preserve the status quo.

III. BACKGROUND ON THE DISCLOSURE CONTROVERSY

OI initiated an investigation in late 1990 into allegations that senior officials at the Georgia Power Company (GPC) made material false statements to the NRC about the reliability of the diesel generators at the Vogtle plant. On December 17, 1993, OI completed its investigation and issued a report for further Staff evaluation. Although the instant controversy arises out of the Staff's motion to defer discovery, dated January 24, 1994, that motion was not the Staff's first attempt to prevent access to the fruits of OI's investigation. The Licensing Board granted two earlier Staff requests to defer production of certain tapes, transcripts, and other documents because the Staff believed their release would interfere with OI's then-ongoing investigation.²

On January 24, 1994, the Staff moved to defer all discovery against the Staff pending its evaluation of the OI report for possible enforcement action and consultation with the Commission on any proposed action.³ In a prehearing conference held January 27, 1994, Mr. Mosbaugh's counsel stressed that he needed to obtain the OI report to properly and expeditiously prepare his case in this proceeding. Counsel asserted that the report would serve as his "road map" to documents and for stipulations.⁴

Although Staff counsel indicated at the prehearing conference (Tr. at 169) that the Staff was willing to eventually release the entire OI report, the Staff

² See LBP-93-22, 38 NRC 189 (1993); Memorandum and Order (Motion to Compel Production of Documents by the Staff), at 6-7 (Aug. 31, 1993) (unpublished). On December 17, 1993, the Staff released some tapes and transcripts. See Letter from Charles A. Barth, NRC Staff Counsel, to Licensing Board (Feb. 18, 1994).

³ NRC Staff Motion to Defer Certain Prehearing Activities Until the Staff Has Formulated a Position (Jan. 24, 1994).

⁴ Prehearing Conference Tr. at 159 (Jan. 27, 1994).

maintained that disclosure before an enforcement decision had been reached could adversely affect the ability of the Staff and the Commission to deliberate concerning whether to institute an enforcement action against the Licensee.⁵ The Staff asserted that the OI report is privileged and protected from discovery as a "predecisional" document.⁶ The Staff maintained that a delay in release of the report would not prejudice the interests of the other parties and that other discovery activities could proceed.

The intervenor opposed Staff's request for a delay in the report's release. Mr. Mosbaugh argued that no deliberative process privilege attaches to the OI report. First, Mr. Mosbaugh emphasized that the privilege does not apply to purely factual materials.⁷ Second, he claimed that release of the document to the public would not cause harm to the agency because the report does not contain "candid" or "personal" remarks, and because the authors of the report expected public dissemination of their remarks and, therefore, would not be affected by early disclosure of the report.⁸

GPC supported the Staff's position, but only insofar as it understood the Staff to be seeking protection of the opinions, conclusions, and recommendations within the OI report.⁹ To this extent, GPC conceded that the Staff's claim of privilege to withhold the report as a predecisional, deliberative document appeared valid, and GPC did not believe that Mr. Mosbaugh had demonstrated a sufficient interest in obtaining the OI report prior to an NRC decision on enforcement action.¹⁰ GPC suggested that the Licensing Board could release the OI report to the parties under a protective order that would restrict public access until the NRC's enforcement decision had been made.¹¹

In LBP-94-6, the Licensing Board found that no privilege protected factual information in the OI report if such information was "not inextricably intertwined with privileged communications." LBP-94-6, 39 NRC at 109. As to the evaluative portions of the report, the Board reasoned that because OI's opinions ultimately would be released in this proceeding, disclosure of OI's evaluations under protective order would have "no additional detrimental impact on discussion in the agency." *Id.*

⁵ NRC Brief on Release of OI Report Requested in Licensing Board Order of February 1, 1994, at 2-3 (Feb. 4, 1994) and attached Affidavit of James M. Taylor, Executive Director for Operations.

⁶ NRC Brief on Release of OI Report, *supra*, at 2.

⁷ Intervenor's Brief Concerning the Release of NRC Office of Investigations Report, No. 2-90-020R, at 9 (Feb. 4, 1994).

⁸ *Id.* at 11.

⁹ See GPC's Brief Concerning NRC Staff Release of Certain Investigatory Material at 5 (Feb. 4, 1994). GPC assumed that the Staff was about to release transcripts and other factual material gathered or reviewed by OI.

¹⁰ See *id.* at 5-8.

¹¹ *Id.* at 9.

The Licensing Board weighed the interests of the parties, and concluded that the intervenor and GPC would suffer greater harm from a delay in disclosure of the OI report than Staff would suffer in its deliberations if the report were promptly released. *Id.* at 110. Although the Board doubted the applicability of the deliberative process privilege to the OI report, the Board granted Staff until April 4, 1994, to release the nonfactual portions of the OI report, and also ordered that this disclosure be subject to protective order. *Id.* at 109.

IV. THE PARTIES' ARGUMENTS BEFORE THE COMMISSION

In its petition for review, the Staff claims that the Licensing Board overvalued GPC and the Intervenor's interests in discovery. Petition for Review at 8-10. The Staff asserts that the agency's interest in discharging its enforcement obligations "without the distractions or confusion caused by the premature release of preliminary agency enforcement materials" outweighs the parties' need for disclosure of the report. *Id.* at 7-8. The Staff also argues that the Board's decision is contrary to a longstanding agency practice, reflected in the Staff's Enforcement Manual (section 5.3.4.h), of only releasing investigative material after enforcement action has been taken, and to the "spirit" of the Commission's Statement of Policy on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984). See Petition for Review at 5.

Both GPC and Mr. Mosbaugh oppose the Staff's position, particularly with regard to the factual material gathered by OI. GPC argues that the Staff's withholding of the purely factual information in the OI report is contrary to law and that continued delay in releasing this material is prejudicial to GPC's interests.¹² GPC seeks only the factual material — i.e., OI records of interviews of NRC Staff personnel and the transcripts of OI's interviews of GPC personnel. The intervenor opposes a further delay in release of the OI materials and also emphasizes a particular need for the interviews, depositions, and other factual material collected by OI.¹³

V. DISCOVERY RULES

The rule governing the production of NRC documents in formal administrative proceedings is set forth in 10 C.F.R. § 2.744. Under this rule, NRC documents must be produced if they are relevant to a proceeding and not exempt

¹² GPC's Response to NRC Staff Petition for Review of LBP-94-6 and/or Motion for Directed Certification at 3-6 (Mar. 30, 1994).

¹³ Intervenor's Answer to NRC Staff's Petition for Review of LBP-94-6 and/or Motion for Directed Certification at 9 (Mar. 30, 1994).

from production under the listed exemptions found under 10 C.F.R. § 2.790(a). Even if a document is exempt from disclosure pursuant to section 2.790(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.” 10 C.F.R. § 2.744(d).

In this case the NRC Staff relies on the exemption provided under 10 C.F.R. § 2.790(a)(5) for “[i]nteragency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission.” This exemption is similar to Exemption 5 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b). FOIA’s Exemption 5 shields from disclosure those documents normally privileged in civil discovery, including documents protected by the common law predecisional or deliberative process privilege. *Jordan v. Department of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978); see *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-53 (1975); *EPA v. Mink*, 410 U.S. 73, 85-90 (1973). The deliberative process privilege may be invoked in NRC proceedings. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

The deliberative process privilege is unique to the government and protects inter- and intraagency communications “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Sears*, 421 U.S. at 150 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff’d*, 384 F.2d 979 (D.C. Cir.)), *cert. denied*, 389 U.S. 952 (1967). At least three purposes for the privilege exist:

First, [the privilege] protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that “officials would be judged by what they decided[,] not for matters they considered before making up their minds.”

Jordan, 591 F.2d at 772-73 (en banc) (citation omitted).

The privilege applies only to information that is (1) “predecisional” and (2) “deliberative.” *Petroleum Information Corp. v. Department of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). 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. See *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *Hopkins v. Department of Housing and Urban Development*, 929 F.2d 81, 84 (2d Cir. 1991). For example, in *Grumman Aircraft*, Regional Boards conducted an investigation, and made analytical findings and recommendations in a report presented to a

Renegotiation Board which used the report in its deliberations, but was not bound by the report's conclusions or analysis. The Supreme Court found the Regional Board reports, which had no operative legal effect by themselves but were prepared to assist the Renegotiation Board's decision, "precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5." *Grumman Aircraft*, 421 U.S. at 184-87. See also *Hopkins*, 929 F.2d at 85 (HUD inspection reports were predecisional because inspectors themselves lacked authority to take final agency action).

Communications are deliberative if they reflect a consultative process. Protected documents can include analysis, evaluations, recommendations, proposals, or suggestions reflecting the opinions of the writer rather than the final policy of the agency. See *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1118-19 (9th Cir. 1988). Deliberative documents "relate[] to the process by which policies are formulated." *Hopkins*, 929 F.2d at 84. However, a document need not contain a specific recommendation on agency policy to qualify as deliberative. *National Wildlife Federation*, 861 F.2d at 1118. A document providing "opinions or recommendations regarding facts" may also be exempt under the privilege. See *id.*

Factual material that does not reveal the deliberative process is not shielded by the privilege. *Norwood v. FAA*, 993 F.2d 570, 577 (6th Cir. 1993) (citing *EPA v. Mink*, 410 U.S. at 91 (1973)); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980). However, if facts are "inextricably intertwined" with the opinion portion, or otherwise would reveal the deliberative process of the agency, the facts may be exempt from disclosure. See *Hopkins*, 929 F.2d at 85; *Norwood*, 993 F.2d at 577.

In a litigation context, the deliberative process privilege is a qualified, not absolute, privilege. The government's interest in confidentiality is balanced against the litigant's need for the information. See *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404-05 (D.C. Cir. 1984); *Carl Zeiss Stiftung*, 40 F.R.D. at 327; *Shoreham*, 19 NRC at 1341. The government agency — here the NRC Staff — bears the initial burden of showing that the privilege should be invoked. See *Coastal States*, 617 F.2d at 868. Once the applicability of the privilege has been established, the litigant seeking the information must demonstrate an overriding need for the material. *Shoreham*, 19 NRC at 1341.

VI. ANALYSIS

The deliberative process privilege applies to the OI report.¹⁴ The Staff has made a sufficient showing that the OI report is both a predecisional and deliberative document. As to its predecisional nature, the report is a step in the process leading to an agency decision on enforcement action. Based upon the report, the NRC will determine, in part, whether to take enforcement action. However, the report's conclusions are neither precedential nor binding upon the NRC Staff or the Commission. We are thus satisfied that this document is predecisional. *See generally Grumman Aircraft*, 421 U.S. 168 (1975) (reports containing investigation results, analysis, and findings, and which were prepared to assist an agency decisionmaker in arriving at a final agency decision, were exempt from disclosure). The OI report is also a deliberative document. The report contains OI's evaluative and subjective conclusions on the evidence accumulated during the investigations. For example, sprinkled throughout the report are investigators' "notes," providing evaluations of the reliability and significance of testimony. These subjective evaluations constitute a significant part of the deliberations that will lead to an agency enforcement decision.

Public scrutiny properly focuses upon the agency's enforcement action and the evidence that forms the basis for the action. It strikes the Commission as inappropriate to permit scrutiny of the evaluative statements of OI investigators, even if limited to the other parties, before the Commission itself has had the opportunity to deliberate on any potential enforcement action. As Staff has asserted, the investigators' conclusions may or may not be adopted as a basis for any proposed enforcement action. Ultimately, deliberations within the agency may be harmed by the piecemeal disclosure of evaluative conclusions of agency officials prior to an agency decision.

Protected communications include those "which would inaccurately reflect or prematurely disclose the views of the agency," suggesting as the agency's position that which as yet is merely opinion. *Coastal States*, 617 F.2d at 866. In the long run, the "efficiency of [g]overnment would be greatly hampered if . . . [g]overnment agencies were prematurely forced to 'operate in a fishbowl.'" *Petroleum Information*, 976 F.2d at 1434 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). Moreover, the Commission does not consider it appropriate to provide GPC, the target of the investigation and a potential target of any enforcement action, a copy of OI's opinions and evaluations before

¹⁴ Because the Staff provided the Commission a copy of the OI report with its enforcement recommendations on March 22, we have been able to review the report *in camera* for the purpose of confirming whether it contains privileged material. *See* 10 C.F.R. § 2.744(c). Although we have been provided a listing of the exhibits to the OI report, we have not been provided the exhibits themselves; thus, we have not examined them in rendering this decision.

the Commission has had an opportunity to reach an enforcement decision.¹⁵ Accordingly, we find that Staff sufficiently has demonstrated that the deliberative process privilege is applicable to the opinion and analyses portions of the OI report.

However, we reject the Staff's argument to the extent that Staff intends to assert that the entire OI report — including purely factual exhibits — may be withheld under the deliberative process privilege. Under the particular facts present here, there is no basis for withholding release of this factual material. The deliberative process privilege shields predecisional opinion, not purely factual information that does not reveal the substance of the predecisional opinion. *Mink*, 410 U.S. at 89; *Norwood*, 993 F.2d at 577. The Staff provides us with no reason to believe that the factual exhibits to the report are intertwined with OI's analyses. Based on the descriptive listing of exhibits to the OI report, it appears that none of the exhibits can be withheld under a "predecisional" or "deliberative process" theory.

It also appears that the OI report itself (excluding exhibits) is not purely opinion material. The Staff has argued, however, that even facts contained in the OI report itself should be privileged because they reflect the investigator's selection of what constitutes significant evidence and, thus, reveal aspects of the agency's deliberative process. Petition for Review at 5 n.8. As Staff notes, factual summaries of evidence prepared to assist an administrator in the resolution of a complex question may reveal deliberative analysis and, consequently, may be within the scope of the exemption. See *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974).

In other circumstances, it might be appropriate to order a further demonstration by the Staff of the basis for its assertion that the factual descriptions in the OI report should be withheld and to probe whether the report could be culled for release of any portions that do not reveal predecisional opinions and evaluations. However, as this case now stands, the Commission's decision on enforcement action is imminent. Because the Staff does not seek protection of the report after an enforcement action is issued, we expect that the parties will obtain the entire OI report very shortly. In light of the imminent release of the OI report, and in the interest of avoiding further delay, the Commission does not consider a further *in camera* review or further redaction of the report to be necessary.

Although the deliberative process privilege under section 2.790(a)(5) does not protect factual materials that do not reveal any evaluation or analysis, a proper claim under section 2.790(a)(7)(i) would provide a basis for withholding the factual material compiled during the investigation. This privilege applies to

¹⁵ Indeed, GPC would obtain an advantage it ordinarily would not receive by being permitted access to the report before it is available to the general public if the Licensing Board's ordered approach were followed.

those documents compiled in investigations and inspections whose production “[c]ould reasonably be expected to interfere with enforcement proceedings.” 10 C.F.R. § 2.790(a)(7)(i). The privilege corresponds to Exemption 7(A) under FOIA, 5 U.S.C. § 552(b)(7)(A), which protects investigatory files, including factual materials, from disclosure in order to prevent harm to either ongoing or contemplated investigations, or to prospective enforcement actions. See generally *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). For example, this privilege protects against the premature disclosure of information that could compromise investigative leads, result in harassment of witnesses, lead the target of an investigation to alter testimony or evidence, or “tip the hand” of the government’s case.¹⁶ Where the requisite harm to an investigation or the enforcement process is shown, this privilege shields even purely factual material.

The Staff does not rely on the privilege in section 2.790(a)(7)(i) as a basis for withholding the report. Although this “investigatory” privilege may be invoked at any time prior to completion of enforcement action, we understand Staff to argue only that premature release of the factual exhibits to the OI report would harm the agency’s deliberative process, not that either the integrity of an NRC investigation or the NRC’s ability to prosecute an enforcement action will be compromised by the early disclosure. Although in other circumstances the Commission itself may see an enforcement-related need to invoke the privilege, the Commission is not exercising its discretion under the particular facts of this case.¹⁷ Accordingly, we direct the Staff to make available to the intervenor and GPC the report’s purely factual exhibits. We will permit a brief period of time prior to release for the Staff to review the exhibits to ensure that personal privacy information or the identity of confidential sources, if any, has been redacted.

Although we find the deliberative process privilege applicable to the opinion portions of the OI report, we still must balance the interests to be protected against the parties’ asserted need for these portions of the report. In balancing the interests at issue, the Licensing Board may have overlooked the interests of the Commission in maintaining the confidentiality of deliberative materials. The premature release of deliberative agency communications, which may or may not be adopted by the Commission, particularly before the agency has reached a

¹⁶ See, e.g., *Alyeska Pipeline Service Co. v. EPA*, 856 F.2d 309, 311-14 (D.C. Cir. 1988); *Willard v. IRS*, 776 F.2d 100, 103 (4th Cir. 1985); *Coastal States*, 617 F.2d at 870. Principles supporting protection of investigative material are reflected in the Statement of Policy on Investigations, Inspections and Adjudicatory Proceedings, *supra*, and in rules specifically applicable to certain enforcement orders. 10 C.F.R. § 2.202(c)(2)(ii); Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,197 (May 12, 1992). See also *Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 56 (1993) (delay in proceeding to protect against premature release of investigative information).

¹⁷ Not only may we invoke the privilege to protect our own investigatory and enforcement processes, but we may also apply the privilege to prevent premature disclosure of information related to a matter that has been referred or is being evaluated for referral to the United States Department of Justice for possible criminal prosecution. In this particular case, we understand that the Department of Justice has already declined prosecution.

final enforcement decision, poses the risks of harm that the deliberative process privilege is intended to prevent. The privilege is designed to foster the quality of the decisionmaking process.

In contrast, neither Mr. Mosbaugh nor GPC has shown an overriding interest in disclosure of the protected portions of the OI report. Indeed, GPC has not insisted on access to the report itself at this time. Mr. Mosbaugh has stated that he has particular need of the interviews and depositions conducted by OI.¹⁸ Given that Mr. Mosbaugh will receive the evidence underlying the OI investigation, we do not believe that a delay in the release of the OI report pending the Commission's deliberations on possible enforcement action will cause Mr. Mosbaugh any appreciable detriment. Mr. Mosbaugh's counsel is certainly free to fashion his own "road map" to his case from the factual exhibits.

Moreover, immediate disclosure of the entire report is not "necessary to a proper decision in the proceeding." The Commission expects to complete its review of the OI report expeditiously, whereupon Staff, which does not intend to protect the report permanently, will release the entire report. Therefore, all parties will have unfettered access to the entire report within a very short period of time. Despite the Licensing Board's emphasis on the need for a "prompt determination of this proceeding," we do not perceive any such need to outweigh the interest in the integrity of the agency's enforcement deliberations. The Board is under no statutory or regulatory deadline to conclude this proceeding. As we understand the Board's most recent scheduling order (issued February 1, 1994), the depositions scheduled for April are focused on the alleged illegal transfer of the license, an issue not covered by the OI report.¹⁹ There is simply no urgency in this proceeding that cannot accommodate an additional minor delay in release of the report.

VII. CONCLUSION AND ORDER

As discussed in this decision, the Commission agrees with the Licensing Board that factual exhibits to the OI report should be released to the parties. We disagree with the Licensing Board to the extent that it required disclosure of the portions of the OI report containing OI's evaluations and opinions prior to the conclusion of the agency's deliberations on enforcement action.

Therefore, consistent with the foregoing opinion, the Commission hereby orders:

¹⁸ Intervenor's Response to NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigations Report at 4 (Mar. 22, 1994).

¹⁹ If necessary, depositions may be reasonably delayed if the parties believe that the OI report will be relevant to this issue. Alternatively, new information in the OI report could be grounds for requesting a followup deposition of a particular witness.

1. The NRC Staff's petition for review, dated March 24, 1994, is *granted*.
2. The NRC Staff's motion for stay of LBP-94-6, dated March 14, 1994, is *dismissed*.

3. The intervenor's motion to strike, dated March 15, 1994, is *dismissed*.

4. The Atomic Safety and Licensing Board's order in LBP-94-6 is *affirmed in part and reversed in part*.

5. Within 7 days of the date of this order, the NRC Staff shall make available to the parties for inspection and copying the documents and materials identified in the list of exhibits to the OI report (Case No. 2-90-020R). Appropriate redactions may be made to protect personal privacy information or the identity of confidential sources.

6. At the time of issuance of an enforcement action (or upon a decision to take no enforcement action) related to the matters within the scope of the investigation, the NRC Staff shall make available to the parties for inspection and copying OI's report of investigation (Case No. 2-90-020R). Appropriate redactions may be made to protect personal privacy information or the identity of confidential sources.

It is so ORDERED.

For the Commission²⁰

JOHN C. HOYLE
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 7th day of April 1994.

²⁰ Commissioner de Planque was not present for the affirmation of this order; if she had been present, she would have approved it.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Richard F. Cole
Frederick J. Shon

In the Matter of

Docket No. 70-3070-ML
(ASLBP No. 91-641-02-ML)
(Special Nuclear
Materials License)

LOUISIANA ENERGY SERVICES, L.P.
(Claiborne Enrichment Center)

April 5, 1994

MEMORANDUM AND ORDER
RULING ON "CITIZENS AGAINST NUCLEAR TRASH'S
FIRST SUPPLEMENT TO CONTENTIONS ON THE
CONSTRUCTION PERMIT/OPERATING LICENSE APPLICATION
FOR THE CLAIBORNE ENRICHMENT CENTER"

Before us for consideration is a proffer by Intervenor Citizens Against Nuclear Trash (CANT), on January 18, 1994, of three contentions additional to those previously admitted in this proceeding. LBP-91-41, 34 NRC 332 (1991).

CANT's Contention T alleges that the design of the Claiborne Enrichment Center (CEC) is invalid because it relies for cooling purpose on trichlorofluoromethane which has been banned by the Environmental Protection Agency. Contention U alleges that the Draft Environmental Impact Statement (DEIS) is inadequate because the Nuclear Regulatory Commission (NRC) failed to consult with other appropriate federal agencies regarding the proposed project as required by the National Environmental Policy Act (NEPA). Contention W

alleges that the DEIS is inadequate because it fails to address the impacts, costs, and benefits of ultimate disposal of depleted uranium hexafluoride (DUF₆) tails, or the cumulative and generic impacts of DUF₆ disposal.

Applicant Louisiana Energy Services, L.P. (LES) filed a response, dated January 31, 1994, requesting that Contentions T and U should be rejected outright. As to Contention W, Applicant believes that it has merit only as a comment on the DEIS and should be incorporated in that process.

Staff filed a response dated February 4, 1994, in which it requested that the three proffered contentions be rejected.

On February 11, 1994, CANT filed a motion for leave to file a reply to the LES and Staff responses. As part of its motion, Intervenor withdrew proffered Contentions T and U. CANT's motion was accompanied by its reply of the same date.

LES did not respond to the CANT motion for leave to file a reply. Staff, in an answer dated February 28, 1994, did not oppose CANT's motion for leave to reply to the responses opposing Contention W.

I. THE MOTION FOR LEAVE TO REPLY TO LES'S AND STAFF'S RESPONSES

We grant CANT's motion for leave to reply to Applicant's and Staff's responses to the proffered contentions. As stated by Staff, it is well established that before any decision is made on the admissibility of any contention in an NRC licensing proceeding, the proponent of the contention must be given the opportunity to be heard in response to any opposition to the contention. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 73 (1981).

We also approve the withdrawal of Contentions T and U and note that CANT's action relieves the Licensing Board of an unnecessary burden.

II. CONTENTION W

A. Pertinent Regulatory Requirements

An admissible contention must meet the requirements of 10 C.F.R. § 2.714(b)(2), which provides:

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

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

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

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

In the case of a nontimely filing, which this is, under 10 C.F.R. § 2.714(a)(1), a licensing board cannot entertain the contention absent a balancing of the following factors in favor of the petitioners:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In amending the applicable regulation on August 11, 1989, the Commission indicated that the amendments do not constitute a substantial departure from then-existing practice in licensing cases. 54 Fed. Reg. 33,170-71.

Existing practice has been that the five factors are not weighed equally, nor do all of them have to be evaluated favorably to the proponent of a late-filed contention in order for the contention to be accepted.

Good cause for late filing has been described as the most significant. Absent good cause, a petitioner must make a stronger showing on the other factors in order to have a contention accepted. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982).

Late-filed contentions filed on subsequent NRC environmental review documents are subject to the late-filed criteria in 10 C.F.R. § 2.714(a)(1)(i)-(v). *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 154 (1993). See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983); 54 Fed. Reg. 33,172.

B. Contention W

CONTENTION W: The DEIS Is Inadequate Because It Fails to Address the Impacts, Costs, and Benefits of Ultimate Disposal of DUF_6 Tails, or the Cumulative and Generic Impacts of DUF_6 Tails Disposal.

According to the DEIS, the 3,830 metric tons ("tonnes") of depleted uranium hexafluoride (" DUF_6 ") tails produced annually by the CEC will be converted to triuranium oxide (U_3O_8). DEIS at 2-31. However, the DEIS contains no information whatsoever regarding the nature and environmental impacts of the process for converting DUF_6 to U_3O_8 , or the impacts of permanently disposing of these U_3O_8 tails. Given this utter lack of information, it is also impossible to determine from the DEIS the basis for the NRC's estimate that tails disposal will cost \$12.6 million/year. DEIS at 2-31. In any event, the NRC does not even appear to have factored the \$12.6 million estimate into its cost-benefit analysis. See DEIS § 4.5.

Moreover, the NRC has failed to evaluate the cumulative and generic impacts of adding to the huge (and growing) national inventory of DUF_6 tails, for which the U.S. government has yet to identify an acceptable means of disposal. The NRC, in consultation with the Department of Energy, should be required to evaluate these impacts before LES can be licensed to produce more DUF_6 .

As its basis for the contention, CANT asserts that NEPA requires an Environmental Impact Statement (EIS) to be comprehensive and assess all reasonably foreseeable, cumulative impacts of a proposed project. It alleges that the DEIS contains virtually no information on the environmental impacts of the conversion of the DUF_6 to U_3O_8 and disposal of the enormous quantity of tails to be generated.

As examples, CANT alleges that the DEIS does not identify or discuss the process by which LES plans to convert DUF_6 to U_3O_8 and what the significant adverse environmental impacts and costs would be.

Intervenor states that the DEIS also fails to identify the means for long-term storage of U_3O_8 , or evaluate its environmental impacts. It also asserts that in violation of NEPA, the DEIS fails to address the cumulative or generic impacts of LES's proposal to add over 10,000 tonnes of DUF_6 tails to the existing national inventory from other uranium enrichment plants.

CANT submits that the issue should be addressed in a generic environmental impact statement by the NRC and the Department of Energy (DOE). Contention W is supported by an affidavit from Arjun Makhijani, Ph.D. Dr. Makhijani is president of the Institute for Energy and Environmental Research and claims expertise in the fields of nuclear engineering and atmospheric protection in relation to the stratospheric ozone layer.

Intervenor states that it has satisfied the late-filed contention standard. It relies on that part of 10 C.F.R. § 2.714(b)(2)(iii) which provides that:

On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those

contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

CANT asserts that the contention satisfies the above and the 10 C.F.R. § 2.714(a)(1)(i) good-cause standard. It contends that the DEIS for the first time states that the NRC or LES has specifically identified the conversion of DUF_6 to U_3O_8 as the chosen means for the disposal of the DUF_6 tails at the CEC.

CANT stated that the DEIS differs from the data and conclusions in Applicant's document. It asserts that, in the Environmental Report (ER), LES states that it is still hopeful to sell the tails but is vague as to the means of disposal if they are unmarketable. CANT quotes from the ER that "UF6 conversion and disposal options will vary," will be "accomplished elsewhere," and will involve conversion to "a stable, non-volatile uranium compound prior to disposal." ER 4.4.2.7 *Disposal*, at 4.4-11 (October 1993).

Intervenor states that the preparation of the contention required it to obtain expert assistance from Dr. Makhijani who was not available to CANT until after the winter holidays. The contention was said to be filed as soon as possible after Dr. Makhijani became available.

CANT alleges as to factor (ii) that there is no other means by which CANT's interest can be protected because it is the only proceeding in which the environmental impacts of the CEC will be considered under NEPA.

It asserts as to factor (iii) that Intervenor's participation can be expected to aid in the development of a sound record with regard to this issue. It will rely on the asserted expertise of Dr. Makhijani in this area.

As to factor (iv), it states that it is the only citizen intervenor group admitted in the proceeding and that there is no other party to represent its interest.

It acknowledges under factor (v) that admission of the contention may broaden the issues and delay the conclusion but it does not expect that it will be in a significant manner. It points to Contention B which challenges the adequacy of LES's decommissioning cost estimates. CANT asserts that the scope of that contention necessarily includes factual issues raised by Contention W regarding the cost of the DUF_6 conversion and disposal so that the admission of the subject contention will not broaden the factual aspects. It would introduce a new legal issue.

Intervenor contends that the factors weigh in favor of admission.

Applicant's Position

LES asserts that Contention W is a comment on the DEIS and should be incorporated in the comment process. It also claims that, in light of the

comment process, the filing of a contention is premature. Applicant states that if Intervenor's comment is not incorporated in the Final Environmental Impact Statement (FEIS) or if it is not resolved to Intervenor's satisfaction, CANT can pursue the matter at a later time. Applicant concedes that additional discussion of environmental effects of DUF₆ disposition would be appropriate in the FEIS.

LES notes that the precise mode of decommissioning and DUF₆ disposal has not been determined by regulation and that applicant's plans on DUF₆ disposition have changed over time. It has addressed possible methodologies and costs of disposal and has revised its decommissioning cost estimates to accommodate conversion to U₃O₈ and disposal at a burial facility. Applicant has not adopted a prescriptive position and considers it to be premature to expend resources analyzing a position, until one of the many viable options is determined to be the proper course to pursue. Applicant contends that this determination may not be feasible until well after the license is issued and in the interim only a general discussion of the environmental impact of DUF₆ disposal is reasonable and necessary.

Applicant denies the need for a generic EIS, considering that the application involves the NRC licensing of a single facility.

Staff's Position

Staff states that it intends to respond to CANT's assertions in the FEIS but opposes the acceptance of the contention.

Staff asserts that, contrary to CANT's position that the ER never specifically identified to the public LES's proposed method for disposal of the DUF₆ tails, the ER does so.

Staff relies on ER 4.4.4.1 *Decommissioning Costs, Tails Disposal* at 4.4-16. It estimates the annual tails disposal costs, which are based on converting UF₆ to U₃O₈, with subsequent disposal in a facility under cognizance of the NRC. The data regarding tails disposal first appeared in the tenth revision to the ER, dated May 1993. Staff claims that, since May 1993, LES has specifically identified conversion of DUF₆ to U₃O₈ as the chosen means for disposing of the DUF₆ tails at the CEC.

Staff contends that the DEIS does not contain any data or conclusions regarding conversions and disposal of DUF₆ that differ significantly from the data or conclusions that have been in the Applicant's environmental report since May 1993. It contends that there is no good cause for CANT's failure to raise its challenge earlier in the proceeding and that the late-filed contention should be rejected pursuant to 10 C.F.R. § 2.714(a)(1).

Staff contends that the five factors to be considered weigh against entertaining the contention. It asserts as to factor (i) that CANT has not shown why the information that was available much earlier in the ER could not have been acted

on previously. Staff concedes that factors (ii) and (iv) may favor admitting the contention but, like factor (i), factors (iii) and (v) weigh in favor of rejecting the contention. As to (iii) it argues that testimony on the inadequacy of the DEIS would be of no value because the FEIS will be the basis of Staff's environmental finding. Staff does not consider factor (v) to support CANT because it alleges that the factual matters of concern are within the scope of an already admitted contention.

Staff asserts that the matter of LES providing financial assurance for tails disposition has already been admitted as part of Contention B, Decommissioning Plan Deficiencies, so that there is no reason to admit the issue for litigation as a separate contention. LBP-91-41, 34 NRC at 336-37.

CANT's Reply

CANT responds to the LES argument that raising the issues by way of a contention is premature by stating that the regulations and case law mandate that contentions be filed at the earliest possible time. It cites in support *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989). Intervenor seeks consideration of the contention now and not after the issuance of the FEIS.

CANT reiterates that the ER at 4.4.2.7 *Disposal* makes no reference to the conversion of DUF_6 to U_3O_8 , vaguely noting that DUF_6 will be converted to a stable, nonvolatile uranium compound. It argues that Staff's reference to the conversion of DUF_6 to U_3O_8 elsewhere in the ER is buried in a separate section, ER 4.4.4.1 *Decommissioning Costs*, Tails Disposal at 4.4-16. It states that CANT cannot be expected to hunt through the application for hidden evidence that LES has chosen a specific tails disposition strategy, when LES has not stated that choice in the section where its plans for tails disposal are supposed to be identified. CANT stands by its position that the DEIS first apprised CANT of LES's selection of a disposal method that would convert DUF_6 to U_3O_8 .

CANT notes that Contention W extends beyond the issue of the financial costs of tails disposal and, therefore, contrary to Staff's assertion, Contention W is not completely embraced in the scope of admitted issues in Contention B. CANT seeks a ruling from the Licensing Board that the broader issues in Contention W are admitted as well as a determination that the cost issue is already admitted.

Discussion and Conclusion

The DEIS dated November 1993 is the first document that unambiguously states what the disposition of the tails will be. "The removal and disposition of

the depleted UF₆ (DUF₆) generated at CEC will involve the conversion of DUF₆ to triuranium octoxide (U₃O₈) prior to disposal.”

Applicant’s ER in the paragraph relating to disposal is noncommittal as to the method that will be employed. It speaks in terms of the possibility of the sale of the tails, by LES, that its conversion and disposal options vary and that the UF₆ will be converted to an unspecified stable nonvolatile uranium compound. ER 4.4.2.7 *Disposal*.

The tenth change made to the ER in May 1993 as to decommissioning costs does not establish, as the DEIS does, that the UF₆ will be converted by LES to U₃O₈. Although the ER at 4.4.4.1 *Decommissioning Costs* provides under Tails Disposal that the decommissioning costs are based on the conversion of UF₆ to U₃O₈, it does not state that LES had selected that process for disposal.

The above description of the decommissioning falls under ER 4.4.4 DECOMMISSIONING COSTS AND FUNDING, at 4.4-14. It specifies that the section provides an estimation on decommissioning costs and is made to ensure that funding is available to cover the costs.

When one considers that the NRC has no regulatory requirement that there must be a concrete plan for the disposal of the depleted uranium, and that the applicable regulations only require that an applicant have a plausible strategy for the disposition of depleted uranium decommissioning,¹ it is not at all clear that in basing its estimate of decommissioning costs on the conversion to U₃O₈, LES had prescriptively selected that method for disposal as the DEIS states.

We find that the DEIS on the issue of tails disposal contains data and conclusions that differ significantly from those in the ER and that under 10 C.F.R. § 2.714(b)(2)(iii) Intervenor is authorized to file a new contention, which it has done.

The right afforded under section 2.714(b)(2)(iii) to file a contention regarding the DEIS is not conditional. CANT can both file a contention and comment on the NRC impact statement. The information that underlies its contention is presently available and CANT has the regulatory authority to proceed. The argument that Intervenor should await the issuance of the FEIS before taking action is without merit. Intervenor need not waive its right to file a contention on the DEIS. Intervenor would be acting at its peril had it chosen to await the filing of the FEIS.

We weigh the five factors in 10 C.F.R. § 2.714(a)(1) to determine whether the contention should be entertained in Intervenor’s favor.

(i) CANT had good cause for failure to file on time. The information that forms the basis of the contention first became available in the DEIS dated November 1993. CANT stated that it needed to employ the expertise of Dr.

¹ LBP-91-41, 34 NRC 332, 337-38 (1991).

Makhijani to prepare the contention and he was not available during the winter holidays. The contention was filed on January 18, 1993. The time taken from when the document became available to the time of filing was not unreasonable. We find that it was a prompt submittal.

(ii) We weigh factor (ii) in CANT's favor. There are no assured other means whereby Intervenor's interest will be protected. Commenting on the DEIS is an alternative but the determination of the matters raised would be in the hands of another party to this proceeding.

(iii) Petitioner's participation may reasonably be expected to assist in developing a sound record. CANT will rely on a witness it considers to have expertise on the issue it has raised on the DEIS. Intervenor has acted knowledgeably and responsibly in the time that this proceeding has been under way and it is expected that it will continue to do so on the subject issue.

(iv) This factor must also be weighed in favor of CANT. CANT is the only intervenor in opposition to the application and there is no other party that will represent its interest.

(v) Petitioner's participation may somewhat broaden the issues and delay the proceeding but not in any material way. Staff asserts that it will respond to CANT's concerns in the FEIS and if that satisfies the Intervenor there will be a negligible effect on the proceeding.

There is an area common to Contention W where CANT questions the basis for NRC's cost estimate for tails disposal and admitted Contention B where CANT's objection is that LES provides no details on how its decommissioning costs were determined. The data developed to respond to Contention B might also apply to Contention W and that would limit the broadening effect of admitting Contention W.

Contention W does raise the issue of the environmental impacts of the conversion of DUF_6 to U_3O_8 which has a broadening effect. However, the hearing on environmental issues is not due to start until December 27, 1994. The issue should not delay the start of the hearing nor should it significantly extend the hearing itself. Factor (v) does not present any real negative to accepting the contention for consideration.

The weight of the five factors requires entertaining the contention as provided under 10 C.F.R. § 2.714(a)(1).

We find that Contention W satisfies the requirements of 10 C.F.R. 2.714(b)(2) except to the extent that the contention asserts that "the NRC, in consultation with the Department of Energy, should be required to evaluate those impacts [of adding to the national inventory of DUF_6 tails] before LES can be licensed to produce more DUF_6 ."

As its basis for the foregoing, CANT asserts that the LES proposal would add 10,000 tonnes of DUF_6 tails to an existing inventory of 500,000 tonnes.

CANT submits that the issue should be addressed in a generic environmental impact statement by the NRC and the DOE.

In its answer, LES asserts that the effect will be nil. CANT does not respond to this in its response.

While the environmental effects of adding 10,000 tonnes of DUF_6 to the national inventory are a legitimate area of concern, our mandate in hearing this license application is not to solve any problem that the national inventory of DUF_6 tails may present. The request for a generic environmental impact statement is without merit and will not be considered. What is required is an environmental impact statement that is specific to CEC. It is the responsibility of the NRC to prepare the statement. The Licensing Board knows of no requirement that it prepare its statement with any other governmental entity. It is expected that Staff will have complied with 10 C.F.R. §§ 51.26 and 51.74 for exchanging comments with other federal agencies.

III. ORDER

Based upon the foregoing, it is hereby Ordered that Contention W be admitted to the extent described.

THE ATOMIC SAFETY AND LICENSING BOARD

Morton B. Margulies, Chairman
CHIEF ADMINISTRATIVE LAW
JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland
April 5, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ivan W. Smith, Presiding Officer
Dr. Peter S. Lam, Special Assistant

In the Matter of

Docket No. 70-364-ML-Ren
(ASLBP No. 94-687-01-ML-Ren)
(Materials License No. SNM-414)

BABCOCK AND WILCOX COMPANY
(Pennsylvania Nuclear Services
Operations, Parks Township,
Pennsylvania)

April 22, 1994

MEMORANDUM AND ORDER
(Granting Request for Hearing)

I. BACKGROUND

Babcock and Wilcox Company (B&W or Applicant) has applied for the renewal of its special nuclear material license issued to the Pennsylvania Nuclear Service Operation facility located in Parks Township, Armstrong County, Pennsylvania (Parks Township facility).¹

On January 5, 1994, Citizens Action for a Safe Environment (CASE), by Patricia J. Ameno, and Kiski Valley Coalition to Save Our Children (the Coalition), by John Bologna, filed a joint request for a hearing on the application. Both the NRC Staff and B&W initially opposed the hearing requests on the grounds that the Requestors had not established their right or "standing" to

¹ *Federal Register* notice of November 3, 1993 (58 Fed. Reg. 58,711).

intervene in an NRC proceeding and that they had failed to allege an area of concern within the scope of the application.²

In a Memorandum and Order of February 2, 1994, LBP-94-4, 39 NRC 47, I granted the Requestors an opportunity to establish that their members have standing to intervene and that such members have authorized the Requestors to represent them in this proceeding.

On February 25, 1994, the Requestors submitted an amendment to their request styled "Illustration of Standing to Intervene." Forwarded with the "Illustration" were certificates and letters from residents of the Kiski Valley region, the essence of which was to authorize CASE and the Coalition to represent them in this proceeding.

However, because Ms. Ameno and Mr. Bologna refused to permit the public use of the letters, the letters could not be used to establish standing to intervene.³ Without objection from Staff or B&W, I afforded a second opportunity for the Requestors to show that they have standing to intervene derived from the standing of their members. *E.g.*, Tr. 30. Subsequently, the Requestors served on the public record information from their members.

II. STANDING TO INTERVENE

The Requestors' second amendment to their request for hearing, served on March 12, 1994, contains permission slips and letters from residents, most of whom demonstrate that they have standing to intervene, all of whom are members of either CASE, the Coalition, or both, and have authorized both organizations to represent them. B&W⁴ and the NRC Staff⁵ concede that the Requestors have established standing to intervene in this proceeding. I agree.

III. STATED AREAS OF CONCERN

A. Legal Standards

Requests for a hearing must describe in detail the requestor's areas of concern about the licensing activity subject to the hearing. 10 C.F.R. § 2.1205(d)(3). However, requestors need not set forth all of their concerns until the request for a hearing has been granted and the NRC Staff creates and serves a hearing

² NRC Staff Notice of Participation and Response to Petitioners' Request for Hearing, January 24, 1994. Letter of January 13, 1994, from B.L. Haertjens, B&W Environmental Services, to Chief Administrative Judge B. Paul Cotter.

³ Transcribed prehearing conference of March 8, 1994, Tr. 1-79.

⁴ Response of Licensee to Request for Hearing and "Illustration of Standing to Intervene" (Mar. 25, 1994).

⁵ NRC Staff Response to Petitioners' Supplemented Request for Hearing (Mar. 31, 1994).

file. At this stage of the proceeding requestors need only identify the *areas* of concerns they wish to raise. They need only provide minimal information to ensure that the areas of concern are germane to the proceeding.⁶

Under the formal procedures of Subpart G, an intervention petitioner must explain the basis for any contention it seeks to litigate and demonstrate that a genuine dispute exists with the applicant on a material issue. 10 C.F.R. § 2.714(b)(2). In this informal Subpart L proceeding, however, there is no such requirement. The test is simple — persons or organizations with standing to intervene need only identify their “areas of concern germane to the proceeding” to have those areas addressed in a hearing. Of course, to be germane to a proceeding, an area of concern must also be rational.

B&W argues that the Requestors have not alleged any area of concern that constitutes a litigable issue in this proceeding, and the request for a hearing should be denied. B&W Response at 7-20.

The NRC Staff concludes that the Requestors have established one litigable area of concern, the so-called “sloppy housekeeping and experiments” issue discussed below, and that the request for a hearing should be granted on that issue alone. March 31 Staff Response at 14.

For convenience, in the following discussion, I shall follow the framework previously used by the Staff and B&W in responding to the areas of concern arguably stated in the request for hearing and supplements to the request.

B. Critical and Sensitive Population

Requestors allege that over 75% of the population are critical or sensitive persons, such as elderly and invalids, and are thus “more vulnerable to dangerous situations than the general population.” The allegation is too inconclusive to be litigable. Also, I infer that the Requestors’ concern is that special evacuation or emergency measures would be needed for this special population. But, as noted in the following section, there is no regulatory requirement for such measures with respect to this type of facility.

C. One Road to Kiskimere

The Requestors are concerned that there is only one road to and from Kiskimere with no alternative emergency evacuation exits. Request at 1; Illustration at 9. B&W and the Staff explain that, unlike nuclear power facilities licensed under 10 C.F.R. Part 50, and for the amount of radioactive materials

⁶ See Statement of Considerations, Informal Hearing Procedures for Materials Licensing Adjudication, 54 Fed. Reg. 8269, 8272; 2-SC-22, 25 (Feb. 28, 1989).

involved in the Parks Township facility, as provided by 10 C.F.R. § 70.22(i), there is no regulatory requirement for an evacuation plan. I agree that there is no regulatory basis upon which the need for a Kiskimere evacuation route can be litigated.

D. Property Values and Public Health and Safety

Requestors and some of the members they represent are concerned about a decline in property values should the facility license be renewed. Request at 1; Illustration at 3. The NRC Staff opposes the admission of this issue on the ground that economic interests are not within the scope of the Atomic Energy Act, citing, *e.g.*, *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). B&W states that there is no linkage between property values and the renewal of the license.

The economic interests at stake in the *Pebble Springs* proceeding, cited by the Staff, pertained to the potential for increased electric power rates — patently a matter beyond the zone of interests of the Atomic Energy Act. Property values, however, should be considered in a different context.

The Staff failed to mention the provisions of 10 C.F.R. § 2.1205(g)(2), which require the presiding officer to consider “the nature and extent of the requestor’s property . . . interest in the proceeding” when ruling on a request for a hearing.

The Requestors are not specific about this allegation, stating only, “we are also concerned about the property values.” Request at 1. Their concern is expressed by the statement of Mildred E. Chelko, who is a licensed realtor and a member of both requesting organizations. Ms. Chelko states that the market value of property in the Parks Township area is “way below other areas.” In another statement, Ms. Chelko alludes to a potential buyer who decided not to proceed with building a house because “he would never be able to sell it.”

Nowhere do the Requestors state in so many words that the depressed property values are directly attributable to the Parks Township facility or the renewal of its license, but, solely for the purpose of this ruling, I shall assume that such is the case.

Even so, I have no basis whatever to infer that the Requestors or their members are concerned about property values that are depressed because of *direct radiological contamination from the Parks facility*. To the contrary, the best inference is that potential buyers simply don’t want to purchase property in the vicinity of the facility because of attitude, concern about resale values, and perhaps fear of living in the vicinity of the plant — in other words, psychological concerns.

The Commission addressed the issue of psychological stress attributed to the fear of releases of radioactivity in a proceeding following the accident at Three Mile Island, and decided that, as a matter of public policy, NRC’s administration

of the Atomic Energy Act will not include psychological effects from the fear of radiation.⁷ Therefore, I cannot accept as an issue to be heard a concern that property values may be depressed where such effect is attributable solely to public and buyer attitude.

E. Opportunity to Be Heard

Requestors wish a "level playing field" for the general population of the region to be heard on the license renewal. Request at 1. This is a standing-to-intervene issue and is mooted by today's order granting the hearing request.

F. The Part 50 Issue

The Requestors complain that certain provisions of 10 C.F.R. Part 50 pertaining to the solicitation of public comments were not complied with. This is a Part 70 proceeding and the Part 50 allegation is irrelevant.

