

NUCLEAR REGULATORY COMMISSION ISSUANCES

OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS

January 1, 1993 – June 30, 1993

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PREFACE

This is the thirty-seventh volume of issuances (1 - 515) 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, 1993 - June 30, 1993.

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

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

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

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

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

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

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



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-446

**TEXAS UTILITIES ELECTRIC
COMPANY, *et al.***
**(Comanche Peak Steam Electric
Station, Unit 2)**

January 29, 1993

The Commission denies the request of Citizens for Fair Utility Regulation (CFUR) for a hearing on the proposed issuance of an operating license for Comanche Peak, Unit 2. The Commission finds that it cannot reopen the hearing on the Unit 2 proceeding as a matter of discretion, based on a hearing request that does not address the criteria for late intervention and reopening of the record. The Commission does not preclude CFUR from filing a renewed hearing request that addresses the relevant regulatory standards.

**RULES OF PRACTICE: REOPENING OF RECORD (PRIOR TO
LICENSE ISSUANCE)**

Until the full-power license for a nuclear reactor has actually been issued, the possibility of a reopened hearing is not entirely foreclosed; a person may request a hearing concerning that reactor, even though the original time period specified in the *Federal Register* notice for filing intervention petitions has expired, if the requester can satisfy the late intervention and reopening criteria.

RULES OF PRACTICE: REOPENING OF RECORD; LATE INTERVENTION

A person seeking a discretionary hearing after the expiration of the time period for filing intervention petitions should either address the late intervention and reopening criteria or explain why they do not apply.

RULES OF PRACTICE: REOPENING OF RECORD (PARTY WITHDRAWAL)

A party that voluntarily withdraws from a proceeding that was later resolved by a settlement agreement must satisfy the late intervention standards before seeking to reopen the record of that proceeding.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a request by the Citizens for Fair Utility Regulation ("CFUR" or "Petitioner") asking that the Commission issue a *Federal Register* notice offering a hearing on the proposed issuance of an operating license for Unit 2 of the Comanche Peak Steam Electric Station ("Comanche Peak"). The Licensee, Texas Utilities Electric Company ("TUEC" or "Licensee") and the NRC Staff have responded in opposition to the request. After due consideration, we deny CFUR's request for the reasons stated below.

II. BACKGROUND

On February 5, 1979, the NRC published a *Federal Register* notice announcing TUEC's request for an operating license for both Unit 1 and Unit 2 of Comanche Peak. *See* 44 Fed. Reg. 6995 (Feb. 5, 1979). CFUR filed a timely petition to intervene and a request for a hearing on the requested licenses. On June 27, 1979, the Licensing Board issued an order granting CFUR's petition to intervene in the proceeding. *See* LBP-79-18, 9 NRC 728 (1979). The order also granted two other petitions to intervene from two other organizations and granted a request from the State of Texas to participate as an "interested state." Subsequently, the Licensing Board issued an unpublished order on April 2, 1982, granting CFUR's request to withdraw from the proceeding. A second intervenor had already withdrawn in 1981.

The proceeding continued with the Citizens Association for Sound Energy ("CASE") as the sole intervenor until the parties reached a settlement agreement dismissing the proceeding. See LBP-88-18A, 28 NRC 101 (1988); LBP-88-18B, 28 NRC 103 (1988). At that time, CFUR attempted to re-intervene in the proceeding; however, the Commission found that CFUR had failed to demonstrate that its petition met the criteria for late intervention in 10 C.F.R. § 2.714(a)(1)(i)-(v). See CLI-88-12, 28 NRC 605, 609 (1988), as modified, CLI-89-6, 29 NRC 348 (1989). CFUR filed a petition for review of that denial but the Commission's decision was upheld. *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir.), cert. denied, 111 S. Ct. 246 (1990).

The NRC Staff issued a full-power operating license to TUEC for Comanche Peak Unit 1 on April 17, 1990. The NRC Staff has now completed its preliminary reviews and is currently preparing to issue a low-power license for Comanche Peak Unit 2.

III. ANALYSIS

Issuance of the full-power license for Unit 1 closed out the opportunity for a hearing on the Unit 1 operating license under the 1979 *Federal Register* notice; however, until the full-power license for Unit 2 has actually been issued, the possibility of a reopened hearing is not entirely foreclosed. For example, a person may request a hearing concerning the Unit 2 operating license under the 1979 *Federal Register* notice if the requestor can satisfy the late intervention and reopening criteria. See *Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-92-1, 35 NRC 1, 6 n.5 (1992) ("CLI-92-1").

In essence, CFUR's request constitutes a petition for late intervention and to reopen the record. However, CFUR has failed to address the standards governing such requests set out in 10 C.F.R. Part 2. Therefore, it appears that CFUR is asking the Commission to reopen the hearing on the Comanche Peak Unit 2 operating license as a matter of discretion without applying the Commission's late intervention and reopening standards. Yet CFUR offers no explanation why the Commission should ignore the standards in 10 C.F.R. Part 2 for late intervention and reopening such as CFUR proposes. CFUR does assert that new issues have arisen since the initial hearings and that hearings on these matters could be beneficial. Whether the issues are, in fact, new and whether the hearings could be beneficial in resolving them must be weighed against the tardiness with which the petition has been presented to the Commission, the contribution the petitioners could make in resolving those issues, and the resulting delay in the proceeding. This is the very purpose for which the late intervention and reopening standards were created. We decline to ignore these

standards and, therefore, we deny CFUR's request. By this decision, we do not preclude CFUR from filing a renewed request for a hearing that addresses the relevant regulatory standards.¹

For the above reasons, we deny CFUR's request for a discretionary offer of reopened hearings on the Comanche Peak Unit 2 operating license.²

It is so ORDERED.

For the Commission,

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of January 1993.

¹ As we noted in CLI-92-1, one must first become a *party* to a proceeding before seeking to reopen that proceeding. See generally CLI-92-1. Because CFUR had voluntarily withdrawn from the original *Comanche Peak* proceedings before the settlement agreement was concluded, CFUR does not now have the right to seek to reopen the record of the proceeding without first seeking late intervention in the proceeding. In addition, as we also pointed out in CLI-92-1, late intervention and reopening is now available only with regard to the Unit 2 proceedings. CLI-92-1, 35 NRC at 6 n.5.

² We have reviewed the technical allegations raised in the CFUR Request and the responses to those allegations by both the Licensee and the Staff. In light of the affidavits attached to the Staff's Response, we find no public health and safety reason to prevent issuance of the low-power license for Unit 2 at this time.

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)

January 21, 1993

The Licensing Board grants the request for a hearing/petition for leave to intervene of a petitioner in a proceeding concerning the proposed extension of operating licenses to recover or recapture into those licenses the period of construction of the reactors.

RULES OF PRACTICE: STANDING

To establish standing, a petitioner must demonstrate that it has suffered or will suffer "injury in fact," that the injury falls within the zone of interests sought to be protected by the statutes being enforced, and that the injury is redressable by a favorable decision in the proceeding. *Public Service Co. of*

New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991).

RULES OF PRACTICE: STANDING (INJURY IN FACT)

A demonstration of "injury in fact" must be actual but need not be substantial. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979), *aff'd*, ALAB-549, 9 NRC 644 (1979). The incremental risk of reactor operation for an additional 12-15 years is sufficient to invoke the presumption of injury in fact for persons resident from 10 to 20 miles from the facility. To require a direct showing would in effect emasculate the hearing procedures by offering a hearing that could not in fact likely be obtained. *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 564 (1980).