G. Report to Pennsylvania Department of Environmental Resources

In the joint request for hearing, Requestors assert that "according to the Licensee's own report to the Pa. D.E.R. we have chemical contamination as well as radiological." Request at 1. The report⁸ was provided by the Requestors with their February 25, 1994 Illustration. Contrary to Requestors' statement, the document does not report radiological contamination. Moreover, Requestors discuss the report again in their February 25 Illustration, but they did not then allege radiological contamination in the water supply within the context of the report. I conclude that the Requestors were mistaken in the initial allegation. This proceeding does not encompass purely chemical contamination.

H. Shot-Blasting Process

Requestors express concern about the shot-blasting process approved by the NRC and the Commonwealth of Pennsylvania for use at the facility. B&W responded by submitting the affidavit of Mr. B.L. Haertjens, Technical Control Manager at the Parks Township facility. He reports that the process was

⁷ *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1) CLI-82-6, 15 NRC 407 (1982). With respect to the National Environmental Policy Act, the Supreme Court held that the NRC need not consider psychological effects in a related case. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). See also *supra* note 11.

⁸ Letter from B&W to the Pennsylvania Department of Environmental Resources, Bureau of Water Quality Management (Jan. 24, 1992).

employed only for a 9-day period early in 1992; that the system was dismantled in February 1994; and that B&W will file an amendment to renewal application to remove authorization for its use.

Normally in NRC proceedings, the factual merits of an issue or contention are not addressed until the issue is accepted for litigation. In this case, however, the shot-blast concern is so clearly mooted by the circumstances explained in Mr. Haertjen's affidavit that I reject it as a separate issue. However, within 10 days following the service of this order, Requestors may move for a reconsideration of this ruling, explaining why, if such be the case, the shot-blast issue should be heard despite the affidavit.

I. Decommissioning

Decommissioning the Parks Township facility, as urged in the Request for Hearing, is not within the scope of this proceeding. Therefore, I have no authority to consider or grant that relief, even though decommissioning might logically follow from a denial of the application for renewal.

J. Housekeeping and Experiments

The Requestors made the blanket allegation that for over 35 years the company has performed "sloppy housekeeping" and experiments "along with a keen eye for 'loop-hole' in the system." The charge was augmented by specifics in the February 25 Illustration and by an accompanying video cassette.⁹

The video cassette recording, as explained in the Illustration (at 8-9), supports a litigable area of concern. It depicts the Parks Township facility in close proximity to residences and a restaurant. Within the radiation area, marked by radiation warning symbols, one can see many drums and industrial containers sitting directly on the ground and close to the facility perimeter. Not knowing the context and contents of the containers, I stop short of calling the housekeeping "sloppy," but there is an aura of casualness about the housekeeping. Overall the video cassettes raise a reasonable area of concern. The NRC Staff agrees that the "sloppy housekeeping" area of concern is acceptable for hearing. Staff Response at 12. The allegation and area of concern regarding housekeeping is accepted as a subissue for hearing, specifically included in a broader area of concern discussed below.

⁹ In their Illustration, Requestors refer to a June 1993 document entitled "Notations of Deficiencies in the N.R.C. Oversight of Decommissioning Activities in the Babcock and Wilcox Apollo, Pennsylvania Facility." Contrary to the Requestors' assertion, the document is not "typical" nor is it "self-explanatory." Among other deficiencies, it is: (1) anonymous, (2) without context, (3) nonspecific, and (4) it contains no explanation of the relevance to this proceeding.

K. Soil Testing of Residential Properties

The Requestors urge that the Parks Township facility license not be renewed until the residences neighboring the facility have had soil testing for radiological, and, presumably, mixed wastes contamination. Request at 2.

The Applicant and NRC Staff oppose the soil-testing issue on the grounds that NRC regulations do not require such testing. Applicant explains that it will be required to meet the applicable provisions 10 C.F.R. Parts 20 and 70, and that offsite soil testing is not a prerequisite to license renewal. B&W Response at 19.

I find three discrete issues involved in this subject matter: (1) soil testing as a part of a broader area of concern, (2) regulatory and procedural authority to require soil testing, and (3) the acceptable purposes for soil testing.

1. Soil Testing as a Part of a Broader Issue

This area of concern is not about soil testing alone. It is inextricably intertwined with the overall concern about offsite radiological contamination.

The Apollo facility plays a major role in raising areas of concern to the Requestors. They argue that Apollo is relevant because:

(1) it is the same company; (2) they have the same manager; (3) both sites operated during the same time span; (4) waste was transported between the two facilities; and (5) the plant sites are approximately 3 miles apart.

Illustration at 6. They allude to a recent finding of offsite contamination of enriched uranium within a 500-foot radius of Apollo. *Id.*

Mr. Bologna also expresses concern about newspaper reports that the Parks dump site, grown to 40 acres, is the "Number 1 Contaminated Site —." Illustration at 7. The Requestors are also concerned that the entire Parks Township facility is located over a mined-out area.¹⁰ The request that nearby residences undergo soil testing is simply a tag to the basic area of concern about offsite contamination, an issue that I accept in the order below.

2. Regulatory or Procedural Authority for Soil Testing

I can find no regulation that requires soil testing as a condition for renewing that Parks Township facility license. In that respect, I agree with B&W and the Staff. However, I do not now reject categorically the possibility that soil testing

¹⁰This statement is contained in a "Response to N.R.C. Staff" (at 2) attached to the Illustration.

may be required as a condition of authorizing the license renewal because of evidence adduced in this proceeding.

3. *Acceptable Purposes of Soil Testing*

However, I can already rule out soil testing for the sole purpose of alleviating unfounded fears of offsite radiation. In the *Three Mile Island* proceeding, cited above, an issue was whether an Atomic Safety and Licensing Board, under the National Environmental Policy Act, could impose a condition designed to improve the quality of life around the Three Mile Island Station by ordering radiation monitoring. The purpose would have been to mitigate community fears about the possibility of offsite radiation releases even though there was no factual basis to expect releases. The Commission would not permit consideration of psychological stress contentions solely directed to mitigating community fears.¹¹

IV. ORDER

A. Areas of Concern Accepted for Hearing

I have found in the papers filed by the Requestors the following broad area of concern and related subareas of concern which I accept as issues for hearing:

Broad area of concern:

Whether there has been, and under a license renewal whether there will be, offsite radiation from the Parks Township facility which threatens the health and safety of the nearby population and threatens radiological contamination of nearby residential, agricultural, and business property.

Included subareas of concern:

1. Whether the housekeeping practices (drums, containers, etc.) at the Parks Township facility threaten the offsite release of radiation through water, dust, and air pathways.
2. Whether B&W management practices as manifested by the management of the Apollo facility threaten offsite releases of radiation from the Parks Township facility.
3. Whether transportation of wastes between Parks and Apollo has radiologically contaminated offsite properties.

¹¹ *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-80-8, 11 NRC 297, 308 (1980) (Certification to the Commission), CLI-80-39, 12 NRC 607 (1980) (Order regarding Certification). See also *Three Mile Island*, CLI-82-6, *supra* note 7.

4. Whether the location of the Parks Township facility waste dump over a mined-out area threatens, through subsidence, the integrity of the dump, and whether the mined-out area creates a threat of offsite release of radiation through a water-migration pathway.

B. Requestors Admitted as Intervenors

The Joint Requestors, Citizens Action for a Safe Environment and Kiski Valley Coalition to Save Our Children have demonstrated their standing to intervene and have stated areas of concern germane to the proceeding. Therefore, I admit them as Intervenors and as parties to this proceeding. Their interests in the proceeding appear to be identical or at least very closely related. Therefore, I grant B&W's motion to consolidate their intervention. I shall henceforth usually refer to them as "Intervenors." Unless informed to the contrary I will assume that Ms. Ameno and Mr. Bologna each has the authority to speak for and to commit the Intervenors.¹²

The NRC Staff and the Applicant, Babcock & Wilcox Company, are also parties to the proceeding.

C. Request for Hearing Granted

The Joint Request for a hearing is *GRANTED*. A hearing based upon an official NRC hearing file and written presentations, as provided by 10 C.F.R. §§ 2.1231 and 2.1233, is *COMMENCED*.

B&W's motion to adopt a schedule is granted as follows:

- | Action | Schedule |
|---|--|
| <ul style="list-style-type: none">• The NRC Staff makes the hearing file available to Intervenors and Applicant pursuant to section 2.1231. | Within 30 days of the Presiding Officer's entry of an order granting in part Intervenors' Request for Hearing. |
| <ul style="list-style-type: none">• Intervenors submit a written presentation of their arguments and documentary data, | Within 45 days after the NRC Staff either serves the hearing file on Intervenors and |

¹² B&W's motion to serve a single copy of pleadings and documents on the Intervenors is denied even though they share the same mailing address. Both Ms. Ameno and Mr. Bologna have contributed to the hearing requests and I assume that each will work on the Intervenors' positions in the hearing. On the other hand, the Intervenors may agree to a single service, and they should cooperate when requested to share large documents. If practicable, both Ms. Ameno and Mr. Bologna will be included in any prehearing conference.

informational material,
and other supporting
written evidence pursuant
to section 2.1233.

- Applicant submits a
written presentation
pursuant to section 2.1233.

Applicant, or makes the
hearing file available in
the Public Document Room
and Local Public Document
Room.

Within 30 days after
Intervenors serve their
written presentation.

V. APPEALABILITY

Pursuant to the provisions 10 C.F.R. § 2.1205(n), within 10 days following the service of this order, the Applicant, Babcock and Wilcox Company, may appeal this order on the grounds that the request for hearing should have been denied in its entirety. An appeal may be taken by filing a succinct statement of alleged errors with supporting argument. Any other party may oppose or support any appeal by the Applicant by filing a counterstatement within 15 days of the service of the appeal documents.

It is so ORDERED.

Ivan W. Smith, Presiding Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland
April 22, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. PRM 170-3

AMERICAN COLLEGE OF NUCLEAR
PHYSICIANS, *et al.*

March 11, 1994

The Nuclear Regulatory Commission ("NRC" or "Commission") received a petition for rulemaking submitted by the American College of Nuclear Physicians ("ACNP") and the Society of Nuclear Medicine ("SNM") ("Petitioners"). The Petitioners requested that the Commission amend its regulations governing the user and annual fees charged to their members because of increases in those fees. Among the specific requests contained in the petition were to establish a generic exemption for medical licensees who provide services in nonprofit institutions and to allow NRC licensees a greater voice in the development of new regulations by the NRC. After careful consideration, the Commission has decided not to adopt the proposals made in the petition.

REGULATIONS: INTERPRETATION (10 C.F.R. § 171.11)

Both exemption procedures (power reactor and materials licensee) contained in section 171.11 allow the requester to inform the Commission of "[a]ny . . . relevant matter that the licensee believes" should impact on the exemption decision. This allows the Commission flexibility to consider each situation on its own merits. Were the Commission to attempt to establish specific criteria for each type of materials licensee, itself a daunting task, it might then be prevented from considering factors that did not fall precisely within those enumerated.

REGULATIONS: INTERPRETATION (10 C.F.R. § 171.11)

The Commission explained in the first 100% fee recovery rule, in FY 1991, that because it was statutorily required to collect 100%, it could not easily exempt licensees from fees. If one licensee or class of licensees is exempted, those fees must then be placed on other licensees, increasing their fee burden. It is for that reason that the Commission only grants exemptions in exceptional circumstances.

DENIAL OF PETITION FOR RULEMAKING

I. THE PETITION

On February 18, 1992, the NRC received a petition for rulemaking submitted by Petitioners American College of Nuclear Physicians (ACNP) and Society of Nuclear Medicine (SNM). The Petitioners requested that the NRC amend 10 C.F.R. Parts 170 and 171 which govern the annual and user fees imposed on most NRC materials licensees by the Commission since the advent of 100% fee recovery in FY 1991. The Petitioners requested these amendments because of the substantial adverse impacts experienced by their members following increases in the NRC's user and annual fees.

On May 12, 1992 (57 Fed. Reg. 20,211), the NRC published a notice in the *Federal Register* announcing receipt of the petition. In that notice, the NRC stated that it would consider the issues raised by Petitioners within the context of the review and evaluation of the fee program for FY 1993 conducted as part of the NRC's continued implementation of Pub. L. No. 101-508, the Omnibus Budget Reconciliation Act of 1990, as amended (OBRA-90). On October 13, 1992 (57 Fed. Reg. 46,818), the NRC published a notice requesting public comment on the issues raised in the petition.

The NRC received nearly 100 comments in response to this request, with the vast majority in favor of granting the petition. After careful consideration of the comments, the Commission has decided to deny the petition for rulemaking, for reasons stated below.

II. RESPONSES TO COMMENTS AND REASON FOR DENIAL

I. Comment

The majority of commenters simply restated their support for some or all of the requested changes in NRC policy detailed in the petition. In their petition,

ACNP and SNM stated that NRC fee increases under the 100% recovery regime were adversely affecting their members' practice of nuclear medicine, in the process harming the societal benefits that stem from that field of medicine. The Petitioners claimed that they could not recoup the costs of NRC fees because Medicare reimbursement levels are inadequate and because competing nuclear medicine alternatives are not regulated (or charged fees) by the NRC. Petitioners then compared their treatment under the NRC's fee rules to that of nonprofit educational institutions, power reactors, and small entities, all of whom Petitioners claimed receive special treatment by the NRC, and argued that, for exemption purposes, medical licensees should not be lumped together with all other materials licensees.

For these reasons, ACNP and SNM requested that the Commission take the following policy actions:

- (1) Grant a generic exemption for medical services provided in nonprofit institutions, such as hospitals, similar to that granted to nonprofit educational institutions;
- (2) Provide individualized exemption criteria for medical licensees, by means of a "simple template for structuring exemption requests";
- (3) Adopt a sliding scale of minimum fees that grants nuclear physicians more relief than the current small entity classification (which grants relief to physicians in private practice with less than \$1,000,000 in gross receipts); and
- (4) Give NRC licensees a greater voice in the NRC's decisionmaking process for developing new regulatory programs.

In that regard, Petitioners suggested that the criteria contained in the NRC's backfit rule be applied to the development of all new regulatory programs. That is, if a regulation is not necessary for the adequate protection of the public health and safety, the NRC would be required to show that the rule would substantially increase safety and that its benefits outweigh its costs.

Response

The Commission does not believe that the analogy between colleges and universities and medical services provided in a nonprofit institution is a valid one. The Commission recently decided to reinstate a longstanding (but temporarily withdrawn) fee exemption for nonprofit educational institutions. The key to educational institutions' singular treatment, however, is not their nonprofit status, or the fact that they provide valuable social benefits; rather, it is the existence of certain structural market failures in educational institutions' production of new knowledge. In other words, colleges and universities produce new knowledge primarily through basic research, and disseminate it (essentially for free) to

all who want it, without receiving compensation from those benefitting. In economic terms, this new knowledge is often termed a "public good."¹

Two defining characteristics of a public good are its nondepletability and nonexcludability. That is, one person's acquisition of knowledge does not reduce the amount available to others; further, it is not efficient — and often is impossible, as a practical matter — to prevent others from acquiring it at a zero price. These characteristics make it difficult to recoup the costs of producing new knowledge. Because the value of a public good may be very great, but the costs of producing it impossible to recapture, public subsidies may be necessary for production to occur at all. The Commission has decided to exempt nonprofit educational institutions from annual fees to advance continued production of new knowledge.

By contrast, medical practitioners have the capability of obtaining compensation for the benefits they provide. Unlike new knowledge, medical services are both depletable and excludable. The benefits of medicine, while unquestionably significant, are therefore a private rather than a public good, in economic terms. The Commission believes, in sum, that the market failure considerations that apply to educational institutions' attempts to produce new knowledge simply do not apply to medical practitioners. There is no structural barrier to the recovery of costs incurred in producing the benefits of medicine. The situation of the medical practitioners is not fundamentally different from that of the for-profit licensees whose claims for exemption on grounds of inability to pass through costs the Commission has rejected in the past. (*See* 58 Fed. Reg. 38,666-68 (July 20, 1993).)

In this regard, the Commission notes Petitioners' claim that Medicare may not account for NRC fees when reimbursing physicians and hospitals. The Commission is also aware of pricing pressures caused by competing nuclear medicine modalities not regulated (or charged fees) by the NRC. However, as the Commission explained in its FY 1993 fee rule, it is impracticable for this agency to evaluate the merits of such empirical claims regarding the ability of licensees to pass through fee costs to their customers. (*See* 58 Fed. Reg. at 38,667-68.) The Commission "does not believe it has the expertise or information needed to undertake the subtle and complex inquiry whether in a market economy particular licensees can or cannot easily recapture the costs of annual fees from their customers." (*Id.* at 38,667.) This statement applies equally to medical licensees as it does to all others whose products cannot be characterized as a "public good."

¹The Commission's analysis of this aspect of the petition is based in part on a memorandum prepared by an NRC consultant on the topic of externalized benefits and public goods. This memorandum has been placed in the NRC Public Document Room for examination by any interested persons. *See* Memorandum to NRC Staff from Stephen J.K. Walters, Professor of Economics, Loyola College (Maryland), dated January 4, 1994.

Addressing the petition's second major point, the Commission disagrees with those commenters who call for new individualized exemption criteria for medical licensees. The Commission believes that the current exemption process for materials licensees, as codified in 10 C.F.R. § 171.11(d), provides medical licensees with the opportunity to request an exemption by means of detailing their particularized circumstances.

Both exemption procedures (power reactor and materials licensee) contained in section 171.11 allow the requester to inform the Commission of "[a]ny . . . relevant matter that the licensee believes" should impact on the exemption decision. This allows the Commission flexibility to consider each situation on its own merits. Were the Commission to attempt to establish specific criteria for each type of materials licensee, itself a daunting task, it might then be prevented from considering factors that did not fall precisely within those enumerated. And if the Commission retained the open-ended provision quoted above, it would have expended considerable time and resources to little purpose, as licensees could make the same claims under new criteria that they can at this time.

Petitioners also complained that the NRC had established a high threshold for granting materials exemption requests. In this regard, the Commission explained in the first 100% fee recovery rule, in FY 1991, that because it was statutorily required to collect 100%, it could not easily exempt licensees from fees. If one licensee or class of licensees is exempted, those fees must then be placed on other licensees, increasing their fee burden. It is for that reason that the Commission only grants exemptions in exceptional circumstances. (*See* 56 Fed. Reg. 31,472, 31,485 (July 10, 1991).)

Petitioners' third request, that the Commission establish a sliding scale of minimum fees based on the size of the licensee, which "reflects the unique constraints on physicians," also is denied. In its FY 1991 fee rule, the Commission explained in great detail why it devised its fee schedules in the manner it did, basing fees on classes of licensees rather than licensee-by-licensee. (*See* FY 1991 Final Rule, 56 Fed. Reg. 31,472, and Appendix A to the Final Rule (July 10, 1991).) There is no information contained in either the petition or comments on the petition that would lead the Commission to reconsider this approach, and therefore the Commission must deny this aspect of the petition as well.

However, the Commission intends to reexamine the size standards it uses to define small entities within the context of compliance with the Regulatory Flexibility Act. The Commission will conduct this review within the context of revision of the small business size standards proposed by the Small Business Administration ("SBA") (58 Fed. Reg. 46,573 (Sept. 2, 1993)). The Commission will not complete this review until the SBA promulgates its final rule on this matter. These activities may result in a revised definition of "small entity" more favorable to Petitioners.

Finally, the Commission denies Petitioners' request that licensees be provided more power over the development of NRC regulations, and that a new backfit rule incorporating cost-benefit analysis be instituted to evaluate the agency's regulatory programs. The Commission denied similar requests in its FY 1991 fee rule, explaining that the NRC is not exempt "from the normal Government review and budgetmaking process." The Commission at that time pointed out that "the Government is not subject to audit by outside parties," and that "[a]udits are performed by the General Accounting Office or the agency's Inspector General, as appropriate." (56 Fed. Reg. at 31,482 (July 10, 1991).) Additionally, the NRC complies with federal regulations such as the Paperwork Reduction Act of 1980 (44 U.S.C. §§ 3501 *et seq.*) and the Regulatory Flexibility Act of 1980 (5 U.S.C. §§ 601 *et seq.*) that require agency analysis of the economic effects of new regulations on licensees. The NRC Staff also prepares detailed cost-benefit analyses to justify any new regulatory requirements; these analyses are carefully reviewed by the Commission. The Commission has seen nothing either in the petition or comments on the petition that would lead it to change its approach in this area. The Commission would like to emphasize, however, that licensees are always welcome and expected to comment on proposed rulemakings, including the accompanying cost-benefit analyses, and that such comments, along with petitions such as the present one, workshops, meetings of the Advisory Committee on the Medical Use of Isotopes, and the day-to-day interaction between licensees and the agency, in the Commission's view provide an adequate and successful method of keeping each group apprised of the other's concerns.

2. *Comment*

The Commission received a potpourri of comments on other aspects of the petition. A number of commenters disagreed with the petition, arguing that medical licensees should not receive an exemption, as the costs of such an exemption would be borne by other licensees to whom the additional fees would have no relation, and that every licensee should pay its fair share. Other commenters stated that the fees should be abolished entirely, which would remove the dilemma over granting exemptions. One commenter argued for basing an exemption on the function for which the license is utilized, not the function of the licensed organization. Some commenters argued that fees should be based on factors such as the amount of radioactive sources possessed, the number of procedures performed or the size of the nuclear department within a hospital. Certain commenters suggested expanding the number of exemptions to include government agencies, along with those licensees that provide products and services to medical and educational entities. One commenter requested that the NRC take Agreement State schedules into account when setting its own

fee schedule. Another commenter raised concerns as to the expense of NRC contractors and the quality of NRC regulation. And a few commenters urged the NRC to reevaluate or abolish its then-recently instituted Quality Management (QM) Program.

Response

As the Commission stated above, it is denying this petition for rulemaking, and therefore not exempting medical licensees for services provided in a nonprofit institution. The Commission cannot abolish its fees unilaterally, as the requirement to collect 100% of the agency's annual budget authority through user and annual fees is statutorily mandated by Congress, *see* section 6101 of OBRA-90.

The Commission has explained in the past why it did not believe that basing fees on factors such as number of sources or the size of the facility would result in a fairer allocation of the 100% recovery requirement. (*See* FY 1991 Final Rule, 56 Fed. Reg. 31,472 (July 10, 1991), and Appendix A to that Final Rule; and Limited Revision of Fee Schedules, 57 Fed. Reg. 13,625 (Apr. 17, 1992).) The Commission has seen no evidence in the petition or comments on the petition that would lead it to change its current approach of charging fees by class of licensee. For reasons similar to those stated in the earlier rules cited above, the Commission does not believe it would be feasible to base an exemption on the function for which a license is utilized rather than on the function of the licensed organization.

The Commission has also explained in prior rulemakings why it has decided to charge federal agencies annual fees, and has seen nothing in comments on the petition that would cause it to change its position on this policy matter. (*See* FY 1991 Final Rule, 56 Fed. Reg. at 31,474-45 (July 10, 1991).) The Commission also does not believe that the exemption for nonprofit educational institutions should be expanded to cover those private companies supplying services and products to medical or educational licensees. The fact that the cost of these services and products impacts upon exempt licensees is not sufficient reason to exempt private for-profit licensees. By exempting nonprofit educational institutions from fees, the Commission has addressed the direct impact of its fees on those institutions. Additionally, the Commission has discussed in both prior and current rulemakings the necessity of a high threshold for exemption requests and the overarching requirement to collect as close to 100% of its annual budget authority as possible; these factors remain valid here.

While the Commission acknowledges that in many cases Agreement States base their fee schedules in some measure on the NRC's fee schedule, the NRC cannot do the reverse. The NRC must conform its fees to the 100%

recovery requirements mandated by OBRA-90, independent of Agreement State fee schedules over which the agency has no control.

Finally, the Commission believes that comments on the agency's QM program, NRC contracting practices and the overall quality of NRC regulation are beyond the scope of this notice. However, the Commission notes that the agency's regulation codifying its QM program was challenged and ultimately upheld in court. *See American College of Nuclear Physicians and Society of Nuclear Medicine v. United States Nuclear Regulatory Commission and United States of America*, No. 91-1431, slip op. at 2 (D.C. Cir. May 22, 1992) (per curiam).

Because each of the issues raised in the petition has been substantively resolved, the NRC has denied this petition.

FOR THE NUCLEAR
REGULATORY COMMISSION

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 11th day of March 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE EXECUTIVE DIRECTOR FOR OPERATIONS

James M. Taylor, Executive Director for Operations

In the Matter of

Docket No. PRM 61-02

NEW ENGLAND COALITION
ON NUCLEAR POLLUTION

March 29, 1994

The Nuclear Regulatory Commission (NRC) is denying a petition for rule-making submitted by the New England Coalition on Nuclear Pollution, Inc. (PRM 61-2). The Petitioner requested that the NRC amend its regulations regarding waste classification of low-level radioactive waste (LLW) to restrict the number and types of waste streams that can be disposed of in near-surface disposal facilities and prepare a supplemental Environmental Impact Statement (EIS). The NRC is denying the petition because the "new information" as presented by the Petitioner is not sufficient to invalidate the existing classification system or justify that NRC prepare a supplemental EIS.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 61)

The final rule for 10 C.F.R. Part 61 did not include a dose limit for inadvertent intrusion. However, provisions, including waste classification, were included in the final rule to reduce the likelihood and magnitude of exposures to potential intruders. The existence of multiple controls in the final rule to reduce the likelihood of exposures to postulated inadvertent intruders at closed LLW sites was, and continues to be, wholly consistent with the ICRP perspective. These multiple controls are specifically identified or included in sections 61.7, 61.12, 61.14, 61.42, 61.52, and 61.59 and are intended to prevent inadvertent intrusion and to reduce potential exposure if intrusion were to occur.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 61)

The NRC believes that to protect against deliberate intrusion would be unnecessarily conservative and unwarranted. The NRC regulations currently include provisions to protect against intrusion by, for example, requiring government land ownership, records, and the use of markers. In order to deliberately intrude into the LLW site, an individual will have to break the law and overlook the hazard. In the development of 10 C.F.R. Part 61, the NRC stated, "it would appear to be difficult to establish regulations designed to protect a future individual who recognizes a hazard but then chooses to ignore the hazard."

DENIAL OF PETITION FOR RULEMAKING

I. THE PETITION

On July 23, 1992 (57 Fed. Reg. 32,743), the Nuclear Regulatory Commission published a notice of receipt of a petition for rulemaking filed by the New England Coalition on Nuclear Pollution, Inc. The Petitioner requested that the NRC amend 10 C.F.R. Part 61 concerning the classification of low-level radioactive waste for near-surface disposal to restrict the number and types of waste streams that may be disposed of in these disposal facilities. The Petitioner believes that the requested changes are necessary because of significant new information concerning intrusion into LLW disposal facilities that was not available at the time the original EIS was developed. Because of the new information, the Petitioner argues that the NRC must prepare a supplemental EIS since the premises leading to the conclusions reached in the original EIS have substantially changed.

The petition is based on three purported changes that the Petitioner believes have occurred since the rule was promulgated. The Petitioner asserts that these changes affect the basis used to promulgate 10 C.F.R. Part 61.

1. The Petitioner argues that the original EIS was based on a 500-millirem per year (mrem/yr) dose to "inadvertent intruders." Revised guidance by international organizations has reduced dose limits for individual members of the public to 100 mrem/yr and this new criterion has been incorporated into 10 C.F.R. Part 20. The Petitioner presumes that the intruder and public dose limits are integrally linked. The Petitioner asserts that this revised dose limit should also be incorporated into the waste classification system and that this would impact waste streams allowed to be disposed of in LLW facilities.
2. The Petitioner states that the three intrusion scenarios that the NRC considered in the development of Part 61 do not define a broad enough

spectrum of possible events. Of particular concern is that the NRC used regulatory discretion, rather than scientific data, to exclude deliberate intrusion. The Petitioner states that recent studies conducted at the behest of the State of Vermont show that, when intrusion is deliberate, the ability of near-surface facilities to properly provide isolation for all of the currently classified LLW streams is questionable.

3. The Petitioner states that because most currently planned LLW facilities are using an engineered structure to isolate the waste, the cost differential between shallow-land burial facilities, assumed in the EIS, and a geologic repository (for high-level waste) has significantly changed since promulgation of Part 61. Because cost considerations were a factor in the development of the waste classification system, a supplemental EIS is needed.

II. PUBLIC COMMENTS ON THE PETITION

The notice of receipt of petition for rulemaking invited interested persons to submit written comments concerning the petition. The NRC received fourteen comment letters. Three comment letters were received from states (two from Vermont), three from private organizations, three from associated industries (including one disposal site operator), three from private individuals, one from a university, and one from the Department of Energy. The comments generally focused on the main elements of the petition — revision of the Part 61 waste classification system and the Petitioner's rationale for this change. In addition, the Commission received responses from the Petitioner on many of the points raised by the commenters. The comments and responses were reviewed and considered in the development of NRC's decision on this petition. These comments and responses are available in the NRC Public Document Room. Following is a summary of the significant comments.

Four of the commenters supported this petition for rulemaking. They supported the concept of changing the classification system to restrict the more hazardous components of currently defined LLW, although not necessarily in the same way as proposed in the petition.

One commenter stated that the definitions of LLW and high-level radioactive waste should be changed to essentially require that waste that presents a potential hazard after 100 years be defined as high-level radioactive waste. Disposal of such newly defined high-level radioactive waste would be the responsibility of the federal government.

A second commenter believes that the bases for developing the Part 61 classification system are not conservative, and therefore, the petition should

be accepted to protect the public from disposal of waste containing long-lived radionuclides.

A third commenter believes that restricting the longevity hazard (long-lived radionuclides) would increase public acceptance of LLW disposal facilities and eliminate program delays.

The fourth commenter, the Vermont Department of Public Service, believes that the classification system should be revised to reclassify nonfuel reactor components as greater than Class C. It is stated that these components, in Vermont, produce 99% of the activity, while comprising less than one-half of 1% of the volume. These components are easily segregated and can be stored in spent fuel pools. The commenter believes that the reclassification "could assist the State processes established by the Low-Level Radioactive Waste Policy Amendments Act of 1985."

The other ten commenters believe that granting the petition would not only be unwarranted, as the Petitioner has not made a justifiable case for changing the waste classification system, but would also cause significant and unnecessary problems for the disposal of LLW. Problems cited include major uncertainty and delay while the NRC was developing a new rule, the creation of "orphan" wastes that would not be acceptable at LLW sites, and the inaccurate use of existing information. For example, the Petitioner refers to a study by Rogers and Associates Engineering Corporation (RAE) prepared for the Vermont Low-Level Radioactive Waste Authority. Several commenters, including RAE and the Vermont Low-Level Radioactive Waste Authority, commented that the Petitioner has incorrectly used the results of this study to assess facility performance and that this study does not support the Petitioner's request.

The commenters argued that Part 61, and supporting documentation, provide a sound regulatory basis for protection of public health and safety and that the Petitioner has not provided any new significant information to justify changing the current rules. These commenters further argued that the Petitioner is inappropriately applying requirements in 10 C.F.R. Part 20 to potential intruder exposures at a closed disposal site. They noted that Part 20 limits, and the international recommendations upon which they are based, are regulatory dose limits for routine exposures and are not uniquely pertinent to accidents, inadvertent intrusion, or other hypothetical events.

Some commenters also took exception to the Petitioner's goal of protecting against willful, purposeful, or intentional intrusion instead of the inadvertent intruder. They stated that to protect against deliberate misuse of disposed waste would be unnecessarily conservative and unwarranted. One commenter noted that mining activities on a previously closed LLW disposal site (an activity postulated by the Petitioner) would constitute possession of source, byproduct, or special nuclear material and would be regulated under the statutory basis of the Atomic Energy Act of 1954, as amended.

Several commenters were concerned that a revised classification system would generate an "orphan" class of waste. These wastes would not be accepted at an LLW site and would have to be stored, pending disposal at a high-level waste or other appropriate facility, resulting in additional radiation exposure due to the extra handling and storage required. These commenters stated that the current classification system provides an adequate level of protection of public health and safety.

Other commenters believe that revising the classification system unnecessarily would be extremely disruptive until new regulations were finalized.

Finally, several commenters did not see a need to develop a supplemental EIS because in their view no significant new information has been provided.

III. REASONS FOR DENIAL

The NRC is denying the petition for the following reasons:

1. The NRC believes that the Petitioner is incorrect in asserting that recommendations by international and national standards organizations (the International Committee on Radiological Protection (ICRP) and the National Council on Radiation Protection and Measurements (NCRP)) on public dose limits applicable to licensee operations should also be applied to hypothetical inadvertent intrusion at a closed LLW facility. In fact, the ICRP¹ distinguishes between limits for the conduct of operations where exposures might be expected and the approach to be taken for "potential exposures," which are hypothetical or postulated. The new Part 20 limit was adopted to impose restrictions on the releases from currently operating licensed facilities or on the ways that current licensees conduct operations. In contrast to this, the LLW classification system specifically addressed limiting potential exposures to an inadvertent intruder who might hypothetically pursue activities at a closed LLW disposal facility following loss of institutional control. Inadvertent intrusion is a hypothetical exposure scenario evaluated in the EIS to support the concentration limits for classifying radioactive wastes. It is a separate and different evaluation from the evaluation performed under 10 C.F.R. § 61.41 to demonstrate protection of the general population from releases of radioactivity. The NRC's calculations, based on conservative assumptions about intrusion activities, demonstrated that if inadvertent intrusion were to occur, the one or few individuals involved might receive radiation exposure of the order of 200 millirems, well below the 500-mrem/yr goal selected as the dose rate limitation guideline.

¹ Annals of the ICRP, ICRP Publ. 60, "1990 Recommendations of the International Commission on Radiological Protection," Vol. 21, at 25-49 and 70-77.

In its final EIS, as noted by the Petitioner, the NRC summarized the rationale for retaining the 500-millirem limitation guideline as follows:

NRC's selection of the 500 mrem limit was based on (1) public opinion gained through the four regional workshops held on the preliminary draft of Part 61; (2) its acceptance by national and international standards organizations (e.g., ICRP) as an acceptable exposure limit for members of the public; and (3) the results of analyses presented in Chapter 4 of the draft EIS.²

However, a fuller explanation for having selected this dose limitation guideline can be found in the Draft Environmental Impact Statement (DEIS) on 10 C.F.R. Part 61 (NUREG-0782, Vol. 1).³ At that time, three candidate values of different orders of magnitude were under consideration; 25 mrem/yr, 500 mrem/yr, and 5000 mrem/yr. While noting the similarity of the selected value to the then-current effective public dose limit in 10 C.F.R. Part 20, the DEIS went on to explain the considerations for selection. Selection of the 25-mrem/yr value would likely have resulted in considerably more costs, more changes in existing practices and greater reduction in disposal efficiency than the other two candidates. This was cited as "especially important considering the hypothetical nature of the intrusion event." The 5000-mrem/yr alternative was seen to involve approximately the same costs and impacts as the 500-mrem/yr alternative. The higher value was considered to potentially result in allowing disposal of larger quantities of long-lived isotopes, which could result in moderately higher intruder hazards extending for long time periods. Therefore, 500 mrem/yr was selected as a general dose rate limitation guideline for the inadvertent intruder.

In the final EIS, the NRC noted that the EPA, in commenting on the DEIS and the proposed Part 61, stated that it was not appropriate to include a dose limit for intrusion in the regulations because the licensee would not be able to monitor or demonstrate compliance with a dose limit related to an event that might occur hundreds of years in the future. Consequently, the final rule for Part 61 did not include a dose limit for inadvertent intrusion. However, provisions, including waste classification, were included in the final rule to reduce the likelihood and magnitude of exposures to potential intruders.

Finally, as noted above, ICRP distinguishes between limits for the conduct of operations where exposures might be expected and the approach to be taken for "potential exposures," which are hypothetical or postulated. In the former case, the ICRP proposed imposition of dose limits, but in the latter case recommended

²NUREG-0945, Final Environmental Impact Statement on 10 C.F.R. Part 61 "Licensing Requirements for Land Disposal of Radioactive Waste" (November 1992), Vol. 2, at B-41 (response to issue C-4).

³Copies of NUREGs may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Mail Stop SSOP, Washington, DC 20402-9328. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. A copy is also available for inspection and/or copying at the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC.

that the probability of postulated events or scenarios be considered along with their consequences. The ICRP noted that the initial focus in controlling the consequences of potential or postulated events should be "prevention," that is, by incorporating provisions to reduce the probability of the postulated events that may lead to radiation exposures. The existence of multiple controls in the final rule to reduce the likelihood of exposures to postulated inadvertent intruders at closed LLW sites was, and continues to be, wholly consistent with the ICRP perspective. These multiple controls are specifically identified or included in sections 61.7, 61.12, 61.14, 61.42, 61.52, and 61.59 and are intended to prevent inadvertent intrusion and to reduce potential exposure if intrusion were to occur.

For these reasons, the NRC does not believe that the current ICRP or NCRP recommendation that the public dose limit be 100 mrem/yr constitutes new information that would warrant modifying these regulations. The NRC believes that the provisions of Part 61 provide an acceptable level of protection to the public and the inadvertent intruder.

2. The NRC believes that the Petitioner has not provided adequate information to justify considering "deliberate" intrusion scenarios. The NRC believes that to protect against deliberate intrusion would be unnecessarily conservative and unwarranted. The NRC regulations currently include provisions to protect against intrusion by, for example, requiring government land ownership, records, and the use of markers. In order to deliberately intrude into the LLW site, an individual will have to break the law and overlook the hazard. In the development of Part 61, the NRC stated, "it would appear to be difficult to establish regulations designed to protect a future individual who recognizes a hazard but then chooses to ignore the hazard."⁴

The NRC also believes that the likelihood of deliberate intrusion is very small. Deliberate intruders would have to ignore the hazard information on markers. The future value of LLW as a material cannot be accurately assessed, but the NRC believes that its value would be unlikely to warrant illegal actions that in themselves would be hazardous, and would require a significant amount of time and effort. If the value of LLW were to become significant, then it is likely that responsible institutions would assess risks and would make rational decisions regarding use or control of the site. Although the NRC is not relying on institutional controls beyond 100 years, the NRC believes that relevant records will be preserved and remain accessible for hundreds of years after closure. This would reduce the likelihood and level of exposure of inadvertent or deliberate intrusion. For example, if intrusion did not occur until 500 years after closure, the exposure would be limited to a few millirems as calculated in the EIS. The NRC, therefore, believes that its current treatment of intrusion continues to

⁴ NUREG-0782, Draft Environmental Impact Statement on 10 C.F.R. Part 61 "Licensing Requirements for Land Disposal of Radioactive Waste" (September 1981), Vol. 2, at 4-3.

reflect a rational and acceptable approach. The NRC current regulations provide reasonable assurance of protection against an inadvertent intruder. And while not directly protecting against the deliberate intruder, the NRC believes that such an intrusion is unlikely to happen; therefore, the risk is very small.

3. The NRC believes that the Petitioner's request for a supplemental EIS, due to increased costs of current disposal plans (including engineered structures), is not valid for several reasons. First, the NRC considered a range of different disposal options and costs, including the use of engineered barriers and structures, in the development of Part 61. Shallow-land burial, as had been practiced at commercial disposal sites, was considered as the base case for analysis. Two improved shallow-land disposal alternatives were also considered. The use of engineered barriers was anticipated and included in cost impact analyses as the upper-bound alternative. Second, although the Petitioner is correct in stating that LLW disposal costs for new facilities have significantly increased since promulgation of the rule, so have the expected costs for other potential methods of waste disposal, including geologic disposal, referred to by the Petitioner. Third, as noted by one of the commenters, much of the increased cost for new LLW disposal facilities is independent of the disposal technology used. That is, the increased costs for site characterization, licensing, public involvement, and administration for all disposal sites would tend to minimize long-term cost differentials between shallow-land burial with and without engineered structures. The Petitioner is erroneously asserting that costs were a prime consideration in the selection of the waste classification system. Although costs were considered in the EIS, the NRC principally looked to identify and implement improvements in the disposal of LLW, such as the development of the waste classification system, to help ensure adequate protection of the public health and safety and the environment. The costs of developing and constructing a facility were not the prime considerations.

In addition to the three reasons above, the NRC has also qualitatively considered the effect of imposing a classification system as indicated in the petition. The benefit would be to reduce the potential radiation exposure of a very small number of individuals after the end of the institutional control period. A realistic estimate of the benefit, as shown in the EIS, would be a 100-millirem reduction in dose (from 200 mrem/yr to 100 mrem/yr) to one or a few individuals per site, 100 years after closure. To maximize the benefit, the intrusion would need to occur relatively shortly after the end of the institutional control period, since the 100-millirem difference between the existing classification system and that suggested by the Petitioner becomes smaller with time. As discussed earlier, as the time period increases beyond 100 years to 500 years, potential exposures reduce to only a few millirems for the existing classification system.

Not only are the perceived benefits exceedingly small, but if a revised classification system were imposed, the NRC believes that it would result in

significant negative impacts. First, it would take years to revise the waste classification regulations. During this time, current efforts by the states and compact organizations to develop LLW facilities could be severely impacted as they would not know what waste would be acceptable in an LLW facility. Second, as provided in the Low-Level Radioactive Waste Policy Amendments Act of 1985, states will continue to be responsible to provide for disposal of waste that is classified A, B, and C under the existing classification system in Part 61. If a new classification system were developed that resulted in some currently acceptable waste being unacceptable for a LLW facility, either congressional action would be necessary to change the Act to make the federal government responsible for the waste or the states would be forced to develop alternative methods to dispose of this new class of waste. And third, additional operational exposures could be expected to occur as specific waste would need to be segregated, handled, treated, stored, and transported while awaiting alternative disposal facilities.

In sum, no new significant information has been provided by the Petitioner that would call into question the basis for, or conclusion of, the final EIS. On the other hand, in a qualitative analysis, it is clear that granting the petition would result in significant negative impacts relative to the small potential reduction in intruder exposures. Therefore, a supplemental EIS is not needed. For reasons cited in this document, the NRC denies the petition.

FOR THE NUCLEAR
REGULATORY COMMISSION

James M. Taylor
Executive Director for
Operations

Dated at Rockville, Maryland,
this 29th day of March 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE EXECUTIVE DIRECTOR FOR OPERATIONS

James M. Taylor, Executive Director for Operations

In the Matter of

Docket No. PRM 32-3

ADVANCED MEDICAL SYSTEMS, INC.

March 28, 1994

The Nuclear Regulatory Commission (NRC) is denying a petition for rule-making (PRM-32-3) from Advanced Medical Systems, Inc. The Petitioner requested that the NRC amend its regulations because it believed that the requirements of Part 32, which are applicable to original manufacturers and suppliers, were not equally applicable to manufacturers and suppliers of replacement parts. The petition is being denied because current regulations apply equally to manufacturers and suppliers of both original and replacement parts, ensuring the integrity of these parts; therefore, no additional requirements addressing the regulation of manufacturers and suppliers of replacement parts are necessary. Further, current regulations address service and maintenance of sources and devices possessed and used under an NRC license, including replacement parts, whether manufactured or supplied by the original manufacturer or supplier or some other manufacturer or supplier. Therefore, the amendments suggested by the Petitioner are not necessary.

REGULATIONS: INTERPRETATION (10 C.F.R. PARTS 30, 32, 35)

Under current NRC regulations, persons authorized under a specific license to use devices containing byproduct material (e.g., use of teletherapy equipment under a Part 35 specific license) ultimately are responsible for the safe use of these devices, and for ensuring that such devices are properly maintained. Suppliers of sources or devices containing byproduct material, whether they are an original manufacturer or a manufacturer of replacement sources or devices, must be licensed under Parts 30 or 32 or an appropriate Agreement State license,

and also have responsibility for the safety of the sources or devices that they supply or replace.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 21)

Under the provisions of Part 21, the supplier of any basic component, whether or not a licensee of NRC or an Agreement State, is also responsible for the quality of the component, whether it is original or replacement.

DENIAL OF PETITION FOR RULEMAKING

I. THE PETITION

In a letter dated June 28, 1991, Advanced Medical Systems, Inc. (AMS) filed a petition for rulemaking with the NRC. The petition was docketed by the Commission on July 19, 1991, and was assigned Docket No. PRM 32-3. The Petitioner requested that the NRC amend its regulations because it believed that the requirements of 10 C.F.R. Part 32, which are applicable to original manufacturers and suppliers, were not equally applicable to manufacturers and suppliers of replacement parts. The Petitioner has suggested two alternatives for accomplishing this objective. The first alternative is to insert the necessary language regarding manufacturers and suppliers of replacement parts into each appropriate section of Part 32. The second alternative would revise the purpose and scope provisions of 10 C.F.R. § 32.1 to include manufacturers and suppliers of replacement parts.

II. BASIS FOR REQUEST

The Petitioner identified itself as an original teletherapy equipment manufacturer. As such, it has a definite and direct interest in the health and safety of the public who may use or be treated by equipment it manufactures.

According to the Petitioner, it appears that the requirements of Part 32 are being interpreted as applying only to manufacturers and suppliers of original equipment and not to manufacturers and suppliers of replacement parts, devices, products, or sources designated for units originally manufactured or transferred by others. In the Petitioner's view, lack of specific requirements applicable to manufacturers and suppliers of replacement parts, devices, products, or sources, can lead to use of inferior-quality replacement parts which, in turn, can cause malfunction or failure of devices, in particular teletherapy equipment, and

thereby risk of overexposure. Advanced Medical Systems cited two incidents as examples of this problem: Access No. M49250, Anderson Memorial Hospital, Anderson, South Carolina; and Access No. M49324, St. Mary's Medical Center, Saginaw, Michigan.

III. PUBLIC COMMENTS ON THE PETITION

A notice of receipt of the petition for rulemaking was published in the *Federal Register* on October 10, 1991 (56 Fed. Reg. 51,182). Interested persons were invited to submit written comments concerning the petition. The comment period closed December 9, 1991. The NRC received comments from the State of Illinois, Department of Nuclear Safety, and the Department of the Air Force, Headquarters Air Force Office of Medical Support.

The State of Illinois, Department of Nuclear Safety, stated that the Department fully supports development of the rule proposed in the petition. The Department further stated that the integrity of NRC-evaluated devices (NRC or an Agreement State evaluates for safety any devices containing radioactive materials) may be compromised significantly if nonstandard replacement parts are used during the life of the device. While the Department agreed that the issue of replacement components needs to be addressed, it was concerned with the use of the term "replacement sources and devices" in the wording of 10 C.F.R. §§ 32.74, 32.110, and 32.210 as suggested by the Petitioner. The Department believed that all sources and devices must be evaluated by the NRC or an Agreement State, whether or not they are considered "original" or "replacement" equipment. Therefore, the Department did not believe that it is necessary to distinguish between original or replacement sources or devices. The Department was in favor of the Petitioner's suggested alternative to modify section 32.1, Purpose and Scope.

The Headquarters Air Force Office of Medical Support, Department of the Air Force, opposed the rule language proposed by the Petitioner, as written, although it agreed with the Petitioner's intent to ensure that the safety and effectiveness of devices not be compromised because original parts are replaced by inferior ones. They did not agree that all replacement parts should be subject to the requirements of 10 C.F.R. Part 32. They stated that NRC review and approval should apply to replacements of parts or components that are essential to the proper and safe operations of a device. The Air Force gave examples of parts (such as panel screws and covers) that conform to industry standards. These, the Air Force stated, should not be subject to the proposed requirements. The Air Force voiced concern that the petition, as written, may serve to restrict competition and would lead to greater expense which would have to be recouped

through higher medical costs from patients, or, in the case of the Air Force, from taxpayers.

IV. NRC ACTION ON THE PETITION

The NRC reviewed the petition, the public comments, and the two cases (incidents) cited by the Petitioner as supporting evidence for filing this petition. The NRC also reviewed its regulations pertinent to the petition.

Shortly after the NRC received correspondence¹ from AMS about the two cases, the NRC advised² AMS of its intention to investigate these incidents, especially with regard to the quality of service and replacement parts used in servicing the teletherapy units. From October to December 1989, the NRC conducted a thorough investigation which included three onsite inspections: Atom Mechanical Company, Cleveland, Ohio (the servicing company that conducted the maintenance and replacement of parts in the two cases), St. Mary's Medical Center, Saginaw, Michigan, and Picker International, Highland Heights, Ohio (the company that manufactured the teletherapy units at Anderson Memorial Hospital and at St. Mary's Medical Center). The NRC also referred the case of Anderson Memorial to the State of Maryland, because the company that serviced the teletherapy unit there, Atom Mechanical Company, is an authorized user on the Neutron Products, Inc., license, and Neutron Products is located in the State of Maryland, an Agreement State.

The incident at Anderson Memorial Hospital was caused by a broken spring in a teletherapy unit which failed to retract the source into the OFF position following a cobalt-60 cancer treatment. The hospital technologist promptly retracted the source manually. According to the hospital report, the technologist received very little additional exposure over expected monthly exposure, as evidenced by the individual's radiation film badge reading. Moreover, according to the same report, the delivered daily dose to the patient was less than the prescribed daily dose, i.e., no patient overexposure for that treatment, because the technologist acted promptly. In its communication with NRC (prior to filing the petition), AMS stated that it was concerned about the quality of the replacement springs used in the teletherapy machine.

The incident at St. Mary's Medical Center was caused by the failure of a microswitch. The failure of the switch prevented a timing device from operating properly, to automatically terminate the treatment. No misadministration

¹ Three letters dated June 20, August 8, and August 25, 1989, to Hugh L. Thompson, Jr., Deputy Executive for Nuclear Materials Safety and Safeguards & Operations Support, NRC, from Sherry Stein, Director, Regulatory Affairs, Advanced Medical Systems, Inc.

² By a letter dated September 15, 1989, from Robert M. Bernero, Director, Office of Nuclear Material Safety and Safeguards, NRC, to Sherry Stein, Director, Regulatory Affairs, Advanced Medical Systems, Inc.

occurred because the subsequent treatment times were adjusted and the total delivered dose did not differ from the prescribed dose. Neutron Products, Inc., was called to repair the machine.

The NRC investigation and subsequent inspections revealed several violations. Enforcement action was taken by the NRC against Atom Mechanical for violation of Part 21 requirements, and against St. Mary's Hospital and Picker International for violations of Part 35 and Part 30 requirements, respectively.³ Moreover, the State of Maryland determined from its own investigation that the incident at Anderson Memorial Hospital resulted from a failure of the part, i.e., breakage of the return spring. No enforcement action was taken by the State of Maryland.

Under current NRC regulations, persons authorized under a specific license to use devices containing byproduct material (e.g., use of teletherapy equipment under a Part 35 specific license) ultimately are responsible for the safe use of these devices, and for ensuring that such devices are properly maintained. Suppliers of sources or devices containing byproduct material, whether they are an original manufacturer or a manufacturer of replacement sources or devices, must be licensed under Part 30 or 32 or an appropriate Agreement State license, and also have responsibility for the safety of the sources or devices that they supply or replace. Service or repair, which would include the replacement of parts or components of medical or industrial sources or devices that present a risk of radiation exposure from the failure of certain parts, such as the teletherapy devices discussed as examples in this petition, may be performed only by qualified persons authorized under an NRC or Agreement State license (*cf.* 10 C.F.R. §§ 35.605, 39.43(e)). Some generally licensed devices may be serviced by general licensees who are authorized to perform limited service work if sufficient information about the service work (e.g., procedures, training, expected dose) is submitted by the manufacturer or initial distributor and accepted by the NRC. However, these devices typically are not mechanically complex and do not present the same risk of significant radiation exposure. Moreover, the NRC has no record of failure of these devices leading to a radiation exposure attributable to defective replacement parts or improper servicing. Finally, under the provisions of Part 21, the supplier of any basic component,⁴ whether or not a licensee of NRC or an Agreement State, is also responsible for the quality of the component, whether it is original or replacement.

³ Specifically, Atom Mechanical Company was found to be in violation of 10 C.F.R. § 21.21 (Oct. 16, 1989), St. Mary Medical Center was found to be in violation of 10 C.F.R. §§ 35.59(g), 35.605, 35.630(a), 35.615(d)(4), 35.632(a), and 35.634(a) (Oct. 17 and 26, 1989), and Picker International, Inc., was found to be in violation of 10 C.F.R. § 30.3 (subsequent to inspections that occurred on Oct. 26 and Nov. 9, 1989). Inspection reports are available for review in the NRC Public Document Room.

⁴ A "basic component" is defined in Part 21 as one, "in which a defect could create a substantial safety hazard."

V. REASONS FOR DENIAL

The NRC has examined the petition (1) in light of its regulations and policies for both general and specific licensees, and (2) in view of the cases cited by the Petitioner in support of the petition. The NRC is denying the petition because current regulations apply equally to manufacturers and suppliers of both original and replacement parts, ensuring the integrity of these parts; therefore, no additional requirements addressing the regulation of manufacturers and suppliers of replacement parts are necessary. Further, current regulations address service and maintenance of sources and devices possessed and used under an NRC license, including replacement parts, whether manufactured or supplied by the original manufacturer or supplier or some other manufacturer or supplier. Accordingly, the petition for rulemaking is denied.

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**James M. Taylor
Executive Director for
Operations**

Dated at Rockville, Maryland,
this 28th day of March 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

Docket No. 30-29567-CivP
(ASLBP No. 94-686-01-CivP)
(Byproduct Material License
No. 20-27908-01)
(EA 93-005)

CAMEO DIAGNOSTIC CENTRE, INC.

May 4, 1994

MEMORANDUM AND ORDER
(Appointing Settlement Judge)

The Licensee and the NRC Staff have agreed that a settlement judge should be appointed in this proceeding.¹ Considering the nature of the issues, the Board believes that negotiations between the parties under the direction of a settlement judge may facilitate a fair and reasonable settlement of particular issues or the entire proceeding.

Therefore, having consulted with the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, and consistent with the provisions of 10 C.F.R. § 2.722, the Board appoints Administrative Judge Peter B. Bloch to serve as a special assistant to the Board and to act as a settlement judge in this

¹ Mr. Paul J. Rosenbaum, President of Cameo Diagnostic Centre, orally moved that the Board appoint a settlement judge during the prehearing conference of April 26, 1994. Tr. 44-45. The NRC Staff responded April 29, 1994, agreeing to the motion.

proceeding. The Board and Judge Bloch have agreed that statements made by the parties in settlement negotiations will not be revealed to the Board.

Any settlement agreement or stipulation reached in negotiations before Judge Bloch will be presented to the Board to determine whether the proposed disposition is in the public interest in accordance with the provisions of 10 C.F.R. § 2.703.

The discovery schedule is suspended until further order of the Board.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
May 4, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

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

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

May 20, 1994

Applicant, two of whose employees were scheduled to be deposed in this case, requested a postponement because these same employees are subject to an NRC demand for information, which accompanied a Notice of Violation recently issued to Applicant. The Licensing Board determined that scheduled depositions should go forward.

**RULES OF PRACTICE: DISCOVERY; EFFECT OF NRC DEMAND
FOR INFORMATION**

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. The individuals involved have known about the basic facts of this case for years. Further preparation is not necessary for them to tell the truth.

MEMORANDUM AND ORDER

(Effect of Enforcement Demand on Depositions)

This afternoon, Intervenor and Licensee called Judge Bloch to discuss the effect on scheduled depositions of the demand for information recently made by the Nuclear Regulatory Commission (NRC) on individuals employed by Georgia Power.¹ The individuals involved in the scheduled depositions are Mr. Frederick, Mr. Majors, and Mr. Burr. Mr. Burr is not subject to a demand for information. Mr. Frederick and Mr. Majors are. At the outset, Judge Bloch determined that counsel did not know any precedent that would govern the Board's determination.²

Counsel for Georgia Power, with the agreement of counsel for Mr. Mosbaugh, asserted that Mr. Frederick has employed new private counsel last Thursday. Mr. Majors has had private counsel for some time. Private counsel were not, however, participating in the telephone conversation among the parties and Judge Bloch.³

Licensee argued that the pending demand for information could have very serious consequences for Mr. Frederick and Mr. Majors and that it would be appropriate to recognize their interests and to delay their depositions in order to be fair to them. It was argued that since Mr. Frederick had new private counsel it might take some time for his attorney to master the volume of materials involved. Georgia Power also argued that the nature of the review of evidence, particularly of audio tapes,⁴ has now changed for these individuals. They now need to hear many tapes that did not seem so important before.

Staff, which developed a position in the course of this conference call, argued that there was no need to rush ahead with these depositions at this time. It did not think that whether or not a delay occurred would affect the ability to discern the truth at the depositions. In response to Judge Bloch's questions, it stated that

¹ The "Notice of Violation and Proposed Imposition of Civil Penalties -- \$200,000, and Demands for Information," was transmitted to Georgia Power Company in a letter of May 9, 1991 (Docket No. 50-424, License No. NPF-68, EA 93-304.

Present during the call were John Lamberski, Ernest Blake, and David Lewis for Georgia Power; Michael Kohn and Stephen Kohn for Mr. Mosbaugh; and Charles Barth and Joe Rutberg for the NRC. The NRC was added as a party to the conversation at the request of Judge Bloch.

² There was some argument about the relevance of prior Board rulings about deferring depositions so that Georgia Power witnesses could first review Mr. Mosbaugh's surreptitiously recorded tapes. Judge Bloch determined, without objection, that there was no direct relevance of this prior ruling in this instance.

³ The relationship between counsel for Georgia Power and the private counsel for these individuals is not clear. There is, therefore, the possibility that private counsel might have different arguments that they would be entitled to raise despite the Board's ruling on the arguments of the parties.

⁴ Mr. Mosbaugh made many surreptitious tapes of conversations held by him with other employees of Georgia Power. These tapes were submitted to the Office of Investigations as evidence in its investigation of the allegations that recently resulted in the issuance of a Notice of Violation concerning representations to the NRC about diesel generators.

the Demand for Information could be met in 30 days from the time of issuance of the Notice of Violation (stamped May 9 on the copy sent to Judge Bloch).

Intervenor argued that it was important to it to conduct the depositions next week. It preferred for tactical reasons not to wait for the witnesses to extend their review of existing evidence before depositions are conducted.⁵ It argued that these individuals have been aware of the allegations for a long time and did not need further preparation to testify truthfully.

Judge Bloch concluded, for the Board, that the depositions should go forward. He urged the intervenors to attempt to complete the depositions within 2 days and he acknowledged that success in that endeavor could be affected by the nature of objections that are interposed by Georgia Power during the depositions. He therefore offered to be available to respond to objections. He also agreed, after a suggestion by Mr. Blake, to resolve on Monday (May 23) questions concerning the scope of the depositions.⁶

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 20th day of May 1994, ORDERED that:

The noticed depositions of Mr. Burr, Mr. Frederick, and Mr. Majors, shall proceed. Georgia Power Company's request for a delay of these depositions is denied.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

⁵ Judge Bloch asked whether Intervenor thought it might be advantageous to it to wait until after private counsel had talked with the witnesses about their position in light of the Demand for Information. Counsel clearly stated his preference to proceed forthwith.

⁶ It was also understood, at Mr. Bloch's urging, that questions concerning the scope of the Subpoena Duces Tecum (the documents to be brought to the deposition) would be resolved among counsel. This includes objections concerning documents already in possession of Mr. Mosbaugh and other objections concerning the relevance of documents.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

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

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

May 23, 1994

The Board determined that a Notice of Violation (NOV) issued to Applicant relates to matters that are related to the pending contention. Consequently, the Board ruled that questions related to that NOV were related to this proceeding and are necessary to the completion of an adequate record in this case. This ruling modified an earlier Board ruling dividing the trial of the pending contention into two phases, the first of which would be limited only to the bases initially filed for the admitted contention.

RULES OF PRACTICE: SCOPE OF PROCEDURE; EFFECT OF NOTICE OF VIOLATION

All matters contained in a notice of violation related to a pending contention are found to be important matters and they must be adjudicated in order to ensure an adequate record.

MEMORANDUM AND ORDER (Scope of Proceeding)

Today we received by facsimile transmission a letter from Georgia Power containing what we interpret to be a motion to limit the scope of scheduled depositions in accordance with prior rulings of this Board. We have decided to deny Georgia Power's motion without waiting for a response. Our ruling is relevant to depositions scheduled during the next 2 days and must, therefore, be made promptly.

The Georgia Power motion is based on a ruling of the Board that predated the issuance to Georgia Power of a Notice of Violation and Proposed Imposition of Civil Penalties on May 9, 1994 (NOV).¹ The motion argues, primarily, that three aspects of the NOV were not mentioned in this proceeding and may not be raised as issues. The issues sought to be excluded from this case are: (1) the accuracy and completeness of a Georgia Power statement in June 29, 1990 letter to the NRC concerning GPC's April 9 letter and April 19 LER; (2) the accuracy and completeness of a Georgia Power statement in an August 30, 1990 letter to NRC concerning Georgia Power's April 9 letter to NRC; and (3) the issue of air quality (high dew point readings) that might affect the starting of the Vogtle diesel generators.

The NOV was based on an extensive investigation conducted by the Office of Investigations of the Nuclear Regulatory Commission.² The matters contained in the NOV also were considered by the Vogtle Coordinating Group, which was comprised of NRC Staff members selected for their expertise in evaluating these charges.³

We note that our earlier order,⁴ which placed some limitations on the scope of this case, delineated the scope of Phase I of this proceeding. At the time, we were aware that it might later be appropriate to expand the scope into a Phase II proceeding. Without even considering whether the prior limitations did or did not pertain to the matters raised by Georgia Power, we have determined that it is necessary to include all the matters in the NOV in the scope of this proceeding. We are hearing an allegation that SONOPCO lacks the character and competence to run a nuclear power plant. We do not know, at this time, whether the allegations in the NOV are valid. However, we have examined extensive documentation that suggests that they have been carefully considered. Hence, the allegations of the NOV are relevant and important to the pending

¹ Docket No. 50-424, License No. NPF-68, EA 93-304.

² The investigation was completed December 20, 1993, and was released to the public simultaneously with issuance of the NOV (Case No. 2-90-020R).

³ February 9, 1994, released simultaneously with the NOV.

⁴ LBP-93-21, 38 NRC 143 (1993).

contention. To exclude any of those allegations would be to have an inadequate record, compiled with blinders that would keep us from examining a portion of the relevant facts. This we shall not do.

All the allegations in the NOV are relevant to this case. IT IS SO ORDERED.⁵

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

⁵ Motions for reconsideration may be filed within 10 days. However, this ruling shall apply during the pending depositions.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

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

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

May 25, 1994

The Board determined that deadlines for the conclusion of discovery must be kept unless good cause is shown for an extension of time. In the circumstances of this case, involving a special problem suffered by an attorney, there was good cause for 4 additional days of discovery, which would have been concluded already but for the attorney's problem. Hence, only discovery related to that special problem was permitted.

The Board also ruled that challenges to its orders must be made promptly, through a motion for reconsideration filed no later than 10 days after issuance of the order (or sooner if the order takes effect more quickly). An unchallenged order becomes the law of the case and cannot be challenged subsequently.

In addition, the Board reviewed several discovery disputes and overruled several objections made by Applicant to questions asked by Intervenor. In consequence, the Board ordered that the affected deposition should continue, and Applicant was cautioned not have any conferences with the affected deponents concerning the topics that were interrupted and are to be completed.

RULES OF PRACTICE: COMPLETION OF DISCOVERY; GOOD CAUSE FOR EXTENSION

A party seeking to extend discovery beyond a deadline may obtain an extension on the discovery period only by showing that there are specific reasons why the deadline was not met. General arguments concerning the developmental nature of the discovery process are not persuasive.

RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION; FINALITY OF BOARD ORDERS

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.

RULES OF PRACTICE: OBJECTIONS DURING DEPOSITIONS; SANITIZING WITNESSES

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. Such objections should not be made. A consequence of making such objections is that further discovery will be permitted and the witness will be barred from further discussions with company lawyers pending the continuation of the deposition.

**MEMORANDUM AND ORDER
(Good Cause for Illegal Transfer Discovery;
Board Concerns)**

There are pending before this Board several motions by Mr. Allen Mosbaugh (Intervenor) to conduct further discovery on the Illegal Transfer Issue. These motions will be discussed below. First, we shall review the procedural history that brought us to this pass.

I. PROCEDURAL HISTORY

Following a prehearing conference held on January 27, 1994, the Board issued an unpublished Prehearing Conference Order (February 1, 1994) establishing a

schedule for completion of discovery on the illegal transfer issue. That Order is definitive. Challenges to orders of this Board must be made promptly, through a motion for reconsideration filed no later than 10 days after issuance of the order (or sooner if the order takes effect more quickly). An unchallenged order becomes the law of the case and cannot be challenged subsequently.

The February 1 order stated:

1. Parties may file requests for stipulations at any time. . . .

* * *

4. All depositions concerning the contention on alleged illegal transfer of operating authority (the 2.206 matter) will be completed by Friday, April 29, 1994.

5. By COB May 31, 1994, the parties and the Board shall *receive* proposed additions to stipulations based on the interview records. All requests for stipulations shall be filed by this time. . . .

Nothing in our order addressed the question of when interrogatories would need to be completed. The question of written discovery was not raised by any party at our prehearing conference, leaving us with the impression that the parties had all completed written discovery. Intervenor has stated that “[t]he Board agreed with Intervenor’s counsel and determined that Intervenor would have no less than 30 days after the completion of depositions to file *written discovery* related to the illegal transfer of control issue”¹ (emphasis added).

In its assertion about written discovery, Intervenor is in error. Our ruling was that requests for *stipulations* might be filed until May 31. Nothing was said about other forms of written discovery. Moreover, in the prehearing-conference discussion about stipulations, Intervenor argued that it would need a month to examine the record before filing stipulations. Tr. 231-32. This led us to believe that the record would be completed on April 29 and that there would be no further discovery after that time. In that way, Intervenor would have a month to prepare requests for stipulations.

Our next prehearing conference was April 11. Intervenor correctly states that the preannounced purpose of the Conference was to reschedule the status conference.² However, additional scheduling matters were considered at that conference, and Intervenor made no motion to limit the scope of the conference. On April 12, 1994, the Licensing Board issued an unpublished order stating the conclusions reached at the telephone conference. The Board order summarizing that conference is particularly important, since there was no transcription record made of that conference. In our order, we stated:

¹Intervenor’s Statement of Good Cause to File Interrogatory Questions Concerning Illegal Transfer of Control and to Convene Depositions Concerning Illegal Transfer of Control, May 6, 1984 (received by facsimile transfer on May 6 and May 10) (hereinafter “Intervenor’s Additional Discovery Motion”), at 2.

²Intervenor’s Additional Discovery Motion at 2.

1. With the exception of matters covered by paragraph 2 of this order, all discovery (including any additional depositions, interrogatories, and responses to pending requests for admissions) related to the alleged illegal transfer of authority over Vogtle shall be *completed* by April 29, 1994. [Emphasis added.]

2. By April 29, 1994, Mr. Mosbaugh shall file a motion covering all disputed discovery issues related to the testimony of Mr. [A.W.] Dahlberg. This motion shall contain all interrogatories or requests for documents that Mr. Mosbaugh plans to make on these issues.

* * *

7. Deadlines may be extended on motion for good cause shown.

On April 22, we held another prehearing conference by telephone. In the course of that conference, Intervenor informed the Board, at Tr. 246, of his theory concerning discovery in the case:

Discovery is the type of thing where you cannot set out at day one and say, "I know I'm going to have to talk to X, Y, and Z, and then I'm going to have my entire case." Discovery is an ongoing process where you see what's out there, you see what you get, you see what the witnesses are saying, and then you figure out where you have to go from there.

We went to the first round and now we're looking at a second round. Based on what's happening, there is also a need for some written discovery to be filed as well. In the interim, that is what I see as necessary for the intervenor to complete the discovery process with respect to the license transfer.

These views are, regretfully, in error. Because of the discovery deadlines in this case, it is not up to Intervenor to organize discovery in this fashion. Once the deadline has expired, discovery may continue only if good cause is shown. Consequently, when Intervenor filed interrogatories on May 3, it had no right to pursue further discovery that would exceed the deadline in the case. It was required to show good cause why that discovery deadline would be exceeded.

We have required Intervenor to show that good cause. However, before we decided to permit Intervenor to show good cause for further discovery, Mr. Barth,³ at a May 3 Prehearing Conference, made the following illuminating comment on behalf of the Staff, at Tr. 344:

I'd like to tackle the good cause first, your Honor. Let me read you the first interrogatory. "Identify all committees or other entities established within the Southern system to study the creation of SONOPCO."

This is a question that could have been asked January 11 [1993], when you and I were down in the rain in Augusta, when we had the first prehearing conference. This is not an interrogatory which arose out of the depositions that have taken place in Atlanta and Birmingham the last two weeks — the first two weeks of April.

³ Mr. Barth also served on us the complete transcript of the deposition of Mr. Dahlberg, and the Board has become familiar with that deposition (which still has not been presented to the witness for signature pursuant to the rules) and is grateful for this insight into the discovery process.

Beginning at Tr. 348, we then required Intervenor to file, so that it is *received* by all the parties by Friday, May 6, at the close of business: (1) all objections arising out of depositions, including Mr. Dahlberg's deposition; (2) good cause for each proposed interrogatory, "one by one." We characterized the interrogatories (with our discussion with Mr. Barth fresh in our memory) in this way:

some do seem to be very basic and very general. And we want to know why there is good cause for filing at this time, given the specific problems that arose with respect to the deponents that you have already interviewed. There has to somehow be shown there is good cause arising out of the difficulties in the depositions.

II. LATENESS

In the course of the telephone conference of April 22, Mr. Kohn, counsel for Intervenor, agreed to inform us on the Monday following the conference about the basis for his argument that he did not need to order a transcript for depositions that he had conducted. Tr. 275. We note that Mr. Kohn did not call on that Monday, as the Board had asked him to do. (*See* Tr. 331-34.) He eventually filed the requested information on May 2, 1994.

We also note that the motion containing matters related to the Dahlberg deposition was not filed by May 3, as had been required. It is for these reasons that we admonished Mr. Kohn on the record, stating that he did not seem to have a systematic way of keeping track of his obligations to the Board. Tr. 334 (corrected herewith).

We then granted an extension of time for filing the Dahlberg Motion. The Board's Chair stated: "I want to be very clear that if there are any other deadlines missed in this case, the consequence will be that you won't be able to make up the filing." Mr. Stephen Kohn then stated for the Intervenor: "[W]e think what happened last week was extraordinary and as a firm we are committed to making sure *that all these deadlines are completely fulfilled in the future . . .*" Tr. 335 (emphasis added).

We note, as well, that we had some discussion earlier in the record that is relevant to the meaning of "completely fulfilled." In the course of discussing Intervenor's decision not to have transcripts made of some of the depositions it had conducted, we were informed that Intervenor had transcribed the Dahlberg deposition and that both the Staff and Georgia Power expected that subsequent transcripts would be made. Tr. 319. In recognition of that possible expectation, Mr. Kohn stated that he had asked the reporter for the depositions to notify the other parties that he was not ordering transcripts. Tr. 319. At that point, Judge Bloch stated, at Tr. 319:

So you relied on the reporter and never followed up to make sure that it would happen? You could see that it was important, in terms of the schedule of the case?

We are concerned that, despite our warning that we would not accept late filings, Intervenor failed to send *complete copies* of its filings either to this Board or to Georgia Power. The consequence was that the Board was not able to prepare in a timely fashion for the scheduled prehearing conference last Thursday, resulting in a 1-week delay in that conference.

The nature of Intervenor's delinquency is that it transmitted some of the pages of its filings to the Licensing Board on May 6 and completed its filing on May 10. Apparently, the cause was a facsimile transmission problem. But Intervenor did not confirm timely receipt of its entire transmission. Both Applicant and Staff also reported difficulties resulting in their receiving a filing that was incomplete at the time it was due to be received.

Because the difficulty here appears to be mechanical and not willful, we are going to step back once more. In the future, even mechanical difficulties will result in a finding of delinquency in timely filing, and filings will not be received. We suggest that Intervenors file early enough to catch mechanical problems and utilize alternative means of filing, if necessary.

III. CONCLUSIONS

A. Pending Depositions

We are persuaded by the merits of Intervenor's Motion to Compel Licensee to Produce A.W. Dahlberg (Motion to Compel⁴). We agree with Intervenor that it is well established that discovery is to be liberally granted so the parties can ascertain facts in complex litigation, refine the issues and prepare for a more expeditious hearing.⁵

At the deposition of Mr. Dahlberg, Intervenor asked questions concerning Georgia Power's nonnuclear budget. It had a basis for these questions. Mr. Dahlberg had testified that the nuclear budget would have been consolidated with the other Georgia Power budgeting matters and then reviewed by Georgia Power's Management Council before it was presented to the Southern Company Management Council. Dahlberg, Tr. 27-28. Since the budget process for nuclear and nonnuclear were said to have been consolidated, there is reason to ask about the two trains of budgeting and to test the consistency of answers given. We are

⁴ Intervenor's Motion to Compel Licensee to Produce A.W. Dahlberg; Reconvene the Deposition of George Hairston and Schedule the Deposition of Thomas Beckham, May 6, 1994 (incompletely transmitted on that date; completed May 10).

⁵ Motion to Compel at 2.

concerned that by objecting to this line of questions, Georgia Power mitigated the value of cross-examination. For this reason, even at this late date, we grant Intervenor's request (in footnote 3 of its brief) to prohibit any discussions between Mr. Dahlberg and his Georgia Power counsel about budgeting questions before his next deposition.

We also caution Georgia Power's counsel not to require Intervenor to make explanations of evidentiary objections in front of Georgia Power's witness. On proper request by Intervenor's counsel, necessary explanations can be given on the record by permitting the witness to leave. However, even these requests should be kept at a minimum because there is no indication that Mr. Kohn has been asking irrelevant questions and his flow of examination should not be broken without important reasons.

With respect to questions asked of Mr. Dahlberg for the purpose of eliciting the extent of his knowledge about nuclear questions, Georgia Power has not stipulated to his lack of expertise in nuclear questions. Hence, these questions were appropriate and attempts to interfere with this line of questions were not appropriate.

The most disturbing difficulty in the Dahlberg deposition relates to questions about Board politics. Intervenor is alleging that the *reality* of governance of Georgia Power and SONOPCO is that SONOPCO assumed improper authority over the nuclear operations of Georgia Power. This allegation may well rise and fall on realities that are separate from the written documents. The politics of Southern company may well affect our decision about what really was going on in the SONOPCO company. We regret that this point was not apparent to counsel for Georgia Power, causing the disruption of an important line of examination. We therefore also caution counsel for Georgia Power to have no discussion with Mr. Dahlberg about these issues before his next deposition.

We also consider questions about Mr. Hobby, about Georgia Power's response to tape-recording activity of Mr. Mosbaugh, and about Mr. Mosbaugh's motives to be sufficiently related to the control issue to have been allowed. These are management areas in which actual performance has been visible to Intervenor. He should have latitude to engage in discovery that attempts to show (or to lead to evidence), directly or indirectly, that SONOPCO may have exercised improper influence in these matters. We likewise caution counsel for Georgia Power not to discuss these matters with Mr. Dahlberg.

IV. INTERROGATORIES

In the scheduling conversations in this case, no party sought to file interrogatories until April 22. Our Order of April 12 set an April 29 deadline for filing interrogatories. No one had requested such a deadline. We specified that date

solely for the purpose of clarifying that all discovery would be completed on that date. We did not anticipate that fresh interrogatories would be filed just before the deadline expired. Such a filing is inconsistent with our prior determination that discovery would be *completed* on April 29.⁶

Now Intervenor has filed a set of interrogatories, comprehensive in scope and considered by us to involve matters that could have been investigated at the very beginning of Intervenor's case. At the May 3 conference, in language discussed above, we specified that we would permit those interrogatories only if good cause could be shown for them one at a time. We stated that we wanted to know not only why the interrogatories were late but why they had not been filed far earlier and what specific difficulties in depositions had made them necessary.

Intervenor attempts to show that its interrogatories are necessitated by its difficulty in completing the deposition of Mr. Dahlberg.⁷ These arguments are now mooted by our determination to permit that deposition to go forward.

However, Intervenor also argued that it "was not in a position to fashion interrogatories about budgeting-related matters until after the depositions of GPC's executives." We find this a strange argument. These interrogatories were drafted even though no budgeting-related questions were answered. We, therefore, conclude that the questions could have been asked at any time and that Intervenor's argument does not support further written discovery. Our examination of the interrogatories at our last prehearing conference convinced us that these were very basic questions that could have been asked at any time, and Intervenor has not even argued that we were incorrect in this impression.

V. ADDITIONAL DEPOSITIONS

On April 20, Intervenor notified Georgia Power that it planned to conduct eleven depositions beginning on April 27 and concluding on May 3.⁸ At the same time, there was a pending request to conduct a continuing deposition for Mr. George Hairston and a deposition of Mr. Thomas Beckham. We have determined that Intervenor has not shown good cause for extending the deadline of April 29 for the purpose of conducting any of these depositions. Each of its explanations is general and is not related to specific difficulties that could not have been anticipated prior to conducting the depositions.⁹

⁶ We note that the Staff of the Nuclear Regulatory Commission has not completed its discovery. It states that it has not done so because of the unavailability of transcripts of Intervenor's depositions. Tr. 283. We have not decided whether Staff has good cause for extension of discovery. That determination awaits a showing of good cause by the Staff.

⁷ Intervenor's Statement of Good Cause, May 6, 1994, at 6-7.

⁸ *Id.* at 8.

⁹ *See id.* at 9-11.

On the other hand, we have concluded that Intervenor should be permitted to complete whatever depositions it could have completed by April 29. It correctly interpreted our action at the April 15 scheduling conference as deferring all contested scheduling matters, for special reasons, until May 3. Hence, Intervenor should not lose the 3-day period from April 27 to April 29 in which it could have held depositions. Consequently, we shall permit Intervenor to conduct 3 full days of depositions of people (including Mr. Hairston and Mr. Beckham) it has named for possible depositions on the illegal transfer issue. We expect that these depositions will not be unfairly obstructed. We also expect that Intervenor will schedule only those depositions it can reasonably expect to complete.¹⁰

VI. ADEQUATE RECORD

In reviewing the record to this date, the Board has determined that there are several issues that should be addressed in order for us to have an adequate record on the illegal transfer issue. We expect the parties to introduce appropriate documentation and testimony at the hearing to ensure that these issues are adequately addressed, and we expect witnesses that are called to be prepared to answer our relevant questions on these issues.

The issues we have determined to be necessary for an adequate record are:

1. *Nonnuclear Responsibilities of SONOPCO.* What nonnuclear responsibilities, if any, were assigned to SONOPCO? For any responsibilities that could affect safety at the Vogtle plant, directly or indirectly, how were those responsibilities defined?

2. *Oversight of SONOPCO.* What organizational units or executive personnel of Georgia Power had any form of oversight activity (including management control, audits, investigation, personnel, quality assurance or control, or root-cause assessments) with respect to SONOPCO? What were those activities for each unit or executive person? What is the approximate total time spent on these activities by each unit or person?

3. *Personnel Decisions.* Did SONOPCO as an entity, or any of its personnel that were not employed by Georgia Power, ever make decisions or recommendations concerning personnel actions to be made by Georgia Power? Please detail.

4. *Operating Responsibilities.* Did any non-Georgia Power personnel of SONOPCO ever have operating responsibilities at Vogtle? What were those responsibilities? For each such exercise of responsibility, was there

¹⁰ We expect the parties to make reasonable accommodations if one of the named witnesses is not available during the time scheduled for completing the illegal transfer depositions.

always a Georgia Power person supervising the performance of the operating responsibility? What is the source of information for the answers to this question.

5. *Site Area Emergency.* Who first called Mr. Dahlberg about the site area emergency? What SONOPCO non-Georgia Power personnel called Mr. Dahlberg at any time concerning the site area emergency. What was discussed? How were the people who called Mr. Dahlberg supervised?

6. *Internal Studies.* What, if anything, has Georgia Power done to assure itself that SONOPCO has not exercised safety functions for which Georgia Power is responsible? Similarly, what, if anything, has Georgia Power done to assure itself that SONOPCO has not improperly pressured Georgia Power personnel in the performance of their safety responsibilities. Please document whatever studies, inquiries, or reports, of any kind, were done by way of assurance.

VII. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 25th day of May 1994, ORDERED that:

1. Mr. Allen Mosbaugh (Intervenor) may continue the deposition of Mr. A.W. Dahlberg, subject to the conditions imposed on Georgia Power Company above.

2. Mr. Mosbaugh may, in addition, conduct 3 full days of depositions on the illegal transfer issue pursuant to a schedule to be adopted by the Atomic Safety and Licensing Board at its May 26 prehearing conference.

3. Intervenor may not conduct any further discovery without good cause shown. Discovery denied in this Order shall not be refiled unless new reasons arise.

4. The parties should become aware of the issues that the Licensing Board considers to be necessary with respect to an adequate record of this case. They shall assure that appropriate documentation and testimony are presented at the Hearing, should one be held.

5. Scheduling of depositions shall be considered at the prehearing conference of May 26, in Bethesda, Maryland.

**THE ATOMIC SAFETY
AND LICENSING BOARD**

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

**Thomas D. Murphy
ADMINISTRATIVE JUDGE**

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

Bethesda, Maryland



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket Nos. STN 50-528
STN 50-529
STN 50-530ARIZONA PUBLIC SERVICE
COMPANY, *et al.*
(Palo Verde Nuclear Generating
Station, Units 1, 2, and 3)

May 16, 1994

The Director, Office of Nuclear Reactor Regulation, denies a Petition filed by Thomas J. Saporito, Jr., pursuant to 10 C.F.R. § 2.206. The Petition requested that the NRC order the immediate shutdown of the Palo Verde Nuclear Generation Station, Units 1, 2, and 3, institute a show-cause proceeding to modify, suspend, or revoke the operating licenses of the three units, take appropriate enforcement action against the Licensee, and deny the Licensee's November 13, 1990 license amendment request to revise the setpoint tolerances for safety valves. As the basis for these requests, Petitioner alleged that neither the Licensee nor the NRC can be sure whether the 72 main steam and pressurizer safety valves will operate within their design bases and setpoint tolerances to mitigate an overpressurization event.

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

On October 23, 1992, Thomas J. Saporito, Jr., filed a Petition pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* requesting that the Nuclear Regulatory Commission (NRC) order the immediate shutdown of

the Palo Verde Nuclear Generating Station, Units 1, 2, and 3 (Palo Verde), and institute a show-cause proceeding to modify, suspend, or revoke the operating licenses of the three Palo Verde units. The requests were based on alleged problems with the main steam and pressurizer safety valves at Palo Verde and other matters raised in the Petition. By letter dated December 29, 1992, Petitioner's request for the immediate shutdown of the Palo Verde units was denied, and receipt of the Petition was acknowledged.

In a supplement to the Petition dated January 4, 1993, Petitioner also requested that NRC take appropriate enforcement action against Arizona Public Service Company (APS or Licensee) and deny the November 13, 1990 license amendment application for an increased setpoint tolerance for the safety valves.

II. BACKGROUND

As a basis for his request, Petitioner stated that the Arizona Public Service Company and the NRC cannot be sure whether the seventy-two safety valves will operate within their design bases and setpoint tolerances to mitigate an overpressurization event in any of the Palo Verde units. In support of this assertion, Petitioner presented seven concerns which are summarized as follows: (1) The November 13, 1990 request of APS to amend the Technical Specifications of its operating licenses for Palo Verde Units 1, 2, and 3 to increase the allowable setpoint tolerances for the main steam and pressurizer safety valves was signed by a person who is not technically qualified to make safety commitments for this or any license amendment request; additionally, 56 persons in engineering positions at Palo Verde hold those positions without having a bachelor of science degree in engineering. (2) In a March 22, 1991 interoffice memorandum, the Licensee responded to an employee who stated a concern that the amendment request to increase the allowable setpoint tolerance for the safety valves indicates that the peak analyzed pressure for the loss of condenser vacuum transient is 2740.9 pounds per square inch, absolute (psia), leaving only a 9.1-psia margin to the safety limit of 2750 psia. (3) In a December 4, 1991 interoffice memorandum, NRC Staff stated that it was not prudent to entertain the Licensee's request to amend its Technical Specifications at this time. (4) A June 1992 Condition Report/Disposition Request of APS (CRDR No. 1-2-0139) listed numerous inadequacies in the safety valves. (5) One of the authors of CRDR No. 1-2-0139 testified to NRC officials that the Licensee falsified documents related to the Licensee's request to amend its Technical Specifications. (6) A person told Petitioner that two NRC Office of Investigations investigators told that person that they had documents demonstrating that Licensee officials falsified documents related to the Licensee's request to amend its Technical Specifications. (7) On October 8, 1991, an engineer employed by the Licensee

willfully violated a safety-related procedure by intentionally adjusting pressurizer safety valve PSV-574 contrary to the requirements of the procedure.

Mr. Saporito supplemented his Petition by a letter dated January 4, 1993, which reiterated his concerns, and also repeated his requests for an immediate shutdown of Palo Verde and a show-cause proceeding to modify, suspend, or revoke the operating licenses of Palo Verde Units 1, 2, and 3. In addition, Petitioner requested that the NRC take appropriate enforcement action against the Licensee and that the NRC deny the Licensee's November 13, 1990 license amendment request to revise the setpoint tolerances for the safety valves.¹

III. DISCUSSION

A. Personnel Qualifications

Petitioner states that the November 13, 1990 request of APS to amend the Technical Specifications of its operating licenses for Palo Verde Units 1, 2, and 3 to increase the allowable setpoint tolerances for the main steam and pressurizer safety valves was signed by a person who is not technically qualified to make safety commitments for this or any other license amendment request. Additionally, the Petitioner asserts that fifty-six persons at Palo Verde who hold engineering positions have no bachelor of science degree in engineering.

NRC regulations require that all applications and amendments to applications be signed by the applicant or duly authorized officer thereof under oath or affirmation pursuant to 10 C.F.R. §§ 50.30(b) and 50.90. The NRC does not require that an applicant or duly authorized officer have any particular educational achievements in order to sign a license or license amendment application. The November 13, 1990 amendment application meets applicable NRC requirements for signature. Accordingly, Petitioner has neither stated a violation of NRC requirements nor raised a substantial safety concern.

Petitioner is correct that some personnel in engineering positions do not have engineering degrees. This was a deviation from the commitment stated in the Updated Final Safety Analysis Report (UFSAR), for which the Licensee was issued a formal Notice of Deviation in NRC Inspection Report 50-528/92-43, dated February 26, 1993. The deviation occurred after the Licensee revised the UFSAR, committing to qualification requirements as specified in job position descriptions (JPDs), which exceeded the requirements of ANSI 3.1-1978.

¹On May 9, 1991, a petition for leave to intervene and a request for hearing filed by Linda Mitchell, *et al.*, was granted. LBP-91-19, 33 NRC 397 (1991). Petitioners challenged the Licensee's November 13, 1990 license amendment request for increased allowable setpoint tolerance, but later withdrew that challenge, and the proceeding was terminated. LBP-91-37A, 34 NRC 199 (1991).

The NRC regional staff has reviewed qualifications of personnel hired into engineering positions since the issuance of the Notice of Deviation, and confirmed that one of the four engineering personnel hired did not have a bachelor of science (BS) degree in engineering as required by the applicable JPD. The Licensee identified this condition and initiated Condition Report/Disposition Request 9-3-0205 to evaluate the circumstances. The Licensee determined that the individual's qualifications were certified by an acting supervisor who did not have authority to deal with personnel matters, and that this fact was not detected through other reviews in the hiring process. The NRC inspector reviewed the individual's résumé and determined that he had a BS degree in mathematics and adequate experience, and had worked as a contractor in the same job function for which he was hired. The inspector concluded that the individual had demonstrated, to Licensee management, his competence in the skills required for his job position. Additionally, the individual meets the requirements of ANSI 3.1-1978, which does not require a degree for the job position.

The NRC Region V staff also reviewed the qualifications of seventeen of the Licensee's ASME Section XI testing personnel. Several discrepancies between JPD requirements and actual qualifications were identified. Three Consulting Engineers/Senior Consulting Engineers lacked Professional Engineer (PE) certifications required by the JPDs. Eight people lacked BS degrees in engineering required by the JPDs. However, the Licensee was aware of all these discrepancies. The NRC identified one discrepancy of which the Licensee was unaware. The Licensee had mistaken a BS degree in Engineering Mathematics for a degree in Engineering. In all cases, however, the personnel met the requirements of ANSI 3.1-1978.

In response to the Notice of Deviation, the Licensee initiated an evaluation of JPDs, with the intent of revising them to require qualifications more appropriate to the job positions. The Licensee initiated a review of dual career path programs, which had resulted in some people not having PE certifications and engineering degrees currently required by the JPDs.

On April 29, 1993, the Licensee changed the UFSAR pursuant to 10 C.F.R. § 50.59. The change eliminated references to JPDs, reducing the qualification requirements to those specified in ANSI 3.1-1978. As a result of this change, the Licensee no longer deviates from the UFSAR commitments (NRC Inspection Report 50-528/93-26, dated July 30, 1993). Based on the Licensee's action, the NRC Staff concluded that this deviation was eliminated. The allegation does not raise a substantial safety concern or warrant any action beyond that already taken by the NRC.

B. The Safety Margin Concern

Petitioner states that in a March 22, 1991 interoffice memorandum, the Licensee responded to an employee's concern that the amendment request to increase the allowable setpoint tolerance for the safety valves indicates that the peak analyzed pressure for the loss of condenser vacuum (LOCV) transient is 2740.9 pounds per square inch, absolute (psia), leaving only a 9.1-psia margin to the safety limit of 2750 psia.

On November 13, 1990, the Licensee applied for amendments to the operating licenses for the Palo Verde units to, among other things, increase the setpoint tolerances for main steam safety valves from $\pm 1\%$ to $\pm 3\%$ and pressurizer safety valves from $\pm 1\%$ to $+3\%$ or -1% . In the NRC review of this matter, one of the NRC Staff questions to APS related to the potential overall reduction of conservatism in order to meet the required limits for system overpressurization and other acceptance criteria, especially for the LOCV event. On May 27, 1992, the Licensee submitted the following information regarding the conservatism that exists in the analysis to demonstrate that the maximum allowable pressure would not be exceeded:

1. Feedwater and steam flow actually ramp down to zero in about 18 seconds instead of the analyzed 0.1 second.

2. Safety valves are assumed to open at the $+3\%$ setpoint tolerance, whereas some are actually expected to open at lower pressures.

3. There is 30 psi of additional conservatism in the high pressurizer/pressure trip setpoint of 2540 psia. Also, surveillance tests indicate that this trip response time is less than 0.3 second instead of the assumed 0.5 second.

4. The analysis does not assume that the pressurizer spray valves open.

5. The initial pressurizer level in the analysis is conservative compared to the level normally expected.

6. Nonsafety systems, such as the Reactor Power Cutback System and the Steam Bypass Control System, are assumed to not operate in the analysis.

7. The moderator temperature coefficient is assumed most positive in the analysis.

8. Other conservative conditions regarding the reactor physics parameters in the analysis are: the least negative fuel temperature coefficient is assumed, bounding generic kinetic parameters are used, and the most limiting control rod is assumed to be stuck full out.

The Licensee stated that, with the operating conditions experienced most of the time, the peak pressure for the LOCV would be only 2650.5 psia (as compared to the safety limit of 2750 psia). The Licensee also stated that the ASME Code provides assurance of large margin to failure and that

its analysis to support the changes is adequate. The Staff agrees that the ASME Code overpressure safety limit (110% of design pressure, 2750 psia) is conservative. The NRC Staff determined that if the Licensee's analysis demonstrated the adequacy of the system overpressure protection with acceptably conservative input parameters and analysis methodology, then no minimal margin beyond the acceptance criteria is required. The NRC Staff has reviewed the Licensee's analysis methodology and input assumptions and concluded that they are sufficiently conservative (License Amendment Nos. 75, 61, and 47, dated May 16, 1994). Thus the Licensee has met the required limits for overpressurization and other acceptance criteria, and demonstrated that maximum allowable pressure would not be exceeded.

Petitioner has not raised a substantial safety concern about the proposed amendment to increase safety valve tolerances at Palo Verde.

C. The NRC Memorandum

Petitioner states that in a December 4, 1991 NRC interoffice memorandum, an NRC Staff member stated that it was not prudent to entertain the Licensee's request to amend its Technical Specifications at this time.