RULES OF PRACTICE: STANDING

A group does not have standing to assert the interest of plant workers, where it has no such workers among its members.

RULES OF PRACTICE: CONTENTIONS

The Commission's revised contention rule, which "raise[d] the threshold" for the submission of contentions, has been held valid on its face, although susceptible to misapplication so as improperly to deny the admissibility of contentions raising material issues. *Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990).

ADJUDICATORY HEARINGS: SCOPE OF REVIEW

The scope of review for construction period recapture proceedings may be broader than that for license renewal, inasmuch as the Commission issued a new rule (10 C.F.R. Part 54) for license renewal specifically spelling out and limiting the scope of such proceedings.

RULES OF PRACTICE: SCHEDULING OF HEARINGS

Even though a license amendment request is filed many years prior to its actual need, it will not be deemed premature where there is no specified application period. However, any conditions found necessary will be applied as

of the date of the licensing board's final decision or (assuming that the board does not bar the amendments) of the license amendment, whichever comes later.

**RULES OF PRACTICE: SHOW-CAUSE PROCEEDING
(EXCLUSIVITY)**

Although the 10 C.F.R. § 2.206 forum may be technically available for a petitioner that wishes to assert operational problems, it is not the exclusive forum. Where operational issues are relevant to a recapture proceeding, they may also be raised in that proceeding. Moreover, the hearing rights available through a section 2.206 petition are scarcely equivalent to, and not an adequate substitute for, hearing rights available in a licensing proceeding. See *Washington Public Power Supply System (WPPSS Nuclear Project No. 3)*, ALAB-747, 18 NRC 1167, 1175-77 (1983).

RULES OF PRACTICE: LITIGABILITY OF ISSUES

In a construction period recapture proceeding, implementation of maintenance and surveillance programs may be challenged, even though the paper programs are not being modified. Irrespective of how comprehensive a program may appear on paper, it will be essentially without value unless it is timely, continuously, and properly implemented.

RULES OF PRACTICE: LITIGABILITY OF ISSUES

Numerous, repetitious cited violations or other incidents may form the basis for a contention questioning the adequacy of a maintenance or surveillance program, even though none of the individual violations or other incidents rises to the level of a serious safety issue. When sufficient repetitive or similar incidents are demonstrated, aggregation and/or escalation of sanctions may be in order.

RULES OF PRACTICE: CONTENTIONS

In proving its claim, a petitioner is not limited to the specific facts relied on to have its contention accepted, as long as the additional facts are material to the contention.

RULES OF PRACTICE: RESPONSIBILITIES OF PARTIES

The "ironclad obligation" of a petitioner to examine publicly available documentary evidence in support of its contentions applies only to information in

support of a contention. A requirement also to examine contrary publicly available documentary evidence would unduly exacerbate the considerable threshold that a petitioner must already meet under the current revised contention rules.

NEPA: LONG-TERM STORAGE

A contention attempting to raise an issue of the lack of long-term spent fuel storage is barred as a matter of law from operating license and operating license amendment proceedings. 10 C.F.R. §§ 51.23(a), 51.53(a).

EMERGENCY PLANS: CONTENT

The Commission has limited the scope of litigation on emergency preparedness exercises to a consideration of whether the results of an exercise indicate that emergency plans are fundamentally flawed.

RULES OF PRACTICE: JURISDICTION OF BOARDS

A contention challenging the appropriateness of a "no significant hazards consideration" finding of the NRC Staff is outside the Board's jurisdiction. It is solely within the province of the Staff. 10 C.F.R. § 50.58(b)(6).

NEPA: PROCEDURES

In a situation where an Environmental Impact Statement (EIS) is neither required nor categorically excluded, a contention seeking an EIS, filed prior to the Staff's issuance of an Environmental Assessment (EA), is premature. After Staff issuance of an EA, a late-filed contention may be submitted (assuming the EA does not call for an EIS).

PREHEARING CONFERENCE ORDER **(Ruling upon Intervention Petition and** **Authorizing Hearing)**

This proceeding involves the proposed amendment of the operating licenses for the Diablo Canyon Nuclear Power Plant, Units 1 and 2, to extend the life of those licenses by more than 13 years (for Unit 1) and almost 15 years (for Unit 2). As explained in our Memorandum and Order (Filing Schedules and Prehearing Conference), LBP-92-27, 36 NRC 196 (1992) (hereinafter, "LBP-92-27"), the amendments are intended to "recover" or "recapture" into the operating

licenses the period of construction for the reactors, to conform the licenses with Commission practice, in effect since 1982, of licensing nuclear reactors for a 40-year period of operation.

In LBP-92-27, we also considered a petition for leave to intervene and request for a hearing filed by San Luis Obispo Mothers for Peace ("MFP" or "Petitioner"). We pointed out that petitioners for intervention had a right to amend their petitions, and we established schedules for the filing of any such amendment and responses by Pacific Gas & Electric Co. ("PG&E" or "Applicant") and the NRC Staff.

In accord with those schedules, MFP on October 26, 1992, filed a supplement to its petition. The Applicant and NRC Staff filed timely responses on November 18, 1992, and November 30, 1992, respectively.¹ On December 10, 1992, we held a prehearing conference in San Luis Obispo, California, to consider these filings.²

As outlined in LBP-92-27, a petitioner for intervention must, as a requirement to achieve party status, establish that it has standing and that it has proffered at least one viable contention. The Applicant opposes MFP's revised petition, for both lack of standing and the failure to assert a valid contention. The Staff also opposes MFP's petition, based on lack of a valid contention.

For the reasons set forth below, we are hereby granting MFP's petition for leave to intervene and request for a hearing. In view of that action, we are also issuing a Notice of Hearing.

I. STANDING

As set forth in LBP-92-27, to establish standing, the petitioner must demonstrate that it has suffered or will suffer "injury in fact," that the injury falls within the zone of interests sought to be protected by the statutes being enforced — here, the Atomic Energy Act or the National Environmental Policy Act (NEPA) — and that the injury is redressable by a favorable decision in the proceeding. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991). In addition, a group such as MFP, to the extent it asserts standing as a representative of the interests of its members (as is the case here), must demonstrate that it is authorized to do so.

¹ On November 23, 1992, the Applicant filed a correction to its response. At the prehearing conference on December 10, 1992 (*see note 2, infra*), MFP and the Staff made several corrections to their filings.

² The conference was announced through our Notice of Prehearing Conference, dated November 2, 1992, published at 57 Fed. Reg. 53,362 (Nov. 9, 1992). In accordance with the invitation in that Notice, the Applicant and MFP elected to file proposed agenda for the conference. (References to the transcript of this prehearing conference are hereafter cited as Tr. —.) As also announced by that Notice, the Board heard oral limited appearance statements from members of the public on Thursday evening, December 10, 1992 (Tr. 218-351), and Friday morning, December 11, 1992 (Tr. 352-406).

To assert its standing, MFP has proffered the affidavits of five members, asserting that they reside and/or carry on businesses 10 (one member), 15 (two members), and 20 (two members) miles from the facility. Each expresses a concern that operation of the plants within the recapture period will be unsafe. In its petition, MFP indicates that this position is founded on reasons set forth in its proposed contentions.³ All of them also authorize MFP to represent their interests in the proceeding.