This Staff recommendation contained in the interoffice memorandum was based primarily on the conclusion that APS had not established a need for the Technical Specification change and the fact that APS was having trouble meeting the $\pm 1\%$ tolerance on the safety valves, as evidenced by the number of Licensee Event Reports filed. The Licensee's stated need for an expanded safety valve tolerance was to reduce the number of Licensee Event Reports submitted that do not have safety significance. The Licensee's valve performance data demonstrated that, with the proposed setpoint changes, the number of required Licensee Event Reports would be reduced. Also, the purpose of the Technical Specification change was not merely to establish a tolerance that would be met, but to provide a reasonable tolerance that was bounded by a safety analysis. The Licensee's safety analysis, submitted as part of the proposed change, dated November 13, 1990, was found acceptable in the Staff's safety evaluation. Additionally, the Licensee has embarked on a special program to try to improve the repeatability of the setpoints on the safety valves. All valves in all units have been refurbished and setpoints were established by a uniform method in an attempt to have directly comparable data. The Licensee is currently testing many more valves than required in an attempt to improve performance. The Licensee is currently resetting out-of-tolerance values to the tighter $\pm 1\%$ tolerance each time a valve is tested, and will continue this practice, in order to ensure that setpoint drift does not take valves outside the targeted 3% tolerances.

The December 4, 1991 Staff memorandum also commented that the Licensee used an incorrect analytical model for the pressurizer safety valve (PSV) lift. In

the analysis proposed in the license amendment, the PSVs were assumed to fully open at their setpoints to immediately deliver full rated discharge flow. Whereas in the UFSAR analyses, the PSVs are modeled to open only to 70% open at the setpoint pressure. The Licensee based this new assumption on test results that show that the valves attain full lift in 0.02 second after starting to open. The Licensee stated that the maximum additional accumulation in pressure for this delay in lifting would be about 2 psi more than the analysis result.

The NRC Staff concludes that the modeling of the PSVs to open fully at their setpoints (with the +3% tolerance) is acceptable on the basis of PSV test data. The previous method used in modeling the PSV performance involved opening the valve to only 70% open at the setpoint pressure. The proposed method is more nearly a best-estimate modeling technique (i.e., within 2 psi of actual expected performance, as discussed above). Although the previous method is more conservative than that being currently proposed, the NRC Staff concludes that the overall conservatism of the analysis assumptions taken together is adequate, and that the analytical model is acceptable.

In addition, the Staff memorandum of December 4, 1991, noted that with the nominal settings of the MSSVs, the average setpoint of the MSSVs is 3.3% above the design pressure of 1255 psig. The memorandum further comments that with all valve setpoints at 3% above the nominal setpoint values, which are the largest values still meeting the proposed T/S criterion, the resulting average setpoint is 1336 psig or 6.4% above the design pressure. The acceptability of the nominal MSSV setpoints is governed by the ASME Code which requires that at least one of the MSSVs be nominally set at or below the system design pressure. The Code also requires that the MSSVs limit the maximum system pressure to 110% of the design pressure for the limiting design-basis transient. The acceptability of the tolerance range (i.e., $\pm 1\%$ or $\pm 3\%$) is governed by the plant Technical Specification and must be supported by an analysis to demonstrate that the appropriate safety limits (i.e., 110% of design pressure) are not exceeded with the maximum allowable MSSV setpoints for the limiting design-basis transient. The average value of the MSSV setpoints is not required to meet any specific limit in relation to the design pressure of the system. The nominal setpoints for the Palo Verde MSSVs are not proposed to be changed in this amendment request and, therefore, continue to meet the above ASME requirement that at least one of the MSSVs be nominally set at or below the system design pressure. Further, the Licensee has demonstrated by analysis that the maximum system pressure is limited to less than 110% of the system design pressure with the maximum allowable MSSV setpoints for the limiting design-basis transient. Therefore, the above stated comment in the December 4, 1991 Staff memorandum does not provide a basis to deny the amendment request.

The NRC Staff has reviewed the license amendment application regarding increasing the setpoint tolerances for the safety valves, and determined that the

proposed amendment was acceptable in a Safety Evaluation (License Amendment Nos. 75, 61, and 47, dated May 16, 1994).

Accordingly, Petitioner has failed to raise a substantial safety concern, and Petitioner's request that the amendment not be issued is denied.

D. The Condition Report/Disposition Request

Petitioner states that a June 1992 Condition Report/Disposition Request of APS (CRDR No. 1-2-0139) listed numerous inadequacies in the safety valves (i.e., blowdown rings out of position, a history of these valves having setpoint drift, and no preventive maintenance performed by the Licensee since 1984).

A Condition Report/Disposition Request (CRDR) is an internal APS report that formally documents a problem and attempts to determine the root cause in order to prevent the problem from recurring. In this case, the problem that was documented by the CRDR was the failure of fourteen out of twenty main steam safety valves and two out of four pressurizer safety valves to perform within the tolerance of $\pm 1\%$, as required by the Licensee's Technical Specifications. All of these valves were removed during the Unit 1 refueling outage and sent to Westinghouse Electric Corporation for testing. In addition, some blowdown rings were found to be incorrectly set. APS has since instituted a two-person verification system for confirming that the blowdown rings are correctly positioned, and has satisfied itself that the quality assurance (QA) program at the Westinghouse test facility fully meets the Licensee and NRC requirements with respect to QA.

The matters discussed in CRDR No. 1-2-0139 were reported to the NRC in a letter dated June 24, 1992, which forwarded Licensee Event Report (LER) 92-004. The report was prepared because some of the safety valves were found to be outside the $\pm 1\%$ tolerance called for in the Technical Specifications. However, this report also contained the results of a safety analysis demonstrating that the safety limit on reactor coolant pressure of 2750 psia was still met with the as-found settings of the safety valves, some of which were outside the proposed tolerance of $\pm 3\%$.

The NRC does not have specific preventive maintenance requirements for these valves. However, the NRC does require out-of-tolerance conditions to be corrected when identified. The Licensee has performed this required corrective maintenance of resetting the valve setpoint when out-of-tolerance conditions existed.

Additionally, the safety valves are receiving a considerable amount of Licensee attention in an effort to improve their performance. In each case when the safety valves were found to be outside the tolerance band, the Licensee conducted an analysis that demonstrated that overpressure safety limits were not exceeded with the "as-found" settings. In addition, all safety valves have been

disassembled, inspected, reworked as required, reassembled, and retested, and lift settings have been readjusted during the recent refueling outages on all of the units. Thus, the Licensee's current program meets NRC requirements for safety valve testing.

Although there have been numerous problems in the industry in getting these valves to lift within a $\pm 1\%$ tolerance, this is not necessarily a safety concern. Relaxation of the Technical Specification tolerance has been granted by the NRC to licensees who have demonstrated that safety limits can be met with the $\pm 3\%$ tolerance. Additionally, there are industry efforts under way through the American Society of Mechanical Engineers (ASME) to change the tolerance band to $\pm 3\%$ in the ASME Code, in order to better reflect actual performance, acceptable from a safety perspective, of these valves.

Petitioner does not raise a substantial safety concern regarding inadequacies of the APS safety valves.

E. Falsified Documents

Petitioner states that an individual testified to NRC officials that the Licensee falsified documents related to the Licensee's request to amend its Technical Specifications.

Whether falsified documents were submitted in support of the Licensee's license amendment application to change the allowable tolerances for the safety valves is a matter that the NRC resolved before completing action on the APS license amendment application. The Staff made a request for additional information to the Licensee on September 2, 1993, that detailed apparent discrepancies in information submitted by the Licensee in letters dated May 27, 1992, and May 13, 1993, and requested the Licensee to provide the test data used to construct its data tables. The Licensee summarized its test data in a letter of November 12, 1993. Additionally, the Licensee discussed the discrepancies in data between the two previous submittals. The Licensee did not perform an independent check of its data, and thus performed an inadequate review of its licensing submittals. There is no persuasive evidence, however, that the Licensee falsified the information in order to support the license amendment application. The revised data (where as-found setpoint settings were changed, e.g., from +3% to +2%) were not exclusively in a single direction, as would be expected if data had been manipulated or falsified to improve results. The Staff reviewed the Licensee's November 12, 1993 letter in conjunction with the license amendment proposal and found that the corrected data did not change the Staff's conclusion that the requested increase in setpoint tolerances is acceptable. Accordingly, the NRC Staff concludes that the licensee did not falsify data in support of its license amendment request.

F. The Office of Investigations Documents

Petitioner states that a person told him that two Office of Investigations investigators told that person that they had documents demonstrating that Licensee officials falsified documents related to the Licensee's request to amend the Technical Specifications.

The NRC's Office of Investigations in the region neither has in its possession any documents containing evidence that APS officials falsified documents related to the November 13, 1990 APS request to amend the Palo Verde Technical Specifications, nor has the named investigators informed anyone that such documents exist.

G. Safety Valve Not Adjusted Correctly

Petitioner states that on October 8, 1991, an engineer employed by APS willfully violated a safety-related procedure by intentionally adjusting a pressurizer safety valve (designated as PSV-574) contrary to the requirements of the procedure.

The matters raised in this allegation were examined in NRC regional Inspection Report 92-43, dated February 26, 1993. (PSV-574 is not a pressurizer safety valve; it is a main steam safety valve.) The NRC Staff concluded therein that the test procedure is not clear regarding the limitations on when adjustments to the valve can be made. Adjusting the lift setpoint after a single failure during the testing of this valve appeared to be technically satisfactory on October 8, 1991, based on a declining trend in test lift settings and with the knowledge that the trend would continue with additional tests. Statements in the procedure appeared to indicate the need for at least two test failures before adjusting the valve. However, another statement appeared to indicate that the two-failure criterion applied only to the first test if it was a failure. It was the conclusion of the inspection report that the procedure was unclear and not appropriate to the circumstances. Accordingly, the Licensee was cited in Inspection Report 92-43, for a Severity Level V violation of the quality assurance provisions in Criterion V, "Instructions, Procedures, and Drawings," of Appendix B to 10 C.F.R. Part 50. Petitioner's allegation was partially substantiated in that a violation of NRC requirements was identified. However, the reason for the violation was that the procedure was not clear, not a lax attitude on the part of any person conducting the test or any willful failure to conduct appropriate testing. The Licensee subsequently revised the procedure to clarify the matter. The allegation does not raise a substantial safety concern and does not warrant any action beyond that already taken by the NRC.

III. CONCLUSION

Petitioner requested that the NRC order the immediate shutdown of all three units at Palo Verde; institute a proceeding to show cause why the operating licenses should not be modified, suspended, or revoked; take appropriate enforcement action against APS; and deny the November 13, 1990 license amendment application. The institution of a proceeding in response to a request for action under 10 C.F.R. § 2.206 is appropriate only when substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). I have applied this standard to determine if any action is warranted in response to the matters raised by Petitioner. Each of the claims or allegations by Petitioner has been reviewed. The available information is sufficient to conclude that no substantial safety issue has been raised regarding the operation of Palo Verde. Other claims either could not be substantiated or the NRC has already taken appropriate enforcement action, as explained above. Therefore, I conclude that, for the reasons discussed above, no adequate basis exists for granting Petitioner's requests for immediate shutdown of Palo Verde, for instituting a proceeding to show cause why the operating license should not be modified, suspended, or revoked, for taking any enforcement action against APS beyond that already taken by the NRC, or for denial of the license amendment request for an increase in safety valve tolerances.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by this regulation, this Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 16th day of May 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket Nos. 50-245
50-336

NORTHEAST UTILITIES
(Millstone Nuclear Power Station)

May 20, 1994

The Director of the Office of Enforcement denies a petition filed by Donald W. DelCore, Sr., requesting action regarding Millstone Nuclear Power Station. Petitioner alleges that: his employment at the plant was terminated as a direct result of his engagement in protected activities, in violation of 10 C.F.R. § 50.7; his termination warrants a Severity Level I violation because it was directed by a corporate officer, as well as enforcement action under 10 C.F.R. § 50.5 for deliberate misconduct because two other corporate officers apparently provided input regarding his termination; a report of the Inspector General indicates a pattern of complaints of retaliation at the plant, demonstrating that repeated violations have occurred; and a "chilling effect" has been created at the plant as a result of the NRC's failure to take enforcement action.

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

I. INTRODUCTION

On July 30, 1993, Donald W. DelCore, Sr. (Petitioner), filed a request for enforcement action which is being treated as a Petition pursuant to 10 C.F.R. § 2.206. The Petitioner requested that the Executive Director for Operations take accelerated enforcement action against Northeast Utilities (NU or Licensee) for willful violation of the employee protection provisions of 10 C.F.R. § 50.7. As grounds for this request, the Petitioner asserted that: (1) his employment at the

Millstone Nuclear Power Station was terminated, in violation of section 50.7, as a direct result of his engagement in protected activities; (2) his termination was directed by an NU corporate officer and therefore comprises a Severity Level I violation, and that two other corporate officers apparently provided input regarding his termination, affording a basis for enforcement of 10 C.F.R. § 50.5 for apparent deliberate misconduct, and also for referral to the Department of Justice; (3) a report released by the Office of the Inspector General indicates that there was a pattern of complaints of retaliation at Millstone, demonstrating that repeated violations occurred; (4) a significant number of NU employees have contacted him, rather than the NRC or NU, claiming that they have been retaliated against for raising safety concerns, indicating that a "chilling effect" has been created at the Millstone Nuclear Station as a result of the NRC's failure to take enforcement action.

II. BACKGROUND

On November 9, 1991, Mr. DelCore was terminated from Millstone Nuclear Power Station. The Department of Labor (DOL) investigated a complaint filed by Mr. DelCore asserting that he was terminated for engaging in protected activity and, in January 1992, the DOL Area Director concluded that the termination constituted discrimination within the meaning of section 210 (now section 211) of the Energy Reorganization Act (ERA). The Licensee appealed that finding to the DOL Administrative Law Judge (ALJ), but before the ALJ ruled on the merits of the complaint, Mr. DelCore reached a settlement with Northeast Utilities on March 16, 1992. The ALJ subsequently issued a Recommended Decision and Order (RDO) on April 1, 1992, recommending approval of the settlement. The ALJ's RDO was reviewed by the Secretary of Labor, was later consolidated with other cases concerning Millstone that were pending before the Secretary of Labor, and the Secretary issued a Final Order Approving Settlements on July 10, 1992.

III. DISCUSSION

On November 13, 1991, prior to completion of the DOL investigation, Region I sent a letter to NU, requesting, in part, that NU provide a response regarding the basis for the termination of Mr. DelCore. The request also asked what actions were being taken by NU to ensure that the termination did not have a "chilling effect" on other employees who may have been discouraged from raising safety concerns because of the termination. A response from NU, dated December 27, 1991, stated that Mr. DelCore was not terminated for raising

safety concerns. The letter advised that he had been raising safety concerns for the previous 4 years and NU management had never contemplated or, in fact, taken any action in retaliation. The response explained that the breakdown between Mr. DelCore and NU management was the result of the antagonistic, contemptuous, and profane manner in which Mr. DelCore interacted with his peers and supervision, which was having a negative effect on co-workers' morale and their ability to concentrate on work assignments.

Subsequent to the NU response, the DOL compliance officer indicated in the narrative report, dated January 17, 1992, which formed the basis for the DOL Area Director's finding in favor of Mr. DelCore, that there was evidence that contradicted NU management's claim in its December 27, 1991 letter to the NRC. The compliance officer reported that it was quite clear that no warnings, suspensions, or performance improvement plans were used by NU for any alleged misconduct by Mr. DelCore. The compliance officer also stated that there was no documentation of the alleged poor behavior.

The Staff had requested, on February 18, 1992, that OI conduct an investigation into this matter, citing, among other reasons, the substantial difference between the finding of the DOL Area Director and the position stated by NU in its December 27, 1991 response to the NRC. Notwithstanding the settlement noted above, the OI investigation was continued in order to make a final determination as to whether discrimination had in fact occurred with regard to the termination of Mr. DelCore.

During the OI investigation, OI determined that, although the DOL compliance officer did interview some of Mr. DelCore's co-workers and supervisors, there were nineteen co-workers and supervisors of Mr. DelCore (and another individual whose allegations were also being investigated) who were not interviewed. Therefore, an effort was made by OI to interview Mr. DelCore's departmental co-workers to determine whether, as claimed by NU, a disruptive work environment existed. In fact, OI interviewed twice as many departmental co-workers and supervisors as did DOL. Based on the information obtained from these individuals and others interviewed, OI concluded that the termination was not the result of Mr. DelCore's engaging in protected activity.¹

The Staff has reviewed the OI report and agrees that there is insufficient evidence to conclude that discrimination in violation of section 50.7 occurred in this case. The factors that the Staff relied upon included a consideration of the fact that: (1) OI spoke with more day-to-day departmental co-workers in the I&C department than did the DOL compliance officer, and the testimony of

¹Mr. DelCore had also filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that discrimination occurred as a result of his raising concerns associated with asbestos issues. OSHA's investigation included interviews of personnel not questioned by OI. OI reviewed the statements collected by OSHA investigators and determined that they did not provide a basis for changing the OI conclusion that no discrimination occurred in Mr. DelCore's termination.

these individuals was that Mr. DelCore was disruptive to the work force and was insubordinate; (2) OI considered testimony that DOL did not appear to consider, such as physical threats Mr. DelCore made to supervisors; and (3) Mr. DelCore refused to be interviewed by OI.²

In the Staff's view, the licensee's management did recognize that Mr. DelCore had engaged in protected activity and, consequently, was being cautious in its use of discipline to avoid a charge of discrimination. However, the situation reached a point of friction between Mr. DelCore and both co-workers and supervisors such that, in the Staff's view, the Licensee's action was not an unreasonable resolution of the matter. Based on the above, there is insufficient evidence to support the Petitioner's claim that his termination was a result of his engaging in protected activity.

The Petitioner also referred to a report by the NRC Office of the Inspector General describing a pattern of complaints of retaliation at Millstone that allegedly demonstrates that repeated violations occurred, supposedly warranting accelerated enforcement action by the NRC.³ While the Commission would be concerned about any pattern of discrimination, the Petitioner's allegations of such a pattern do not establish that the Petitioner was the subject of discrimination in this case and do not have a bearing on the need for enforcement action for the Petitioner's termination.

The Petitioner also referred to a "chilling effect" at Millstone that resulted from NRC's failure to take enforcement action, as evidenced by the fact that "a significant number" of employees have contacted him, rather than the NRC or NU. Again, the Petitioner's vague allegations⁴ in this regard do not establish that the Petitioner was the subject of discrimination when NU terminated his employment and do not provide any basis for the NRC to take enforcement action for the Petitioner's termination.

IV. CONCLUSION

As explained above, the Petitioner has not raised any issues that would warrant the requested action. Therefore, for the reasons given above, the Petitioner's request for accelerated enforcement action is denied. As provided

²The interview was intended to provide Mr. DelCore with an opportunity to respond to the company's charge that he was disruptive and insubordinate. Mr. DelCore attempted to impose conditions on the interview that were not acceptable to OI and were contrary to OI procedures.

³The Office of Investigations is currently evaluating recent allegations of discrimination to determine whether the complaints can be substantiated. Following the completion of OI's work, the NRC Staff will determine whether further enforcement action is warranted.

⁴Subsection 2.206(a) requires that the Petitioner set forth the specific facts that constitute the basis for the requested action. In these additional allegations about "chilling effect," Petitioner has failed to provide the specific facts required by 10 C.F.R. § 2.206(a) to support the requested action.

in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary for the Commission's review.

Joseph R. Gray, Acting Director
Office of Enforcement

Dated at Rockville, Maryland,
this 20th day of May 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 30-16055-SP
(Suspension Order)
(EA 86-155)

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

June 9, 1994

The Commission denies the appeal of the licensee, Advanced Medical Systems, Inc., from LBP-90-17, 31 NRC 540 (1990), in which a licensing board granted summary disposition to the NRC Staff on all matters remaining in controversy in a proceeding to consider the Licensee's challenge to the NRC Staff's immediately effective suspension order.

RULES OF PRACTICE: APPELLATE BRIEFS

The appellant bears the responsibility of clearly identifying the asserted errors in the decision on appeal and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims.

ATOMIC ENERGY ACT: ENFORCEMENT ACTION (HEARING RIGHT)

Although a licensee usually should be afforded a prior opportunity to be heard before the Commission suspends a license or takes other enforcement action, extraordinary circumstances may warrant summary action prior to hearing.

ATOMIC ENERGY ACT: ENFORCEMENT ACTION (RIGHT TO HEARING)

The Commission's regulations regarding summary enforcement action are consistent with section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c), and due process principles.

ATOMIC ENERGY ACT: ENFORCEMENT ACTION (RIGHT TO HEARING)

Due process does not require that emergency action be taken only where there is no possibility of error; due process requires only that an opportunity for hearing be granted at a meaningful time and in a manner appropriate for the case.

RULES OF PRACTICE: HEARING REQUIREMENT

An agency may dispense with an evidentiary hearing in resolving a controversy if no dispute remains as to a material issue of fact.

RULES OF PRACTICE: STANDARD FOR REVIEW OF AN IMMEDIATELY EFFECTIVE ENFORCEMENT ORDER

The standard by which the immediate effectiveness of an order is judged may differ from the standard ultimately applied after a full adjudication on the merits of an enforcement order.

RULES OF PRACTICE: STANDARD FOR REVIEW OF AN IMMEDIATELY EFFECTIVE ENFORCEMENT ORDER

The review of an order's immediate effectiveness permits such orders to be based on preliminary investigation or other emerging information that is reasonably reliable and that indicates the need for immediate action under the criteria in 10 C.F.R. § 2.202. In accordance with the Commission's rulemaking on the procedures for review of the immediate effectiveness of enforcement orders, the basic test is "adequate evidence," a test similar to the one used for probable cause for an arrest, warrant, or preliminary hearing.

RULES OF PRACTICE: STANDARD FOR REVIEW OF AN IMMEDIATELY EFFECTIVE ENFORCEMENT ORDER

The "adequate evidence" test is intended to strike a balance between the interest of the Commission in protecting the public health, safety, or interest

and an affected party's interest in protection against arbitrary enforcement action. The test is intended only as a preliminary procedural safeguard against the ordering of immediately effective action based on clear error, unreliable evidence, or unfounded allegations.

RULES OF PRACTICE: STANDARD FOR REVIEW OF AN ENFORCEMENT ORDER

The Commission has never adopted the "clear and convincing" evidence standard as the evidentiary yardstick in reaching the ultimate merits of an enforcement proceeding, nor is it required to do so under the Atomic Energy Act or the Administrative Procedure Act. NRC administrative proceedings have generally relied upon the "preponderance of the evidence" standard in reaching the ultimate conclusions after hearing to resolve a proceeding.

RULES OF PRACTICE: SUMMARY DISPOSITION

Where a licensee opposing summary disposition does not contest occurrence of the essential facts contained in signed statements or reports of interview of former licensee employees, general objections to the Staff's reliance on such documents or bald assertions that the employees were "disgruntled" workers are insufficient to show a concrete, material issue of fact that would defeat summary disposition.

RULES OF PRACTICE: SUMMARY DISPOSITION

The hearsay nature of an investigator's interview report with a witness does not bar its consideration in deciding whether to grant summary disposition, particularly in the absence of any evidence suggesting the report's inherent unreliability or any material objection to the statement of facts recounted in the interview report.

RULES OF PRACTICE: SUMMARY DISPOSITION

NRC Staff's subsequent decision to rescind an enforcement order does not constitute an admission that disputed facts remained regarding the sufficiency of the order when issued.

RULES OF PRACTICE: SUMMARY DISPOSITION

Absent any probative evidence supporting the claim, mere assertions of a dispute as to material facts does not invalidate the licensing board's grant of summary disposition.

MATERIALS LICENSE: TETHERAPY UNITS

Under a materials license that required that maintenance and service of teletherapy units be performed only by approved technicians if it involved a potential for increased exposure to the radioactive source or compromise the safety of the unit, replacement of the unit timer could be performed only by an approved technician because the timer controls the amount of time a patient is exposed to radiation. The potential effect on the safety of the unit or on the amount of radiation exposure, not the simplicity of the maintenance, is the determinative factor.

MATERIALS LICENSE: SAFETY STANDARDS (TETHERAPY UNITS)

The safety of particular operations under a license, in this case one involving the maintenance of teletherapy units, properly involves the consideration of the potential impact on the licensee's employees, patients, and hospital employees.

ATOMIC ENERGY ACT: LICENSEE'S RESPONSIBILITY FOR VIOLATIONS

The involvement of a licensee's management in a violation has no bearing on whether the violation may have occurred; if a licensee's employee was acting on the licensee's behalf and committed acts that violated the terms of the license or the Commission's regulations, the licensee is accountable for the violations, and appropriate enforcement action may be taken.

ATOMIC ENERGY ACT: DISCRETION TO TAKE ENFORCEMENT ACTION

The Commission is empowered to impose sanctions for violations of its license and regulations and to take remedial action to protect public health and safety. Within the limits of the agency's statutory authority, the choice of sanction is quintessentially a matter of the Commission's sound discretion.

ENFORCEMENT ACTIONS: BASIS FOR IMMEDIATE EFFECTIVENESS

An immediately effective suspension order was found justified where the alleged violations involved significant license conditions and procedures that were intended to ensure safe handling and maintenance of devices containing a radioactive source that could deliver a substantial or even lethal radiation dose. The Staff could reasonably conclude that license suspension was required to remove the possible threat of adverse safety consequences to patients and workers from maintenance and service on teletherapy units by untrained licensee employees.

ENFORCEMENT ACTIONS: BASIS FOR IMMEDIATE EFFECTIVENESS

In deciding whether an immediately effective order is necessary to protect public health and safety, the Staff is required to make a prudent, prospective judgment at the time that the order is issued about the potential consequences of the apparent regulatory violations. A reasonable threat of HARM requiring prompt remedial action, not the occurrence of the threatened harm itself, is all that is required to justify immediate action.

RULES OF PRACTICE: STANDARD FOR REVIEW OF AN ENFORCEMENT ORDER

Where the contested issues focused on the adequacy of the evidence in the Staff's knowledge when it initiated the license suspension, the licensing board did not err in limiting its consideration to the evidence amassed by the Staff before the order was issued.

ENFORCEMENT ACTIONS: BASIS FOR IMMEDIATE EFFECTIVENESS

The Staff is not barred from relying on additional evidence gathered after an immediately effective order is issued to defend the continued effectiveness of the order; however, the Staff may not issue the order based merely on the hope that it will thereafter find the necessary quantum of evidence to sustain the order's immediate effectiveness.

RULES OF PRACTICE: STANDARD FOR REVIEW OF AN ENFORCEMENT ORDER

Certain affidavits proffered by the Licensee were immaterial to the basis for immediate effectiveness of the Staff's order because they lack a contemporaneous link to the events described in the order and do not cast any doubt on the occurrence of those events or their safety significance.

RULES OF PRACTICE: HEARING REQUIREMENT

No further consideration need be given to the potential willful nature of license violations where an order's immediate effectiveness was not sustained on the basis of willfulness and where the licensee suffers no other collateral effects of the order.

ENFORCEMENT ACTIONS: ALLEGATIONS OF DISCRIMINATORY ENFORCEMENT

To justify further inquiry into a claim of discriminatory enforcement, the licensee must show both that other similarly situated licensees were treated differently and that no rational reason existed for the different treatment.

ENFORCEMENT ACTIONS: AGENCY DISCRETION

The Commission need not withhold enforcement action until it is ready to proceed with like action against all others committing similar violations. The Commission may act against one firm practicing an industrywide violation. A rigid uniformity of sanctions is not required, and a sanction is not rendered invalid simply because it is more severe than that issued in other cases.

ENFORCEMENT ACTIONS: AGENCY DISCRETION

Enforcement actions inherently involve the exercise of informed judgment on a case-by-case basis, and the ordering of enforcement priorities is left to the agency's sound discretion.

DECISION

I. INTRODUCTION

In this decision, we deny the appeal of Advanced Medical Systems, Inc. (AMS), a licensee authorized to possess and use radioactive byproduct material, from a decision of an Atomic Safety and Licensing Board, LBP-90-17, 31 NRC 540 (1990), which granted the Nuclear Regulatory Commission (NRC) Staff's motion for summary disposition of the issues in this enforcement proceeding. AMS's appeal was filed initially with the Atomic Safety and Licensing Appeal Board in accordance with the rules of practice then in effect. While AMS's appeal was pending before the Appeal Board, the Commission determined to abolish the Appeal Board and initiated a rulemaking to revise our appellate procedures. *See* Procedures for Direct Commission Review of Decisions of Presiding Officers, 56 Fed. Reg. 29,403 (June 27, 1991). Although the Appeal Board retained jurisdiction over AMS's appeal under the interim appellate procedures in effect pending the conclusion of the rulemaking, the Appeal Board did not reach a decision on AMS's appeal prior to the Appeal Board's dissolution on June 30, 1991. By order dated June 28, 1991, the Appeal Board referred AMS's appeal to the Commission for determination.¹

The Staff, the only other party to the proceeding, opposes AMS's appeal and urges us to affirm the Licensing Board's decision. For the reasons that follow, we affirm LBP-90-17.

II. PROCEDURAL BACKGROUND

A. Prior History

AMS is authorized by NRC license to undertake a number of activities involving the use of radioactive byproduct material: e.g., the manufacture of sealed radioactive sources to be used in teletherapy and radiography units, the installation and removal of sealed sources from teletherapy machines, and the maintenance, service, and dismantling of such machines. This proceeding concerns AMS's challenge to an "Order Suspending License and Order to Show Cause (Effective Immediately)," issued by the NRC Staff on October 10, 1986.² Based on an investigation of allegations about the Licensee's service operations,

¹ Because our review of AMS's appeal is governed by the same rules in effect when AMS filed its appeal, the transfer from the Appeal Board to the Commission has not affected AMS's right to an appeal of the Licensing Board's decision or the nature of our consideration of AMS's appeal.

² 51 Fed. Reg. 37,674 (Oct. 23, 1986). The order was signed by the Director of the Office of Inspection and Enforcement, then the principal Staff officer responsible for administering the NRC's enforcement program.

the Staff charged that the Licensee's employees had been performing service and maintenance on teletherapy equipment at various medical facilities even though the employees lacked required training, did not have radiation detection and monitoring equipment or the required service manuals, and had objected to performing maintenance without proper training. Given the circumstances of the alleged violations, the Staff found that it lacked adequate assurance that AMS would adhere to the terms of its license. Moreover, the Staff found that the conduct of maintenance and service activities by unauthorized and untrained personnel could have potentially serious adverse consequences to the public, hospital personnel, and AMS's employees. Consequently, the Staff determined that immediate action was required to ensure protection of the public health and safety and, pending further order, the Director of the Office of Inspection and Enforcement summarily suspended AMS's activities under Byproduct Material License No. 34-19089-01 pertaining to installation, service, maintenance, or dismantling of radiography or teletherapy units.

AMS filed a timely request for hearing on the order and denied the alleged violations.³ AMS also sought relief from the Staff from the immediate effectiveness of the order.⁴ When that relief was denied, AMS filed a motion to stay the effectiveness of the order.⁵ While its stay motion was still pending before the Licensing Board, AMS proposed to the Staff a number of actions that AMS was willing to take to obtain a rescission of the effectiveness of the order pending completion of a hearing. Based on AMS's commitments, the Staff permitted AMS by letter dated February 2, 1987, to resume licensed activities subject to certain conditions.⁶ On February 10, 1987, AMS withdrew its motion for a stay.

In March 1987, at the request of the United States Department of Justice, the Staff sought a stay of the proceeding pending the completion of a parallel criminal investigation of AMS. A stay of the proceeding was granted initially until August 15, 1987, and subsequently was continued until July 12, 1988. ALJ-87-4, 25 NRC 865 (1987); see LBP-89-11, 29 NRC 306, 310 n.7 (1989). On August 11, 1987, the Staff amended AMS's license in response to applications

³ AMS's Answer to Order Suspending License and Order to Show Cause (Effective Immediately) (Request for Hearing Contained Herein) (Oct. 29, 1986).

⁴ Motion of Advanced Medical Systems, Inc., for Preliminary Hearing on Continuation of License Suspension During Pendency of Agency Adjudication (Oct. 30, 1986). Although AMS filed its motion with the Commission, the Secretary of the Commission informed AMS's counsel that relief should first be sought from the NRC Regional Administrator who was empowered by the terms of the order to relax or rescind any of its conditions. Letter from Samuel J. Chilk, Secretary, to Richard D. Panza, Esq. (Nov. 6, 1986). AMS thereafter filed a Brief in Support of Rescission of Suspension Order (Dec. 22, 1986) with the Regional Administrator for NRC Region III and met with the Staff on December 23, 1986, to discuss relief from the order. The Staff declined to grant relief at that time. Letter to S.S. Stein, President, AMS, from James G. Keppler, Administrator, NRC Region III (Jan. 7, 1987) (Attachment 37 to NRC Staff's Motion for Summary Disposition).

⁵ Application of Advanced Medical Systems, Inc., for Stay of the Effectiveness of Decision (with Supporting Memorandum) (Jan. 16, 1987). Although filed with the Commission, the stay application was referred to the presiding officer for a ruling.

⁶ Letter to S.S. Stein, AMS, from James G. Keppler, Region III Administrator (Feb. 2, 1987).

filed by AMS to authorize certain persons to act as “licensed” service engineers.⁷ A few months later, the Regional Administrator revoked in their entirety the original order and the conditions in the February 2, 1987 letter that permitted resumed activities, because the license amendment superseded and apparently conflicted in some respects with the earlier order and letter.⁸

B. Issues Set for Litigation

After the stay of the proceeding expired, the Licensing Board requested the parties’ positions as to whether any issues remained for litigation in the proceeding. Although the Staff took the position that the proceeding was moot, AMS identified seven issues it wished to litigate:

1. Whether or not there was a substantial basis for the NRC to conclude that it lacked the requisite reasonable assurances that AMS would comply with Commission requests in the future;
2. Whether or not there was a substantial basis for the NRC to conclude that continued conduct of certain licensed activities by AMS could pose a threat to the health and safety of the public, to wit: the performance of installation, service, maintenance or dismantling of radiography or teletherapy units;
3. Whether or not the NRC had a substantial basis for concluding that the public health, safety and interest required that AMS’ License Number 34-19089-01 should be suspended;
4. Whether or not the NRC had a substantial basis for concluding that pursuant to 10 CFR Section 2.201(c) no prior notice was required as to its actions, and pursuant to 10 CFR Section 2.202(f) that the Suspension Order of October 10, 1986 should be immediately effective;
5. Whether or not the NRC had a substantial basis for the actions it took beyond and through its January 7, 1987 Declination to Rescind Immediate Effectiveness of October 10, 1986 Suspension Order;
6. Whether or not, and to what extent, all service, installation, maintenance and dismantling of radiography or teletherapy units at issue herein must be performed by licensed individuals (including hospital personnel);
7. Whether or not 10 CFR Section 2.202(f), *et seq.*, is constitutional.⁹

⁷ Amendment No. 12 to License No. 34-19089-01, attached as Enclosure 1 to NRC Staff’s Statement of Issues in Proceeding (Sept. 11, 1987).

⁸ Letter from A. Bert Davis, Regional Administrator, to S.S. Stein (Dec. 3, 1987). The Staff had taken the position a few months earlier that the amendment to the license had in effect superseded the earlier order and the Regional Administrator’s condition for rescission of the suspension. *See* NRC Staff’s Statement of Issues in Proceeding at 2-3 (Sept. 4, 1987).

⁹ AMS’s Statement of Issues at 6-7 (Aug. 5, 1988). AMS characterized the matters in controversy alternatively as raising seven, three, or two general issues. *Id.* at 7-8; AMS Response to NRC Staff Response at 3 (Sept. 2, 1988); *see also* LBP-89-11, 29 NRC at 313 n.12. We have looked at the alternative characterizations to the extent that they helped us understand AMS’s position.

In LBP-89-11, the Licensing Board determined that the proceeding was not moot and admitted the first four of AMS's issues for litigation.¹⁰ The Licensing Board declined to admit issue 5 because it merely echoed the challenge in issue 4 with respect to the immediate effectiveness of the order. The Board rejected issue 6 to the extent that it sought a generic determination of the scope of licensable activities, but the Board acknowledged that it could, and probably must, determine the legality of AMS's actions under AMS's license. The Board viewed issue 7 as beyond the scope of its authority and therefore precluded from litigation by 10 C.F.R. § 2.758(a).

On January 10, 1990, the Staff filed a motion for summary disposition of the issues under 10 C.F.R. § 2.749. The Staff's motion was supported by affidavit and other documentary exhibits, including statements from AMS employees obtained during the investigation of the alleged violations and purchase orders reflecting the transactions in question. AMS filed a "Brief in Opposition to NRC Staff Motion for Summary Disposition" (Mar. 1, 1990) (hereinafter "Brief in Opposition").

C. The Licensing Board's Decision

In LBP-90-17, the Licensing Board found that no material issues of fact remained in dispute with respect to the issues and, consequently, the Board granted Staff's motion for summary disposition. The Board found that the admitted issues could be distilled to a single question: "Under Commission regulations, did the Director act lawfully when he issued the summary suspension order?" 31 NRC at 543. The Board confined itself to an examination of the information available to the Staff when the Director issued the order on October 10, 1986. *Id.* at 542 n.5.

In reviewing the Director's decision to issue the suspension order the Licensing Board applied the criteria derived from the Commission's decision in *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975):

- (1) [W]hether the statement of reasons given permits rational understanding of the basis for his decision;
- (2) whether the Director has correctly understood the governing law, regulations, and policy;
- (3) whether all necessary factors have been considered, and extraneous factors excluded, from the decision;
- (4) whether inquiry appropriate to the facts asserted has been

¹⁰ 29 NRC at 313-17. In this decision the Licensing Board also determined, in response to AMS's request for an award of attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (1988), that the Board was empowered to grant such relief if the licensee prevailed on some or all of the issues set for litigation. 29 NRC at 310-13. The Licensing Board's determination on this score was reversed by the Appeal Board. ALAB-929, 31 NRC 271 (1990). The Commission declined to review the Appeal Board's decision. Memorandum for Board and Parties from S.J. Chilk, Secretary (June 13, 1990).

made; and (5) whether the Director's decision is demonstrably untenable on the basis of all information available to him.¹¹

With respect to the first criterion, the Licensing Board determined that the order adequately articulated the basis on which the Director based the decision to suspend temporarily AMS's service and maintenance operations; i.e., the alleged violations of license requirements pertaining to personnel authorized to conduct maintenance, training, and radiation monitoring. LBP-90-17, 31 NRC at 546. In analyzing the Staff's application of the governing law and regulations, the Board found that the Director had relied on the appropriate statutory authority and procedural regulations for issuing an order and making it immediately effective. *Id.* at 547. Because the gravamen of the dispute between Staff and AMS concerned the scope of service and maintenance work that requires a "licensed" service engineer, the Licensing Board reviewed the available affidavits, documentary evidence, and the contents of AMS's license to determine whether the alleged violations had an adequate foundation.

The Board found that the Staff had sufficient evidence at the time that the order was issued to conclude that unlicensed persons were replacing timer mechanisms in teletherapy units, that unlicensed individuals were exposing the radioactive source in the units, and that individuals were conducting service and maintenance activities without following required safety procedures. *Id.* at 551. Under the terms of AMS's license, the Board concluded, work involving a teletherapy unit's timer must be carried out by "licensed" personnel and all individuals must use radiation monitoring devices. *Id.* at 553. Consequently, the Board determined that the Director had properly interpreted and applied the conditions of AMS's license. Moreover, in the Board's view, the Director reasonably concluded that "substandard or ill-planned" maintenance of teletherapy could have potentially immediate, adverse consequences on the general public and workers using the equipment. *Id.* at 554.

With respect to the remaining three *Indian Point* criteria, the Licensing Board also found that the Staff had acted appropriately in issuing the suspension order. The Director had considered the appropriate factors in making the decision to issue the order and had made an appropriate inquiry into the facts that formed the basis for the order. LBP-90-17, 31 NRC at 554-55. In assessing whether the Director's decision was "demonstrably untenable," the Licensing Board emphasized that the Staff should be afforded flexible discretion to initiate administrative enforcement action. In the Board's view,

¹¹ See 31 NRC at 544-45. As the Board noted, the criteria in *Indian Point* had been articulated in the context of Commission review of a Staff decision to deny an enforcement petition, i.e., a *declination* to issue an order. The Commission, however, later applied the criteria in a case involving a licensee's challenge, similar to the one here, to the issuance of an immediately effective order. *Nuclear Engineering Co. (Sheffield Low-Level Radioactive Waste Disposal Site)*, CLI-79-6, 9 NRC 673, 676 (1979), *reconsideration denied*, CLI-80-1, 11 NRC 1 (1980).

the sufficiency of the information on which the Staff relied in taking action should be assessed in the context of whether it was “reliable, probative, and substantial — within the context of reasonableness”. *Id.* at 556. The Licensing Board concluded that the Director reasonably relied on the interviews of past and present AMS employees conducted by NRC investigators. Moreover, the information reasonably supported a conclusion that unlicensed technicians were performing maintenance on teletherapy machines in a manner inconsistent with the terms of AMS’s license, that such activities could pose a safety risk to the public and workers, and that there was a disrespect for or conscious disregard of radiation safety on the part of AMS employees or management. *Id.* at 557. Consequently, the Board concluded that the Director’s actions were reasonable and not “demonstrably untenable.” *Id.*

D. Issues on Appeal

AMS raises a number of issues on appeal challenging both the substance and the scope of the Licensing Board’s decision.¹² AMS argues that the Board decided the case on the basis of an issue that the parties had never raised or briefed and ignored the issues that AMS had raised and were admitted for litigation. AMS maintains that the Board erroneously concluded that no material facts remained in dispute with respect to the activities of AMS technicians and AMS management’s involvement. AMS contends that the Board employed an improper standard of review of the Staff’s actions by only assessing the facts available in October 1986 when the Director issued the suspension order, rather than looking to all the facts available up to the time that the order was revoked by the Staff in December 1987. In AMS’s view, the Board should have applied a “clear and convincing evidence” standard in assessing the facts.

AMS also maintains that the Director did not have the discretion to issue an immediately effective order and thus violated Commission procedures. At most, AMS contends, the Director could have issued a non-immediately-effective show-cause order. AMS suggests that it was treated unfairly because other licensees did not receive a similar order. For these averred flaws, AMS asks that a full hearing on the merits of AMS’s claims be ordered to determine the truthfulness of the witness statements on which the Staff relies and to examine the motives and fairness of NRC management in suspending AMS’s operations.

For its part, the NRC Staff submits that the Licensing Board’s order is well founded and should be sustained.¹³ In the Staff’s view, the Board properly

¹² Advanced Medical Systems, Inc.’s Brief in Support of Reversal of the Licensing Board’s Order Granting NRC Staff Motion for Summary Disposition and Terminating Proceeding (July 20, 1990) (hereinafter AMS Appeal Brief).

¹³ NRC Staff Brief in Response to Appeal by AMS (Sept. 4, 1990) (hereinafter Staff Reply Brief).

found that no genuine issues of material fact remained to be decided; AMS's assertions to the contrary rested on general denials and speculation and did not demonstrate that the essential factual bases for the Staff's order were in dispute. The Staff submits that the Board decided precisely the issues that AMS had raised and the Board considered an appropriate scope of evidence. The Staff also contends that the Board applied an appropriate standard of proof and properly found that the Director acted within his discretion in determining to issue a summary suspension order to AMS.

III. ANALYSIS

A. The Licensing Board's Characterization of the Issues

At the outset, we deal with AMS's assertion that the Licensing Board did not decide the matters set for decision in the proceeding, but decided the case on the basis of an issue neither raised nor briefed by the parties. If AMS's assertion had merit, our inquiry might stop here. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977), *aff'd on other grounds*, CLI-78-1, 7 NRC 1 (1978). AMS has not convinced us, however, that the Board failed to resolve the contested issues in this case and to articulate in reasonable detail the basis for its decision or that the Board decided the case on a basis that the parties did not have an opportunity to address.

AMS complains that the Board did not base its decision on the four issues adopted for litigation,¹⁴ but AMS does not explain why the Board erred in treating these issues as aspects of one overriding question: i.e., "did the Director act lawfully when he issued the summary suspension order?" LBP-90-17, 31 NRC at 543. Even in its earlier order admitting issues for litigation, the Board recognized that AMS's issues all bore on the general question of the legal and factual basis for the Staff's suspension order.¹⁵

AMS gives no clue as to the matters that the Board decided which AMS avers were not briefed or raised by the parties. AMS's failure to illuminate the bases for its exception would in itself be sufficient grounds to reject it as a basis for appeal. The appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims. *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926,

¹⁴ AMS Appeal Brief at 21; see LBP-89-11, 29 NRC at 313, 317.

¹⁵ See LBP-89-11, 29 NRC at 314 & n.13. As the Board noted, AMS itself variously characterized the matters in controversy as raising seven, three, or two issues. *Id.* at 313 & n.12.

31 NRC 1, 9 (1990); *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 278 (1982).

In any event, the Licensing Board's analysis of the legal and factual matters in controversy leaves no doubt that the Board considered the issues that AMS had raised and that it determined the case on a fair consideration of those and other relevant matters. In structuring its analysis around the criteria set forth in our decision in *Indian Point*, the Board dealt precisely with the issues that AMS had raised.

AMS's first issue challenges whether the Staff had a substantial basis to conclude that AMS would not comply with Commission requirements in the future. The Board's analysis of the second, fourth, and fifth criteria in *Indian Point* deal essentially with that issue: i.e., whether the Director understood governing law, regulations, and policy; whether an appropriate factual inquiry has been made; and whether the Director's decision is demonstrably untenable on the basis of available information. With respect to AMS's second and third issues, the Board's consideration of the second through fifth *Indian Point* criteria discusses matters concerned with the basis for determining that AMS's activities could pose a threat to public health and safety and thus warranted suspension of the license. AMS's fourth issue, concerning the basis for dispensing with prior notice and making the order immediately effective, is analyzed primarily in the context of the Board's discussion of the second, fourth, and fifth criteria under *Indian Point*.

Thus, we reject AMS's general complaint that the Licensing Board failed to address the issues raised by the parties or to decide the case on matters that the parties had no opportunity to address. We turn now to the more specific exceptions to the Licensing Board's decision.

B. Authority for Immediately Effective Orders

The Director's order was issued under 10 C.F.R. § 2.202 of the Commission's regulations and relied on the exceptions specified in 10 C.F.R. §§ 2.201(c) and 2.202(f) as the basis for making the order effective upon issuance. When the order was issued in October 1986, our regulations provided —

§ 2.201 Notice of violation.

(a) Before instituting any proceeding to modify, suspend, or revoke a license or to take any other action for alleged violation of any provision of the Act or this chapter or the conditions of a license, the Director, Office of Inspection and Enforcement, a Regional Administrator, or the designee of either, will serve on the licensee or other person subject to the jurisdiction of the Commission a written notice of violation, except as provided in paragraph (c) of this section. . . .

. . . .

(c) When the Director, Office of Inspection and Enforcement, finds that the public health, safety, or interest so requires, or that the violation is willful, the notice of violation may be omitted and an order to show cause issued.

§ 2.202 Order to show cause.

(a) The . . . Director, Office of Inspection and Enforcement, . . . may institute a proceeding to modify, suspend, or revoke a license or for such other action as may be proper by serving on the licensee an order to show cause which will:

(1) Allege the violations with which the licensee is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action;

(2) Provide that the licensee may file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee of his right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing;

(4) Specify the issues; and

(5) State the effective date of the order.

. . . .

(f) When the . . . Director, Office of Inspection and Enforcement, . . . finds that the public health, safety, or interest so requires or that the violation is willful, the order to show cause may provide, for stated reasons, that the proposed action be temporarily effective pending further order.¹⁶

The Commission's regulations recognize that a licensee should be afforded under usual circumstances a prior opportunity to be heard before the agency suspends a license or takes other enforcement action, but that extraordinary circumstances may warrant summary action prior to hearing. *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-73-38, 6 AEC 1082, 1083 (1973). Similar provisions have been in force since the early days of the regulatory scheme under the Atomic Energy Act of 1954.¹⁷

The Commission's regulations are consistent with the Administrative Procedure Act (APA) and the dictates of due process. Under section 9(b) of the APA, which is made specifically applicable to the Commission in section 186 of the Atomic Energy Act, an agency may dispense with prior notice of the withdrawal, suspension, revocation, or annulment of a license in cases of willfulness or those in which the public health, safety, or interest so requires.¹⁸ Moreover, summary administrative action to protect important governmental interests, par-

¹⁶We rely on the regulations as they were codified in Title 10 of the 1986 edition of the *Code of Federal Regulations* in effect at the time of issuance of the order. Our procedural rules for issuing orders have undergone significant updating and revision in the past few years, although the essential procedures for issuing orders and making them immediately effective have remained the same. See 10 C.F.R. §§ 2.201, 2.202, 2.204 (1994); 56 Fed. Reg. 40,664 (Aug. 15, 1991); 57 Fed. Reg. 20,194 (May 12, 1992).

¹⁷See 21 Fed. Reg. 804 (1956); Plaine, *The Rules of Practice of the Atomic Energy Commission*, 34 Tex. L. Rev. 801, 806-07 (1956).

¹⁸5 U.S.C. § 558(c); 42 U.S.C. § 2236(b). See *Koden v. Department of Justice*, 564 F.2d 228, 234 (7th Cir. 1977); *Wolf Corp. v. SEC*, 317 F.2d 139, 142 (D.C. Cir. 1963); *New England Air Express v. Civil Aeronautics Board*, 194 F.2d 894 (D.C. Cir. 1952).

ticularly protection of public health and safety, has long been upheld under the Constitution.¹⁹

Due process does not require that emergency action be taken only where there is no possibility of error;²⁰ due process requires only that an opportunity to be heard be granted at a meaningful time and in a manner appropriate for the case.²¹ Our inquiry here concerns whether the Licensing Board properly decided, using summary procedures and without an evidentiary hearing, that the Staff had an adequate basis for issuing an immediately effective suspension of AMS's license. An agency may ordinarily dispense with an evidentiary hearing in resolving a controversy when no dispute remains, as the Licensing Board found in this proceeding, as to a material issue of fact. See *Veg-Mix, Inc. v. Department of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

C. The Appropriate Standard for Review of Staff's Order

This proceeding was decided by the Licensing Board and comes before the Commission in an unusual posture. Unlike most licensing or enforcement proceedings, we are not called upon to make a decision that has any substantial future effect on AMS. Neither a reinstatement of the license suspension nor other enforcement sanction would be triggered by a decision affirming LBP-90-17. In deciding that issues remained for determination in this proceeding, the Licensing Board relied on an exception to the doctrine against issuing declaratory orders in otherwise moot cases when the party's injury is "capable of repetition, yet evading review." LBP-89-11, 29 NRC at 314 (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911)). In the Board's view, this proceeding fell within that set of cases because the challenged suspension was too short to be fully litigated before its cessation and AMS could be subject to similar action again. LBP-89-11, 29 NRC at 314-15. To the extent that the Licensing Board found issues left for resolution, however, those issues centered on the basis for the immediate effectiveness of the Staff's suspension order. *Id.* at 313, 316.

AMS contends that the Licensing Board applied an inappropriate evidentiary standard. Indeed, AMS maintains that the Board should have applied a "clear and convincing" standard to the evidence. AMS Brief at 19. Upon consideration of AMS's arguments we conclude that the Licensing Board's decision reflects

¹⁹ *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300-01 (1981); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 315-16 (1908). Contrary to the implication in AMS's brief (at 17), summary action prior to hearing has not been limited solely to circumstances requiring protection of the national interest in wartime.

²⁰ *Hodel*, 452 U.S. at 302.

²¹ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). See also *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1081 (D.C. Cir. 1974).

an appropriate analysis of the sufficiency of the evidence required to support the Staff's *threshold* decision to order an immediately effective suspension. The standard by which the immediate effectiveness of the order is judged may differ from that ultimately applied after a full adjudication on the merits of an enforcement order. *See Sheffield*, 11 NRC at 4-5. In this proceeding, however, because the admitted issues concern only the threshold determination as to whether there was a sufficient basis for issuing an immediately effective order, the standard applied to review of matters after a full adjudicatory hearing on the merits of an order did not apply.

The Licensing Board applied the criteria in *Indian Point* and *Sheffield* in its assessment of the adequacy of the Staff's bases for an immediately effective order. As the Board noted, these criteria give substantial deference to the Staff's decision to initiate enforcement proceedings. LBP-90-17, 31 NRC at 543-45. To the extent that the Staff's order, and particularly its immediate effectiveness, rested on specific factual allegations, the Board measured the sufficiency of the evidentiary basis for the order under "the threshold evidentiary requirements associated with administrative proceedings under the Administrative Procedure Act — that the information he bases his decision upon be reliable, probative, and substantial — within the context of reasonableness." *Id.* at 556.

We agree with the Licensing Board that the standard for review of an order's immediate effectiveness under *Sheffield* permits such orders to be based on preliminary investigation or other emerging information that is reasonably reliable and indicates the need for immediate action under the criteria set forth in section 2.202. *See* CLI-79-6, 9 NRC at 677-78, *reconsideration denied*, CLI-80-1, 11 NRC 1, 5-6 (1980). This standard does not suggest an absence of controversy over such evidence or over the need for immediate action. In a recent rulemaking to adopt procedural changes to our rules of practice to ensure a prompt review of challenges to the immediate effectiveness of orders, we characterized the basic test as one of "adequate evidence" for the order and noted the kinship of this test to one for probable cause for an arrest, warrant or preliminary hearing. *See* Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,195-96 (May 12, 1992). Under this test,

[A]dequate evidence is deemed to exist when facts and circumstances within the NRC Staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges are true and that the order is necessary to protect the public health, safety, or interest.

Id. at 20,196. The test "strikes a reasonable balance between the Commission's ability to protect the public health, safety, or interest on the basis of reasonably trustworthy information while still providing affected parties with a measure

of protection against arbitrary enforcement action by the Commission.” *Id.* Although this rulemaking was adopted after the controversy in this proceeding arose, the “adequate evidence” test is consistent with the preliminary review of the available evidence under our earlier *Sheffield* decision.

Thus, we reject AMS’s argument that the Staff was required to show that it had “clear and convincing evidence” of license violations before it issued its order.²² In the recent amendments to section 2.202, we rejected a similar comment that the Commission apply the “preponderance of the evidence” standard in assessing threshold challenges to the immediate effectiveness of an order, because of the potential adverse impact on the public safety or interest that could occur if additional time were required to collect evidence necessary to sustain immediate action under such a standard. 57 Fed. Reg. at 20,196.

We acknowledged in our rulemaking that the “adequate evidence” standard is not a test for determining the ultimate merits of an order, but is intended only as a preliminary procedural safeguard against the Staff’s ordering immediately effective action based on “clear error, unreliable evidence, or unfounded allegations.” *Id.* at 20,197. Likewise, the Licensing Board’s assessment of the information available to the Director should be understood in a similar context. As the Board recognized, AMS’s admitted issues for litigation concentrated on the legitimacy of the Director’s invocation of the grounds for making an order immediately effective and initiating such action. Thus, we believe that the Licensing Board correctly considered in assessing the evidence available to the Staff whether that evidence was probative and a reasonably reliable basis on which to impose an immediately effective suspension. No more stringent test need be considered in addressing the threshold adequacy of such an order.

In reviewing the record in light of the criteria in *Sheffield*, the Board concluded in response to the Staff’s motion for summary disposition under 10 C.F.R. § 2.749 that no material facts remained in dispute regarding whether the Staff had sufficient evidence on which to base an immediately effective order. *See* LBP-90-17, 31 NRC at 542 & n.5. Thus, we have also reviewed the record

²² As Staff notes in its reply brief (at 12), AMS raises the applicability of the “clear and convincing” test for the first time on appeal, which would in itself be grounds for its rejection. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 133 (1987). The only authority cited for AMS’s proposition is a Licensing Board decision adopting as a *matter of discretion* a “clear and convincing” test in a special hearing on falsification of data related to operation of the Three Mile Island Unit 2 reactor. *Inquiry into Three Mile Island Unit 2 Leak Rate Data Falsification*, LBP-87-15, 25 NRC 671, 690-91 (1987), *aff’d on other grounds*, CLL-88-2, 27 NRC 335 (1988). Notwithstanding a licensing board’s discretionary application of the standard in a single case, the Commission has never adopted a “clear and convincing” standard as the evidentiary yardstick in its enforcement proceedings, nor are we required to do so under the AEA or the APA. Typically, NRC administrative proceedings have applied a “preponderance of the evidence” standard in reaching the ultimate conclusions after hearing in resolving a proceeding. *See, e.g., Radiation Technology Inc.*, (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533, 536 (1979); Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,673 (Aug. 15, 1991). The “preponderance” standard is also the one generally applied in proceedings under the APA. *See Steadman v. SEC*, 450 U.S. 91, 101-02 (1981) (preponderance of evidence standard governs APA on-the-record proceedings).

in light of AMS's arguments that the Staff could not satisfy the requirements for summary disposition under section 2.749. In so doing, we have focused our review on whether a genuine issue remains in dispute regarding whether the Staff had sufficient evidence on which to base an immediately effective order. From our review, we conclude that the Staff had demonstrated that no genuine issue of material fact remains in dispute and that the Staff is entitled to a decision in its favor as a matter of law.

D. The Violations Alleged in the Order

The Staff ordered the license suspension primarily on the basis of its preliminary investigative findings that certain AMS employees had conducted service and maintenance operations on teletherapy equipment that they were not authorized to perform and without adhering to required safety precautions. The order summarized the charges as follows:

The NRC recently has confirmed additional allegations that since the Spring of 1985 and as recently as September 1986, employees of the licensee were directed to perform certain service and maintenance on teletherapy equipment at medical facilities notwithstanding their lack of NRC authorization, their lack of required training to perform the directed maintenance, their lack of appropriate radiation detection and monitoring equipment or required service manuals, and their express objections to performing such maintenance without proper training. In addition, one hospital at which such service and maintenance was performed has indicated its belief that a licensee employee was unqualified to perform the maintenance of its teletherapy equipment.²³

For the most part, AMS does not deny that its employees undertook maintenance and service activities as the Staff alleged. However, AMS insists that its employees did not engage in any activities for which they were not authorized and denies that management knowingly instructed its employees to violate license requirements. As AMS states in its brief,

²³ 51 Fed. Reg. 37,674 (Oct. 23, 1986). The order also references certain alleged violations of radiation safety requirements during operations in February 1985 in a hot cell at AMS's facility. The alleged hot cell violations were the subject of a separate civil penalty proceeding. See LBP-91-9, 33 NRC 212 (1991), *rev'd and remanded in part*, CLI-93-22, 38 NRC 98 (1993), *settlement approved*, LBP-94-10, 39 NRC 126 (1994). Other than the Licensing Board's brief reference to them in its decision in the instant case, see LBP-90-17, 31 NRC at 545, these violations involving other aspects of AMS's licensed activity do not figure in the Board's consideration of the issues before it. Earlier in the proceeding the Staff had eschewed reliance on those violations to support its position. See Letter to William F. Kolis, Jr., AMS counsel, from Stephen H. Lewis and Colleen Woodhead, NRC Staff counsel (Feb. 19, 1987). The Staff did not reference the violations in its Motion for Summary Disposition or its brief opposing AMS's appeal, nor did AMS refer to the violations in its Brief in Opposition or in its appeal to us. Consequently, we do not further consider those alleged violations here, and they have no bearing on our decision.

AMS has never claimed the work was not done, but has always claimed that its employees did no unlicensed work and has denied that certain of the work was performed in the manner alleged by AMS employees.

AMS Appeal Brief at 12. To assess the merits of AMS's arguments, we first review the relevant requirements of AMS's license and then turn to the evidence that the Licensing Board found sufficient to warrant an immediately effective suspension order.

1. "Licensed Operations" Under AMS's License

The Staff's order suspended AMS's authorization under NRC Materials License No. 34-19089-01 to install, maintain, service, and dismantle radiography or teletherapy units. At the time that the order was issued, this license and certain documents incorporated by reference defined the basic requirements and limitations on AMS's activities.²⁴ Prior to June 25, 1986, AMS's licensed maintenance and service operations were governed by License No. 34-19089-02 (the "-02" license). As the Licensing Board noted, the two licenses were combined in June 1986.²⁵ Most of the incidents of unauthorized maintenance on which the Licensing Board relied occurred while the "-02" license was in effect. Relevant excerpts from the documents or procedures incorporated by reference in that license are quoted in the Licensing Board's decision and are attached to the Staff's summary disposition motion. *See* LBP-90-17, 31 NRC at 551-53; MSD Attachments 1-4. Although the license in effect at the time of the suspension order contained updated and revised procedural documents and requirements, the changes did not alter materially the essential limitations on AMS's service operations, and none of AMS's arguments against the Licensing Board's interpretation of the license depend on differences between the two licenses.

At times relevant here, Condition 12 of the "-02" license required that activities involving licensed material be performed or supervised by persons designated by AMS's Isotope Committee.²⁶ AMS was also required under condition 14 of the "-02" license to adhere to the statements, representations,

²⁴ A copy of the license as it appeared at the time the order was issued is appended to the Staff's motion for summary disposition as Attachment 1.

²⁵ 31 NRC at 551; *see also* Attachment A to Affidavit of George M. McCann, *et al.* (hereinafter McCann Affidavit), submitted with NRC Staff's Motion for Summary Disposition (hereinafter "MSD"). To ensure that we had a proper understanding of the license requirements and procedures in effect at the relevant times in question, we directed the Staff by order dated November 23, 1993, to file on the docket of this proceeding a complete copy of License No. 34-19089-02 and the documents incorporated by reference therein and a copy of the licensee's November 12, 1984 letter which was incorporated by reference in License No. 34-19089-01.

²⁶ Under Conditions 11.A and 11.B of the "-01" license in effect after June 26, 1986, servicing and maintenance of teletherapy and radiography units could be conducted by or under the supervision and in the physical presence of certain named individuals. *See* MSD Attachment 1.

and procedures contained in its November 1979 license application and other supporting documents, such as AMS's Factory Training Course and the Cobalt Service Procedures Manual.²⁷ By virtue of their incorporation by reference into the license, the procedures and limitations on activities prescribed in the specified manuals and documents became binding license requirements which AMS was not free to ignore.

Schedule B of the 1979 license application states that —

all work requiring [sic] a specific license which does not involve removal of the source from it's [sic] shielded container, but does include operation of an exposure device, will be performed by persons formally approved to do so by the Advanced Medical Systems, Inc., Isotope Committee.

MSD Attachment 2 at 3. Under AMS's procedures, service technicians were required to complete specified training before they could be certified by the AMS Isotope Committee to work independently on teletherapy systems as authorized users.²⁸ As defined by AMS's procedures, licensed operations —

include work involving the [radioactive] source or parts of the unit which could result in increased exposure to the source. This includes work on the source shutter or other mechanisms which could expose the source, reduce shielding around the source, or compromise the safety of the unit and result in increased exposure levels.

LBP-90-17, 31 NRC at 552 (quoting AMS's Factory Training Course at 9). As prescribed by the Licensee's Cobalt Service Procedures Manual, certain operations could be performed only by a certified person: contamination checks, waste disposal, emergency closing of a stuck shutter, surveys, collimator removal and installation, head installation and removal, shutter service and cleaning, shutter bearing lubrication, and unit tests and demonstration. See MSD Attachment 3 at 9.

The Cobalt Service Procedures Manual also required that —

[p]rior to commencement of the operations outlined in this manual, the licensee for whom the service is being performed will relinquish control over the use of, and the keys for, the equipment and it's [sic] controlled areas to the licensed person in charge until such time as it has been determined by the licensed person that the equipment is in safe operating condition. The licensed person will *then* return control of the equipment and controlled areas to the licensee.

²⁷ Compare License No. 34-19089-01, Amendment No. 8, Condition 19 (MSD Attachment 1). See AMS's Factory Training Course (MSD Attachment 2); Cobalt Service Procedures Manual (MSD Attachment 3).

²⁸ 1979 License Application, Schedule B, at 3 (MSD Attachment 2); Factory Training Course at 9 (MSD Attachment 2); AMS March 10, 1980 letter at 1 (MSD Attachment 3).

Id. at 2. During such operations, AMS employees were required to carry film badges, pocket dosimeters, and audible gamma radiation detectors. *Id.* at 5. The manual further specifies procedures for unit check-out after completion of service, including steps involving operation of the unit before returning the key to and jurisdiction over the unit to the client. *Id.* at 17-18. Thus, any maintenance or service that would require testing (including opening the source shutter) to verify the safe and proper operation of the serviced, repaired, or replaced components or subsystems would be a “licensed operation.”

2. *Alleged Incidents of Unauthorized Maintenance*

In reviewing the evidence available to the Staff at the time the suspension order was issued, the Licensing Board relied primarily on the statements of AMS employees that were prepared during the course of the Staff’s preliminary investigation. *See* LBP-90-17, 31 NRC at 548-51, 554, 556-57. At the time the order was issued, the Staff had available information provided to NRC investigators by several current or former AMS employees: service technicians James M. Leslie, Russell P. Fortier, Garnett C. Light, and Richard G. Speer and AMS Field Service Manager Paul Carani. *See id.* at 548-51. The statements or interview reports of the service technicians contain allegations of a number of incidents of unauthorized maintenance or service of teletherapy units by unlicensed technicians.

AMS attacks the Licensing Board’s reliance on the statements of the service technicians, suggesting that the technicians are “merely” disgruntled employees. AMS also contends that the statements are not reliable because the statement in one instance is unsigned and thus hearsay and because Staff has not provided an affidavit that the statements were “true, accurate, and actually the words of those individuals.” AMS Brief at 15.

With the exception of Mr. Light, the statements are signed and sworn by the service technicians.²⁹ Moreover, George M. McCann of NRC Region III signed the statements as a witness to their making and attests to the statements’ authenticity in his affidavit accompanying the Staff’s motion for summary disposition.³⁰ Although the statement reflecting the interview with Mr. Light is signed only by Mr. McCann and the NRC investigator who also conducted the interview, the hearsay nature of the affidavit does not in itself bar its consideration,³¹ nor does the record contain any other evidence suggesting its

²⁹ *See* MSD Attachments 5, 11, 17, 23, 38. The witness statements were also provided to AMS with NRC Inspection Report No. 030-16055/86-001(DRSS), issued Nov. 25, 1986 (Exhibit 11 to Application of Advanced Medical Systems, Inc., for Stay of the Effectiveness of Decision (Jan. 16, 1987)).

³⁰ McCann Affidavit ¶¶ 19d, 19e.

³¹ *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 412 (1976).

inherent unreliability.³² As described in the ensuing discussion of the particular violations, AMS does not contest the occurrence of the essential facts that are described in the Staff's interview report for Mr. Light or the statements of any of the other service technicians. AMS's general objections to the reliance on the technicians' statements and its bald assertions that the technicians were "disgruntled" employees are insufficient to show a concrete, material dispute of fact.³³

AMS also argues that the Licensing Board erred in finding no dispute of fact because the Regional Administrator had the same "conflicting" evidence available when he revoked the suspension order in its entirety in December 1987. In AMS's view the Regional Administrator's action was tantamount to an admission that "the NRC's actions were neither substantially justified nor that special circumstances existed so as to have made their actions reasonable."³⁴ The Regional Administrator's letter contains no such admission or basis for believing that the Staff had confessed error in issuing the original order. Indeed, had Staff's letter contained such an admission, we would proceed no further with AMS's appeal, for AMS would have obtained the victory it desires and its appeal would be moot. The letter, however, suggests only that subsequent amendments to AMS's license had superseded the terms of the order and potentially conflicted with them. There is no suggestion in the letter that the Staff admitted that the evidence supporting its order was insufficient to sustain it. We therefore proceed to an analysis of the evidence of the violations charged in the order.

The Board identified the following incidents as particularly material to the Board's review:

11. James M. Leslie replaced the timer on the teletherapy unit at Munson Medical Center, Traverse City, Michigan on April 28-29, 1986. . . .
17. AMS employee Russell P. Fortier performed service on the main cable of the teletherapy unit at the Hospital for Joint Diseases, Harlem, N.Y. on May 30, 1985 without survey meter, dosimeter, audible radiation monitor or service manual for the unit. . . .
22. AMS employee Russell P. Fortier replaced the timer in the teletherapy unit and exposed the radioactive source at Ball Memorial Hospital, Muncie, Indiana on October 23-24, 1985. . . .
24. On June 10 and 11, 1986 Garnett Light serviced the wiring between the teletherapy stand and the control console, exchanged the treatment timer in the unit, performed safety tests,

³² Indeed, a transcribed interview with Mr. Light conducted after the order was issued confirms the basic facts contained in the Staff's original interview report regarding Mr. Light's actions at a Veterans Administration hospital in New Jersey and at Eastside Radiology Imaging and Therapy Center in Ohio. See Investigative Interview of Garnett C. Light at 14-18 (Oct. 28, 1986) (MSD Attachment 18).

³³ See *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

³⁴ AMS Appeal Brief at 5, 15; see Letter from A. Bert Davis to S.S. Stein, AMS President (Dec. 3, 1987).

- performed emergency and interlock checks, and activated the unit at the VA [Veterans Administration] Hospital, East Orange, N.J. . . .
27. Garnett Light installed a head containing the source in the teletherapy unit at Eastside Radiology, Willoughby Hills, Ohio in July 1986 without supervision of an LSE [licensed service engineer]. . . .
 34. AMS employee Richard Speer repaired a timer in the teletherapy unit at St. Joseph's Hospital, St. Paul, Minnesota in December 1985. . . .³⁵

AMS does not dispute that Messrs. Leslie, Fortier, Light, and Speer were neither listed on AMS's license nor certified by AMS's Isotope Committee. Rather, AMS maintains that these employees' actions did not constitute "licensed" operations. None of AMS's disputes with the service technicians' statements reveals any real controversy over the employees' actions, even under the most generous reading of AMS's position. As the Licensing Board stated, AMS has provided little more than "bare denials" in the way of evidence that neither contradicts the basic events described in the Staff's motion and its supporting materials nor otherwise shows that material issues of fact remain for determination in this proceeding. 31 NRC at 542 n.5. Absent any probative evidence supporting AMS's claims, mere assertions of a dispute do not invalidate the Licensing Board's grant of summary disposition. See *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

Mr. Light's removal and reinstallation of a teletherapy head at Eastside Radiology in Willoughby Hills, Ohio, quite clearly violated the limits spelled out in AMS's license.³⁶ Head installation and removal is specifically listed as a "licensed operation" in AMS's procedures manual.³⁷ The teletherapy head contained a radioactive source of some 9000 curies of the cobalt-60 isotope and could create a significant hazard to patients, clinical staff, and the service technician if not properly handled or installed.³⁸

AMS does not deny that Mr. Light conducted this operation; at most, AMS challenges, on the basis of a 1990 affidavit from Mr. Carani, that Mr. Light was instructed to perform the work over Mr. Light's objection without the presence of an authorized AMS representative. See AMS Appeal Brief at 8-9. Although these assertions might be material to a determination of AMS management's culpability, they do not raise any question regarding the work performed by Mr.

³⁵ NRC Staff's "Statement of Material Facts as to Which No Genuine Issue Exists" (appended to MSD); see LBP-90-17, 31 NRC at 543 n.5.

³⁶ See Interview of Garnett C. Light (MSD Attachment 17).

³⁷ Cobalt Service Procedures Manual at 9 (MSD Attachment 3). The head contains the radioactive source within a movable source carrier that moves the source from the shielded to exposed position. McCann Affidavit ¶8 and Fig. 3.

³⁸ See McCann Affidavit ¶60; Staff Statements of Material Fact Nos. 29 and 51 (appended to MSD).

Light or otherwise indicate that the Staff's reliance on its interview with Mr. Light was unreasonable.

Other alleged instances of unauthorized maintenance or repairs by service technicians involved the wiring of teletherapy units. The NRC investigators' report of their interview with Mr. Light indicates that he completed wiring work on the unit stand and the control console at a Veterans Administration Hospital in East Orange, New Jersey, in June 1986 after the licensed service engineer had departed.³⁹ Mr. Light further indicated that he performed safety tests as well as emergency and interlock checks that required activation of the teletherapy unit and exposure of the radioactive source.⁴⁰ Mr. Fortier's statement describes his work in May 1985 on the wiring of the main cable for the teletherapy unit at the Joint Disease Tumor Hospital in Harlem, New York.⁴¹ AMS does not dispute that the work was performed, but denies that the work constituted "licensable activities" which could be performed only by persons named in the license or approved by the Isotope Committee.

In determining whether the technicians' activities were "licensable," the Staff examined the safety significance of their operations and concluded that, because the work could affect the performance of a number of important radiation and patient safety features of the teletherapy unit, the work was required to be performed or directly supervised by a licensed service engineer. Wiring the main cable, for example, can affect the safe operation of the unit, because the main cable of a teletherapy unit connects the unit to the remote control panel, and the cable contains electrical wiring that affects source exposure equipment and the unit's safety systems. See McCann Affidavit ¶¶38-39. Wiring from the control panel links the controls to safety mechanisms in the unit. *Id.* ¶55. AMS does not dispute these basic facts. Given the importance of proper repair and installation of the main cable and other wiring, the Staff reasonably concluded that such actions could "compromise the safety of the unit and result in increased exposure levels"⁴² and thus were required to be performed or supervised by a "licensed" engineer approved by the NRC or the Isotope Committee.

In the absence of any supporting affidavit, document, or other proffered evidence, AMS's simple denial that certain work performed by service technicians Light and Fortier was "licensable" is not compelling. See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC

³⁹ Report of Interview of Garnett C. Light (MSD Attachment 17).

⁴⁰ *Id.*

⁴¹ Interview of Russell P. Fortier (MSD Attachment 11). Mr. Fortier also says he did not have radiation monitoring devices with him, which Staff alleged violated AMS's Cobalt Services Procedures Manual (MSD Attachment 3 at 5). AMS does not deny that he lacked such equipment, but blames Mr. Fortier for the violation. AMS Appeal Brief at 8. The Licensing Board also noted at least two other instances during which the service technician did not have required radiation monitoring equipment. See 31 NRC at 550.

⁴² Factory Training Course at 9 (MSD Attachment 2).

741, 754 (1977). AMS has not rebutted the conclusion that these activities, as supported by Staff's affidavit, affected the teletherapy units in such a way that brought them within the scope of licensed service operations under AMS's license and procedures. *See, e.g.,* McCann Affidavit ¶¶38, 48, 55, 59, 69. Indeed, we are unable to find in AMS's appeal brief any challenge to the Board's acceptance of the Staff's statements of material fact regarding the significance of various portions of the teletherapy unit to the safe operation of the unit. Even in AMS's answer to the Staff's motion for summary disposition, AMS responds for the most part by merely disputing any "alleged improprieties" suggested in the Staff's statements. *Compare, e.g.,* Staff's Statements of Fact Nos. 24-26 and 29 with AMS Brief in Opposition to NRC Staff's Motion for Summary Disposition at 32 ¶9.

The remaining instances of allegedly unauthorized maintenance that the Licensing Board deemed material involved replacement of the teletherapy unit's timer mechanism which controls the amount of time that the patient is exposed to the radioactive source. Mr. Leslie was sent to Munson Medical Center in Traverse City, Michigan, in April 1986 to replace a timer in the teletherapy unit's control console.⁴³ Although AMS quibbles with some of the words used in Mr. Leslie's statement to characterize his actions, AMS denies neither that Mr. Leslie was acting on AMS's behalf nor that Mr. Leslie worked on the timer device in the teletherapy unit. AMS Brief at 5. Moreover, AMS does not dispute that Mr. Fortier replaced the timers at Ball Memorial Hospital in Muncie, Indiana, in October 1985⁴⁴ and that Mr. Speer replaced a timer at St. Joseph's Hospital, St. Paul, Minnesota, in 1985.⁴⁵ Mr. Fortier operated the unit at Ball Memorial Hospital after timer replacement, a clear violation of license conditions and procedures that limit operation of the device to "licensed" service engineers.⁴⁶

AMS argues that timer replacement is not a "licensed operation" because

⁴³ Interview of James M. Leslie (MSD Attachment 5).

⁴⁴ AMS Appeal Brief at 8; *see* Interview of Russell P. Fortier (MSD Attachment 11). Mr. Fortier states that he activated the teletherapy unit in connection with the timer replacement at Ball Memorial Hospital; AMS does not deny that he did so or that he was sent to the hospital on AMS's behalf, but contends either that he acted contrary to AMS policy or that a hospital employee with Mr. Fortier may have been authorized to operate the unit. Even if Mr. Fortier acted "contrary to AMS policy," the Commission may act to ensure that activities under the color of AMS's license comply with Commission requirements and do not endanger public health and safety. Not only is AMS's suggestion regarding the hospital employee's activities pure speculation, it also flies in the face of the restrictions of AMS's license procedures that require AMS employees to take control of the teletherapy unit during maintenance. Cobalt Service Procedures Manual at 2 (MSD Attachment 3).

⁴⁵ Interview of Richard G. Speer (MSD Attachment 23).

⁴⁶ License No. 34-19089-01, Condition 11.B, and Cobalt Service Procedures Manual at 9 (MSD Attachments 1 and 3). AMS suggests that a hospital employee, identified only as "Fred" in Mr. Fortier's statement, who was present during Mr. Fortier's operation, could have operated the unit if he were a licensed individual under the hospital license. No basis for AMS's fanciful speculation is provided or even suggested in the record that could lead one to conclude that a genuine dispute existed as to such facts. In any event, AMS's theory flies in the face of its license requirement that AMS take control of maintenance operations.

replacement is a relatively simple operation and is performed outside the room wherein the radioactive source is located. AMS Appeal Brief at 5, 8. Although this may be true, AMS's argument misses the mark. The Licensing Board found that work on the timer mechanism, because it controls the amount of time that a patient is exposed to radiation, is work that could result in increased exposure to the source or compromise the safety of the unit and result in increased exposure levels. Therefore, the Board concluded that replacement of a timer was work that must be performed by "licensed" personnel — which Messrs. Leslie, Fortier, and Speer were not.⁴⁷ The potential effect on the safety of the unit's operation is determinative of whether the maintenance is a "licensed operation" — *not* the relative simplicity of a maintenance operation and *not* the locus of the technician's activity. Nowhere does AMS dispute that, as described in the Staff's affidavit, the timer affects the amount of radiation exposure provided during operation of the teletherapy unit.⁴⁸

AMS overlooks the safety of patients who are treated with the unit or hospital employees who assist patients and operate the unit, all of whom could be affected by potentially improper maintenance by AMS employees not qualified or approved for such activities. We see nothing in AMS's license or procedures or in AMS's filings before the Board or us that support such a crabbed view of safety. We therefore affirm the Licensing Board's interpretation of the license and the related procedures.⁴⁹

AMS asserts that its management did not instruct the service technicians to undertake any activities that would violate AMS's license. AMS Appeal Brief at 8-9. AMS management's involvement in the violations has no bearing on whether violations may have occurred. It is clear that the service technicians were AMS employees acting on AMS's behalf. If their actions violated AMS's

⁴⁷ See 31 NRC at 553. In further support of this conclusion, we take official notice of AMS's November 1984 revision of the Cobalt Service Procedures Manual, ISP-25, which was submitted to the NRC with AMS's November 12, 1984 license renewal application. The revised ISP-25 includes the Picker C-9 Maintenance Manual, H57-M, Revision A (March 1, 1979). Section 1, page 1.0 of the C-9 Maintenance Manual contains a maintenance schedule for C-9 cobalt-60 teletherapy systems. The schedule lists various components and subsystems of the C-9 that require inspection, and states the frequency at which those inspections should be made. Several components listed on the schedule, including the treatment timer, are footnoted with an asterisk. The footnote reads:

*CAUTION: Service and/or adjustment may be performed only by personnel licensed by the NRC or an Agreement State to service Cobalt Units.

The reference indicates that AMS considered treatment timer service a licensable activity and belies AMS's persistent denial of the same throughout this proceeding.

⁴⁸ See McCann Affidavit ¶¶ 8, 30, 32, 43.

⁴⁹ We note that this interpretation is consistent with contemporaneous generic licensing guidance on teletherapy units, which suggests a standard license condition limiting maintenance or repair of any mechanism on the unit that could "expose the source, reduce the shielding around the source, or compromise the safety of the unit and result in increased radiation levels." Draft Regulatory Guide and Value/Impact Statement, "Guide for the Preparation of Applications for Licenses for Medical Teletherapy Programs," Task FC-414-4, Appendix H, at H-5 (Dec. 1985). The draft regulatory guide specifically defines "safety devices" as "timers, mechanical and electrical interlocks, warning lights and alarms, safety switches, door interlocks, beam collimators, and other devices that actively warn of, limit, or prevent radiation exposure to either patients or personnel." *Id.* at H-2. AMS referenced this description in its Brief in Opposition (at 13) to the Staff's motion.

license or Commission regulations, AMS is accountable for the violations and appropriate enforcement action may be taken. *Atlantic Research Corp.* (Alexandria, Virginia), CLI-80-7, 11 NRC 413, 422 (1980).

In sum, AMS has failed to identify any error in the Licensing Board's determination that the work performed by the unlicensed service technicians fell within the scope of "licensable" activities. Therefore, we affirm the Licensing Board's conclusion that no genuine issue remained regarding the question of whether the Staff had sufficient evidence to conclude that licensable activities were being conducted by unauthorized AMS personnel.⁵⁰ Having found that the Staff possessed reliable, probative evidence indicating that violations of AMS's license had occurred, we next consider whether the evidence was sufficient to warrant an immediately effective suspension.

E. Suspension as a Sanction for the Violations

The Licensing Board determined that, based on the evidence of violations of license conditions that agency inspectors and investigators had gathered, the Staff was well within its discretion to suspend AMS's license. AMS argues on appeal that the Staff had no discretion to impose an immediately effective suspension. At most, AMS maintains, the Staff could have issued a show-cause order. AMS's arguments against the Board's determination are unconvincing. The Licensing Board properly found that suspension of AMS's license was a reasonable remedy under the circumstances and was authorized by law.

Without question, the Commission is empowered to impose sanctions for violations of NRC regulations and licenses and to take remedial action to protect public health and safety from the potential effects of such violations or other unsafe practices. The Congress has authorized the Commission to issue such orders as "the Commission may deem necessary or desirable . . . to protect health or minimize danger to life or property." AEA § 161b, 42 U.S.C. § 2201(b). As we stated in an earlier enforcement proceeding, "[t]he Commission's safety regulations and license conditions reflect the Commission's considered judgment as to what is required to protect the public as well as licensees' employees from the hazards inherent in the industrial use of radioactive byproduct material." *Atlantic Research Corp.*, 11 NRC at 425. A violation of requirements subjects the violator to the full range of sanctions authorized under the Atomic Energy Act, including revocation of a license. See AEA §§ 186a, 234, 42 U.S.C.

⁵⁰ Although our review has focused on the threshold sufficiency of the Staff's evidence as a basis for ordering an immediately effective suspension, the absence of any material dispute over the technicians' activities, coupled with our interpretation of the applicable regulatory requirements, indicates that summary disposition would be appropriate even as to the ultimate merits of the alleged violations. In other words, we see no material dispute with respect to the occurrence of the violations themselves that would have required a hearing under any circumstance in this case.

§§ 2236(a), 2282. Within the limits of the agency's statutory authority, the choice of sanction is quintessentially a matter of the agency's sound discretion.⁵¹

1. Staff's Basis for the Order's Immediate Effectiveness

Based on the matters set forth in the order, the Director asserted the following rationale for making the order immediately effective under the provisions of 10 C.F.R. §§ 2.201(c) and 2.202(f):

[I]t appears that the licensee has demonstrated careless disregard for license requirements and, consequently, I lack the requisite reasonable assurance that the licensee will comply with Commission requirements in the future. Continued conduct of certain licensed activities could pose a threat to the health and safety of the public. Specifically, the performance of installation, service, maintenance, or dismantling of radiography or teletherapy units by unauthorized and unqualified individuals could result in the overexposure of individuals receiving or administering teletherapy treatment or performing maintenance or service on radiography or teletherapy units. Therefore, I have determined that the public health, safety and interest require that License No. 34-19089-01 be suspended. . . .

51 Fed. Reg. 37,674.

AMS asserts that the Board erroneously concluded that the Staff had a reasonable basis to find willful misconduct by AMS. AMS argues that the Board erred in concluding that there was no litigable issue with respect to AMS management's involvement in the violations. AMS Appeal Brief at 11.

We acknowledge that the Staff seemingly invokes both the willfulness⁵² and the public health and safety grounds for making an order immediately effective. It does not appear to us, however, that the Licensing Board in sustaining the order made any particular findings with respect to willful behavior by AMS management. In its decision the Licensing Board found that the Staff could readily conclude that "such maintenance, if carried out haphazardly or negligently, posed a great and immediate safety risk to both the person performing the maintenance and patients being treated by the teletherapy units." LBP-90-17, 31 NRC at 557. As indicated in this passage, the Board sustained the immediate effectiveness on the basis of the potential safety impact of the alleged violations underlying the order. Although the Board indicated

⁵¹ See *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-87 (1973) (Congress intended to give agency administrators a broad grant of discretion to select the sanction that best serves to deter violations); *Go Leasing, Inc. v. National Transportation Safety Board*, 800 F.2d 1514, 1518-19 (9th Cir. 1986) (agency administrator has discretion in selecting from among available sanctions); *Robinson v. United States*, 718 F.2d 336, 339 (10th Cir. 1983) ("once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion").

⁵² Under our enforcement policy, conduct may be "willful" if it manifests, at a minimum, a careless disregard for requirements. See 10 C.F.R. Part 2, Appendix C, § IV.C (1994).

that the technicians' failure to use radiation monitoring devices during certain maintenance could indicate "either a lack of respect for or a conscious disregard of radiation safety on the part of the AMS employees or its management," the Board emphasizes the adverse safety impact of such practices through the risk of undetected radiation exposure to AMS workers. *Id.*

Because the Licensing Board rested on the public health and safety ground for immediate effectiveness and that ground is sufficient here to sustain the order's immediate effectiveness, we need not consider further whether the order could have been sustained on the basis of alleged willfulness. For the reasons that follow, we agree with the Board that the Staff's judgment reflected a reasonable assessment of the significance and safety impact of the violations on which the suspension was based.

As the Licensing Board put it, "[t]he fundamental principle guiding all Commission licensing actions is the paramount consideration of public safety." *Id.* at 554. The activities in question hardly concerned trivial matters, nor were they isolated occurrences. The alleged violations involved significant license conditions and procedures that were intended to provide assurance of the safe handling and maintenance of devices containing radioactive material. In the order the Staff emphasized the potential for radiation overexposure as a result of maintenance or service of equipment by unauthorized and unqualified persons in violation of the terms of the license. A teletherapy unit contains a high-intensity radioactive source that can deliver a substantial — even lethal — radiation dose. *See McCann Affidavit* ¶¶ 7, 10. As noted in the analysis of the alleged violations, the Staff's affidavit further details the potential adverse effects from improper maintenance of a teletherapy unit. *Id.* ¶¶ 32, 38, 43-44, 48, 51, 55-56, 60, 69. AMS never controverted these basic facts. With information that the service technicians were undertaking activities for which they had neither completed the specified training nor obtained NRC or AMS's own committee approval, the Staff could reasonably conclude that a suspension of the license was required to remove the potential for significant adverse safety consequences to patients, hospital workers, and AMS employees themselves. Additional information in the technicians' statements that they at times lacked the required radiation monitoring equipment or service manuals during their operations only magnifies the safety concern underlying the Staff's order.

In its appeal, AMS maintains that the Staff established no risk to public safety and that the Staff's invocation of the "public health and safety" ground for immediate effectiveness exceeded its discretion and was inconsistent with NRC precedent. In arguing that no safety risk was posed by the technicians' activities, AMS points to an affidavit that was prepared in February 1990 by a physicist at two client facilities served by AMS and submitted with AMS's answer to

the Staff's summary disposition motion.⁵³ All the affidavit says, however, is that during the shutdown of AMS's services, the affiant "discovered no health or safety risks with our teletherapy units." While it is indeed fortunate that no safety problems were discovered in the units, the affidavit has no real bearing on whether the Staff acted reasonably in ordering the suspension. The affidavit does not controvert any of the basic facts concerning the technicians' maintenance activities (indeed, the facilities were not ones identified by the technicians as places where they had worked) or the potential hazards associated with an ill-maintained or improperly serviced unit. The affidavit does little more than view events from the easy vantage of hindsight.

The Staff was called upon to make a prudent, prospective judgment at the time that the order was issued about the potential consequences of service operations undertaken in apparent violation of the license by unauthorized persons. A reasonable threat of harm requiring prompt remedial action, not the occurrence of the threatened harm itself, is all that is needed to justify immediate action to protect public health and safety. *See Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 10-12 (1974)* (immediate suspension of construction permit where latent conditions might not be subject to correction in future).

In arguing that the Staff had no discretion to issue an immediately effective order, AMS maintains that the NRC lacked the discretion to choose among enforcement options, and that, if any sanction was called for, the agency could only have issued AMS a non-immediately-effective order to show cause. AMS Appeal Brief at 26-27, 34. AMS's claims have no credible basis. AMS cites no statutory provision to support its claim that the Director's choice of a sanction violated a "statutory command" that the agency issue a show-cause order. *See id.* at 28. Nor does AMS ever identify any NRC regulation which allegedly has been transgressed. *Id.* at 27, 34.

AMS relies on a wholly irrelevant analysis of the discretionary function exception under the Federal Tort Claims Act (FTCA). AMS submits that the NRC lacked decisionmaking discretion because its actions were "operational" in nature. *Id.* at 35. To support this claim, AMS draws an analogy to cases brought under the FTCA, in which government agencies were found to have had a duty to take a particular action because they had become operators and not merely regulators. *Id.* at 35-36. The NRC's enforcement actions in this case bear no resemblance to the assumption of operational control and the performance of day-to-day management activities that occurred in these FTCA cases. As we noted earlier in our opinion, an agency's decision on how to proceed to enforce its regulations and meet its statutory responsibilities involves at its core

⁵³ AMS Appeal Brief at 16 (citing Affidavit of Dr. Arun Kaluskar, Attachment 15 to brief).

an exercise of discretion. The regulatory scheme under the Atomic Energy Act itself "is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

AMS suggests that the Staff's action was inconsistent with *Sheffield*, *supra*, 9 NRC 673. AMS's argument is footed on the erroneous premise that the Staff had issued a show-cause order to the licensee *before* requiring immediate action from the licensee in *Sheffield*. See AMS Appeal Brief at 18, 26-27. However, the order in that proceeding, just like the one at issue here, contained both a "show-cause" provision as well as an immediately effective provision requiring specified action pending the outcome of further proceedings. Just as AMS was compelled to suspend certain operations upon issuance of the order, Nuclear Engineering Company was required to resume immediately the responsibilities that it was attempting to abandon under its license. See *Sheffield*, 9 NRC at 675.

AMS also notes that the Staff deferred issuance of an order in *Sheffield* until it had inspected the licensee's facility twice. AMS Brief on Appeal at 26; see *Sheffield*, 9 NRC at 678. The Commission relied on the inspections in *Sheffield* to ensure that there was an adequate factual basis, and not mere speculation, to support the Staff's order. We see no weaker basis for immediate action in the instant case. The Staff based its order on interviews of persons who had direct knowledge of the service operations at issue. The Staff made a reasonable judgment that violations had occurred that could have potentially significant safety consequences. This was an "inquiry appropriate to the facts asserted" and sufficient to warrant an immediately effective order. *Sheffield*, 9 NRC at 678.

F. Other Asserted Flaws in the Licensing Board's Decision

In addition to its disagreement with the Licensing Board's resolution of the factual and legal issues underlying the Staff's order, AMS argues that the Licensing Board erred by failing to consider certain other evidence in the record or by failing to resolve other issues. On both counts, AMS's arguments fail.

1. The Licensing Board's Focus on Evidence Known Prior to Issuance of the Order

AMS contends that the Licensing Board erred in focusing on the evidence that was available to the Staff on the day that the order was signed.⁵⁴ AMS

⁵⁴ AMS Appeal Brief at 23. AMS's position on appeal is at odds with the position it took before the Regional Administrator in late 1986 when AMS sought withdrawal of the suspension order and before the Licensing Board
(Continued)

claims that the Board's decision departs from our earlier decision in *Nuclear Regulatory Commission (Licensees Authorized to Possess or Transport Strategic Quantities of Special Nuclear Materials)*, CLI-77-3, 5 NRC 16, 19-20 (1977) (citing *Indian Point*, *supra*, 2 NRC 173).

In its decision, the Board noted that the parties had sought factual findings on events that occurred or were documented after issuance of the order on October 10, 1986. Because the Board viewed AMS's issues as raising the question of whether the Staff had acted lawfully or abused its discretion when the summary suspension order was issued, the Board focused its inquiry "only on the information available to the Director at the time that he issued the order." LBP-90-17, 31 NRC at 542 n.5. Given that the only remaining issues for decision in this case concerned the rationale for the Staff's *initiation* of the suspension, we think the Board properly focused on the adequacy of the evidence that the Staff had amassed before issuing the order. As we have already noted, we expect the Staff to take summary enforcement action if such action is necessary or prudent to protect public health and safety from imminent threat, but such action must be based on more than mere speculation or unfounded allegation. Thus, we would expect the Licensing Board in reviewing the Staff's determination to concentrate, as it did in this case, on the probative value of the information within the Staff's knowledge when the Staff acted summarily to suspend the license.⁵⁵

Our earlier decisions in *Nuclear Regulatory Commission* and *Indian Point* do not mandate a different result. To begin with, both of those decisions concerned Commission review of a Staff decision *not* to take enforcement action. The Commission was faced, therefore, in both instances with the question of whether the circumstances on which the Staff relied to decline enforcement action still controlled and should guide the agency's future action toward the licensees. Even in *Sheffield*, a case closer to the one at hand, the question before the Commission centered on the *continuation*, pending hearing, of the immediate effectiveness of the order over the licensee's objection.