In LBP-92-27, we pointed to the Commission's recent decision that dealt with standing in proceedings involving amendments to operating licenses. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989). There, the Commission noted that, in construction permit or operating license proceedings for nuclear reactors, residence of a person within 50 miles of a facility would be sufficient to confer standing. The Commission went on to hold that this 50-mile presumption did not apply in all operating license amendment proceedings but only in those involving a "significant" amendment involving "obvious potential for offsite consequences." *Id.*, 30 NRC at 329-30.⁴ For other amendments, a petitioner would have to demonstrate a particular "injury in fact" flowing from the amendment in order to participate in the proceeding.

The Applicant challenges the Petitioner's demonstration of standing.⁵ It claims that the amendment in question is not "significant" but indeed is virtually ministerial — i.e., "an administrative change to the license" with no changes in authorized structures, procedures, or operations.⁶ Therefore, according to the Applicant, the 50-mile presumption does not apply and a petitioner would have to demonstrate actual "injury in fact" in order to be admitted as a party. The Applicant thus contends that MFP's demonstration of the residence of five MFP members from 10 to 20 miles from the plant is not sufficient.⁷

For its part, the NRC Staff observes that "the geographical 50 miles seem[s] reasonable given that this does have to do with operation."⁸ The Staff does not challenge MFP's demonstration of standing, except with respect to Contention VI, which seeks to litigate certain of the Applicant's practices on the basis,

³ MFP October 26, 1992 Supplemental Petition (hereinafter, MFP Supplement), at 2-3.

⁴ In that proceeding, the Commission denied for lack of standing the intervention request of a resident living 40 miles from the facility. The proceeding concerned a proposed exemption from regulatory requirements dealing with the use of "protection factors" in respirators used by workers in radioactive environments. The Commission commented that "the exemption . . . deals with the protection of workers in the plant, not protection of the general public. . . . The Petitioner [for intervention] is not a worker at the plant." *St. Lucie*, 30 NRC at 329.

⁵ Pacific Gas and Electric Company's Answer to Request for Hearing and Petition to Intervene, dated September 4, 1992, at 11-14; Pacific Gas and Electric Company's Response to Petitioner's Supplement to Petition to Intervene, dated November 18, 1992 (hereinafter, PG&E Response), at 51-56.

⁶ Tr. 15.

⁷ No party currently challenges MFP's demonstration that the organization is authorized to represent the interests of the five individual members who submitted affidavits.

⁸ Tr. 34.

inter alia, of alleged harm to workers.⁹ The Staff claims that MFP has not demonstrated authority to represent workers and thus lacks standing to present a portion of that contention. (The Staff opposes Contention VI in its entirety on other grounds as well.)

In response to the Applicant's claims on standing, MFP replies that the members it is representing will be subject to a risk of an accident with offsite consequences for an additional 13 to 15 years (from Units 1 and 2, respectively). It thus deems the amendment in question to be "significant" and to possess an "obvious potential for offsite consequences."¹⁰ It differentiates this amendment from the "minor change to . . . existing operation" considered in cases cited by the Applicant.

In reply to the Staff's claim that MFP cannot assert the portion of Contention VI raising matters affecting workers because none of its members are workers, MFP concedes that it has no members who are also Diablo Canyon employees.¹¹ It also asserts that Contention VI additionally deals with harm to members of the general public; we will address this claim in our discussion of the contention, *infra*.

It is clear to us that a demonstration of "injury in fact" must be actual but need not be substantial. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979), *aff'd*, ALAB-549, 9 NRC 644 (1979). MFP claims that the risk of accidents from the facility is a real risk and that, under the amendment, it will continue for more years than if the amendment were not granted. Although the opportunity for considering the risk of accidents was earlier available during the operating license proceeding, as claimed by the Applicant, this does not mean that such risk may not be a basis for standing in this proceeding. The risk, even though it then may have been evaluated by NRC as being acceptably small, nevertheless continues — it is in part a function of time — and constitutes the necessary showing of "injury in fact" for this proceeding.

A direct showing of injury in fact caused by the proposed amendment, as the Applicant claims is necessary to establish standing, could probably not be shown,¹² for the amendment authorizes no substantive changes except for the added risk stemming from additional time of exposure. That being so, we do not

⁹ NRC Staff Response to San Luis Obispo Mothers for Peace Supplement to Petition to Intervene, dated November 30, 1992 (hereinafter, NRC Staff Response), at 3-6.

¹⁰ MFP Supplement at 2-3.

¹¹ Tr. 160-61.

¹² The "concerns" expressed by the five MFP members, although not satisfying the Applicant's criteria, might possibly be adequate in this regard, although we are not relying on those expressed concerns to demonstrate "injury in fact." Nor does the Applicant accept as a showing of real injury in fact the incremental risk asserted by MFP as the foundation of its standing claim (Tr. 30-33).

read the Commission's notice as in effect emasculating the hearing procedures by offering a hearing that could not in fact likely be obtained.

As stated by the Appeal Board with respect to a comparable claim in a construction permit extension proceeding:

If the applicant's premise is right, it would appear to follow that there would not be many, if any, persons resident in the general area of a nuclear facility under construction who could obtain intervention in a permit extension proceeding such as the one at bar. The applicant provides no examples of possible "additional or incremental injury beyond that authorized by the construction permit" which might flow from the extension of the completion date specified in the permit. And very few come readily to mind.⁹ Thus, what the applicant's position comes down to is that the notice of opportunity for hearing amounted to a tender of public participational rights on terms which almost no individual could meet.

We should, of course, be most cautious in treating Commission notices (whether issued by the Commission itself or its delegate) as being, in practical effect, illusory.

⁹ Offhand, we can think of only one: the enlargement of the time interval during which the surrounding community must endure the transitory environmental and socio-economic effects of the construction work itself. . . .

Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 564 (1980).

This Appeal Board conclusion would appear to be fully applicable to the situation here. Moreover, we also believe that the additional operation of a nuclear reactor, for 13 to 15 years, in itself would constitute significant additional exposure to risk for nearby residents, thereby establishing potential "injury in fact."

For these reasons, we are accepting MFP's demonstration of "injury in fact." As for the aspects of standing beyond "injury in fact," MFP through its contentions has alleged harms involving the public health and safety and the environment. Thus its injuries arguably fall within the zone of interests sought to be protected by the Atomic Energy Act and NEPA. Further, MFP has demonstrated how it could attain relief for the problems it asserts — either by license denial or by conditions relating to the problem in question.

In conclusion, at the prehearing conference we stated that we had determined that MFP has standing to participate in this proceeding.¹³ That conclusion was not intended to include the representation of plant workers, as comprehended by Contention VI. We reiterate that conclusion now. Except with respect to its attempt to raise the concerns of workers in Contention VI, MFP has demonstrated its standing to participate as a party in this proceeding.

¹³ Tr. 41-42.

II. CONTENTIONS

1. General

In order to be admitted as a party, a petitioner for intervention must not only establish its standing but must also proffer at least one valid contention. 10 C.F.R. § 2.714(b)(1). In its October 26, 1992 supplement to its intervention petition, MFP submitted eleven contentions (numbered I-XI). The Applicant and Staff, in their responses, each opposed the admissibility of all of the contentions. At the prehearing conference, we considered each contention, but we ruled on only one of them (No. X) which we denied as being beyond our jurisdiction to consider. We now turn to all of the contentions, which we discuss *seriatim*.

At the outset, we would note that contentions in this proceeding are governed by the recently amended version of 10 C.F.R. § 2.714, the requirements of which we summarized in LBP-92-97. These amendments were intended by the Commission to "raise the threshold" for the admissibility of contentions. 54 Fed. Reg. 33,168 (Aug. 11, 1989).