Unlike those cases, we are not faced with deciding whether the order should have some continuing or future effect or whether some other sanction should be imposed on AMS. The suspension of the license was lifted long ago, and

when it sought a stay of the order. See AMS Brief in Rescindment of Suspension Order at 43 (MSD Attachment 36); Memorandum in Support of Application of Advanced Medical Systems, Inc., for Stay of the Effectiveness of Decision at 5 (Jan. 16, 1987).

⁵⁵ This is not to say that the Staff would be barred from relying on additional evidence gathered after an immediately effective order is issued to defend the continued effectiveness of the order under the preliminary "adequate evidence" procedure now codified in 10 C.F.R. § 2.202(c)(2)(i) (1994) or at a full hearing on the merits of the order. In many circumstances the Staff may take summary action while continuing related investigations or inspections that may have a bearing on the ultimate outcome of the proceeding. The Staff, however, may not issue an immediately effective order based merely on the hope that the Staff will thereafter find the necessary quantum of evidence to sustain its immediate effectiveness.

even the conditions for the suspension's rescission ceased to have any operative effect when the Regional Administrator revoked the order in its entirety in late 1987. Thus, consistent with the issues AMS itself put in controversy, we are called to determine only whether the Staff acted reasonably within the governing statutory and regulatory parameters in initiating the license suspension. Our focus is necessarily on the evidence available at the time the order was issued.

Even if we were to agree with AMS that the Licensing Board should have expanded the scope of its review, AMS has not shown that a more expanded review would have led to a materially different result. For all its complaints about the Board's limited review of the evidence, AMS fails to identify any evidence in its appeal brief that the Board ignored that would suggest that the factual events underlying the order had not occurred or that the potential safety hazards of improperly maintained equipment were not significant.

From our own review of the record, we are unable to identify any evidence that would suggest a different result. The only additional evidence provided by AMS in its answer to the Staff's summary disposition motion consisted of affidavits prepared in 1990 by a user of teletherapy devices serviced by AMS and by several former or current AMS employees who generally deny that they were directed to intentionally violate NRC requirements.⁵⁶ These affidavits, however, are immaterial, because they lack a tie to the events contemporaneous with the issuance of the order and do not otherwise cast any doubt on the occurrence of the events relied upon by the Staff or the alleged safety potential of the service technicians' actions.⁵⁷ Even if we look back to AMS's late 1986 submittal to the Regional Administrator seeking rescission of the suspension or AMS's subsequent application for stay, we do not find any evidence that would suggest the Staff's suspension was ill-founded. The thrust of both of those documents is that the Staff's interpretation of "licensed" activities was erroneous, *not* that the events had not occurred. Indeed, if we look, as AMS seems to suggest (AMS Appeal Brief at 23) at the other evidence gleaned up until the time the order was rescinded, we find the Staff's position only strengthened by additional examples of unauthorized maintenance.⁵⁸ AMS did not deny the occurrence of the events

⁵⁶ Affidavits of Edward Svigel, Paul A. Carani, Michael Baruffa, Donna Ely, and Dr. Arun Kaluskar, attached to AMS Answer to Staff Motion for Summary Disposition. Mr. Svigel also disputes that the control console key switch can cause the source to fail to close, but he indicates that it does turn on the source (thereby conceding the device falls within the definition of "licensable" activity in dispute); Mr. Baruffa avers that timers on the units are easy to replace, a point we have already found immaterial to the interpretation of the license condition.

⁵⁷ Were we determining whether the suspension should be reinstated or other sanction imposed or were it necessary to determine the relative culpability of AMS management for the practices at issue, we acknowledge that these later affidavits might have some relevance. However, no such issues remain for our determination.

⁵⁸ See, e.g., MSD at 16-17; Staff Statements of Material Facts As to Which No Genuine Issue Exists Nos. 31, 33, 36, 40-41, 43, 45-49, 58; NRC Inspection Rep't No. 030-16055/86-001(DRSS), at 27-30 (Attachment 11 to AMS's Jan. 16, 1987 Application for Stay).

described in the Staff's documentation. Therefore, we see nothing in the record to suggest that the Staff lacked a basis to take summary action.

2. No Other Issues Need Be Decided

In its appeal, AMS also contends that it should be afforded a further opportunity to address the accusation of willfulness against AMS and the alleged disparate treatment of AMS in the Staff's issuance of a suspension order. AMS Appeal Brief at 11-12, 19. Neither issue merits further consideration.

As we noted earlier, the Licensing Board did not rest on a finding of willfulness to sustain the immediate effectiveness of the suspension, and neither do we rely on such grounds. Although the Staff's order asserted AMS's apparent "careless disregard" for regulatory requirements, that assertion, even assuming that it was sufficient to support the order's immediate effectiveness, is not conclusive of AMS management's intent with respect to the circumstances set forth in the order.

We see no reason why the matter should be considered further. The Staff "revoked the order in its entirety" in late 1987, and we are aware of no subsequent action that relies on AMS management's relative culpability or intent with respect to the violations connected with the 1986 order. The Staff granted AMS's license renewal application in 1989. The period under the enforcement policy within which the violation would be considered as a basis for escalation of subsequent enforcement sanctions has long passed. See 10 C.F.R. Part 2, Appendix C, § VI.B.2(c) and Table 2 (1994). AMS has provided no basis to suggest that it is subject to ongoing adverse consequences as a result of the order. In the absence of any such collateral effects of the order, no further hearing need be offered to explore AMS's "willfulness." See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 186 (1993) (citing cases), *appeal docketed*, No. 93-3602 (6th Cir., June 3, 1993).

AMS also argues that the Licensing Board "erred in failing to find that AMS was treated differently from other similarly situat[ed] Licensees." AMS Brief at 18. AMS claims that, at the time it received the NRC order, unlicensed individuals employed by other byproduct material licensees were performing licensed work, yet the other licensees received only NRC Information Notice 87-18. Thus, AMS argues, the Staff abused its discretion in issuing the suspension order by treating AMS in a disparate fashion.

This allegation of discriminatory enforcement is without merit. AMS must show both that other similarly situated licensees were treated differently and that no rational reason existed for the differential treatment. See *Encyclopaedia Britannica v. FTC*, 605 F.2d 964, 974 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980). AMS has never shown that there were other unit manufacturers

or service licensees like AMS that had committed comparable violations.⁵⁹ The Staff's issuance of Information Notice 87-18 does not demonstrate that the NRC had knowledge of particular licensees in violation of similar regulations or license conditions.

Even if AMS successfully had shown that other licensees in its class had engaged in identical unlawful activities, the NRC would not have been obliged to withhold issuance of the suspension order unless others were similarly sanctioned. The Commission may act against one firm practicing an industrywide violation.⁶⁰ As the Supreme Court has observed,

[I]n the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment. . . . [A]lthough an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency.

Moog Industries, Inc. v. FTC, 355 U.S. 411, 413 (1958). Indeed, it would be unfeasible for an agency to act against every violation. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Baltimore Gas & Electric Co. v. Heintz*, 760 F.2d 1408, 1419 (4th Cir.), *cert. denied*, 474 U.S. 847 (1985).

Moreover, a sanction within the authority of an administrative agency is not rendered invalid because it is more severe than that issued in other cases. *FCC v. WOKO*, 329 U.S. 223, 227-28 (1946). A rigid "uniformity of sanctions (which the licensee appears to think necessary) is neither possible nor required." *Radiation Technology, Inc.*, ALAB-567, 10 NRC at 541. Differences in sanctions imposed may be due to any number of factors. Enforcement decisions inherently involve "the exercise of informed judgment on a case-by-case basis." *Id.* In sum, the ordering of enforcement priorities is left to the agency's discretion. *See Heckler*, 470 U.S. at 831-32; *Heintz*, 760 F.2d at 1419.

⁵⁹ Indeed, the Staff acted consistently with its suspension order to AMS by concurrently ordering safety checks at AMS's client hospitals and clinics as a remedial measure to ensure the safety of the teletherapy units. *See* 51 Fed. Reg. 37,676, 37,678, 37,682-83, 37,685-87 (Oct. 23, 1986) (orders to Ball Memorial Hospital, Eastside Radiology Imaging and Therapy Center, Munson Medical Center, V.A. Hospital, East Orange, N.J., V.A. Hospital Bronx, V.A. Medical Center, Allen Park, MI).

⁶⁰ *See FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 249-52 (1967) (FTC's refusal to withhold enforcement of a cease-and-desist order pending investigation of alleged industrywide practices did not constitute a patent abuse of discretion); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 24 (7th Cir. 1971) (an order should not be set aside "simply because it was directed against a single violator" among many); *Rabiner & Jontow v. FTC*, 386 F.2d 667, 669 (2d Cir. 1967), *cert. denied*, 390 U.S. 1004 (1968).

IV. CONCLUSION

In sum, the Staff acted reasonably and had a substantial basis for issuing an immediately effective suspension order. The order was well within the agency's statutory and regulatory authority. Accordingly, AMS's appeal is *denied*, and LBP-90-17 is *affirmed*. The proceeding is hereby *terminated*.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Acting Secretary of the
Commission

Dated at Rockville, Maryland,
this 9th day of June 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

**Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque**

In the Matter of

**Docket No. 11004699
(Application No. XSNM02785)**

**WESTINGHOUSE ELECTRIC
CORPORATION
(Nuclear Fuel Export License
for Czech Republic — Temelin
Nuclear Power Plants)**

June 9, 1994

The Commission denies the petition of Natural Resources Defense Council and others for leave to intervene and for a hearing on Westinghouse Electric Corporation's application to export nuclear fuel to the Czech Republic for use in the nuclear facility at Temelin. The Commission finds that the Petitioners have not met the criteria for a grant of late intervention and further finds that the Petitioners lack standing and that a discretionary hearing would not be in the public interest.

EXPORT LICENSES: HEARING REQUESTS

Commission regulations provide, in 10 C.F.R. § 110.82(c)(2), that hearing requests on applications to export nuclear fuel are to be filed within 15 days after the application is placed in the Commission's Public Document Room.

NUCLEAR NON-PROLIFERATION ACT: EXPORT LICENSES

United States nonproliferation policy, as set forth in the Nuclear Non-Proliferation Act of 1978 (NNPA), requires the NRC to act in a timely manner

on export license applications to countries that meet U.S. nonproliferation requirements.

NUCLEAR NON-PROLIFERATION ACT: EXPORT LICENSES

Because Congress viewed timely action on export license applications as fundamental to achieving the nonproliferation goals underlying the NNPA, the Commission is reluctant to grant late hearing requests on export license applications.

EXPORT LICENSES: UNTIMELY INTERVENTION PETITIONS OR HEARING REQUESTS (CRITERIA)

Under 10 C.F.R. § 110.84(c), untimely hearing requests may be denied unless good cause for failure to file on time is established. In reviewing untimely requests, the Commission will also consider: (1) the availability of other means by which the petitioner’s interest, if any, will be protected or represented by other participants in a hearing; and (2) the extent to which the issues will be broadened or action on the application delayed.

EXPORT LICENSES: UNTIMELY HEARING REQUESTS OR INTERVENTION PETITIONS (CRITERIA)

Because timely action on export licenses supports U.S. nuclear nonproliferation goals under the NNPA, it is particularly important that petitioners in this context demonstrate that the pertinent factors weigh in favor of granting an untimely petition.

EXPORT LICENSES: UNTIMELY INTERVENTION PETITIONS (“GOOD CAUSE” FOR LATE FILING)

The first and principal test for late intervention is whether a petitioner has demonstrated “good cause” for filing late. In addressing the good-cause factor, a petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible.

EXPORT LICENSES: UNTIMELY HEARING REQUESTS OR INTERVENTION PETITIONS (CRITERIA)

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.

EXPORT LICENSES: UNTIMELY HEARING REQUESTS OR INTERVENTION PETITIONS (REPRESENTATION OF PETITIONER’S INTEREST)

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.

EXPORT LICENSES: UNTIMELY HEARING REQUESTS OR INTERVENTION PETITIONS (DELAY OF ACTION)

The potential for delay of action on an export license application is an important factor in the Commission’s analysis of a late-filed petition on such application, in light of the NNPA’s directive for timely decisions on export license applications.

EXPORT LICENSES: UNTIMELY HEARING REQUESTS OR INTERVENTION PETITIONS (BROADENING OF ISSUES OR DELAY OF ACTION)

Holding a hearing on an export license application at a point when the NRC has had in its hands for 2 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.

EXPORT LICENSES: UNTIMELY HEARING REQUESTS OR INTERVENTION PETITIONS (GOOD CAUSE)

In circumstances where there has been no showing of good cause for the untimeliness of an intervention or hearing request, the Commission concludes that denial of the request is the appropriate action.

**RULES OF PRACTICE: STANDING TO INTERVENE
(REDRESSABILITY)**

As a line of Supreme Court cases makes clear, “redressability” is an essential element of standing.

**EXPORT LICENSING PROCEEDING: STANDING TO INTERVENE
RULES OF PRACTICE: STANDING TO INTERVENE**

The Commission, throughout its history, has applied judicial standing tests to its export licensing proceedings.

**RULES OF PRACTICE: STANDING TO INTERVENE
(REDRESSABILITY)**

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.”

RULES OF PRACTICE: STANDING TO INTERVENE

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.

**RULES OF PRACTICE: STANDING TO INTERVENE
(REDRESSABILITY)**

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.

EXPORT LICENSE: HEARING REQUEST

**NUCLEAR REGULATORY COMMISSION: DISCRETIONARY
HEARING**

Commission regulations, in 10 C.F.R. § 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.

EXPORT LICENSE: HEARING REQUEST

In the absence of evidence that a hearing would generate significant new information or analyses, a public hearing would be inconsistent with the Nuclear Non-Proliferation Act.

NUCLEAR REGULATORY COMMISSION: DISCRETIONARY HEARING

In order for the Commission to grant a discretionary hearing, 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.

MEMORANDUM AND ORDER

I. INTRODUCTION

By today’s Memorandum and Order, we¹ deny the petition jointly filed by the Natural Resources Defense Council, Friends of the Earth, Hnuti Duha, and Global 2000 (“NRDC”), as well as those of Greenpeace Austria and Oberösterreichische Plattform gegen Atomgefahr (“OPGA”), for leave to intervene and for a hearing on the license application filed by Westinghouse Electric Corporation (“Westinghouse” or “Applicant”) to export nuclear fuel to the Czech Republic for use in the nuclear facility at Temelin. As Petitioners themselves concede, their petitions were not timely filed, and we have not found good cause or any other justification to warrant overlooking their lateness. Moreover, Petitioners lack standing and therefore have not established any right to a hearing. Finally, a discretionary hearing would not be in the public interest.

¹ Chairman Selin recused himself from participating in this matter in a Memorandum he issued on April 26, 1994.

II. BACKGROUND

Petitioners are challenging the proposed export of the first reactor fuel load for the Temelin reactors. Temelin Units 1 and 2 are nuclear power reactors in the advanced stages of construction of the VVER-1000 type designed in the former Soviet Union. The project is located in South Bohemia, approximately 60 miles south of the Czech capital, Prague, and within 125 miles of the Austrian capital, Vienna.

On December 1, 1993, Westinghouse filed an application for a license to export 342,000 kilograms of low-enriched uranium for use as fuel in the two nuclear reactors.² A copy of Westinghouse's fuel export application, designated as License Application No. XSNM02785, was placed in the Commission's Public Document Room on December 20, 1993. Pursuant to 10 C.F.R. § 110.82(c)(2), intervention and hearing petitions upon the application were due within 15 days thereafter.

On March 17, 1994, NRDC filed a petition to intervene and request for hearing on Westinghouse's fuel export application.³ NRDC asserts that it seeks intervention because "the public interest requires a hearing on the health, safety and environmental effects of the export of nuclear fuel to Temelin." NRDC Petition at 6. Thereafter, the Commission received two undated petitions to intervene and requests for hearing incorporating by reference the NRDC petition, one from Greenpeace Austria on April 18, 1994, and the second from OPGA on April 29, 1994. Westinghouse filed timely answers to the petitions of the NRDC, Greenpeace Austria, and OPGA on April 20, April 25, and May 2, 1994, respectively. We received no reply from any of the Petitioners to Westinghouse's answers.

III. TIMELINESS OF THE PETITIONS FOR LATE INTERVENTION

The Commission's regulations provide, in pertinent part, that hearing requests on applications to export nuclear fuel are to be filed within 15 days after the application is placed in the Commission's Public Document Room. 10 C.F.R. § 110.82(c)(2). Here, intervention petitions and hearing requests regarding Westinghouse's fuel export licensing application were due on January 4, 1994. The petitions to intervene and hearing requests filed by NRDC, Greenpeace

²Previously, the Commission had issued two other licenses to Westinghouse, XCOM1078 and XCOM1082, authorizing the export of components for the Temelin reactors.

³"Petition for Intervention and Request for Hearing of the Natural Resources Defense Council, Friends of the Earth, Hnutí Duha, and Global 2000," dated March 17, 1994.

Austria, and OPGA are untimely, as they were not received until March 17, 1994, April 18, 1994, and April 29, 1994, respectively.

United States nonproliferation policy, which is set forth in the Nuclear Non-Proliferation Act of 1978 ("NNPA"), requires the Commission to act in a timely manner on export license applications to countries that meet our nonproliferation requirements.⁴ Indeed, Congress viewed timely action on export license applications as fundamental to achieving the nonproliferation goals underlying the NNPA. As Judge Wilkey noted in *National Resources Defense Council, Inc. v. NRC*, 647 F.2d 1345, 1360 (D.C. Cir. 1981) (*quoting* 123 Cong. Rec. H9831 (daily ed. Sept. 22, 1977) (statement of House floor manager):

[The] NNPA was intended in part to remedy prior "uncertainty as to what the U.S. nuclear export standards are" by "establish[ing] consistent and effective criteria for the licensing of all U.S. exports and . . . procedures for prompt consideration of export applications [to] enhance our position as a reliable supplier of nuclear fuel to nations which share our antiproliferation policies."

See also Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 261 (1980) ("*Westinghouse/South Korea*"). In light of this mandate, the Commission is reluctant to grant late hearing requests on export license applications.

Section 110.84(c) of the Commission's regulations sets forth the framework governing consideration of late-filed petitions in export license proceedings. Under that regulation, untimely hearing requests may be denied unless good cause for failure to file on time is established. In reviewing untimely requests, the Commission will also consider: (1) the availability of other means by which the petitioner's interest, if any, will be protected or represented by other participants in a hearing; and (2) the extent to which the issues will be broadened or action on the application delayed. The regulation further provides that the Commission will not act upon a hearing request until it has received the Executive Branch's views on the merits of the underlying application.

The factors considered by the Commission in acting upon untimely intervention and hearing requests in the export licensing context do not differ significantly from those considered in the domestic licensing context. *Compare* 10 C.F.R. § 2.714(a)(1)(i)-(v) (domestic licensing) *with* 10 C.F.R. § 110.84(c)(1)-(2) (export licensing). However, because of the NNPA mandate discussed above, it is particularly important that petitioners in the export licensing context demonstrate that the pertinent factors weigh in favor of granting an untimely petition.

⁴ *See, e.g.*, section 2(b) of the NNPA, 22 U.S.C. 3201, *et seq.*, and section 126b(1) of the Atomic Energy Act (AEA). *See also* AEA § 126b(2) (requiring Commission to specify in rules adopted under the NNPA that it shall "immediately initiate review of any [export] application," and generally providing for Executive Branch decision if the Commission fails to complete action on export application within 120 days).

We turn now to the first and principal test for late intervention: whether a petitioner has demonstrated “good cause” for filing late. In addressing the good cause factor, a petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible. *See, e.g., State of New Jersey* (Department of Law and Public Safety’s Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 295 (1993). Here, the untimely petitions to intervene fall well short of showing good cause.

Indeed, NRDC provided no explanation whatsoever why their petition was not or could not have been filed by January 4. Greenpeace Austria and OPGA (who filed short, virtually identical petitions incorporating by reference the NRDC petition) noted only that they “did not learn until mid-March of 1994 that the Commission had received the instant export application from Westinghouse.” Petitions at 2. Even if these Petitioners did not learn about Westinghouse’s application “until mid-March,” they made no effort whatsoever to explain why, upon learning of Westinghouse’s application, they waited over a month to file their very perfunctory petitions.

In these circumstances, the petitions fail the “good cause” test for late intervention. There is no reason apparent to us, and certainly no reason is offered in the petitions, why Petitioners waited 2 months or more to request a hearing, in the face of an NRC regulation imposing a 15-day deadline and in view of a statutory scheme urging promptness on the agency.

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. *See, e.g., State of New Jersey*, CLI-93-25, 38 NRC at 296; *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), *aff’d sub nom. Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51, 54 (5th Cir. 1990). As noted above, in the export licensing context the two remaining factors are: (1) the availability of other means by which the petitioner’s interest, if any, will be protected or represented by other participants in a hearing; and (2) the extent to which the issues will be broadened or action on the application delayed.

While we recognize that no one will represent the Petitioners’ perspective if the hearing requests are denied, this in itself is insufficient for us to excuse their untimeliness. *See, e.g., State of New Jersey*, CLI-93-25, 38 NRC at 296 (in totality of the surrounding circumstances, weight given to the “other means” factor is slight). Indeed, excusing untimeliness for every petitioner who meets only this factor would effectively negate any standards for untimely intervention in cases such as this where no one else has requested a hearing, since a late-filing petitioner could always maintain that there will be no hearing to protect its interest if intervention is denied.

We turn now to the final factor — i.e., the potential for delay of action on the application. As previously noted, in light of the NNPA's directive for timely decisions on export license applications, this is an important factor in the Commission's analysis of late-filed petitions on such applications.

In attempting to justify why granting the late intervention and hearing request would not delay action on Westinghouse's application, Petitioners rely heavily on the Commission's lack of authority to act on an export license application before it receives the views of the Executive Branch.⁵ Their main argument is in fact that the delay in filing the hearing requests did not prejudice anyone because the Commission had not yet received Executive Branch views. However, the Executive Branch notified the Commission by letter dated March 21, 1994 (i.e., just 3 days after the filing of the NRDC petition and before the filing of the petitions of Greenpeace Austria and OPGA) of its conclusion that Westinghouse's license application meets all of the applicable AEA export licensing criteria, and recommended that the Commission issue the requested export license to Westinghouse. Absent receipt of the untimely hearing petitions, the Commission would have acted on the application by late March 1994. Moreover, holding a hearing at this point, with the Executive Branch recommendation in our hand for 2 months would undoubtedly "broaden" the issues and substantially "delay" the Commission's final decision on the fuel export application.

In their only other defense of their untimely filings, Petitioners refer us to *Westinghouse Electric Corp. (Exports to the Philippines)*, CLI-80-14, 11 NRC 631 (1980) ("*Westinghouse/Philippines*"). That decision, however, nowhere addresses the "timely filing" requirement. Petitioners assert that in *Westinghouse/Philippines* the Commission had entertained an intervention petition filed "29 months after the filing of the initial [reactor] export application. . . ." and after the Executive Branch had already commented on the reactor export application. NRDC Petition at 5.

Petitioners have apparently misunderstood the time frames involved in the *Westinghouse/Philippines* export proceeding. Specifically, while it is true in *Westinghouse/Philippines* that the Executive Branch had already submitted its preliminary views to the Commission regarding the reactor export application when the late intervention petition was filed, the Commission had not yet, contrary to Petitioners' implication, received the Executive Branch's *final* views on the reactor export application at the time the late intervention petition was filed. Rather, the Executive Branch's final views were not received by the

⁵Section 126 of the AEA provides, *inter alia*, that no "license may be issued by the Nuclear Regulatory Commission . . . for the export of any production or utilization facility, or any source material or special nuclear material . . . until . . . the Commission has been notified by the Secretary of State that it is the judgment of the Executive Branch that the proposed export or exemption will not be inimical to the common defense and security, or that any export in the category to which the proposed export belongs would not be inimical to the common defense and security because it lacks significance for nuclear explosive purposes."

Commission until approximately 6 months after the filing of the late intervention petition. See 11 NRC at 632-34. Thus, in contrast to the instant request from NRDC, the potential for delay involved in granting the *Westinghouse/Philippines* late-filed petition was much less.⁶

Finally, while the circumstances of the *Westinghouse/Philippines* case may have justified a grant of late intervention, the Commission has made clear elsewhere that it looks with particular disfavor upon untimely filed petitions in the export licensing context. See *Westinghouse/South Korea*, 12 NRC at 256-57 (denying as untimely a late intervention and hearing request filed after the Executive Branch's views had been received). Where, as here, there has been no showing of good cause for the untimeliness of an intervention or hearing request, the Commission concludes that denial of the request is the appropriate action.

IV. STANDING

In addition to finding, as described in the previous section of this Memorandum, that Petitioners' hearing request must be dismissed as untimely, we find that Petitioners lack standing. As they frankly acknowledge, the relief they seek is to prevent the Temelin nuclear plant from going into operation. This is simply not a remedy that the Commission is empowered to grant, nor is it even a goal that would be advanced significantly by a Commission decision to deny the fuel export now before us. Petitioners therefore fail the test of "redressability," which, as a line of Supreme Court cases makes clear, is an essential element of standing.⁷ See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). The Commission, throughout its history, has applied judicial standing tests to its export licensing proceedings. *Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Material)*, CLI-76-6, 3 NRC 563, 569-70 (1976).

The standing doctrine's requirement that petitioners not only allege actual injury, "fairly traceable" to the defendants' actions, but also show that this injury would likely be "redressed" if petitioners obtain the relief requested, is grounded in the provision in article III of the Constitution that limits jurisdiction to "cases and controversies." See *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S. Ct. 2130, 2136 (1992). Standing is not a mere legal technicality, it is in fact an essential element in determining whether there is any legitimate role for

⁶The other Petitioners here stand on an even weaker footing since their petitions were not filed until after the Executive Branch's views had been received.

⁷Petitioners may also lack standing on other grounds. However, in view of our finding on "redressability," we need not explore other aspects of standing.

a court or an agency adjudicatory body in dealing with a particular grievance. *See generally Edlow International Co.*, CLI-76-6, 3 NRC at 568-72. Where the injury alleged 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. *See Allen v. Wright*, *supra*, 468 U.S. at 759.

Applying the redressability test to the petitions before us, we must ask whether denial of the particular fuel export license application now before the NRC would be likely to prevent operation of the Temelin plant and thus avert the harm that Petitioners allege. The answer is that there is no reason to believe that denial of this license would have any effect whatsoever on whether Temelin goes into operation. It is Petitioners' burden to demonstrate that the relief they seek will likely redress their grievance, Temelin's operation. Petitioners have not made the slightest effort to meet that burden. *See Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S. Ct. at 2136-37.

The matter before us, it should be emphasized, is an export license application for nuclear fuel, not for a reactor. Such fuel is not a United States monopoly. If it were, it might be possible to argue that NRC denial of fuel exports would block the operation of Temelin. But that is not the case. In reality, a number of nations export nuclear fuel which could be used in the Temelin reactor.⁸ *See, e.g., "Fuel Review 1993," Nuclear Engineering International* (September 1993), at 18-24.

The decision to complete the Temelin reactor and operate it, using nuclear fuel obtained on the international market, was and is entirely in the hands of another sovereign nation, the Czech Republic. The NRC has no authority to approve or disapprove Temelin's operation. The Czech government, which has expended large sums to construct the plant, has made clear that it is committed to operating it, and it is the Commission's view that withholding of nuclear fuel export licenses by the NRC would not prevent it from doing so. Accordingly, Petitioners have failed to demonstrate that the injury they claim will be redressed by the NRC action they seek, and therefore they lack standing.

A recent Supreme Court case, *Lujan v. Defenders of Wildlife*, *supra*, discussed the redressability aspect of standing in a factual setting similar to ours. There, members of an environmental group asserted that a project in Sri Lanka, funded in part by the Agency for International Development, would jeopardize endangered species of particular importance to members of the group. A four-justice plurality of the Court, relying on prior Supreme Court cases, found that

⁸ It might conceivably be argued that a United States decision not to export fuel to Temelin would assist the Petitioners in persuading every other country that exports nuclear fuel to follow suit. Such a result is too speculative, and dependent on the unpredictable actions of numerous third parties, to suffice as a basis for meeting the test of redressability.

the environmental group had failed to meet the test of redressability.⁹ AID, the Justices observed, provided less than 10% of the funding of the project, and the environmental plaintiffs had “produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated.” 112 S. Ct. at 2142. The plurality added that “it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.” *Id.* In other words, the alleged harm, if it occurred, would not be the result of U.S. action but rather of the Sri Lankan government’s decision to undertake the project, and plaintiffs had failed to show that Sri Lanka would abandon the project if U.S. support were denied.¹⁰

The same analysis applies here. The Czech Republic, not the NRC, has the authority to decide whether to operate Temelin. If public hearings were held that led to an American decision not to export fuel to Temelin, operation of the reactor would not be prevented. The decision whether to operate the reactors is a decision that only an independent third party, the Czech Republic, can make.

V. DISCRETIONARY HEARING

The Commission’s regulations provide that, if Petitioners are not entitled to a hearing under section 189a of the Atomic Energy Act 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 assist the Commission in making the statutory determinations required by the AEA. 10 C.F.R. § 110.84(a)(1). Regarding this discretionary hearing provision, the Commission has made clear that:

[i]n the absence of evidence that a hearing would generate significant new information or analyses, a public hearing would be inconsistent with one of the primary purposes of the Nuclear Non-Proliferation Act — that United States government agencies act in a manner which will enhance this nation’s reputation as a reliable supplier of nuclear materials to nations which adhere to our non-proliferation standards by acting upon export license applications in a timely fashion.

Westinghouse/South Korea, CLI-80-30, 12 NRC at 261.

Here, Petitioners assert that they are requesting a hearing in light of their “recent” discovery of certain documents regarding the Temelin project that

⁹ Three Justices disagreed with the plurality on the issue of redressability. Two others, having decided on other grounds that the plaintiffs lacked standing, did not reach the redressability issue.

¹⁰ In a footnote, also possibly relevant to the present case, the Justices added that evidence suggested that the U.S. role in the project would be to *mitigate* the feared harm to wildlife, “which means that termination of AID funding would *exacerbate* respondent’s claimed injury.” *Id.*, n.6.

purportedly “raise substantial questions about whether the Temelin plant is being or can be upgraded to meet generally-recognized safety standards.” NRDC Petition at 6. Petitioners state that “these and related documents” have been “analyzed at length” by “Technical Advisors to the Special Delegation of the Austrian Government to the United States,” and refer us to a series of attachments to their pleading consisting of letters and documentation previously filed with the Export-Import Bank of the United States in a loan proceeding concerning the Temelin project. The only remaining “evidence” referenced in Petitioners’ submissions consists of various press statements and magazine article references that purportedly also raise concerns about the safety of the Temelin plant.

Even assuming that the health and safety-related issues raised by Petitioners are matters that the Commission considers in making its export licensing determinations,¹¹ we cannot conclude from Petitioners’ submissions that they would offer anything in a hearing that will generate significant new information or insight about Westinghouse’s current fuel export application.¹² On the contrary, the submissions reflect that Petitioners would not offer any information or documentation in a hearing that is not already readily available to the Commission. In particular, the so-called “new evidence” that provides the framework for Petitioners’ hearing request consists of documents prepared by third parties that have already been in the public domain for some time — namely, three reports regarding the Temelin project issued by the International Atomic Energy Agency dating back to 1990 and 1992, and a 1992 audit report of the Temelin site issued by Halliburton NUS, an independent contractor. Moreover, given the redressability problem discussed above, it is far from clear that any new information that would be produced at a hearing would result in the remedy Petitioners seek — prevention of operation.

In sum, we conclude that a public hearing would not be in the public interest or assist the Commission in making its statutory determinations. It would only further delay the decisionmaking process without any clear public benefit and undermine this country’s role as a reliable supplier of nuclear materials to countries that do not pose nonproliferation risks.

VI. CONCLUSION

For the reasons outlined earlier in this Decision, we have decided this case on two independent procedural grounds, finding both a lack of timeliness and a lack

¹¹ Petitioners themselves acknowledge, however, that this is contrary to longstanding precedent. *See generally Westinghouse/Philippines*, CLI-80-14, *supra*.

¹² Again, we note that the documents cited by Petitioners address safe operation of the Temelin reactors rather than issues bearing on the fuel export application pending before the Commission.

of standing. We therefore do not reach the merits of their substantive claims. We thus have no occasion to decide whether, as Petitioners claim, operating the Temelin plant poses grave hazards or, on the contrary, as the supporters of the Temelin project maintain, represents a major step in *averting* hazards in Eastern Europe through the use of technology purchased from the United States to upgrade to acceptable levels the safety and environmental acceptability of nuclear reactors in the former Soviet bloc. These are important questions, but they are not appropriate for an adjudicatory decision by this Commission, in the context of ruling on this application for a license to export nuclear fuel.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Acting Secretary of the
Commission

Dated at Rockville, Maryland,
this 9th day of June 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

OI Docket No. 1-92-037R

HENRY ALLEN, DIANE MARRONE,
and SUSAN SETTINO

June 17, 1994

The Commission denies the motion of three individuals, who are employed by companies who supply products to the nuclear industry, to quash a subpoena issued by the NRC's Office of Investigations (NRC-OI) for their testimony concerning potential violations of NRC regulations. The Commission establishes a new date for compliance with the subpoenas.

REGULATIONS: SAFETY STANDARDS

The term "safety-related" is generally used to describe systems, structures, or components that are designed to remain functional or to assure required safety functions in the event of an emergency. See 10 C.F.R. Part 100, Appendix A, Criterion III(c).

REGULATIONS: SAFETY STANDARDS

A "basic component" is defined as a plant structure, system, component or part thereof necessary to assure (i) the integrity of the reactor coolant pressure boundary; (ii) the capability to shut down the reactor and maintain it in a safe shutdown condition, or (iii) the capability to mitigate the consequences of accidents which could result in potential offsite exposures comparable to those referred to in [10 C.F.R.] § 100.11[.] 10 C.F.R. § 21.3(a)(1).

NRC: ENFORCEMENT OF SUBPOENAS

The NRC has consistently treated motions to quash or modify NRC Staff or NRC-OI subpoenas using procedures analogous to those used in resolving motions to quash or modify subpoenas issued by presiding officers in licensing proceedings. *See* 10 C.F.R. § 2.720(f).

NRC: ENFORCEMENT OF SUBPOENAS

In general, an agency subpoena is enforceable if (1) the subpoena is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; (3) the information is not yet in the possession of the agency; and (4) statutory procedures have been followed in the subpoena's issuance. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989).

RULES OF PRACTICE: STAFF RESPONSIBILITY

The NRC Staff has the responsibility to review and resolve questions regarding public health and safety. *Richard E. Dow*, CLI-91-9, 33 NRC 473, 478 (1991). *Cf. Joseph J. Macktal*, CLI-89-12, 30 NRC 19, 24-25 (1989).

NRC: AUTHORITY TO INVESTIGATE (SUBPOENA); ENFORCEMENT OF SUBPOENAS

The NRC may subpoena *any* person who it reasonably believes has information relating to issues within its jurisdiction regardless of where or for whom that person works.

NRC: JURISDICTION

Suppliers of products and materials to the nuclear industry are subject to the NRC's jurisdiction to the extent that they sold safety-related products or "basic components" to NRC licensees under a certification that those products were produced in accordance with an approved Part 50, Appendix B quality assurance program, which was based upon another supplier's testing under its own quality assurance program.

REGULATIONS: SAFETY STANDARDS

A supplier's act of discontinuing its approved Part 50, Appendix B quality assurance program cannot remove the supplier from NRC jurisdiction regarding any acts committed during the time in which it was a "supplier" of safety-related products to NRC licensees.

RULES OF PRACTICE: STAFF AUTHORITY

The NRC Staff has the authority to review the installation of *any* product that is related to the safe operation of a nuclear power plant, even if that product is a "commercial-grade" product that is "dedicated" and then installed by the licensee.

NRC: AUTHORITY TO INVESTIGATE (SUBPOENAS)

The NRC has authority to question persons with relevant knowledge *regardless* of their employment. Just because 10 C.F.R. § 50.9 does not apply to a witness' employer does not mean that a witness does not possess "relevant, competent or material" information subject to a subpoena.

NRC: AUTHORITY TO INVESTIGATE

Under a Memorandum of Understanding with the Department of Justice (DOJ), the NRC-OI is the proper office of the NRC to refer matters to DOJ for possible criminal prosecution.

NRC: AUTHORITY TO INVESTIGATE

In most cases, only after NRC-OI has completed its investigation of a matter and prepared its report does it submit that report to DOJ with a request for a review of the case's possible prosecutorial merit; in special circumstances, NRC-OI may advise DOJ or the local U.S. Attorney of a case prior to issuance of its investigation report or may request an early determination of a case's prosecutorial merit.

NRC: AUTHORITY TO INVESTIGATE

Case law clearly holds that a criminal referral, in and of itself, does not require a government agency to suspend its civil investigation.

NRC: AUTHORITY TO INVESTIGATE

The United States Supreme Court has upheld the concept of allowing parallel civil and criminal investigations to proceed. *United States v. Kordel*, 397 U.S. 1 (1970).

NRC: AUTHORITY TO INVESTIGATE (SUBPOENA)

A civil subpoena may not be used in a situation involving a *pending* criminal charge, or an investigation *solely* for criminal purposes.

NRC: AUTHORITY TO INVESTIGATE

Regulatory agencies that have ongoing regulatory functions may proceed with civil investigations of a matter even after referral of that matter to the Department of Justice. *SEC v. Dresser Industries*, 628 F.2d 1368, 1380 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980).

NRC: AUTHORITY TO INVESTIGATE (SUBPOENA)

To successfully defeat the enforcement of a civil subpoena, a party opposing the subpoena must demonstrate that the agency's *sole* purpose was to gather information of a criminal nature. *United States v. LaSalle National Bank*, 437 U.S. 298 (1978).

NRC: AUTHORITY TO INVESTIGATE

The fact that there is an ongoing grand jury investigation simultaneously with an NRC investigation is not sufficient reason, in and of itself, to stop the NRC investigation. *United States v. McGovern*, 87 F.R.D. 582, 584 (M.D. Pa. 1980).

NRC: AUTHORITY TO INVESTIGATE

Once a grand jury issues an indictment in a case that the NRC Staff or NRC-OI is investigating, the NRC Staff and/or NRC-OI should stay any non-emergency phases of their inquiries.

NRC: AUTHORITY TO INVESTIGATE

Where the NRC is investigating the quality of materials sold to NRC licensees and installed in the safety-related systems of those licensees' plants, there are, obviously, public health and safety purposes for that type of investigation.

COMMISSION PROCEEDINGS: SUBPOENA ENFORCEMENT (PARTICIPATION)

A subpoena "proceeding" is not, strictly speaking, a Part 2, Subpart G "proceeding," under which a party who meets the intervention standards in 10 C.F.R. § 2.714 may participate, or under which a party may be granted, as a matter of discretion under 10 C.F.R. § 2.715, a limited right to participate.

COMMISSION PROCEEDINGS: SUBPOENA ENFORCEMENT (PARTICIPATION)

While a party against whom possible evidence is sought does not have a *right* to intervention in a subpoena enforcement proceeding, that party can seek *permissive* intervention in such a proceeding. *Donaldson v. United States*, 400 U.S. 517 (1971).

COMMISSION PROCEEDINGS: SUBPOENA ENFORCEMENT (PARTICIPATION)

The correct way to challenge evidence recovered by the government in response to a civil subpoena is by challenging introduction of that evidence in a subsequent enforcement proceeding. *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

RULES OF PRACTICE: CONFIDENTIAL INFORMATION (PROTECTION FROM DISCLOSURE)

The mere "possession" of privileged information cannot create a bar to testimony in a civil regulatory proceeding.

RULES OF PRACTICE: CONFIDENTIAL INFORMATION (PROTECTION FROM DISCLOSURE)

The Commission is under no duty to "not learn" an item of information just because it may be privileged.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

A testifying witness may assert the attorney-client privilege to prevent revealing (1) a communication (2) made in confidence (3) between an attorney (4) and a client (5) for the purpose of seeking or obtaining legal advice.

RULES OF PRACTICE: PRIVILEGE (ATTORNEY-CLIENT)

The attorney-client privilege protects only the disclosure of “communications,” not the disclosure of “facts” by those who communicated with the attorney.

RULES OF PRACTICE: CONFIDENTIAL INFORMATION (PROTECTION FROM DISCLOSURE)

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

A witness who provides safety information that also happens to be privileged may be protected as a whistleblower by section 211 of the Energy Reorganization Act.

RULES OF PRACTICE: PRIVILEGE (WORK PRODUCT)

The “work-product” doctrine, as defined in *Hickman v. Taylor*, 329 U.S. 495 (1947), protects (1) documents and tangible things otherwise discoverable, (2) prepared in anticipation of litigation, (3) by the party or its attorney.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a joint motion filed by three individuals (“Petitioners”) who are employees of either Five Star Products, Inc. (“FSP”), or Construction Products Research, Inc. (“CPR”). Each Petitioner seeks to quash an NRC subpoena issued by the NRC’s Office of Investigations (“NRC-OI”). The subpoenas require each respective individual to appear at a specified time and place to testify in an NRC investigation. In addition, FSP and CPR (“the Employers”) have also submitted a joint motion to quash the three subpoenas. While we are not convinced that the Employers have standing to participate in this subpoena proceeding, we have exercised our discretion and docketed the Employers’ motion. After reviewing the parties’ arguments, we

deny the motions to quash and enforce the subpoenas for the reasons stated below.

II. FACTUAL BACKGROUND

A. Introduction

The factual background underlying this matter is set forth at some length in an earlier decision involving a related but separate NRC-OI investigation. *See Five Star Products, Inc., and Construction Products Research, Inc.*, CLI-93-23, 38 NRC 169, 174-76 (1993) ("CLI-93-23"). Accordingly, we will repeat only the basic essentials here.

Briefly, FSP and CPR are two closely related companies located in Fairfield, Connecticut. Both companies are owned by Babcock & King, Inc., and the two companies share a common office building and have several officers in common. For example, Mr. H. Nash Babcock is the President of CPR and the Vice President of FSP. His son, Mr. William N. Babcock, is the President of Babcock & King, Inc., the President of FSP, and the Vice President of CPR. For approximately 20 years, FSP has sold grout and structural concrete products to the nuclear industry while CPR performed testing services for FSP.

Prior to August 25, 1992, FSP had advertised that its products had been produced consistent with the NRC's requirements in 10 C.F.R. Part 50, Appendix B ("Appendix B") and 10 C.F.R. Part 21 ("Part 21"). Because an understanding of those regulations is essential to understanding this case, we will present a brief overview of them at this point.

B. Appendix B

Under Appendix B, Criterion II, NRC nuclear power plant and fuel reprocessing plant licensees must establish a quality assurance ("QA") program to ensure that equipment and materials that are purchased for use in the "safety-related" systems of a nuclear power plant are suitable for their intended use.¹ Vendors — or "suppliers" — of products that are to be used in the construction of nuclear power plants may also establish QA programs that meet the guidelines of Appendix B. The certification by a supplier that its products have been produced in accordance with a licensee-approved Appendix B QA program is significant

¹ The term "safety-related" is generally used to describe systems, structures, or components that are designed to remain functional or to assure required safety functions in the event of an emergency. Those required safety functions include assuring (1) the integrity of the reactor coolant pressure boundary; (2) the capability to shut down the reactor and maintain it in safe shutdown; and (3) the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures comparable to those set forth in 10 C.F.R. § 100.11. *See* 10 C.F.R. Part 100, Appendix A, Criterion III(c).

because an NRC licensee may then purchase those products and install them in safety-related plant systems without being required to perform additional testing on them.

However, if an NRC licensee purchases products while relying on vendor/supplier certification, the purchaser must audit (or inspect) the supplier's "QA" program, which supports that certification, to ensure that the program complies with Appendix B. See Appendix B, Criterion VII. However, if an NRC licensee purchases products for installation in a safety-related system from a supplier who does *not* have an approved Appendix B QA program, the licensee must then qualify those products itself under its own QA program, which generally means testing the products to demonstrate that they are suitable for their intended use.

In this case, FSP had established a QA program that had been audited and "approved" by several NRC licensees (while being rejected by others) and the NRC Staff has obtained copies of some of those audits. CPR had also established a QA program, although it is not clear to the NRC Staff (1) whether that program had been audited by anyone other than FSP and (2) whether FSP had indeed actually audited the CPR QA program.

C. Part 21

The NRC has established the regulations in Part 21 to implement section 206 of the Energy Reorganization Act ("ERA"). Part 21 requires that suppliers of "basic components" must have in place a system for reporting to the NRC any defects discovered in those components and a system for maintaining records of such defects. A "basic component" is defined as

a plant structure, system, component or part thereof necessary to assure (i) the integrity of the reactor coolant pressure boundary; (ii) the capability to shut down the reactor and maintain it in a safe shutdown condition, or (iii) the capability to mitigate the consequences of accidents which could result in potential offsite exposures comparable to those referred to in [10 C.F.R.] § 100.11[.]”

10 C.F.R. § 21.3(a)(1). The NRC considers the grout and structural cement supplied by FSP to be "basic components" to the extent that they are tested by CPR and certified by FSP as fit to be installed by NRC licensees in safety-related systems without further examination. In addition, the definition of a "basic component" includes

safety related design, analysis, inspection, *testing*, fabrication, replacement parts, or consulting services that are associated with the component hardware whether these services are performed by the component supplier or others.

10 C.F.R. § 21.3(a)(3) (emphasis added). Thus, the testing services supplied by CPR also constitute a "basic component" of a plant in which FSP's products have been installed in a safety-related system.

In addition, Part 21 also requires a supplier of "basic components" to (1) post appropriate notices, 10 C.F.R. § 21.6; (2) allow NRC inspections, 10 C.F.R. § 21.41; and (3) maintain specified records, 10 C.F.R. § 21.51. Furthermore, those entities who are subject to Part 21 must ensure that all procurement documents, such as purchase orders, specify that the provisions of Part 21 apply. 10 C.F.R. § 21.31.