Although petitioners long have been required to identify a "basis" for contentions, they now must identify facts or expert opinion supporting the contention, together with demonstrating that they have a "genuine dispute with the applicant on an issue of fact or law." *Id.* In addition, under both the former and the revised rule, contentions asserted must be within the scope of the proposed licensing action.

The revised contention requirement was challenged by an intervenor group on the basis, *inter alia*, that it deprived intervenors of the hearing provided by section 189a of the Atomic Energy Act. The court rejected this claim and held the revised rules to be *valid on their face*. *Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990). In doing so, however, the court observed that

The NRC rules of course *could be applied* so as to prevent *all parties* from raising a material issue. But "[e]ven assuming *arguendo* that we were to find that these instances . . . [would] constitute specific misapplications of the rule . . . they [would] suggest, at most, only that the rule might in the future be misapplied. Such arguments are of course inappropriate here, where the rule is being challenged on its face." [Citation omitted.]

Id. at 56. In reviewing MFP's proposed contentions, we will keep in mind both the upholding of the purpose of the rule and the need to interpret it as not foreclosing reasonable inquiries into the licensing action before us.

As for the scope of the present licensing action, the Applicant would treat the amendment as an "administrative change," whereas the petitioner appears to consider it the equivalent of "initial licensing." In our view, it is neither. The Commission has not spoken with regard to such scope. There is no legal

precedent that would define such scope, although the decision of the Licensing Board in the *Vermont Yankee* recapture proceeding provides some guidance. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85 (1990).

The Applicant asserts that, logically, the scope could not be broader than that for license renewal (where the Commission strictly limited the issues that could be considered). Indeed, the single safety issue that can be considered in license renewal — age-related degradation of structures, systems, and components (SSCs) — would not, under the Applicant's view, be litigable in this proceeding inasmuch as the SSCs have, according to the Applicant, been previously analyzed for a full 40 years of operation (the license term that is currently being sought). The Commission, however, passed a new rule in order to effectuate such limitation of issues for license renewal. It explicitly defined the issues that could be litigated in those proceedings. 10 C.F.R. Part 54, in particular, 10 C.F.R. § 54.29. It has enacted no similar limitation with respect to recapture proceedings. Therefore, absent a regulatory pronouncement of this type, the scope of permissible issues would be similar to that permitted with respect to any license amendment involving a degree of risk to the public.

MFP also asserts that the application under review is premature, that the amendment is not needed until 2008 at the earliest, and that the proceeding should thus be deferred until approximately 2000. The Applicant expressed certain business reasons why it filed its requested amendments at this time and also pointed out that there is no regulatory provision that would bar the current application at this time. The Staff agrees. We conclude that, unlike license renewal, where a specific application period is specified (10 C.F.R. § 54.17), there appears to be no regulatory bar for the early application before us.

We thus will consider the application at this time. On the other hand, although certain of the contentions involve matters that could conceivably be moot by the time of the recapture period, we will take facts as they exist today and apply the results of our review as of the date of our final decision in this proceeding or (assuming we do not bar the amendments) of the license amendment, whichever comes later. In other words, the Applicant cannot have it both ways: with the early application comes the need to consider and rule based on facts that currently exist.

We turn now to the contentions before us.

2. Contention I

The San Luis Obispo Mothers for Peace contends that Pacific Gas and Electric Company's proposal to extend the life of the Diablo Canyon Nuclear Power Plant for more than 13 years

(Unit 1) and almost 15 years (Unit 2) should be denied because PG&E lacks a sufficiently effective and comprehensive surveillance and maintenance program.¹⁴

a. MFP Position

In asserting this contention, MFP focuses on section 4.2.3 ("Surveillance and Maintenance Programs") of the Applicant's License Amendment Request 92-04, in which PG&E submitted its request for the operating license amendments at issue in this proceeding. That section states that these "programs assure that any significant degradation of plant equipment will be promptly identified and corrected throughout the proposed 40-year operating license terms."¹⁵ Throughout the application, according to MFP, PG&E relies on these programs in justifying the acceptability of many of the SSCs. MFP asserts that these programs "[have] been noted as having significant weaknesses."¹⁶ MFP attributes the weaknesses to the "performance based pricing" rate-setting mechanism to which PG&E is subjected by the California Public Utility Commission.

As bases for the alleged weaknesses in the programs, MFP cites a number of NRC inspection reports, notices of violation directed at the Applicant, observations of various NRC personnel (at enforcement conferences and through other means), and Applicant Licensee Event Reports (LERs). MFP leads off with alleged instances where the NRC has "repeatedly cited PG&E for its slow response to correct maintenance problems." Specifically:

1. Inspection Report 92-17 (May 12, 1992), concerning failure to correct a condition involving reverse rotation of containment fan cooler units (CFCU) 1-5.
2. A Notice of Violation, dated June 19, 1992, involving the same CFCUs.
3. An enforcement conference report (Inspection Report 92-19) also relating to the CFCU matter and identifying three apparent violations (one of which was later withdrawn). In that same report, an NRC official allegedly criticized PG&E for the excessive time taken to address certain operational problems in a systematic manner.
4. Failure promptly or effectively to identify problems relating to the positive displacement charging pumps (PDPs), as discovered in an inspection conducted from June 2, 1992 through July 13, 1992 (based on Notice of Violation dated August [1]3, 1992, Inspection Report 92-20.)

¹⁴ MFP Supplement at 5.

¹⁵ The "Surveillance and Maintenance Programs" covered by this section are defined to include the Inservice Inspection (ISI) Program, Inservice Testing (IST) Program, Environmental Qualification (EQ) Program, and Maintenance Program.

¹⁶ MFP Supplement at 6.

MFP next asserts that “[m]aintenance and surveillance practices at Diablo Canyon . . . have been further criticized by the NRC for lack of attention to detail, poor or incomplete work, inadequate instructions to personnel, and ineffective surveillance.”¹⁷ The following examples are provided:

1. The first example provided is not an “NRC criticism” but rather a Licensee Event Report (LER) submitted to NRC by the Applicant. The report stated that tools, plastic tool bags, clothing and other items had been left unattended in the containment. A PG&E investigation determined that the cause was the failure of four individuals who entered the containment to comply with surveillance recordkeeping requirements. LER 2-91-012-00, dated March 5, 1992.
2. The discovery by NRC during a January 1, 1992-February 3, 1992 inspection (92-01) of a maintenance violation, including the failure of licensee personnel to detect for over 7 days the failure of a reactor cavity level instrument; this was a repeat of a 1990 failure of the instrument that had not been detected for over 2 months. A Notice of Violation dated February 28, 1992 was cited.
3. The report by NRC (Inspection Report 91-39, dated January 24, 1992) of weaknesses in the motor-operated valve (MOV) testing program.
4. The report by NRC (Inspection Report 92-14, dated June 5, 1992) of PG&E’s failure to provide written instructions for the assembly of the expansion bellows to the turbocharger of the diesel generator EDG-2-3.
5. The next example is not a report by NRC but instead was derived from an LER. It concerned corrosion on DFO supply piping that left the liner below minimum wall thickness requirements. It also concerned maintenance of coal tar protective coating. LER 1-92-006-00, dated August 6, 1992.
6. The discovery by NRC (Inspection Report 92-21, dated August 18, 1992) of gum, candy wrappers, sunflower seeds, and/or smoked cigarettes in 12 different locations in which eating, drinking and smoking are banned.

At the prehearing conference, MFP referred to several other asserted violations. It sought to distribute a supplemental statement, but the Board declined to permit it to do so, inasmuch as the Applicant or NRC Staff would not have had an opportunity to respond adequately. According to MFP, all of the examples reinforced MFP’s position that the sheer number and repetitiveness of the violations or discrepancies reflected on its face a deficiency in the maintenance or surveillance programs. Because of the lack of an opportunity for proper response, however, we are not considering these additional violations in determining the admissibility of this contention.

In view of all of the foregoing examples of alleged deficiencies in maintenance and surveillance practices, as set forth in its Supplemental Petition, MFP claims that the Applicant has had a consistent and chronic pattern of poor

¹⁷ *Id.* at 9.

maintenance and surveillance practices, that its program is neither adequate nor effective and that the license amendment should be denied. Alternatively, MFP indicated that it would accept license conditions if denial were not warranted (Tr. 59).

b. Applicant and Staff Positions

The Applicant and Staff each oppose this contention on a variety of grounds. The Applicant first expresses the view that the maintenance and surveillance programs are outside the scope of the proceeding, inasmuch as the amendment offers no changes to these programs, which were subject to review at the operating license (OL) stage of review. It would relegate the Petitioner's challenge to these programs to an enforcement forum, as provided by 10 C.F.R. § 2.206, for operational problems of the type underlying this contention.

Next, alternatively assuming (but not conceding) that implementation of these programs may be within the scope of the proceeding, it expresses the view that the cited inspection reports, LERs and notices of violation represent isolated, out-of-context events that do not have any implications about the adequacy of the Applicant's maintenance or surveillance programs. The Applicant also cites favorable NRC Staff findings concerning plant operations, as well as what it deems to be favorable Staff findings in the Systematic Assessment of Licensee Performance (SALP) program. It asserts that financial considerations bearing upon the California rate system are not subject to review in an NRC licensing proceeding. Finally, it points out that the majority of adverse findings concerning the maintenance and surveillance programs have been "closed out" to the Staff's satisfaction. The Applicant concludes that there is no real dispute between it and MFP inasmuch as the cited bases are inadequate to serve as such.¹⁸

For its part, the Staff initially takes the position that, to the extent that MFP raises matters that concern current operation of the facility rather than operation in the recapture period, those concerns are properly raised in a petition pursuant to section 2.206 and "may not" be admitted into this proceeding.¹⁹ The Staff goes on to describe why the various violations or findings cited by MFP cannot, in the Staff's view, form a valid basis for a contention.

With respect to the CFCU assertions of MFP, the Staff points out that the Notice of Violation on this matter was withdrawn and that a contention may not be based on information repudiated by its source. (As an aside, the Staff notes that the Licensee was cited for other matters involving improper maintenance of the dampers (in the CFCUs).) The Staff also points out that the CFCU situation was identified in an LER, not a Staff inspection report (a circumstance

¹⁸ PG&E Response at 3-4, 14-25; Tr. 84.

¹⁹ Staff Response at 10.

that MFP acknowledged at the prehearing conference).²⁰ The Staff concludes that the CFCU maintenance problems will be mooted long before the recapture period.²¹

c. Board Analysis

(i) We disagree with both the Applicant and Staff that operational problems such as those cited by MFP need be relegated for challenges to the section 2.206 forum. That provision does no more than to permit the petitioner to request the NRC Staff — a party to this proceeding — to institute enforcement action against the Applicant for a particular violation or activity. With respect to the matters brought to our attention by MFP, the Staff has until this time not chosen to take any such action.

Although the section 2.206 forum may be technically available to MFP, it is not the exclusive means for challenging these practices. When it provided an opportunity for a hearing, the Commission opened the door of this proceeding for licensing challenges of this type. Moreover, the hearing rights available to MFP through section 2.206 are scarcely equivalent to, and not an adequate substitute for, those available in this proceeding. See *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-77 (1983). Among other matters, the decision of the Staff to take or not take enforcement action pursuant to section 2.206 is purely discretionary — it is not subject to review by the Commission (except on its own motion) or by courts, even for abuse of discretion. 10 C.F.R. § 2.206(c)(1) and (2); *Heckler v. Cheney*, 470 U.S. 821 (1985).²² Further, hearings as a result of section 2.206 petitions are almost never granted.

For these reasons, we do not believe that the Commission has closed off the various challenges advanced by MFP to the adequacy of the Applicant's surveillance and maintenance programs. The Applicant has relied extensively on those programs to support the adequacy of its proposed amendment. MFP has referenced that reliance. Moreover, consideration of the implementation of those programs is one of the limited means available to challenge the adequacy of those programs. The only aspect of the programs that could have been examined at the OL stage of review was the validity of the paper programs. But, even

²⁰ Tr. 98-99.

²¹ Staff Response at 14 n.8.

²² The Commission has agreed that section 2.206 actions under 10 C.F.R. Part 52 are reviewable — unlike actions taken under section 2.206 in other contexts. Such reviewability in that context was one of the primary ingredients in the judicial approval of Part 52. *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169 (1992). The Court there noted that "the use to which a § 2.206 petition is put — not its form — governs its reviewability." *Id.* at 1178. The Commission or Staff (or Applicant) has not suggested that the section 2.206 petition to which they would relegate MFP would be reviewable at the behest of MFP, either by the Commission itself or judicially.

assuming the continuing adequacy of the paper programs, the implementation of those programs is the only real gauge of their effectiveness. As the Appeal Board observed with respect to analytically similar quality assurance (QA) programs,

No QA program is self-executing. Thus, irrespective of how comprehensive it may appear on paper, the program will be essentially without value unless it is timely, continuously and properly implemented.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973). We thus reject the positions of the Applicant and Staff that the implementation of the maintenance and surveillance programs cannot be questioned in this proceeding.

Further, the prior opportunity at the OL stage of review to question the paper programs was in itself likely to have been circumscribed. For, on paper, the only statement of those programs normally appears in various technical specifications — there is no detailed program set forth in the Applicant's FSAR, except through incorporation by reference. Moreover, the programs as a whole need not comply with any NRC regulations and are merely subject to approval by the NRC Staff.²³ Indeed, at the operating license stage, a timely challenge by an intervenor would not have been possible inasmuch as proposed technical specifications were not issued at the time when timely petitions would have had to have been submitted. (Late-filed challenges, although permissible, are explicitly not favored, and must meet a balancing of the factors set forth in 10 C.F.R. § 2.714.)

(ii) As for the claims that the cited incidents are not sufficient to indicate a problem with the surveillance or maintenance programs, we disagree. Although the cited incidents each may rise to a level no higher than a level IV violation, such violations "are of more than minor concern, i.e., if left uncorrected they could lead to a more serious concern." 10 C.F.R. Part 2, Appendix C, IV. Moreover, when sufficient repetitive or similar incidents are demonstrated, aggregation and/or escalation of sanctions may well be in order. See *Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297, 305 (1991).

Sufficient incidents have here been cited so that we could not, as a matter of law, hold that there are no problems with the maintenance or surveillance programs. Although none of the cited incidents individually rises to the level of a serious violation, collectively they might well have some safety significance, as MFP claims.

Moreover, although some of the cited incidents may in fact have little or no bearing on surveillance or maintenance practices, that is an evidentiary matter. (The single CFCU matter that the Applicant and Staff focus on as having no

²³ The Commission has issued a Policy Statement concerning maintenance programs, but that Statement explicitly declines to impose any particular standards. 54 Fed. Reg. 50,611 (Dec. 8, 1989).

bearing on maintenance or surveillance was not primarily relied upon by MFP — only the CFCU violations bearing on maintenance.²⁴) The favorable comments cited by the Applicant may counterbalance the negative comments relied on by MFP. But that is also an evidentiary question. Nor does the circumstance (relied on by the Applicant) that all of the alleged violations or adverse comments have been “closed out” by the NRC Staff indicate that implementation problems do not exist. Indeed, if the violations had not been closed out, far more serious enforcement remedies might well be in order.