D. FSP's Commercial Practices

As indicated by documents obtained by the NRC Staff, FSP generally transacted business by responding to purchase orders submitted to it by NRC licensees. A purchase order contains a complete description of the product desired by the purchaser. The purchase orders submitted to FSP usually specified that the materials to be supplied were to comply with the NRC regulations in both Part 50, Appendix B, and Part 21.

Generally, FSP would first obtain the products that it planned to sell in response to the purchase order from its own suppliers and then submit them to CPR for testing. CPR would test these materials in accordance with CPR's QA program, which was allegedly audited by FSP to determine if CPR's program met the requirements of Appendix B. Following this testing, and the reporting of the test results to FSP, FSP would supply the materials to the NRC licensee along with documentation (a "Certificate of Compliance") stating that the materials conformed to the purchase order requirements which, as we noted above, generally included compliance with both (1) the licensee's approved Appendix B QA program and (2) Part 21. Thus, as we also noted above, the certification signified to NRC licensees that they could install these products without further testing, assuming that the licensees had adequately audited the implementation of FSP's QA program. Presumably, FSP relied upon CPR's test results in issuing its Certificate of Compliance.

E. The August 1992 Inspection

During the summer of 1992, the NRC's technical staff ("NRC Staff") received a confidential allegation from Mr. Edward Holub, a CPR employee, that CPR had failed to test safety-related materials in accordance with FSP's QA program and applicable industry standards. Based upon this allegation, the NRC Staff became concerned that FSP was perhaps selling substandard materials to NRC licensees

for use in safety-related systems. Accordingly, the NRC Staff conducted an inspection at the FSP/CPR facility on August 18 and 19, 1992.

The NRC Staff has alleged that during this inspection, FSP and CPR officials refused to allow the NRC inspectors to have unfettered access to company records or to visit the CPR laboratory. On August 25, 1992, FSP advised its customers who were NRC licensees that it would no longer supply safety-grade materials and that it was discontinuing its Appendix B QA Program. On September 1, 1992, the NRC Staff and United States Marshals seized numerous documents relating to FSP's and CPR's QA programs. This seizure was conducted under the authority of a criminal search warrant issued by the United States District Court for the District of Connecticut on August 28, 1992. The NRC Staff requested and received the assistance of the Office of the United States Attorney for the District of Connecticut in obtaining the search warrant.

F. Current NRC Activities

The NRC Technical Staff is currently reviewing FSP's and CPR's QA programs and FSP's sale of safety-related materials to the nuclear industry to determine if either FSP, CPR, or any NRC licensees violated NRC regulations during the period FSP was selling products certified as complying with Appendix B and Part 21. In addition, the NRC's Office of Investigations ("NRC-OI") is conducting two separate investigations that are related to these events. First, NRC-OI has initiated Investigation No. 1-92-037R, which has two main functions. The first function of this investigation is to support the Staff's review of the sale of products by FSP to NRC licensees and to determine (1) whether NRC licensees adequately audited FSP's and CPR's QA programs; (2) whether NRC licensees provided the NRC with correct information concerning the materials installed in safety-related plant systems and whether those materials should be removed from NRC-licensed plants; and (3) whether FSP and/or CPR maintained adequate Appendix B QA programs. The second function of the investigation is to determine if there was a violation of NRC regulations by either FSP or CPR during the NRC Staff inspection in August of 1992.

Second, NRC-OI initiated Investigation No.-1-93-027R after the U.S. Department of Labor made an initial finding that CPR terminated Mr. Holub in retaliation for his raising safety concerns to the NRC. This *second* NRC-OI investigation seeks to determine if CPR deliberately violated the NRC's whistleblower protection provision by firing Mr. Holub when it discovered that he had informed the NRC of his safety concerns.

We have already enforced a subpoena that was issued in this second NRC-OI investigation and sought records related to Mr. Holub's termination. *See Five Star Products*, CLI-93-23, *supra*. However, CPR has refused to comply with the subpoena and the NRC has sought enforcement of that subpoena in the U.S.

District Court for the District of Connecticut. The dispute now before us centers on three subpoenas issued in the *first* NRC-OI investigation, No. 1-92-037R.

III. ANALYSIS²

A. Applicable Statutes and Regulations

In section 161c of the Atomic Energy Act (“AEA”) of 1954, as amended, Congress explicitly provided that the NRC

is authorized . . . to make such studies and investigations, obtain such information . . . as the Commission may deem necessary and proper to assist it in exercising any authority provided in this Act, or in the administration and enforcement of this Act, or any regulations or orders issued thereunder. For such purposes, the Commission is authorized . . . by subpoena to require *any person* to appear and testify or appear and produce documents, or both at any designated place.

42 U.S.C. § 2201(c) (emphasis added). Section 11s of the AEA, in turn, defines “person” as “(1) any individual” 42 U.S.C. § 2014(s).³

In section 206 of the Energy Reorganization Act (“ERA”), as amended, Congress provided that

Any individual director, or responsible officer of a firm . . . supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the [AEA], or pursuant to the [ERA], who obtains information reasonably indicating that such facility or activity or basic components supplied to such facility or activity (1) fails to comply with the [AEA], or any applicable rule, regulation, order, or license of the Commission relating to substantial safety hazards, or (2) contains a defect which could create a substantial safety hazard, as defined by regulations . . . shall immediately notify the Commission of such failure to comply, or of such defect”

42 U.S.C. § 5846(a). In addition, Congress authorized the Commission “to conduct such reasonable inspections and other enforcement activities as needed to ensure compliance with the provisions of this section.” 42 U.S.C. § 5846(d). The Commission has adopted regulations implementing section 206 of the ERA. These regulations can be found in 10 C.F.R. Part 21 and have been described above.

² We have consistently treated a motion to quash or modify an NRC Staff or NRC-OI subpoena using procedures analogous to those used in resolving a motion under 10 C.F.R. § 2.720(f). *Joseph J. Macktal*, CLI-89-12, 30 NRC 19, 20 (1989).

³ Petitioners are clearly “persons” within the meaning of section 161c of the AEA and as defined in section 11s of the AEA and we do not read Petitioners to argue to the contrary.

In general, an agency subpoena is enforceable if (1) the subpoena is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; (3) the information is not yet in the possession of the agency; and (4) statutory procedures have been followed in the subpoena's issuance. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989) (enforcing an NRC subpoena). Neither the Petitioners' motion nor the Employers' motion (1) alleges that the information sought is inadequately described; (2) challenges the service of the subpoena; or (3) alleges that the information sought is in the possession of the agency. Accordingly, we will limit our discussion to whether the subpoenas are issued for a proper purpose authorized by Congress. We will review the issues raised in the Petitioners' motion and in the Employers' motion *seriatim*.

B. Petitioners' Motion to Quash

1. The NRC Has Authority to Conduct This Investigation

As we have noted in other subpoena cases, the NRC Staff has the responsibility to review and resolve questions regarding public health and safety. *Richard E. Dow*, CLI-91-9, 33 NRC 473, 478 (1991). *Cf. Joseph J. Macktal*, CLI-89-12, 30 NRC 19, 24-25 (1989). Based upon the allegations of Mr. Holub and a preliminary analysis of documents recovered during the search on September 1, 1992, the NRC Staff has reason to believe that NRC licensees may have installed nonconforming material in safety-related systems in their nuclear power plants and may have failed to provide true and correct information to the NRC, the agency charged by Congress to protect the public health and safety. In addition, the NRC Staff has reasonable grounds to believe that violations of NRC regulations may have occurred during the Staff's inspection of August 1992. As we noted in the *Dow* case, "[T]o deny [the Staff] the opportunity to gather relevant information for these undeniably proper purposes would be to thwart its effort to better execute its responsibilities." *Dow*, CLI-91-9, 33 NRC at 478, quoting *United States v. McGovern*, 87 F.R.D. 590, 593 (M.D. Pa. 1980).

The Petitioners allege that the NRC does not have statutory authority to conduct the investigation in which the NRC-OI subpoenas are issued because the NRC does not have jurisdiction over either FSP or CPR, the Petitioners' Employers. Motion to Quash at 2. In support of this argument, Petitioners rely upon the brief filed by FSP and CPR in their motion to quash the subpoenas in the second NRC-OI investigation. Motion to Quash at 1-2. Briefly, Petitioners argue that the NRC regulations cited in the subpoena cannot apply to their Employers. Accordingly, they seem to infer, the NRC is barred from compelling

them to answer questions in any investigation. We find Petitioners' arguments both irrelevant and unconvincing.

a. This Investigation Has Safety Implications That Are Clearly Within the NRC's Jurisdiction

Quite simply, the validity of these subpoenas does not depend on our having "licensing" jurisdiction over FSP or CPR. It is clear that the NRC licensees who installed FSP's products in reliance upon FSP's certification were — and still are — subject to NRC's jurisdiction. Moreover, the quality of the products — or "components" — installed in a nuclear power plant, especially those products or components installed in "safety-related" systems, is a subject well within the jurisdiction of the NRC. Thus, the NRC has the authority to investigate whether NRC licensees correctly audited FSP's QA program (and by extension, CPR's QA program), whether those licensees correctly informed the NRC about the quality of the materials installed in their nuclear power plants under their Appendix B QA program, and whether those materials were in fact produced in accordance with appropriate safety standards.

The NRC may subpoena *any* person whom it reasonably believes has information relating to those issues, regardless of where or for whom that person works. Here, the NRC Staff has reason to question the quality of the products sold by FSP to NRC licensees and NRC-OI has reason to believe that these three individuals may have some knowledge about the sale of these materials to NRC licensees, the type of materials sold to those licensees, and the nature of FSP's QA program and whether NRC licensees audited it correctly. That is all the justification that NRC-OI needs to issue these subpoenas.

b. The NRC Has Jurisdiction Over FSP and CPR to the Extent They Were Suppliers of "Basic Components"

We also find that FSP and CPR are subject to the NRC's jurisdiction to the extent that FSP sold products to NRC licensees under a certification that those products were produced in accordance with an approved Appendix B QA program based upon CPR's testing under its own QA program.⁴ As we noted above, FSP certified to its customers that its products were prepared in accordance with both an approved Appendix B QA program and with Part 21. In addition, FSP's advertising literature informed potential customers since

⁴We have already held that we have jurisdiction over FSP and CPR under section 211 of the ERA at least to the extent that FSP and CPR supplied products and services (either directly or indirectly) to NRC licensees that allegedly meet the requirements of Appendix B and Part 21. See *Five Star Products*, CLI-93-23, *supra*.

approximately 1981 that its products were prepared in compliance with an approved Appendix B QA program.

Moreover, FSP's act of discontinuing its Appendix B QA program cannot remove it or CPR from NRC jurisdiction regarding any acts committed *before* August 25, 1992, during which time it was a "supplier" of safety-related products to NRC licensees and CPR was engaged in testing those products. Otherwise, a supplier of safety-related materials could simply discontinue its Appendix B program in response to a pending investigation, insulating itself from liability and preventing the NRC from obtaining information related to the installation of material in safety-related systems at nuclear power plants.⁵ Accordingly, Petitioners' argument that it is now a supplier of "commercial grade" materials and that Part 21 does not apply to suppliers of "commercial grade" materials is irrelevant. While FSP and CPR may not *now* supply "safety-grade" materials to NRC licensees, they did supply that quality of materials at the time in question.⁶

c. The Investigation Focuses on Issues Within the NRC's Proper Jurisdiction

As we noted above, the investigation in which these subpoenas are issued (1-92-037R) specifically targets these issues. First, this investigation supports the technical Staff's review of FSP's sale of safety-related products to the nuclear industry and any violations of either Appendix B or Part 21 that may have arisen from either the sale or the installation of nonconforming materials that were certified as meeting the requirements of Appendix B and Part 21. The investigation seeks to determine, *inter alia*, (1) if NRC licensees conducted appropriate audits of FSP's and CPR's QA programs; (2) if the NRC should require its licensees that have installed materials supplied by FSP to remove them from safety-related systems and (3) if FSP wrongly certified that its products were produced in accordance with Appendix B and Part 21.

Second, the NRC-OI investigation seeks to determine the facts surrounding the inspection conducted on August 18 and 19, 1992, and if any NRC regulations were violated by FSP, CPR, or their employees during that inspection. Under section 206(d) of the ERA and 10 C.F.R. §§ 21.41 and 21.51, the NRC had the authority to inspect the FSP/CPR premises and records. The NRC Staff reports that its inspectors were not allowed full and unfettered access to FSP's records and were not allowed *any* access to the CPR laboratory in the basement of the

⁵ And as we pointed out in CLI-93-23, the discontinuation of the Appendix B QA program does not remove either FSP or CPR from the NRC's jurisdiction over those activities that "relate back" to the Employers' actions while they were supplying safety-related products to NRC licensees. See CLI-93-23, 38 NRC at 179-80.

⁶ In our view, the Staff has the authority to review the installation of *any* product that is related to the safe operation of a nuclear power plant, even if that product is a "commercial-grade" product that is "dedicated" and then installed by the licensee. However, in this case, FSP was clearly providing "safety-grade" products to NRC licensees.

FSP/CPR building. The NRC-OI investigation is a proper step in documenting the NRC Staff's inspection efforts. In addition, the Staff also indicates that FSP or CPR personnel may have supplied false or incomplete information to the NRC inspectors during the inspection. Again, the NRC-OI investigation is the proper first step toward documenting that allegation.

d. The Regulations Cited in the Subpoena Are Not Inappropriate for This Investigation

The subpoenas inform the Petitioners that they have been asked "to testify in the matter of potential violations of NRC regulations including, but not limited to, 10 CFR 50.5, 10 CFR 21.41, and 10 CFR 50.9 relating to activities at [FSP]." In response, the Petitioners argue that the regulations cited in the subpoenas issued by NRC-OI cannot be applicable to them or their Employers and are incapable of supporting the investigation.⁷ However, as we noted earlier, assuming *arguendo* that Petitioners' Employers were not under NRC jurisdiction does not, in and of itself, mean that the subpoenas should be quashed. Moreover, the regulations cited in the NRC-OI subpoenas are clearly applicable to this investigation.

Initially, Petitioners argue that section 50.9 cannot support their questioning by the NRC because this provision applies only to "licensees" or "applicants," which cannot include either FSP or CPR. However, as we noted above, the NRC has authority to question persons with relevant knowledge *regardless* of their employment. After all, just because a regulation does not apply to a witness's employer does not mean that a witness does not possess "relevant, competent or material" information subject to a subpoena. For example, NRC licensees are required to provide "complete and accurate" information regarding many of the activities they conduct. One of the purposes of this investigation is to determine if NRC licensees correctly audited FSP's and CPR's QA programs and whether any information they discovered should have been reported to the NRC. The Petitioners may have knowledge of the licensees' review of FSP's and CPR's QA programs and other actions by NRC licensees that are required to be reported. Thus, the subpoena's reliance upon section 50.9 is appropriate within the context of this investigation.

In addition, the Petitioners argue that 10 C.F.R. §21.41 cannot apply to this investigation because Part 21 does not apply to suppliers of "commercial-grade" materials. But while Part 21 does exempt suppliers of commercial-

⁷ We do not read the Petitioners to argue that the subpoenas do not give them adequate notice of the information expected of them. However, that argument is generally made in response to a subpoena for documents, not in response to a subpoena for testimony. The subpoenas at issue do *not* require the respondents to produce documents.

grade materials “to the extent that they supply commercial grade items[,]” see 10 C.F.R. § 21.7, it is beyond dispute that FSP and CPR supplied “safety-grade” materials at the time of the NRC Staff’s inspection. Thus, Petitioners’ Employers are not exempt from the requirements of Part 21 for the purposes of this investigation.

Finally, as the Petitioners admit, 10 C.F.R. § 50.5 clearly applies to “suppliers” and their employees. Petitioners’ argument that it should not apply in this case is premised on an argument that both FSP and CPR supply only “commercial-grade” products. However, the regulation itself does not contain such a limitation — as the Petitioners concede. Moreover, as we just noted, it is clear that prior to August 25, 1992, FSP and CPR supplied “safety-grade” materials, not solely “commercial-grade” materials. Thus, any action by either FSP or CPR relating to the sale of those materials prior to that date is a fair subject of an NRC investigation.

2. The Existence of Parallel NRC and DOJ Investigations Does Not Require the Subpoenas to Be Quashed

Petitioners also argue that the subpoenas should be quashed because they are possible victims of a “civil discovery process [that is] being used in order to obtain information for the purposes of a criminal proceeding.” Motion to Quash at 3. In CLI-93-23, in response to a similar allegation by Petitioners’ Employers, we stated that the NRC had not referred this matter to the Department of Justice. See CLI-93-23, 38 NRC at 186. Both Petitioners (and their Employers) now reassert that we have referred the matter and that therefore the subpoena should be quashed. See also Employers’ Motion to Quash, discussed *infra*, at 8-9 & n.4. In order to clear up any confusion, we have separately asked both NRC-OI and the U.S. Attorney’s Office to advise us of their handling of this matter.

In response, the U.S. Attorney’s Office for the District of Connecticut has advised us that while NRC-OI had not formally referred the matter to it for prosecution (at the time of its response), the U.S. Attorney’s Office opened its own investigative file on this case when it assisted the NRC Staff in obtaining the criminal search warrant for the FSP/CPR facilities in August of 1992. However, the U.S. Attorney’s Office has also informed us that it has not presented the matter to a grand jury and no federal grand jury has initiated an investigation on its own.

For its part, NRC-OI has advised us that it has now — for all practical purposes — formally referred the matter to the U.S. Attorney while this Order

was being prepared.⁸ While NRC-OI has not issued a referral letter in this case, NRC-OI and the U.S. Attorney's Office have held significant discussions about the case and the U.S. Attorney has instituted a preliminary investigation. However, the U.S. Attorney's Office has not yet made a final determination regarding a possible criminal investigation and, as we noted above, it has not yet referred this matter to a Grand Jury.

The three individual Petitioners themselves — as opposed to the corporate employers and the corporate management — are *not* considered to be subjects of either the NRC investigation or the DOJ investigation at this time. Furthermore, it remains important to continue to develop information — especially testimonial information — in order to identify any possible regulatory violations. However, assuming *arguendo* that one or more of the Petitioners *is* a potential target of a criminal investigation, it is clear that the law does not require that these subpoenas be quashed at this time. Case law clearly holds that a criminal referral, in and of itself, does not require a government agency to suspend its civil investigation. Accordingly, even though NRC-OI has referred this case to the U.S. Attorney for possible prosecution, that fact, in and of itself, does not require us to quash the subpoenas before us at this time.

Over 20 years ago the Supreme Court upheld the concept of allowing parallel civil and criminal investigations to proceed in a case involving the Food and Drug Administration ("FDA"). *See generally United States v. Kordel*, 397 U.S. 1 (1970). In that case, the FDA served civil interrogatories on the defendants after it seized allegedly misbranded drugs. Shortly thereafter, before the defendants answered the interrogatories, the FDA referred the case to the Department of Justice for criminal prosecution. The trial court refused to stay the civil investigation and refused to suppress the defendants' answers to the interrogatories and those answers were later admitted in the criminal trial. 397 U.S. at 3-6.

The Supreme Court not only upheld the convictions but also approved the trial court's decision not to stay the agency's civil investigation.

The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It

⁸ Under a Memorandum of Understanding with the Department of Justice ("DOJ"), NRC-OI is the proper office of the NRC to refer matters to DOJ for possible criminal prosecution. *See* 53 Fed. Reg. 50,317 (Dec. 14, 1988). Under normal procedures, NRC-OI does not formally refer matters for possible prosecution until it completes an investigation and prepares a report. In most cases, it is only then that NRC-OI provides that report to the DOJ with a formal letter requesting review of the matter for possible prosecution. However, in special circumstances, NRC-OI may advise either the DOJ or the local U.S. Attorney (or both) of the circumstances surrounding a case. In addition, NRC-OI may request an early determination of prosecutorial merit.

would stultify enforcement of federal law to require a government agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

397 U.S. at 11.

In this case, the Petitioners — as supported by their Employers — rely on *Donaldson v. United States*, 400 U.S. 517 (1971), and *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), for the proposition that all civil investigations must cease after a referral to the Department of Justice for possible prosecution. However, as we show below, those cases do not require that result here.

In *Donaldson*, the Supreme Court addressed the question of when a permissible summons in an IRS civil investigation became impermissible because of a possible future criminal prosecution. The *Donaldson* Court noted that the use of agency subpoenas “has been approved, even where it is alleged that its purpose is to uncover crime, if no criminal prosecution as yet has been instituted.” 400 U.S. at 532-33 (footnote omitted) (citations omitted). But the *Donaldson* Court noted that “where the *sole* objective of the investigation [was] to obtain evidence for use in a criminal prosecution, the purpose [was] not a legitimate one and enforcement may be denied.” 400 U.S. at 533 (emphasis added). Thus, the Court limited the prohibition on the use of civil process “to the situation of a *pending* criminal charge or, at most, of an investigation *solely* for criminal purposes.” *Id.* (emphasis added). The Court further refined its test in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), where the Court held that the use of a civil summons (or subpoena) was presumptively invalid after the IRS had formally referred the case to the U.S. Department of Justice for a criminal prosecution. 437 U.S. at 311-13.⁹

However, subsequent cases have distinguished *Donaldson* and *LaSalle* from *Kordel* on the basis of the difference between the functions of the IRS and the functions of other regulatory agencies. For example, courts have held that other regulatory agencies have ongoing regulatory functions that may not be delayed. As the D.C. Circuit noted in a case involving the Securities and Exchange Commission (“SEC”),

[u]nlike the IRS, which can postpone collection of taxes for the duration of parallel criminal proceedings without seriously injuring the public, the SEC must often act quickly, lest the false or incomplete statements of corporations mislead investors and infect the markets. Thus the Commission must be able to investigate possible securities infractions and undertake civil

⁹However, the *LaSalle* Court held that even where the district court had found that the individual IRS investigator was using the civil investigation to uncover evidence of criminal violations (prior to a formal referral), that fact would not, in and of itself, transform the investigation from a civil investigation into a criminal investigation. Instead, the party opposing the subpoena must demonstrate that the agency’s *sole* purpose was to gather information of a criminal nature. 437 U.S. at 313-17.

enforcement actions even after Justice has begun a criminal investigation. For the SEC to stay its hand might well defeat its purpose.

SEC v. Dresser Industries, 628 F.2d 1368, 1380 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980).

The Second Circuit has adopted this same reasoning in upholding an FDA civil investigation that was conducted in parallel with a criminal investigation. *United States v. Gel Spice Co.*, 773 F.2d 427, 432-33 (2d Cir. 1985) (citing cases). As the Second Circuit noted in that case,

the mere existence of a pending recommendation for criminal prosecution to the DOJ does not mean that evidence obtained by the FDA during inspections conducted subsequent to the recommendation was improperly obtained. Civil and criminal enforcement may proceed simultaneously.

773 F.2d at 434 (citing *Kordel*). In fact, one court has specifically enforced a subpoena in an NRC investigation even though a separate grand jury proceeding into the same event was ongoing. *United States v. McGovern*, 87 F.R.D. 582, 584 (M.D. Pa. 1980) (“[t]he fact that there is an ongoing grand jury investigation simultaneously with the NRC investigation is not sufficient reason, in and of itself, to stop the NRC investigation”).

In this case, there is no grand jury investigation, much less an indictment.¹⁰ Moreover, the NRC, like the SEC in *Dresser Industries* and the FDA in *Kordel* and *Gel Spice*, must be able to investigate regulatory compliance and possible violations of its regulations without delay. The NRC is the agency charged by Congress to ensure that nuclear power plants are constructed with adequate safeguards to protect the public health and safety. In this case, the NRC is investigating, among other issues, whether its licensees installed substandard or nonconforming materials in their nuclear power plants and whether those licensees correctly audited FSP’s QA program. The NRC should not have to await the conclusion of a possible criminal proceeding to continue this investigation. *Dresser Industries*, *supra*.

Obviously, there clearly are “noncriminal” purposes for this investigation. For example, the NRC is investigating the quality of the materials sold to NRC licensees and installed in the safety-related systems of their plants. Thus, it is clear that the NRC is not conducting this investigation for the *sole* purpose of developing a criminal case against either the Petitioners or their Employers (whose claims we address below). Accordingly, even applying the *Donaldson* and *LaSalle* criteria, we find no grounds to quash the three subpoenas before us.

¹⁰We agree that if the grand jury issues an indictment in this case, the Staff and NRC-OI should stay any non-emergency phases of their inquiries.

C. The Employers' Motion to Quash¹¹

1. The Employers' Right to Participate

The Commission has received a pleading from the Petitioners' Employers entitled "Motion to Quash" ("Employers' Motion") arguing that the Commission should quash these three subpoenas to their employees. Generally, the pleading retraces arguments raised in our previous case, *see* CLI-93-23, *supra*, and recites the same arguments raised by the Petitioners themselves, with one exception which we note later. However, the pleading does not state a jurisdictional ground for its filing.¹² Nevertheless, we will exercise our discretion and consider the issues raised by the Employers.

In their pleading, the Employers raise two distinct issues: (1) the possible overlapping of the parallel NRC and DOJ investigations and (2) the questioning of one of the Petitioners who allegedly possesses privileged information. We have already discussed above the issue regarding parallel investigations conducted by NRC-OI and the Department of Justice. Accordingly, we turn to the issue of privileged information in the possession of one of the witnesses.

2. A Petitioner's Alleged Possession of Privileged Information Does Not Require Her Subpoena to Be Quashed

The Employers argue that the subpoena to at least one of the Petitioners, Ms. Settino, should be either quashed or modified because she possesses privileged information in the form of both attorney-client communications and attorney work-product materials.¹³ Employers' Motion at 2. Although the Employers have failed to provide any legal discussion of the matter, this issue is not difficult

¹¹The Employers have requested oral argument before the Commission. Employers' Motion at 12 n.5. Oral argument before the Commission is discretionary in all cases. *Cf.* 10 C.F.R. § 2.763. We find nothing in the pleadings before us to indicate how oral argument would assist us in reaching a decision. *Joseph J. Macktal*, CLI-89-12, *supra*, 30 NRC at 23 n.1. Accordingly, the Employers' request for oral argument is denied.

¹²Because the subpoenas are directed to the employees, not to the Employers, it is not clear what right the Employers have to be heard in this matter. Clearly, they are not "parties" to the subpoenas. Furthermore, technically speaking, the NRC's intervention standards in 10 C.F.R. § 2.714 do not apply to this proceeding because this "proceeding" is not a proceeding under Part 2, Subpart G, of the Commission's rules. Likewise, 10 C.F.R. § 2.715 is not generally applicable as codified.

The Supreme Court addressed the issue of intervention in a subpoena "proceeding" in *Donaldson*. The *Donaldson* Court held that while a party against whom possible evidence was sought did not have a right to intervention, that party could seek permissive intervention in a subpoena enforcement proceeding. 400 U.S. at 529-30. However, the *Donaldson* Court noted that the better place to challenge any evidence recovered by the government in response to a civil subpoena was by challenging introduction of that evidence in any subsequent enforcement proceeding. *See* 400 U.S. at 531.

¹³There is some question whether sharing an otherwise privileged communication with Ms. Settino may have waived that privilege. "[V]oluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with assertion of the privilege." *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3rd Cir. 1991). The Employers describe Ms. Settino as "Mr. Babcock's Assistant and secretary . . ." Employers' Motion at 2. Thus, it is not clear how Ms. Settino gained any knowledge of privileged information. However, that can be determined during her interview, if necessary.

to resolve. We are not aware of any case — and none has been cited by the Employers — that stands for the proposition that the mere “possession” of privileged information creates a bar to testimony in a civil regulatory proceeding. If such were the case, potential witnesses could immunize themselves against a subpoena simply by “obtaining” privileged information. Accordingly, we find that the Employers’ assertion is clearly not grounds to quash the subpoena.

Moreover, the Commission is under no duty to “not learn” an item of information just because it may be privileged. If Ms. Settino — or any other employee — wishes to provide the Commission with relevant information that also happens to be privileged, that is a matter between Ms. Settino and her employer, not between the employer and the NRC. Witnesses reveal information covered by a privilege at their own peril — subject, of course, to the protection of any applicable laws.¹⁴

A witness — like Ms. Settino — may assert the attorney-client privilege to prevent revealing (1) a communication (2) made in confidence (3) between an attorney (4) and a client (5) for the purpose of seeking or obtaining legal advice. *See generally* 8 J. Wigmore, *Evidence*, 541-42 (McNaughton rev. 1961). Without specifically ruling on the issue, we will assume for purposes of this argument that the privilege applies when the client is a corporation. *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (citation omitted). If so, the privilege belongs to the client and can only be waived by that client (here, the Employer), not the employee (here, the Petitioners).

However, the privilege protects only the disclosure of “communications,” not the disclosure of “facts” by those who communicated with the attorney. *Upjohn*, 449 U.S. at 395-96 (1981) (citing cases).¹⁵ Thus, while Ms. Settino (or any other employee) may not be compelled by OI to testify about privileged *communications* with the company’s attorney, she may be compelled to testify regarding other communications and any “facts” that she may know as a result of her employment at either FSP or CPR.

Ms. Settino has the right to be represented by her own counsel when she responds to the subpoena and her counsel may advise her if a question calls for the disclosure of privileged information. The OI investigators should (1) determine if areas of privileged communications exist and (2) honor Ms. Settino’s assertion of the privilege in response to specific questions, where

¹⁴For example, a witness who provides safety information that also happens to be privileged may be protected as a whistleblower by section 211 of the Energy Reorganization Act.

¹⁵“The client cannot be compelled to answer the question, ‘what did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.” *Upjohn*, 449 U.S. at 396, quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962). This privilege extends only to communications with the employer’s attorney, not to communications with the employer.

applicable. We can review any disputes over this issue if and when they arise. See, e.g., *Five Star Products*, CLI-93-23, 38 NRC at 185-86.

Finally, the Employers' reference to "work-product material" is irrelevant. The "work-product" doctrine, as defined in *Hickman v. Taylor*, 329 U.S. 495 (1947), and incorporated into the Federal Rules, protects (1) documents and tangible things otherwise discoverable; (2) prepared in anticipation of litigation; (3) by the party or their attorney. See Fed. R. Civ. P. 26(b)(3). The subpoena issued to Ms. Settino does not require her to produce documents; thus, the subpoena does not call upon her to surrender any "work-product" material.

IV. SUMMARY

In summary, we deny the request to quash the NRC-OI subpoenas issued to Henry Allen, Diane Marrone, and Susan Settino. We hereby establish the new date for compliance with the subpoenas as 3 weeks from the date of this Order, unless the Petitioners and NRC-OI negotiate a mutually agreeable alternative date.

It is so ORDERED.

For the Commission¹⁶

JOHN C. HOYLE
Acting Secretary of the
Commission

Dated at Rockville, Maryland,
this 17th day of June 1994.

¹⁶ Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III
Thomas D. Murphy

In the Matter of

Docket No. 40-8027-EA
(ASLBP No. 94-684-01-EA)
(Source Material License
No. SUB-1010)

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site Decontamination
and Decommissioning Funding)

June 8, 1994

MEMORANDUM
(Ruling on Motions for Summary Disposition
or Dismissal, Oral Argument, Staying Discovery
and Leave to File Reply)

The General Atomics Corporation (GA), on February 17, 1994, filed a motion for summary disposition, or alternatively an order of dismissal, of all claims against it in a Nuclear Regulatory Commission (NRC) Order dated October 15, 1993 (unpublished, hereinafter October Order). That Order makes GA and Sequoyah Fuels Corporation (SFC), a subsidiary company and an NRC licensee, jointly and severally liable for providing financial assurance for the decommissioning of SFC's uranium processing facility near Gore, Oklahoma. GA requested oral argument on its motion and moved to stay discovery pending

the Board's decision. Thereafter, GA submitted a motion for leave to reply to responses to its motion filed by the Staff and Native Americans for a Clean Environment (NACE).¹ On April 28, 1994, the Board denied GA's motions and request and stated a written memorandum detailing its reasons would follow.² This Memorandum sets forth the basis for that ruling.

A. The Pleadings

As a foundation for disposing of the charges against it, GA propounds four allegations, namely (a) that, as a matter of law, NRC lacks jurisdiction to compel it to guarantee the financial obligations of GA's subsidiary, an NRC licensee, for decommissioning; (b) that the NRC fails to allege a legally cognizable claim against GA and can prove no set of facts entitling it to impose non-civil-penalty financial liability on GA; (c) that the NRC, due to prior actions, is estopped from seeking a guarantee of decommissioning costs from GA; and (d) that requiring GA to contest the October Order would deprive it of due process protection guaranteed by the U.S. Constitution, the Administrative Procedure Act, and NRC's rules of practice.³

In line with NRC's procedural requirements in 10 C.F.R. § 2.749(a), GA submitted a statement of material facts on which it contends there is no genuine issue to be heard. The Staff and NACE responses include statements of material facts on which, it is propounded by both, genuine issues exist to be litigated.⁴ A summary of the parties' respective positions finds basic disagreement on the role that GA has assumed with respect to SFC, the agency's licensee, and on NRC's regulatory authority to reach that role. The major issues raised by the motion for summary disposition or dismissal and responses to it are, first, whether GA can be considered a licensee of the NRC;⁵ second, whether NRC's October Order states a claim for which relief may be granted;⁶ and, last, whether NRC's previous activities preclude it from holding GA liable for decommissioning costs.⁷

¹ General Atomics' Motion for Leave to File a Reply to the Responses of the NRC Staff and NACE to the Motion for Summary Disposition (April 20, 1994) [hereinafter GA Reply Motion].

² Order (Denial of motions for summary disposition or order of dismissal and request for oral argument, motions to stay discovery and leave to file reply) (April 28, 1994).

³ Brief in Support of [GA's] Motion for Summary Disposition or for an Order of Dismissal (February 17, 1994) at 3-4 (hereinafter GA Brief). In support of its summary disposition motion, GA submitted copies of various letters, documents, and memoranda from NRC and GA officials, transcripts of parts of a Board prehearing conference, NRC public meetings and affidavits from two GA corporate officers. See appendices to GA Annex "A" and Tabs A, B, C, and affidavits to GA Brief.

⁴ See NRC Staff Answer to GA Motion for Summary Disposition (April 13, 1994) (hereinafter Staff Answer]; NACE Opposition to GA Motion for Summary Disposition (April 13, 1994) [hereinafter NACE Opposition].

⁵ GA Brief at 8-32; Staff Answer at 10-24; NACE Opposition at 12-23.

⁶ GA Brief at 32-37; Staff Answer at 25-28; NACE Opposition at 23-35.

⁷ GA Brief at 37-43; Staff Answer at 28-30.

B. Summary Disposition Standards

Summary procedure provisions enable parties to pierce the allegations of pleadings to determine whether genuine issues are available for litigative resolution.⁸ Similar to its judicial counterpart, Rule 56 of the Federal Rules of Civil Procedure, the proponent of a motion for summary disposition carries the burden of demonstrating the absence of genuine issues of material fact to litigate.⁹ The Board's function, based on the filings and supporting material, is simply to determine whether genuine issues exist between the parties. It has no role here to decide or resolve such issues.¹⁰ The parties opposing such motions may not rest on mere allegations or denials, and facts not controverted are deemed to be admitted.¹¹ Finally, since the burden of proof is on the proponent of the motion, the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn.¹²

C. Rulings on Motions

1. Motion for Summary Disposition

a. Jurisdiction

A primary question raised by the pleadings centers on whether there is jurisdictional authority to include GA in the NRC Order. None of the parties contest the proposition that the NRC, like all other federal administrative agencies, is a statutory creature whose powers are controlled by legislative grants of authority. However, they part company over the applicability of section 161 of the Atomic Energy Act of 1954, as amended, to provide a jurisdictional foundation for the NRC action in question here.¹³ The movant, with a comparison of the sectional provisions being enacted at different times, asserts that the subsections of section 161 applicable here (161b, 161i) are

⁸ 6 James W. Moore, et al., *Moore's Federal Practice* ¶56.02 (2d ed. 1994) [hereafter *Moore's Federal Practice*].

⁹ See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-4, 31 NRC 54, 67 (1990); see also 6 *Moore's Federal Practice* ¶56.15(3).

¹⁰ See *Weiss v. Kay Jewelry Stores Inc.*, 470 F.2d 1259, 1261-62 (D.C. Cir. 1972).

¹¹ *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982).

¹² 10A Charles A. Wright, et al., *Federal Practice and Procedure* §2727 (2d ed. 1983).

¹³ In addition to section 161, the NRC designates sections 62, 182, and 186 of the Act as a basis for the October Order, as well as regulations found in 10 C.F.R. §2.202 and 10 C.F.R. Part 40. (Order at 23.) However, since section 161 alone relates to the jurisdictional controversy raised by GA's summary disposition motion, it is unnecessary to review the other sections and regulations in this decision. See GA Brief at 8-9; Staff Answer at 19-20.

directed to the conduct of licensees and not intended to apply to nonlicensed entities such as GA.¹⁴

According to GA, in order for the NRC to use that section as the basis for finding jurisdiction over GA, the NRC would have to contend that GA had “constructive ‘possession and use’ of nuclear fuel.”¹⁵ GA says that this argument would require a construction of the words “possession and use” in a fashion that would make them apply to not only those who have actual, tangible “possession and use” of nuclear material, but to “all others who, in the subjective judgement of the NRC, stand in sufficiently close legal relationship with a licensee who does have actual physical possession and use of such material.”¹⁶ Any such interpretation, GA asserts, would require a disregard and outright breach of settled rules of statutory construction.

To underpin this assertion, GA cites the 1990 amendment to section 161b which gave the NRC jurisdiction over certain nuclear devices and equipment. GA contends that since Congress had chosen to use the words “possession and use” in the original version of that provision and the words “control” and “ownership” in the amended version, attaching the NRC’s interpretation to the words “possession and use” would be redundant. The word “possession” would already bring with it the concepts of “control” and “ownership.” According to GA, black-letter statutory construction principles adopted by the Supreme Court require that effect be given to “every word Congress used”¹⁷ and a presumption that “Congress acts intentionally and purposely [sic] in the disparate inclusion or exclusion” of words in the same statute.¹⁸ Therefore, legal control by one corporate entity over another that possesses regulated material cannot be equated with “possession” of the material under section 161b.¹⁹

GA’s arguments concerning the congressional intent behind the words “possession and used” and “control and ownership” are challenged by the Commis-

¹⁴ See GA Brief at 9-13; NACE Opposition to GA Motion at 21, 22; Staff Answer at 16 n.11; and Commission’s Statement of Consideration on Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,667 (Aug. 15, 1991). A-Ninth Circuit case (*Reynolds v. United States*, 286 F.2d 433, 438 (9th Cir. 1960)) is also cited in support of GA’s contention. Both NACE and the Staff argue that the *Reynolds* case is not applicable here and that the Commission’s jurisdiction extends to nonlicensees. In the *Reynolds* case, while the Court, in dicta, indicated that section 161i applied only to licensees, its holding was that the statute was applicable to private industry and not to NRC’s own activities. Regulations concerning such activities were held invalid. The Court did not have before it the issue as to whether NRC has any jurisdiction over unlicensed entities.

¹⁵ GA Brief at 11.

¹⁶ *Id.*

¹⁷ GA Brief at 12, citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

¹⁸ GA Brief at 12, citing *Russello v. United States*, 464 U.S. 16, 23 (1983).

¹⁹ We do not find it necessary to set out NACE’s rebuttal of the GA statutory interpretation argument more than to say it met GA’s assertions *seriatim*. The rebuttal contests GA’s contention that it was not a possessor or user of nuclear materials within the meaning of section 161b. See NACE Answer at 12-26.

sion's own interpretation of the ambit of its authority under section 161.²⁰ Both the Staff and NACE point to Commission statements that its statutory authority to issue orders is not limited to licensees but covers any person (including corporations) engaging in activities or conduct affecting activities within the Commission's subject matter jurisdiction.²¹ In light of these statements concerning the range of its authority over nonlicensees, the Staff argues against any necessity for interpreting the agencies' authority under section 161.²² But, whether the Commission intended to assert its authority over unlicensed persons not charged with deliberate misconduct, as is apparently the case here, is unclear.²³ In any event, it appears to the Board that the breadth of the Commission's jurisdiction in the case before us cannot be resolved without an evaluation of the factual situation that gave rise to its assertion. The jurisdictional issue is clearly predicated on GA's involvement in SFC's affairs. This proceeding is a significant one, being one of first impression, and with the jurisdictional issue here being intertwined with the factual circumstances involved, a resolution of the jurisdictional matter must await the development of the litigative factual issues before us. The jurisdictional issue here could only be resolved by a motion for summary disposition if no factual issues remain in controversy.²⁴

b. Issues of Material Fact

In terms of the motion before us, we must inquire whether there are genuine issues of material fact concerning GA's involvement in the affairs of SFC that should be heard in this proceeding.²⁵ As set out in the October Order, NRC bases its claim for holding GA responsible for additional financial assurance of decommissioning financing on a determination that GA has been in substantial control of its subsidiary's (SFC) business and made representations of financial assurances to the Commission on which the NRC relied.²⁶ The Staff Answer lists five genuine issues of fact that it considers material to whether the NRC

²⁰ See discussion, *infra*, concerning the Commission's Statement of Consideration on Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. at 40,666.

²¹ *Id.*

²² See Staff Answer at 19.

²³ The parties also argue herein on whether an Appeal Board decision in *Safety Light Corp.* (Bloomsburg Site Decontamination) ALAB-931, 31 NRC 350 (1990), provides guidance on the question of NRC's regulatory authority over a parent of a licensee subsidiary for decommissioning costs. See GA Brief at 30-32; Staff Answer at 23-24; NACE Opposition at 20, 29. This case deals with section 184 of the Atomic Energy Act concerning license transfers and has no applicability to the case at bar where no license transfer is in question.

²⁴ *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987). In view of our ruling on the jurisdiction issue, we find it unnecessary to review here GA's other contentions on congressional intent concerning the Atomic Energy and Energy Reorganization Acts.

²⁵ No party has raised an objection that the Commission lacks subject matter jurisdiction in the case at hand. See Staff Response at 16 n.10.

²⁶ See October Order at 21.

has jurisdiction over GA for the purposes of the Order.²⁷ As one theory of the case, the opposing parties contend that GA exercised enough control over the day-to-day activities of SFC to permit a disregard of the corporate form that separates a parent from a subsidiary (*a.k.a.* piercing the corporate veil). Under this premise, GA and SFC may be considered one and the same.²⁸ If GA is considered to be a *de facto* licensee, and a parent whose conduct and activities are within the NRC's subject matter jurisdiction, the Commission may exercise its jurisdiction regardless of whether it could regulate nonlicensees under section 161b. Staff and NACE exhibits evidence the assignment of GA personnel to SFC management positions and GA's involvement in its subsidiary's affairs.²⁹ The Staff also submits evidence tending to demonstrate GA's intention to provide financial assurance for decommissioning in the event that SFC fails to do so.³⁰ In summary, the disputed material facts submitted by the Staff and NACE, as well as factual issues numbers 4 and 5 claimed by GA as not being at issue, relate generally to the nature of GA's relationship to the NRC as evidenced by GA's conduct and activities, the inadequacy of SFC funding for decommissioning and the obligation of GA and SFC to provide financial assurance. GA's motion, brief, and supporting evidence on the other hand, although not contesting directly the activities related above, deny the existence of any licensee status, financial obligation, or NRC jurisdiction over the Corporation resulting therefrom and claim a prejudgment of this case by NRC's Chairman and possibly other Commissioners.

From the foregoing, it is clear that the central issues in this proceeding concern the role that GA performed in connection with its subsidiary's (SFC) licensed activities and whether that role constitutes GA as a *de facto* licensee or one whose conduct has affected activities within the Commission's subject-matter jurisdiction.

c. *Ruling*

According to the evidence submitted by the Staff and NACE, GA has made itself liable for ensuring the financing of SFC's decommissioning responsibilities. Our review of the pleadings presenting the motion for summary disposition and responses thereto leaves no alternative except to conclude that the Staff and NACE have provided sufficient evidence to support a number of material facts in dispute and the movant has not carried its burden of proving that no genuine

²⁷ Staff Answer at 8. It should be noted that NACE's argument on "piercing the corporate veil" (NACE Opposition at 26-33) and numbers 1, 2, and 3 in its statement of material facts mirror the Staff's assertions.

²⁸ Staff Answer at 14-17, 26-27; NACE Opposition at 26-33.

²⁹ See NACE Opposition, Attachments 2, 4; Staff Answer, Exhibits 1, 2, 3.

³⁰ See Staff Answer, Exhibit 4.

issues of material facts exist to be litigated. There is no question that NRC has subject matter jurisdiction over the decommissioning of licensed facilities and the public's protection against dangers to health, life, or property from the operation of licensed nuclear facilities. And there is no question that GA, albeit a third-tier owner of SFC, has been involved in its subsidiary's activities. What the degree of that participation has been, and its significance for NRC's regulatory authority in this case, cannot be determined absent further developments in this proceeding. On the basis of the foregoing, a motion for summary disposition or order to dismiss cannot be granted herein.³¹

d. Alternate Motion

GA has filed an alternate motion for an order of dismissal of NRC's claims, alleging that a legally cognizable claim has not been stated and facts cannot be proved to entitle the agency to impose a financial liability on the corporation. The foundation for this motion — a lack of jurisdiction — is substantially the same as that put forth for its summary disposition request: NRC has no authority to extend its control over nonlicensees under a "de facto corporation" doctrine or a "piercing of a corporate veil" theory; but even possessing such authority, NRC has not stated a proper claim against GA.³² In GA's view, the limited liability of corporations cannot be dispensed with by arbitrary assertions of regulatory power and such assertions cannot be sustained without pleading some form of fraud, illegality, or improper conduct.³³ Here, according to GA, the October Order does not contain such averments and NRC has acknowledged its claim is not based on "deliberate misconduct on the part of GA."³⁴

Commission rules of practice make no provision for motions for orders of dismissal for failing to state a legal claim. However, the Federal Rules of Civil Procedure do in Rule 12(b)(6), and, as the Staff points out, we occasionally look to federal cases interpreting that rule for guidance. In the consideration of such dismissal motions, which are not generally viewed favorably by the courts, all

³¹ In light of our ruling here, the Board saw no reason for delaying discovery procedures and accordingly denied GA's motion to delay discovery. GA's request for oral argument on its motions was denied as the movant failed to provide any bases for the request. Also, the Board denied GA's motion for leave to reply to Staff and NACE responses to GA's motion for summary disposition or order of dismissal. In its request, GA neither delineated the numerous new issues it alleges the parties raised nor the legal theories allegedly advanced to support the claim of NRC's jurisdiction. *See* GA Reply Motion. The agency's rules of procedure do not provide for replies to responses for disposing of matters on pleadings, and in the absence of some compelling reason to justify our exercise of the Board's discretion to authorize such a reply, no such reply should be granted. If the Board granted a reply here, fairness requires providing opposing parties a similar opportunity to respond, bringing in its wake an unnecessary prolongation of the case. Such an opportunity to reply is particularly unnecessary where a party will have ample opportunity to present additional arguments on a subject during the course of a hearing. *See* [NACE] Opposition to [GA] Motion for Leave to File a Reply (Apr. 25, 1994), at 3.