Nor is there any indication that the closeouts will render the implementation question moot by the time of the recapture period. In any event, were we to find that implementation conditions (as contrasted with license amendment denial) were warranted because of problems with the maintenance or surveillance programs, we would make those conditions effective as of the date of issuance of our Order in this proceeding or of the license amendment, whichever came later.²⁵

(iii) For these reasons, we find that Contention I is a valid contention, and we hereby accept it into this proceeding. The contention is similar in type to that accepted by the Licensing Board in *Vermont Yankee*, LBP-90-6, *supra*. The Applicant’s point that the defects in the implementation of the maintenance or surveillance programs here are less severe than in *Vermont Yankee* is another purely evidentiary question. And the contrast that the Applicant and Staff make concerning the more stringent contention rule in effect here is not meritorious. The revised contention rule requires a statement of facts — which MFP has provided. The facts and the issue raised thereby must also be material — a requirement that MFP in our opinion has satisfied. Finally, the revised rule requires a showing of a genuine dispute with the Applicant which, in our view, MFP has demonstrated.

In sum, were the new contention rule to be interpreted to rule out this contention, a material issue would in effect be ruled out of this proceeding. This is the type of “specific misapplication of the rule” that the Court in *UCS* indicated would be improper under the rule as applied.

We note that, in proving its claim, MFP will not be limited to the specific incidents relied on to admit its contention. As set forth in the Statement of Considerations for the revised contention rule,

²⁴ See MFP Supplement at 11.

²⁵ We note that, on the basis of a proposed “no significant hazards” analysis, the Applicant seeks to make the proposed amendments effective prior to the conclusion of this proceeding.

[The contention] requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinion, be it one fact or opinion or many, of which it is aware *at that point in time* which provide the basis for its contention.

54 Fed. Reg. at 33,170 (emphasis supplied).

Incidents such as those that MFP attempted to read into the record at the prehearing conference may be acceptable, as long as they are material to the implementation of the surveillance and maintenance programs. To the extent that MFP is asked to do so, however, it must identify prior to hearing all of the incidents on which it intends to rely in advancing and going forward with its contention.

3. *Contention II*

The San Luis Obispo Mothers for Peace contends that the proposed license extension at Diablo Canyon Nuclear Power Plant should not be granted because PG&E's employees have not proven themselves skilled, reliable or motivated enough to adequately protect the public safety.²⁶

a. *MFP Position*

In support of this contention, MFP claims that the Diablo Canyon plant has been "plagued" with incidents related to personnel errors. It cites differing incidents or NRC comments set forth in four LERs, one PG&E letter to NRC, and three NRC inspection reports (one of which concerned a report by PG&E and led to a Notice of Violation). It concludes, generally, that the incidents in question demonstrate a "consistent and repetitive pattern of poor and unsafe personnel performance" and that the license "extension" would further jeopardize safety, because "personnel at the plant have not exhibited the expertise or motivation to resolve detected safety problems or to prevent dangerous situations."²⁷ Finally, it adds that, as the plant ages, experienced personnel will retire and there is no assurance that qualified personnel can be obtained and, further, that a "maintenance program must rely on experienced and qualified workers."²⁸

b. *Applicant and Staff Positions*

The Applicant opposes this contention on essentially two bases. First, it claims that the contention represents a challenge to PG&E's technical qualifications and that such issue was considered during initial plant licensing. Second,

²⁶ MFP Supplement at 13-14.

²⁷ *Id.* at 16.

²⁸ *Id.* at 16-17.

it asserts that the contention fails for lack of a basis indicating a genuine dispute between it and MFP. Specifically, it denies the accuracy of the claim of a consistent and repetitive pattern of poor and unsafe personnel performance. It derogates the significance of the cited incidents, claiming that they do not support the systematic programmatic conclusion suggested by MFP. It also criticizes MFP for ignoring favorable SALP reports in the functional area of operations.²⁹ Finally, it concludes that, even if proved, the assertions would not entitle MFP to relief.

The Staff acknowledges that the incidents cited resulted from personnel errors. But it asserts that, considered together, they do not reflect any recurring or pervasive problem with the competence of PG&E's employees. According to the Staff, they represent isolated incidents of the type that inevitably occur in the operation of a reactor, and do not reflect any underlying breakdown in the training, motivation, or reliability of the employees.³⁰

c. Board Analysis

At the outset, we reject the Applicant's position that, because the technical qualifications of the Applicant were open to examination during initial licensing, they perforce cannot be examined here. For that examination could not have reflected any experience in operating with those technical qualifications. To claim that the program will stay the same throughout the recapture period and thus cannot be reexamined is to state that, irrespective of the quality of personnel performance, there can be no collective examination of the company's operation — a result that would defy rational analysis and ignore the need for adequate protection of the public health and safety. And, as set forth in conjunction with Contention I (p. 18, *supra*), the potential examination of various personnel practices under section 2.206 is not a practical substitute for a hearing here, at least for anyone other than the NRC Staff.

The other major claim of both the Applicant and Staff has more merit. As they each point out, the incidents cited appear to have no common thread. Specifically, the four that were uncovered by the Applicant involve (1) a mobile

²⁹ PG&E Response at 26-27. The Applicant further criticizes MFP for ignoring its "ironclad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention," citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), and *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 412 (1984). That obligation by its terms only applies to publicly available information *in support* of a contention. Although the Applicant claims that it is "logical" as well as "consistent with fundamental concepts of fairness and judicial economy" to apply the obligation to information both supportive of and contrary to a proposed contention, we disagree. Such an interpretation would unduly exacerbate the considerable threshold that petitioners must already meet under the revised contention rules. *Cf. Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973) (at evidentiary stage, all parties have an obligation to reveal all information in their possession concerning a matter at issue).

³⁰ Staff Response at 19.

crane coming too close to 500-kV power lines; (2) calibration of a steam flow channel being performed using an incorrect data sheet/scaling calculation; (3) a nonlicensed operator who filled the acid and caustic day tanks simultaneously, causing an acid/caustic spill and a chemical mist to enter the turbine building; and (4) the isolation of the sprinkler fire water to the component cooling water and centrifugal charging pump areas in accordance with an equipment tagout request without the Shift Foreman noting that a continuous fire watch was needed.³¹

The remaining three are founded on Staff inspection reports. Specifically, (5) the statement in an inspection report that, during a 3-month period in 1991, there "appeared to be a high number of noteworthy personnel error events"; (6) the performance of inspections of the CFCU matter (discussed in conjunction with Contention I) without appropriate procedures; and (7) a reported weakness in control of lifting and rigging devices for heavy loads, particularly in light of a year ago rigging problem involving a loss of offsite power.

We agree that these incidents or statements represent unrelated and widely disparate personnel incidents that collectively do not appear to amount to a failure of either the personnel program or related training programs. Unlike the numerous incidents cited in Contention I that relate, for the most part, to the specific maintenance and surveillance programs, the incidents cited here have no apparent common focus.

For that reason, we are rejecting Contention II. We note, however, that the incident of the missed fire watch (founded upon LER 1-92-008-00, dated July 22, 1992) is sufficiently related to the maintenance and surveillance programs, dealt with by Contention I, as well as the Thermo-Lag Contention V (which we are also accepting in part) for it to be included in the litigation of either (or both) of those contentions. Further, the CFCU incident bears upon a subject that we have accepted for litigation in Contention I, and those allegations here may also be examined in conjunction with Contention I.

4. *Contention III*

The San Luis Obispo Mothers for Peace contends that PG&E's application for an extended license should be denied because PG&E has not taken adequate measures to detect the presence of fraudulently certified components at Diablo Canyon Nuclear Power Plant. Nor has PG&E demonstrated that it is capable of preventing the acquisition and use of counterfeit parts in the future. Failure of such components could cause or contribute to an accident at Diablo Canyon. Thus, NRC lacks reasonable assurance that the plant can safely operate beyond its original license period.³²

³¹ *Id.* at 20 n.10.

³² MFP Supplement at 17.

a. MFP Position

In support of this contention, MFP cites several regulatory requirements concerning a licensee's obligation to establish suitable control programs for purchased parts and components. It references a General Accounting Office report and several NRC information notices or other statements to the effect that there is a general problem concerning bogus parts. With respect to Diablo Canyon, however, MFP cites two NRC inspection reports critical to particular specified procurement activities.

b. Applicant and Staff Positions

Both the Applicant and Staff oppose this contention for not setting forth any viable basis for challenging the Applicant's procurement program. The Applicant notes that the criticisms advanced by MFP both related to nonsafety procurements that were not subject to the Applicant's quality assurance rules for safety-related procurements. Moreover, in both cases, the Applicant provided information to the NRC that eventually led to the arrest and conviction of the fraudulent vendors. Further, the Applicant cites an NRC Procurement Assessment Report that gave a favorable overall assessment of PG&E's program. The Staff observes that the only one of the cited Information Notices having any bearing upon Diablo Canyon is one that concerns the felony conviction of a vendor after PG&E identified it as a seller of counterfeit valves.

c. Board Analysis

It is clear that the cited incidents do not raise a sufficient question about PG&E's program to constitute an adequate challenge. In particular, the two inspection reports concern equipment the purchase of which is not even subject to the procurement program for safety equipment. For these reasons, we are rejecting this contention.

5. Contention IV

The San Luis Obispo Mothers for Peace contends that PG&E's application for license extension must be denied because age-related degradation of systems, structures and components unacceptably increases the risk of accidents during the extended period of operation.³³

³³ *Id.* at 24.

a. MFP Position

In support of this contention, MFP claims that it is “common knowledge” that a wide variety of SSCs (it lists some twenty-seven of them) are subject to age-related degradation. It cites a GAO report concerning uncertainties in this area and stating that, accordingly, each plant applying for an operating license “extension” must be evaluated in light of its own operating history. It also references a speech by an NRC Commissioner. These materials are general statements that do not relate specifically to Diablo Canyon.

Specifically with regard to Diablo Canyon, MFP references two LERs, one of which concerned leakage from the chemical and volume control system and the other corrosion of piping associated with diesel fuel oil and two fire suppression system carbon dioxide lines.³⁴ MFP further cites an article stating that Diablo Canyon has been identified by NRC as a reactor with anticipated vessel embrittlement, and a newspaper account of PG&E’s discovery of several age-related problems. MFP concludes that, as components age, the probability of an accident increases, including accidents involving multiple failures of equipment or more severe than the safety systems were designed to mitigate.

b. Applicant and Staff Positions

The Applicant and Staff view age-related degradation as a subject suitable for examination in a license “renewal” proceeding but not in a recapture proceeding such as this one. They reason that the components have already been examined for 40 years of operation, and, if they age prematurely, maintenance and surveillance programs are designed to detect and mitigate any such effects. They note that the GAO reports related to license renewal and the Commissioner’s speech related to common-mode failure of steam generator tubes. They also question the accuracy of or weight that should be afforded the cited newspaper accounts. They further reference the holding of the *Vermont Yankee* Licensing Board rejecting a similar contention, largely because of the availability of maintenance programs. They conclude that this contention lacks a proper basis.

c. Board Analysis

We agree that the contention lacks an adequate basis. We also note that, to the extent that degradation is subject to maintenance efficacy, the subject will be examined in conjunction with the contention on that subject that we are accepting (Contention I). Accordingly, we are rejecting this contention.

³⁴ This latter LER — 1-92-006-00, dated August 6, 1992 — was also cited in conjunction with Contention I and is to be reviewed by us in that context.

6. *Contention V*

It is the contention of the San Luis Obispo Mothers for Peace that the Thermo-Lag material fails as a fire barrier and, in fact, poses a hazard in the event of a fire or an earthquake. Until this situation is adequately resolved, the license for Diablo Canyon Nuclear Plant certainly should not be extended.³⁵

a. MFP Position

As a basis for this contention, MFP first asserts that Thermo-Lag is used at Diablo Canyon (citing a PG&E Letter to NRC, dated July 29, 1992, to this effect). MFP next refers to a series of NRC Bulletins warning power reactor operators that, based on certain tests, Thermo-Lag failed to protect cables and conduits. It references a series of compensatory measures that NRC has prescribed for Thermo-Lag materials, including "roving human observers." It then cites five incidents (based on two NRC inspection reports and three LERs) involving such matters as missed fire watches or the disabling by plant personnel for personal convenience of fire protection measures (specifically, fire barriers).³⁶ MFP observes that NRC proposes to treat the issue generically but to require "compensatory measures" in the interim. It asks that the license amendment be denied until PG&E has taken all measures necessary to end its use of Thermo-Lag for fire protection. (It adds that the risk of Thermo-Lag is even greater in an area subject to earthquakes, as is Diablo Canyon.)

b. Applicant and Staff Positions

The Applicant describes this contention as addressing a current issue, generic in the industry, that is "not safety significant."³⁷ According to the Applicant, it is an issue that will be resolved generically, without regard to the expiration dates of the Diablo Canyon licenses, and accordingly is not within the scope of this proceeding. The Applicant also references a letter to it from NRC accepting the interim fire protection measures adopted by PG&E. Finally, it asserts that MFP has failed to develop a nexus between the fire protection measures and the proposed license amendments. As with certain other contentions, the Applicant asserts that the Petitioner's only remedy for a perceived problem of this type is through a section 2.206 petition (under which the Staff has already declined to take action with respect to the Thermo-Lag question).

³⁵ MFP Supplement at 28.

³⁶ MFP also cites a purported technical study of the question, derived from a newspaper article. It turns out that the information in the newspaper article was incorrect and that no such report exists, and MFP conceded its error in this respect at the prehearing conference (Tr. 146-47). We are giving no consideration to this purported study.

³⁷ PG&E Response at 37.

The NRC Staff disagrees with PG&E's conclusion that the Thermo-Lag issue lacks safety significance, but the Staff agrees that the issue is not safety significant at Diablo Canyon.³⁸ It acknowledges that it has accepted the Applicant's interim compensatory measures as providing adequate fire protection. The Staff claims that MFP has not shown any basis for concluding that the Applicant has not taken sufficient action to prevent any problems arising from its use of Thermo-Lag. Further, the Staff asserts that MFP has provided no basis on which it could be concluded that any problem with Thermo-Lag at Diablo Canyon would not be rendered moot for the recapture period, inasmuch as any needed action would be taken prior to that time.³⁹

c. Board Analysis

This contention can be construed as raising a question of the adequacy of fire protection both on an interim and a permanent basis. Covering both aspects of the contention, MFP has provided bases for asserting that problems with use of Thermo-Lag exist (the NRC Bulletins) and that Thermo-Lag is used at Diablo Canyon (the PG&E letter). However, the basis provided for contending that fire protection on a permanent basis is inadequate — i.e., the purported study that in fact does not exist — is insufficient. (The connection to earthquakes, also apparently derived from the purported study, is also inadequate.) Thus, there is an insufficient basis for the claim concerning the generic resolution of the Thermo-Lag issue, as applied at Diablo Canyon. This aspect of the contention is accordingly rejected.