³² GA Brief at 32-37.

³³ *Id.*

³⁴ *Id.*

factual allegations of the complaint are to be considered true and to be read in a light most favorable to the nonmoving party.³⁵ As indicated herein, *supra*, the October Order rests GA's responsibility for providing decommissioning financial assurance on the grounds that GA has had direct involvement and control of SFC activities, and has committed itself to provide such assurance, which commitment was relied upon by the NRC.³⁶ In a leading case, *Coney v. Gibson*, 355 U.S. 41 (1957), the Court stated that all that the rules require is a short statement of a claim to give the litigant in question a fair notice of what the claim is and the grounds on which it rests. It seems evident that such a requirement has been met by the agency here. And, in light of claims to the contrary by GA, we must state that there is no impediment to the NRC (and GA also) to develop additional facts and theories as a result of the discovery process. As the Court pointed out in the case above, such procedures are established to disclose more precisely the basis of both claims and defenses and to define more narrowly disputed facts and issues. *Id.* at 85.³⁷

2. Other Issues

GA raises several collateral matters requiring resolution. First, the principle of estoppel is urged to prevent NRC from now attempting to hold GA financially liable because the Staff failed to require such a financial guarantee in 1988 at the time GA purchased SFC. Also, GA asserts, in 1992, NRC's own statements reflect that a legal obligation for decommissioning financial assurance had not been consummated.³⁸ The Staff, however, argues that in the absence of misconduct, which is not alleged in the circumstances of this activity here, estoppel will not succeed against the government.³⁹

We conclude that this issue cannot be raised successfully based on NRC's failure to pursue funding commitments. A basic allegation of the October Order is that GA's Chairman promised financial assistance for decommissioning and NRC relied upon it. That assurance, on its face, tends to negate any NRC actions inconsistent with an intention to hold GA financially accountable for decommissioning expenditures.

Next, there is an allegation of a failure of due process if GA is required to contest the October Order. The movant claims that NRC's Commissioners cannot be called to testify under its rules even though they have knowledge of material facts in the proceeding. In addition, GA contends that possibly the

³⁵ 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2nd ed. 1990).

³⁶ October Order at 19.

³⁷ *See id.* at 12-15.

³⁸ GA Brief at 37-43.

³⁹ Staff Answer at 28-30.

full Commission and certainly its Chairman have previously adjudged the facts giving rise to the Order.⁴⁰

These allegations have no validity in this proceeding. Assuming the truth of the GA charges — that Commissioners had prior knowledge of the material facts of this case and made some prejudgments based on those facts — such considerations have no place before this tribunal. The October Order is an agency directive of the Nuclear Regulatory Commission and not its individual Commissioners.

It has also been indicated that members of NRC's Staff will be made available to provide testimony on the Order that the Commission issued.⁴¹ Any averments of prejudice against Commission members must be reserved to a time, if and when, this Board's decision is before the Commission. The movant has made no showing that this Board is not capable of fairly judging the matters in controversy here.⁴² Under the circumstances presently existing in this proceeding, nothing in the authorities cited by GA call into question any due process protections provided by the Constitution or the Administrative Procedure Act.

GA also charges a failure in due process protection in NRC's attempt to hold it financially responsible without first creating clear standards by which nonlicensees could "gauge and control" their conduct.⁴³ There is no due process requirement we are aware of that necessitates a regulatory agency detailing in advance the variety of conduct that a regulatory agency is authorized to assure or prohibit. NRC's decommissioning responsibilities and its mandate to protect the public health and safety from nuclear hazards have certainly been known to GA since it purchased SFC in 1988. The agency's authority for the issuance of orders under section 161 has also been in existence since that time. The corporation here has had ample opportunity to be advised of the claims against it and time to prepare for challenges to its interests. Due process requires no

⁴⁰ See GA Motion at 44-57. These charges are supported by exhibits containing excerpts from a Commission public meeting participated in by GA and SFC officials and a follow-on press conference conducted by the Commission's Chairman.

⁴¹ Staff Answer at 33 n.20.

⁴² See *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

⁴³ GA Brief at 28-30.

more, and, accordingly, we can determine no violation of its protection in the circumstances alleged herein.

THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Bethesda, Maryland
June 8, 1994

Separate Statement by Bollwerk, J.

I do not join the majority in denying General Atomics' (GA) February 17, 1994 motion for summary disposition because I believe that a Board ruling on the motion should be made only after affording GA an opportunity to file a reply to the April 13, 1994 responses of the NRC Staff and intervenor Native Americans for a Clean Environment (NACE) to GA's motion. The Board majority is correct that under NRC rules of practice whether to permit a reply is a matter within the discretion of the Board. Even affording no weight to the fact that the Staff (as the originator of the enforcement order at issue here) does not oppose GA's request to file a reply, I can think of few better instances to exercise that discretion than here. The issues GA raises in its summary disposition motion involve fundamental questions about the jurisdictional basis for this proceeding. Moreover, GA's stake in this proceeding is substantial given that failure of its challenge to the Staff's enforcement order would leave it jointly and severally liable (along with its subsidiary Sequoyah Fuels Corporation) for some eighty-six million dollars in cleanup costs for the Gore, Oklahoma facility. As a consequence, I would have afforded GA the small additional time necessary to reply to the Staff and NACE responses to its summary disposition motion.*

*The majority's decision also suggests that allowing GA to file a reply to the Staff and NACE responses to its motion would create the need to permit a further "surreply" by the Staff and NACE. See 39 NRC at 365 n.31. I fail to see how this is the case. Replies are a well-established part of the legal pleading process, see, e.g., U.S.D.D.C. R. 108(d); surreplies are not.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

James P. Gleason, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8681-MLA-3
(ASLBP No. 94-693-02-MLA-3)
(Source Materials License
No. SUA-1358)

UMETCO MINERALS CORPORATION

June 30, 1994

MEMORANDUM AND ORDER
(Requests for Hearing)

This informal adjudicatory proceeding, convened under 10 C.F.R. Part 2, Subpart L, involves a proposed amendment of a source material license possessed by Umetco Minerals Corporation (UMC). The amendment application is directed to authorize the receipt and disposal of 2.6 million cubic yards of materials from the Department of Energy (DOE) Monticello Tailings Project at UMC's White Mesa Mill near Blanding, Utah.

Several timely requests for hearings on the proposed amendment have been filed by Steve Erickson on behalf of Downwinders, Inc. (Downwinders), and by Norman Begay, a resident of the White Mesa Native American community near Blanding.¹ The Downwinders' request is opposed by the Nuclear Regulatory Commission Staff (Staff) and UMC; however, while both the Staff and UMC find the Begay request deficient, they suggest providing an additional opportunity

¹ Letter from Erickson to Hall, May 12, 1994; (Begay) Request for Hearing, May 14, 1994.

for Begay to provide supplemental information to support his petition. See Staff Response (June 10, 1994) at 16; UMC Response (June 14, 1994) at 1-2.²

BACKGROUND

The Downwinders' request for a hearing merely indicates that Downwinders, Inc., is a "non-profit, educational foundation" with an address listed in Salt Lake City, Utah. The Begay multifaceted petition claims a residence within the White Mesa Native American community in an area where the Licensee's mill is located; that a "commercial disposal facility for imported radioactive tailings" will "threaten and defame" the "religious, historical and cultural heritage" of Petitioner and other Native Americans in an area considered sacred; that the area contains cultural ruins and has been selected as a Native American religious and cultural center; that Petitioner and other residents will have their drinking water supply "jeopardize[d]" as the wells are "situated down-gradient"; and, finally, that since the residents share their primary access road with the UMC facility, the high volume of "heavy equipment traffic" threatens the Petitioner's and the residents' safety.

In order to participate in NRC's adjudicative proceedings, petitioners must demonstrate that they meet the agency's standing requirements. This means that they must show that the intended action will cause injury in fact to petitioner's interests and that those interests are arguably within the zone of interests protected by the Atomic Energy Act of 1954, as amended, or the National Environmental Policy Act of 1969, as amended. See *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). Additionally, as the Staff points out in its review of the Commission's legal requirements for standing, petitioners may not obtain participation in the agency's proceedings on behalf of persons they are not authorized to represent. See Staff Response at 7.

RULING

The Downwinders' request is denied. The petition submitted by Steve Erickson provides no information that meets NRC's standing requirements. It contains no statements on the requestor's interest in this proceeding or what interest is within the zone of interests covered by the Atomic Energy Act. The request is simply void of any information on which a finding could be made that

² Pursuant to 10 C.F.R. § 2.1213, the Staff indicates its intention to participate as a party if a hearing is conducted on this matter. See Staff Response, n.3.

either Mr. Erickson or the Downwinders' organization is entitled to participate in this adjudicatory proceeding.

The Norman Begay request for a hearing is also deficient in several respects. His allegations fail to provide any specifics regarding how his interests could be impacted by the license amendment. No information is submitted on the location of the requestor's residence or the White Mesa Native American community in relation to the Licensee's mill facilities, nor is any information submitted concerning the proximity of the water wells to the UMC site. The petition also lacks details on how this proposed license amendment would impact the requestor's historic, cultural, and religious heritage or how additional traffic using a commonly traveled road presents a safety threat to him. Based on the contentions submitted, there is not sufficient information to support a conclusion that the license amendment could cause an injury-in-fact to the Petitioner's interests and that those interests are within the zone of interests protected by any statute. From the statements submitted, however, and as required by 10 C.F.R. § 2.1205, the Petitioner has submitted a number of areas of concern regarding the proposed licensed activities. Accordingly, at this point, although the Petitioner has not met the agency's standing requirements, the Presiding Officer agrees with the Staff and UMC that an opportunity should be provided the requestor to supplement his petition.³ Accordingly, the Petitioner is granted a period of fifteen (15) days from the receipt of this Order to provide additional information in support of his request for a hearing and the Staff and UMC will have a period of 10 days after receipt thereof to respond.

ORDER

1. The request for hearing in this proceeding submitted by Steve Erickson in behalf of Downwinders, Inc., is denied. Pursuant to 10 C.F.R. § 2.1205(n), the question whether this request for hearing should have been granted, in whole or in part, is appealable within 10 days of service of this Order.

³ See *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973). Petitioners are usually permitted to amend petitions containing curable defects.

2. Norman Begay is granted a period of 15 days to supplement his request for hearing and the Staff and UMC a period of 10 days from the receipt of such supplement to respond thereto.

IT IS SO ORDERED.

**James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
June 30, 1994**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket No. 30-16055

ADVANCED MEDICAL SYSTEMS, INC.
(Cleveland, Ohio)

June 16, 1994

A Petition, dated August 2, 1993, from William B. Schatz, on behalf of Northeast Ohio Regional Sewer District, requested that the Commission institute a proceeding to modify the license of Advanced Medical Systems, Inc. ("AMS") to require AMS to provide adequate financial assurance, available in the form of insurance, to cover public liability pursuant to section 170 of the Atomic Energy Act of 1954, as amended. The Director of the Office of Nuclear Material Safety and Safeguards has carefully considered the Petitioner's request, has concluded that no substantial public health and safety concerns warrant NRC action concerning this request, and has denied the Petition.

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

I. INTRODUCTION

By letter dated August 2, 1993, addressed to Mr. James M. Taylor, Executive Director for Operations, U.S. Nuclear Regulatory Commission ("NRC"), William B. Schatz, on behalf of Northeast Ohio Regional Sewer District ("District"), requested that the NRC take action with respect to Advanced Medical Systems, Inc. ("AMS"), of Cleveland, Ohio, an NRC licensee. The District requested, pursuant to 10 C.F.R. § 2.206, that the NRC institute a proceeding to modify the license of AMS to require AMS to provide adequate financial assurance, available in the form of insurance, to cover public liability pursuant to section 170 of the Atomic Energy Act of 1954, as amended. The District

alleges the following bases for the request: (1) There is a large volume of evidence indicating prior discharge of cobalt-60 to the sanitary sewer, and (2) hundreds of curies of loose cobalt-60 remain in the London Road facility.

By letter dated November 24, 1993, I formally acknowledged receipt of the Petition and informed the Petitioner that its request was being treated pursuant to section 2.206 of the Commission's regulations. A notice of the receipt of the Petition was published in the *Federal Register* on Monday, December 6, 1993 (58 Fed. Reg. 64,341). The NRC Staff sent a copy of the letter dated November 24, 1993, with the Petition, to AMS. I have completed my evaluation of the matter raised by the Petitioner and have determined that, for the reasons stated below, the Petition should be denied.

II. BACKGROUND

The NRC issued License No. 34-19089-01 to AMS on November 2, 1979. The licensed operation, facilities, and equipment had been previously owned and operated by Picker Corporation since 1959. From 1979 to mid-1991, the AMS license authorized the possession of 150,000 curies of cobalt-60 in solid metal form for the purpose of manufacturing of sealed sources for distribution to authorized recipients for use in teletherapy units (used at medical facilities for treatment of medical conditions). The license currently authorizes AMS to possess cobalt-60 in solid metal form in storage and to use this material in training of Licensee personnel in the manufacture of NRC-approved sealed sources; the current license does not authorize manufacture of sealed sources for distribution. In addition, the license continues to authorize possession of large quantities of cobalt-60 and cesium-137 in sealed sources, and plated depleted uranium shielding, incident to teletherapy and industrial radiography installation, maintenance, and service. The AMS license currently limits possession to 300,000 curies of cobalt-60 (150,000 curies as solid metal and 150,000 in sealed sources; although the solid metal can be used to manufacture sealed sources; no manufacturing is authorized at present), 40,000 curies of cesium-137, and 4000 kilograms of depleted uranium. Based on NRC interviews and review of records, AMS stopped releases of processed radioactive liquids to the sewer system in 1989, and since then has generated little radioactive liquid waste, which it holds on site. See U.S. NRC Report No. 030-16055/93002(DRSS) dated July 29, 1993. The facility that houses the licensed material is located on London Road in Cleveland, Ohio.

The Northeast Ohio Regional Sewer District is responsible for operating three wastewater treatment facilities in and around the Cleveland, Ohio metropolitan area. Its Southerly Wastewater Treatment Center ("SWTC") has been operating since 1927 to remove grit and debris from wastewater generated in the District's

service area. This process involves incineration of sludge, transport of the residual ash in a slurry to settlement and evaporation ponds, and eventual transfer of the dried ash to landfills.

In April 1991, the NRC identified cobalt-60 at the SWTC by chance during an aerial radiation survey of an unrelated site, namely, the Chemetron Corporation facility located in Newburgh Heights, Ohio. Surveys were subsequently performed at SWTC in September 1991 and March 1992, by Oak Ridge Institute for Science and Education ("ORISE") at the request of NRC, to determine the extent of the cobalt-60 contamination at the facility. The results of the ORISE surveys are reported in "Radiological Characterization Survey for Selected Outdoor Areas, Northeast Ohio Regional Sewer District, Southerly Wastewater Plant, Cleveland, Ohio," Final Report, August 1992 (hereafter referred to as "ORISE report"). The results of the ORISE surveys indicated that there were elevated direct radiation readings that were caused by cobalt-60, with elevated soil and sediment sample concentrations. With background averaging 9 microroentgens per hour, exposure rates ranged from 6 to 580 microroentgens per hour. (ORISE report at 6.) The activity of background soil samples was less than 0.2 picocuries per gram; soil and sediment sample activity ranged from less than 0.1 to 9990 picocuries per gram. (ORISE report at 6.)

It was originally deduced (memorandum for Carl J. Paperiello, Deputy Regional Director from Loren J. Hueter, Radiation Specialist on the subject of Report on Trip to General Chemical Corporation (non-licensee), 5000 Warner Road, Cleveland, Ohio, and to Northeast Ohio Regional Sewer District, 6000 Canal Road, Cleveland, Ohio (Docket No. 030-18276, License No. 34-17726-02), dated June 13, 1991), based on the history and analysis of layers of incinerator ash in the fill areas, that the cobalt-60 began entering the treatment facility in the late 1970s or early 1980s. The history of SWTC revealed that, after renovation of the incinerators between 1975 and 1978, the current ponds were put into use for the first time. The ponds were then cleaned for the first time from December 1982 to March 1983, and all the excavations placed in the north fill area. The ash from the evaporation ponds was removed in vertical sections, and spread horizontally in the fill areas. The only timing sequence that can be determined is that cobalt-60 contamination entered SWTC prior to the 1982 cleaning. The contamination apparently originated from discharges to the sewer system in the Cleveland area that is serviced by the District.

The District removes ash from the ponds every few years so that the facility can continue to use the ponds and continue its water treatment process. The District has transferred the dried ash from the evaporation ponds to an onsite fill area at SWTC. The NRC approved the site characterization strategy for the ash removal and has conducted confirmatory surveys along with ORISE following the transfer of ash from the evaporation ponds. Radiological characterization

of the facility is ongoing to better determine the amount of cobalt-60 that is actually present on the SWTC site.

III. DISCUSSION

The District's petition requests the NRC to require AMS to provide adequate financial assurance, available in the form of insurance, to cover public liability pursuant to section 170 of the Atomic Energy Act of 1954, as amended, to cover any contamination that might be caused by loss of control of radioactive material by AMS. While applying to any contamination resulting from a future release from the AMS operation, the request in the Petition also appears to apply to the contamination already present at the District's SWTC. The NRC has treated the request in broad terms, i.e., as applying to possible future events resulting in offsite contamination as well as the currently existing contamination on the AMS site. (The District had filed a petition (dated March 3, 1993) pursuant to section 2.206, requesting that the NRC require AMS to assume all costs resulting from the offsite release of cobalt-60 that has been deposited at the SWTC. That Petition is currently pending before the NRC.) The concerns that form the bases for the Petitioner's request and the evaluation by the Staff are provided below.

A. Regulatory Framework

1. Summary of Price-Anderson Provisions

The Petitioner requests that the NRC apply the provisions of section 170 of the Atomic Energy Act of 1954, as amended ("Act"), 42 U.S.C. § 2210 ("Price-Anderson provisions"), to require AMS to obtain insurance for public liability. Section 170a in part provides that:

Each license issued under section 103 and 104 and each construction permit issued under section 185 shall, and each license issued under section 53, 63, or 81 may, for the public purposes cited in section 2i., have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amount as the [Commission] in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection [170]b. to cover public liability claims.

Thus, section 170a provides that the Commission *must* require all of its power reactor licensees to have and to maintain financial protection (e.g., liability insurance) to cover public liability claims. Nuclear reactors are licensed pursuant to either section 103 or 104 of the Act. Reactors at nonprofit educational institutions are exempt from the provisions of section 170a, but are subject to the provisions of 170k. Section 170a, however, also authorizes the Commission

to exercise its *discretion* to determine *whether* materials licensees should be required to have and maintain financial protection.

2. Commission Application of Price-Anderson to Material Licensees

Because the Commission issued the AMS license under section 81 of the Act, the Commission may exercise its discretion under the Price-Anderson provisions, as discussed above, in determining whether to require AMS to have and to maintain financial protection (i.e., liability insurance). As a matter of policy, the Commission generally has chosen not to require financial protection of a licensee whose license has been issued pursuant to sections 53, 63, or 81 of the Act. The rationale for this policy rests on the NRC's determination that the magnitude of compensation for potential personal injury or property damage associated with activities conducted under materials licenses is significantly less than that associated with the operation of facilities licensed pursuant to sections 103 or 104 of the 1954 Act (i.e., nuclear reactors). Not only is the quantity of radioactive material much less for material licensees than that contained in the inventories at reactor sites, but there are other significant differences. For example, the material licensee's radioactive material is in a nonpressurized, ambient-temperature state compared to a reactor's inventory, which is maintained in a highly energized condition or environment, characterized by high temperature and pressure. Accordingly, an accidental release of radioactive material from a material licensee's facility will be relatively confined compared to a reactor facility. This, in turn, leads to much lower potential for the need for involvement of offsite support for a material licensee's accidental release, as compared to an accidental release from a reactor.

In 1976, however, the Commission determined that there was a significant radiological hazard associated with the operation of *some* "plutonium processing and fuel fabrication plants." (Compare the definition of "plutonium processing and fuel fabrication plant" in 10 C.F.R. § 70.4 with that in 10 C.F.R. § 140.3(h). Not all such plants licensed pursuant to 10 C.F.R. Part 70 are required to have financial protection pursuant to 10 C.F.R. § 140.13a.) The Commission exercised its discretionary authority under the Price-Anderson provisions to require licensees of "plutonium processing and fuel fabrication plants" (as defined in 10 C.F.R. 140.3(h)), licensed under section 53 of the 1954 Act, to have financial protection in an amount equal to the maximum amount of liability insurance available from private sources. (See 10 C.F.R. § 70.4, 140.3(h), and 140.108.) Currently, no person holds a license to operate such a facility.

Finally, in order to ensure that all licensees within a particular class are treated uniformly, it has been the policy of the Commission, in implementing the Price-Anderson provisions, to impose requirements upon a defined class of licensees by promulgating regulations of general applicability, rather than issuing orders to

individual licensees. Notwithstanding the above, the Commission requires that licensees, and not the public, bear the burden of prompt cleanup of accidental contamination from releases in violation of Commission requirements.

B. Application of Price-Anderson to Existing Conditions

That discharge of cobalt-60 to the sanitary sewer has occurred is well established. Records of licensees in the District service area that were licensed for cobalt-60 indicate that licensees were authorized to discharge cobalt-60 to the sanitary sewerage under controlled conditions.

Insurance coverage in general, and under Price-Anderson in particular, however, is *prospective*, and does not cover preexisting conditions such as property damage that has already occurred. Any insurance required now could not be used to satisfy a claim by the District to pay for cleanup of the cobalt-60 contamination now on the District's site. Accordingly, the imposition of financial protection requirements (e.g., liability insurance) pursuant to section 170 on AMS would not provide the District with a remedy for the bases it asserts. Likewise, any contamination on the AMS site is also a preexisting condition and would not be covered by any insurance required pursuant to section 170. Accordingly, the District's bases for its request do not warrant the NRC granting the request.

Moreover, with respect to AMS's onsite contamination, the scope of the Price-Anderson coverage is limited to claims for public liability, i.e., legal liability arising out of or resulting from a nuclear incident or precautionary evacuation except, *inter alia*, claims for loss of, or damage to, or loss of use of property that is located at the site and used in connection with the licensed activity (*see* section 11.w of the Act, 42 U.S.C. § 2014(w)); it does not provide funds for cleanup *per se*. (In general, a "nuclear incident" means any occurrence causing bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. *See* section 11.q of the Act, 42 U.S.C. § 2014(q).) With regard to the onsite contamination alleged by the District, therefore, requiring insurance pursuant to section 170 would be to no avail. In view of the foregoing, even if it were not a preexisting condition, the contamination on the AMS site in and of itself does not provide a basis for requiring insurance pursuant to Price-Anderson.

In exercising its authority to protect the public health and safety pursuant to section 161 of the Act, 42 U.S.C. § 2201, the Commission has imposed requirements on its licensees to provide financial assurance for decommissioning that require the licensees to set aside funds to pay for remediation of any onsite contamination prior to license termination. *See* 10 C.F.R. § 30.35.

With regard to the contamination on the AMS site and AMS's continued possession of byproduct material, funding of onsite cleanup is covered by the Commission's decommissioning funding plan requirements, which provide adequate protection for the public health and safety. On July 7, 1992, AMS provided decommissioning financial assurance by certification as permitted by 10 C.F.R. § 30.35(c)(2), and will be required to include a decommissioning funding plan in its next application for license renewal; the current AMS license expires in December 1994. In view of the above, the District has not provided a basis for imposing additional requirements under Price-Anderson on AMS with regard to existing contamination on the AMS site or at the District's SWTC.

C. Possible Future Public Liability Claims

The possibility remains, nevertheless, that the contamination existing on the site might be spread to areas off site or that future operations could result in offsite contamination. As set forth below, however, the District has not provided a basis for granting its request.

As discussed above, the Commission has adopted a policy of exercising its discretionary authority to apply the Price-Anderson provisions with respect to classes of licensees rather than to individual licensees. The circumstances presented by the possibility of offsite contamination by AMS do not provide sufficient justification to deviate from that policy. The likelihood of accidental release of cobalt-60 from the AMS facility has diminished and continues to do so for several reasons, including the following: First, AMS is no longer authorized to manufacture sealed sources, and the use of raw material for this process has ceased. Second, efforts are being made by AMS to contain and dispose of loose radioactive material presently at the facility, decreasing their inventory substantially. Third, AMS is listed on the Site Decommissioning Management Plan, which provides for heightened NRC attention toward an objective of timely decontamination of the site to unrestricted use criteria and the eventual removal of the site from the list. Fourth, present disposal regulations allow disposal of only soluble radioactive material into the sanitary sewer, as discussed further below. In addition, the bases the District alleges in support of the Petition do not distinguish AMS from other materials licensees for the purposes of application of the Price-Anderson provisions. The District has not provided sufficient information, nor are we aware of information at this time that would warrant extension of Price-Anderson to all materials licensees similar to AMS. In view of the above, the District's request concerning Price-Anderson coverage is denied. Moreover, because the Commission requires each licensee to be responsible for any remediation of offsite contamination resulting from a release of byproduct material in violation of regulations or license conditions, no action is required to modify the AMS license as requested by the District. In

view of the foregoing, the District has presented no basis warranting the granting of its request.

The NRC notes that the 1991 revision to 10 C.F.R. Part 20, which became mandatory January 1, 1994, included several revised criteria for permissible release of radioactive material into the sanitary sewer. Since insoluble material was involved in a number of sewage treatment facility cases, the new rule eliminates the options to release either insoluble, or readily dispersible material, unless it is biological material, into a sanitary sewer system. Revised Part 20 also lowers allowable concentrations of radionuclides released into the sanitary sewer. Because a 1992 NRC study demonstrated that, under certain conditions, the potential to exceed the Part 20 public dose limit exists, NRC has contracted with Pacific Northwest Laboratory to perform additional studies on possible mechanisms at sewage treatment facilities that could lead to reconcentration of radionuclides. This multitask contract began in October 1993; a report is due later this year. In connection with this study, the Commission has issued an advanced notice of proposed rulemaking in which the Commission has requested comments on whether an amendment to the current regulations governing the release of radionuclides from licensed nuclear facilities to sanitary sewer systems is needed. (59 Fed. Reg. 9146 (Feb. 25, 1994)). The facts regarding the District's SWTC were one set of circumstances prompting the Commission to issue the notice.¹

Finally, it should be noted that the Commission has requested the NRC Staff, in a Staff Requirement Memorandum dated June 28, 1993, to address the issue whether financial assurance for materials licensees for cleanup of an accident with the potential for significant contamination should be required. The Staff will recommend that rulemaking be initiated if it appears that the benefit of such requirements outweighs the costs.

IV. CONCLUSION

The Staff has carefully considered the request of the Petitioner. In addition, the Staff has evaluated the bases for the Petitioner's request. For the reasons discussed above, I conclude that no substantial public health and safety concerns warrant NRC action concerning the request.

¹The Commission recently expressed its views that although the Atomic Energy Act of 1954 preempts dual federal-state regulation of radiation hazards, it does not prohibit actions by state or local authority on bases other than protection of public health and safety from radiological hazards. See Letter dated 11/9/93 from M. Malsch, NRC, to M. Fitzgerald, GAO; and Letter dated 11/9/93 from M. Malsch, NRC, to H. McFadden, Laramie, Wyoming, City Attorney. The above matters do not provide a basis for granting the District's request or change the results of the analysis in this Decision.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become final action of the Commission twenty-five (25) days after issuance unless the Commission on its own motion institutes review of the Decision within that time.

**FOR THE NUCLEAR
REGULATORY COMMISSION**

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

**Dated at Rockville, Maryland,
this 16th day of June 1994.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

BOSTON EDISON COMPANY (Pilgrim Nuclear Generating Station)	Docket No. 50-293
CAROLINA POWER & LIGHT COMPANY (Brunswick Steam Electric Plant, Units 1 and 2)	Docket Nos. 50-325 50-324
CLEVELAND ELECTRIC ILLUMINATING COMPANY (Perry Nuclear Power Plant, Units 1 and 2)	Docket Nos. 50-440 50-441
COMMONWEALTH EDISON COMPANY (Dresden Nuclear Power Station, Units 2 and 3; LaSalle County Station, Units 1 and 2; Quad Cities Nuclear Power Plant, Units 1 and 2)	Docket Nos. 50-237 50-249 50-373 50-374 50-254 50-265
CONSUMERS POWER COMPANY (Big Rock Point Plant)	Docket No. 50-155
DETROIT EDISON COMPANY (Enrico Fermi Atomic Power Plant, Unit 2)	Docket No. 50-341

ENTERGY OPERATIONS, INC. (Grand Gulf Nuclear Station, Unit 1; River Bend Station, Unit 1)	Docket Nos. 50-416 50-458
GEORGIA POWER COMPANY (Edwin I. Hatch Nuclear Plant, Units 1 and 2)	Docket Nos. 50-321 50-366
GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Oyster Creek Nuclear Generating Station)	Docket No. 50-219
ILLINOIS POWER COMPANY (Clinton Power Station, Unit 1)	Docket No. 50-461
IOWA ELECTRIC LIGHT & POWER COMPANY (Duane Arnold Energy Center)	Docket No. 50-331
NEBRASKA PUBLIC POWER DISTRICT (Cooper Station, Unit 1)	Docket No. 50-298
NIAGARA MOHAWK POWER CORPORATION (Nine Mile Point Nuclear Station, Units 1 and 2)	Docket Nos. 50-220 50-410
NORTHEAST NUCLEAR ENERGY COMPANY (Millstone Nuclear Power Station, Unit 1)	Docket No. 50-245
NORTHERN STATES POWER COMPANY (Monticello Nuclear Generating Plant, Unit 1)	Docket No. 50-263

PECO ENERGY COMPANY (Peach Bottom Atomic Power Station, Units 1 and 2; Limerick Generating Station, Units 1 and 2)	Docket Nos. 50-277 50-278 50-352 50-353
PENNSYLVANIA POWER & LIGHT COMPANY (Susquehanna Steam Electric Station, Units 1 and 2)	Docket Nos. 50-387 50-388
POWER AUTHORITY OF THE STATE OF NEW YORK (James A. FitzPatrick Nuclear Power Plant)	Docket No. 50-333
PUBLIC SERVICE ELECTRIC & GAS COMPANY (Hope Creek Generating Station, Unit 1)	Docket No. 50-354
TENNESSEE VALLEY AUTHORITY (Browns Ferry Nuclear Plant, Units 1, 2, and 3)	Docket Nos. 50-259 50-260 50-296
VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station)	Docket No. 50-271
WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS Nuclear Project No. 2)	Docket No. 50-397 June 22, 1994

A Petition, dated August 12, 1993, requested the Commission to require each boiling water reactor licensee to either conclusively demonstrate the operability of the condensate pots and associated level instruments, interlocks, and emergency core cooling system functions or be granted a plant-specific license exemption with a plant-specific safety analysis. The Petition further requested that, if operability cannot be demonstrated and the NRC does not grant plant-specific relief from the regulations, each plant must comply with

the action statements of the plant's technical specifications for inoperable level instrumentation. The Director of the Office of Nuclear Reactor Regulation has considered all of the matters raised in the Petition, and has denied the Petition.

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

I. INTRODUCTION

On August 12, 1993, Mr. Paul M. Blanch (the Petitioner) filed a request (the Petition) with the Executive Director for Operations, requesting that the U.S. Nuclear Regulatory Commission (NRC) take action regarding all boiling water reactors (BWRs). The Petitioner requested that the Commission require that the licensee of each BWR either conclusively demonstrate the operability of the condensate pots and associated level instruments, interlocks, and emergency core cooling system (ECCS) functions or be granted a plant-specific license exemption (amendment) with a plant-specific safety analysis. He also requested that, if operability cannot be demonstrated and the NRC does not grant plant-specific relief from the regulations, each plant comply with the action statements of the plant's technical specifications for inoperable level instrumentation. By letter dated November 9, 1993, the NRC acknowledged receipt of the Petition and indicated that the Staff would take action within a reasonable time. The NRC further indicated that certain additional actions and information that the Petitioner had requested were determined not to fall within the purview of 10 C.F.R. § 2.206 because they did not request a proceeding pursuant to 10 C.F.R. § 2.202 to modify, suspend, or revoke a license and did not otherwise request enforcement action. As indicated in NRC's November 9, 1993, letter of acknowledgment, these additional questions will be addressed by separate correspondence.

In support of the requested actions, the Petitioner asserts that he is not aware that any BWRs have been granted plant-specific exemptions (amendments) for continued operation with inoperable level instruments. He further states that Washington Public Power Supply System Nuclear Project No. 2 (WNP-2) and possibly many other plants have another problem, in that a loss-of-coolant accident outside of the containment may not be isolated with defective condensate pots.

For the reasons discussed below, I have concluded that the concerns raised in the Petition do not provide a basis for the action requested by the Petitioner and I, therefore, deny the Petition.

II. DISCUSSION

The Petitioner requests that each BWR licensee be required to either conclusively demonstrate the operability of the condensate pots and associated level instruments, interlocks, and ECCS functions or be provided a plant-specific license exemption (amendment) with the plant-specific safety analysis. The Petitioner further requests that, if operability cannot be demonstrated and/or the NRC fails to grant plant-specific relief from these regulations, each plant comply with the action statements of the technical specifications for inoperable level instruments.

The BWR reactor vessel level instrumentation determines the water level in the reactor vessel by measuring the differential pressure between a constant reference leg and a water column connected to the reactor vessel below the water level. The water in the reference leg is maintained at a constant level by condensing steam in a condensate pot that is connected to the steam space above the water level in the reactor vessel. During operation, hydrogen and oxygen are produced by the hydrolysis of water in the reactor vessel and can become dissolved in the water in the reference leg. During an event that depressurizes the reference leg, the dissolved gases can be released and displace some of the water in the reference leg. The resulting reduced inventory in the reference leg can result in erroneous indications of high level on vessel water level instruments.

The level error that could result from the effects of noncondensable gases in the level indication reference legs may prevent the level instrumentation systems in BWRs from satisfying (1) General Design Criterion (GDC) 13, "Instrumentation and control," of Appendix A to 10 C.F.R. Part 50; (2) GDC 21, "Protection system reliability and testability"; (3) GDC 22, "Protection system independence"; and (4) 10 C.F.R. § 50.55a(h). The Technical Specifications of all BWRs require that the reactor vessel water level instrumentation, which supports safety system functions (e.g., Reactor Protection System (RPS), ECCS, or interlocks), be operable during operation. These are the principal regulatory requirements that apply to the operability of the reactor vessel water level instrumentation that would come into play if a licensee were to determine such instrumentation to be inoperable.

Reactor vessel water level instrumentation, and the interlocks and ECCS functions associated with these instruments, are critical to the safety and operation of BWRs. The NRC considers the BWR level instrumentation issue to be very important. The NRC has taken a number of significant actions to address this issue and to ensure that these instruments are capable of carrying out their required functions. The NRC Staff requested activation of the BWR Owners Group (BWROG) Regulatory Response Group on July 22, 1992, and held a public meeting with the group on July 29, 1992, to discuss this issue. The Staff issued Information Notice (IN) 92-54, "Level Instrumentation Inaccuracies

Caused by Rapid Depressurization,” on July 24, 1992, to alert licensees to the potential for level instrumentation inaccuracies caused by rapid depressurization. On August 19, 1992, the Staff issued Generic Letter (GL) 92-04, “Resolution of the Issues Related to Reactor Vessel Water Level Instrumentation in BWRs Pursuant to 10 CFR 50.54(f),” requesting each BWR licensee to (1) determine the impact of potential level indication errors on automatic safety system response during all licensing-basis transients and accidents, (2) notify the Staff of any corrective actions taken, and (3) provide its plans and schedule for corrective actions. In response to these NRC initiatives, the licensees of all BWRs are expected to evaluate the applicability of these issues to their plants and assess the need for corrective actions and/or operability determinations. The NRC has provided guidance on operability determinations in GL 91-18.

As a result of GL 92-04, all BWR licensees implemented short-term compensatory measures, including operator training and procedures, to further ensure that potential level errors will not result in improper operator actions. The BWR licensees indicated that the systems’ automatic safety functions would be satisfied prior to level error caused by depressurization and that existing emergency operating procedures provided adequate guidance to ensure that the long-term cooling safety function was also satisfied. The Staff reviewed the licensees’ responses and agreed that reasonable assurance had been provided that continued operation posed no undue risk to public health and safety. The Staff did not review any formal operability determinations. However, the Staff did consider licensee responses in light of the guidance provided in GL 91-18, “Information to Licensees Regarding Two NRC Inspection Manual Sections on Resolution of Degraded and Nonconforming Conditions and on Operability,” dated November 7, 1991. On this basis and based on the licensees’ continuing responsibility to ensure the operability of all components, structures, and systems that are required to be operable by the Technical Specifications, the Staff judged that no need existed for further formal action regarding OPERABILITY determinations.

The NRC Staff determined that interim plant operation was acceptable because (1) the level instrumentation is expected to initiate safety systems before a significant depressurization of the reactor occurs and, therefore, before significant errors in level occur; (2) emergency procedures currently in place, in conjunction with operator training, are expected to result in adequate operator actions; and (3) an abrupt depressurization event resulting in a common-mode, common-magnitude level indication error is unlikely. Events that result in divergent level indications are events for which operators have been trained to respond by following the emergency operating procedures.

In early 1993, additional information concerning potential level errors was obtained. On January 21, 1993, during a plant cooldown after a reactor scram at WNP-2, a level indication error was observed on one of four channels of the reactor vessel narrow-range level instrumentation. The level error was about

32 inches (81 cm) and recovered over a period of approximately 2 hours. In evaluating the January 21, 1993 event at WNP-2, the licensee identified a scenario in which a leak in the residual heat removal (RHR) system piping might not be isolated during shutdown conditions if large errors were present in multiple-level instruments. Because of this scenario identified for WNP-2, the Staff issued IN 93-27, "Level Instrumentation Inaccuracies Observed During Normal Plant Depressurization," on April 8, 1993, to alert licensees to this potential problem. Other new information was obtained during early 1993, including (1) data (from a test program conducted by the BWROG) confirming the potential for significant errors in the level instrumentation and (2) a report submitted by the BWROG on May 20, 1993, that discussed the possible effect of level errors on safety system response during accident scenarios initiated from shutdown conditions, such as draindown events.

The information led to the issuance of NRC Bulletin (NRCB) 93-03, "Resolution of Issues Related to Reactor Vessel Water Level Instrumentation in BWRs," issued May 26, 1993, in which the NRC requested that BWR licensees take the following additional short-term compensatory actions to ensure that potential level errors caused by reference leg degassing will not result in improper system response or improper operator actions during transients and accident scenarios initiated from reduced pressure conditions (Mode 3): (1) Establish enhanced monitoring of all reactor pressure vessel (RPV) level instruments to provide early detection of level anomalies associated with degassing from the reference legs; (2) develop enhanced procedures or additional restrictions and controls for valve alignments and maintenance that have a potential to drain the RPV during Mode 3; and (3) alert operators to potentially confusing or misleading level indication that may occur during accidents or transients initiating from Mode 3. For example, a draindown event could lead to automatic initiation of high-pressure ECCS without automatic system isolation or low-pressure ECCS actuation. Each licensee was also requested to complete augmented operator training on loss of RPV inventory scenarios during Mode 3, including RPV draindown events and cracks or breaks in piping, by July 30, 1993. In addition to the above short-term compensatory actions, each licensee was requested to implement hardware modifications necessary to ensure that the level instrumentation system design is of high functional reliability for long-term operation. This includes level instrumentation performance during and after transient and accident scenarios initiated from both high-pressure and reduced-pressure conditions. The hardware modifications discussed in NRCB 93-03 are the same as the modifications requested in Generic Letter 92-04. Since the level instrumentation plays an important role in plant safety and is required for both normal and accident conditions, the Staff requested that these modifications be implemented at the next cold shutdown beginning after July 30, 1993. If a facility was in

cold shutdown on July 30, 1993, the licensee was requested to implement these modifications prior to starting up from that outage.

All BWR licensees have completed the short-term compensatory actions requested in NRCB 93-03 and have committed to implement hardware modifications to the level instrumentation that will prevent the accumulation of dissolved gases in the level instrument reference legs. To date, twenty-three of the thirty-six affected BWR units have completed the hardware modifications. Eight units are currently shut down and will complete the modifications before restart. Of the five remaining units, four will complete the modifications during the next cold shutdown and one (Dresden Unit 2) will complete its modifications during its next cold shutdown following June 30, 1994. Based upon the licensees' safety analyses and the short-term compensatory measures provided in response to GL 92-04 and NRCB 93-03 that have been taken, the NRC Staff considers these schedules to be acceptable, and in the interim, these compensatory measures ensure that the affected licensees are in compliance with existing NRC rules and regulations.

On July 15, 1992, Northeast Utilities' Millstone Unit 1, declared its reactor vessel level instrumentation inoperable (LER 92-022) and elected to remedy the inoperability by a hardware modification. WNP-2 declared individual level instrumentation channels inoperable, during notching events, but did not exceed its technical specification limits regarding minimum operable channels per trip system. No other licensees have reported their reactor vessel level instrumentation inoperable due to reference leg degassing, pursuant to 10 C.F.R. § 50.72. In addition, the NRC reviewed the licensees' responses to GL 92-04 and NRCB 93-03, from both a safety standpoint and in light of the operability guidance provided in GL 91-18, and found those responses acceptable. Based upon this information, the problem that Petitioner raises, namely that operating BWRs may have inoperable reactor vessel level instrumentation, has not been identified to be the case at any other operating BWR. Therefore, additional Staff actions with regard to operability determinations are not deemed warranted.

III. CONCLUSIONS

The concerns raised by the Petitioner have been reviewed by the NRC Staff. As indicated above, the NRC has concluded that, based on their responses to GL 92-04 and NRCB 93-03, licensees have provided reasonable assurance that their reactor vessel water level instrumentation is capable of carrying out its required safety functions and that continued operation of these BWRs is acceptable. The Staff has further concluded that licensees are not operating in violation of applicable NRC requirements during the interim period while implementing the corrective actions requested by the Staff in NRCB 93-03, and that no operating

BWR, with the exceptions of Millstone Unit 1 and WNP-2, has reported its reactor vessel level instrumentation to be inoperable based upon the phenomena discussed in the Petition.

On the basis of the above assessment, I have concluded that there is no need to grant plant-specific exemptions (or amendments) for continued operation. The institution of proceedings pursuant to section 2.202 is appropriate only if substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that I have applied to the concerns raised by the Petitioner to determine whether any action is warranted. For the reasons discussed above, no basis exists for taking the specific actions requested in the Petition as the Petitioner has raised no substantial health and safety issues. Therefore, no action pursuant to section 2.206 is being taken in this matter.

The Petitioner's request for action pursuant to section 2.206 is denied. As provided in section 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review.

FOR THE NUCLEAR
REGULATORY COMMISSION

William T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 22d day of June 1994.

CASE NAME INDEX

ADVANCED MEDICAL SYSTEMS, INC.

DENIAL OF PETITION FOR RULEMAKING; Docket No. PRM 32-3; DPRM-94-3, 39 NRC 242 (1994)

ENFORCEMENT; DECISION; Docket No. 30-16055-SP (Suspension Order) (EA 86-155); CLI-94-6, 39 NRC 285 (1994)

ENFORCEMENT; ORDER APPROVING AND INCORPORATING STIPULATION FOR SETTLEMENT OF PROCEEDING AND SETTLING AND TERMINATING THE PROCEEDING; Docket No.

30-16055-CivP-R (ASLBP No. 93-682-01-CivP-R) (Civil Penalty); LBP-94-10, 39 NRC 126 (1994)

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 30-16055; DD-94-6, 39 NRC 373 (1994)

AMERICAN COLLEGE OF NUCLEAR PHYSICIANS, et al.

DENIAL OF PETITION FOR RULEMAKING; Docket No. PRM 170-3; DPRM-94-1, 39 NRC 225 (1994)

ARIZONA PUBLIC SERVICE COMPANY, et al.

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. STN 50-528, STN 50-529, STN 50-530; DD-94-4, 39 NRC 269 (1994)

BABCOCK AND WILCOX COMPANY

MATERIALS LICENSE RENEWAL; MEMORANDUM AND ORDER (Authorizing Amendment to Hearing Request); Docket No. 70-364-ML-Ren (ASLBP No. 94-687-01-ML-Ren) (Materials License No. SNM-414); LBP-94-4, 39 NRC 47 (1994)

MATERIALS LICENSE; MEMORANDUM AND ORDER (Granting Request for Hearing); Docket No. 70-364-ML-Ren (ASLBP No. 94-687-01-ML-Ren) (Materials License No. SNM-414); LBP-94-12, 39 NRC 215 (1994)

BOSTON EDISON COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-293; DD-94-7, 39 NRC 382 (1994)

CAMEO DIAGNOSTIC CENTRE, INC.

ENFORCEMENT ACTION; MEMORANDUM AND ORDER (Appointing Settlement Judge); Docket No. 30-29567-CivP (ASLBP No. 94-686-01-CivP) (Byproduct Material License No. 20-27908-01) (EA 93-005); LBP-94-13, 39 NRC 249 (1994)

CAROLINA POWER & LIGHT COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-325, 50-324; DD-94-7, 39 NRC 382 (1994)

CLEVELAND ELECTRIC ILLUMINATING COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-440, 50-441; DD-94-7, 39 NRC 382 (1994)

COMMONWEALTH EDISON COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-237, 50-249, 50-373, 50-374, 50-254, 50-265; DD-94-7, 39 NRC 382 (1994)

CONSUMERS POWER COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-155; DD-94-7, 39 NRC 382 (1994)

DETROIT EDISON COMPANY

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-341; DD-94-7, 39 NRC 382 (1994)

CASE NAME INDEX

ENTERGY OPERATIONS, INC.

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-416, 50-458; DD-94-7, 39 NRC 382 (1994)

GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-289; DD-94-3, 39 NRC 163 (1994)

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-219; DD-94-7, 39 NRC 382 (1994)

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