On the other hand, the portion of the contention applying to the interim corrective action stands on a different footing. Facts are provided to support this aspect of the contention — i.e., missed fire watches and disablement of fire barriers, together with the use of Thermo-Lag at Diablo Canyon and the existence of problems with Thermo-Lag. Moreover, there is no basis for requiring MFP to demonstrate that the interim measures will become moot by the recapture period, as asserted by the Staff. Those measures are scheduled to extend indefinitely, until superseded by a generic resolution of the issue. Terming the measures "interim" does not limit the time of their applicability.⁴⁰ In any event, as noted earlier, any corrective action found by us to be necessary would be made effective as of the date of our final decision or the license amendment, whichever comes later. Finally, required resort to section 2.206 is

³⁸ NRC Staff Response at 30 n.16.

³⁹ *Id.* at 32.

⁴⁰ When the Commission wishes to impose a termination date for interim measures, it does so explicitly. *See, e.g.,* 10 C.F.R. §§ 50.44(c)(3) (combustible gas control systems), 50.62(d) (ATWS requirements), and 50.63(c) (loss of all alternating current).

not appropriate — particularly where, as here, the Staff has already unilaterally denied a similar petition.

For these reasons, MFP has met all applicable requirements for setting forth a contention concerning the interim fire-protection measures. We could provide various forms of relief, ranging from license denial to conditions designed to improve fire protection pending generic resolution of the Thermo-Lag issue. Accordingly, this contention is accepted, limited to the litigation of interim fire-protection measures.⁴¹

7. *Contention VI*

The San Luis Obispo Mothers for Peace contends that PG&E's inability to properly store and handle hazardous materials is another indication of the company's inadequate control programs and personnel. (Refer to Contentions I and II.) PG&E's violations of NRC regulations affects the health of its employees, the local environment, the integrity of safety-related equipment, and thus the safety of the general public. On this basis, PG&E's proposed license extension must be denied.⁴²

a. *MFP Position*

In support of this contention, MFP cites a number of NRC inspection reports and Notices of Violation, and a Licensee Nonconformance Report, dealing with such matters as the mislabeling of low-level waste and chemical storage containers, the failure to properly post areas in which waste is stored, the failure to perform a whole-body frisk immediately following a person's exit from a contaminated area, and the failure to include certain chemicals on a specified list. These violations or failures are said to endanger workers and have "implications for the integrity of safety-related equipment as well, thus jeopardizing the health and safety of the general public."⁴³

b. *Applicant and Staff Positions*

The Applicant opposes this contention because it involves operational issues that, in its view, are beyond the scope of this proceeding. Further, it claims that the allegation that labeling and posting practices at Diablo Canyon have "implications for the integrity of safety-related equipment" lacks any basis.

⁴¹ We express no opinion with respect to the Applicant's extensive arguments (PG&E Response at 37-38, especially n.42) concerning the litigability of generic issues, inasmuch as the issue we are accepting for litigation is not such an issue.

⁴² MFP Supplement at 31.

⁴³ *Id.* at 34-35.

The Staff claims that the asserted violations and deficiencies were discovered in a Staff inspection devoted to the Applicant's occupational radiation protection program and are relevant only to workers at the facility. It claims that MFP lacks standing to represent workers. Like the Applicant, it claims that MFP has provided no basis for its claim that the practices may affect the general public.

c. Board Analysis

In our discussion of standing (*supra* pp. 10-11, 12), we already ruled that MFP lacks standing to assert claims on behalf of workers. Although we believe that occupational practices affecting the public could form the basis for a contention in this proceeding (contrary to the assertion of the Applicant), we agree with both the Applicant and Staff that MFP has provided no basis for its claim of consequences to the general public. Accordingly, we are rejecting this contention.

8. Contention VII

The San Luis Obispo Mothers for Peace contends that the proposal to extend the operating life of the Diablo Canyon Nuclear Power Plant for an additional 15 years must be denied because of the unsolved problem of radioactive waste storage and disposal.⁴⁴

a. MFP Position

This contention takes issue with the portion of PG&E's license amendment application dealing with the disposal of spent fuel, stating that PG&E has a contract with the Department of Energy for the disposal of spent fuel. MFP claims that there is no assured storage location, either permanent or interim, for such waste. It states that the problem should not be treated generically inasmuch as earthquakes make the Diablo Canyon spent fuel pool likely to be deformed (citing actual deformation of the spent fuel liner at PG&E's Humboldt Bay Power Plant as the result of an earthquake).

b. Applicant and Staff Positions

As both the Applicant and Staff point out, this contention is barred as a matter of law from operating license and operating license amendment proceedings. As set forth in 10 C.F.R. § 51.23(a):

⁴⁴ *Id.* at 35.

The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations.

See also 10 C.F.R. § 51.53(a) (Applicant's Supplement to its Environmental Report need not discuss any aspect of the storage of spent fuel within the scope of the generic determination in section 51.23); *Vermont Yankee*, LBP-90-6, 31 NRC at 94-95.

c. Board Analysis

We agree that this contention is generally barred as a matter of law. Further, to the extent that it attempts to challenge the lack of safety of the current spent fuel pool, it is not supported by an adequate basis. The alleged defects at Humboldt Bay are not relevant to, or suggestive of, defects with regard to the Diablo Canyon spent fuel pool. Indeed, MFP has not even alleged, much less demonstrated, that the design at Humboldt Bay is any way comparable to that at Diablo Canyon.

In view of the foregoing, we decline to admit any aspect of this contention.

9. Contention VIII

The emergency preparedness program for Diablo Canyon Nuclear Power Plant is inadequate to protect public health and safety. The San Luis Obispo Mothers for Peace contends that until this program is revised and improved, PG&E's request for a license extension cannot be considered.⁴⁵

a. MFP Position

Petitioner cites NRC Inspection Reports 91-15 and 92-15 and a FEMA report dated April 1, 1992, as bases for its contention. The reports cite particular deficiencies in performance of the Licensee or local government noted during exercises of the Diablo Canyon Emergency Plan conducted in 1991 and 1992.

Most of the deficiencies cited by Petitioner involve failures of personnel to follow procedures. These include, for instance, delays in the transmission of protective action recommendations (PARs) from the Licensee to the County, failure to verify reactor shutdown, failure to refer to all Annunciator Response

⁴⁵ *Id.* at 38.

Procedures, and several instances of failure to follow procedures in the performance of emergency-related tasks or communications.

These failures lead Petitioner to conclude that PG&E's and County's employees are inadequately trained for emergency response and unprepared to act efficiently in an emergency. Accordingly, MFP urges the Board to deny the license amendment pending correction of the asserted deficiencies in personnel training.

b. Applicant and Staff Positions

The Applicant opposes admission of this contention on two grounds. First, it claims that there is no nexus between the proffered contention and the proposed license amendment because the amendment does not change the emergency plan in any way. Second, it claims that the inspection reports cited by Petitioner do not provide support for the contention because all findings cited in the reports have been addressed by PG&E and closed out by NRC. The Applicant argues that the contention is beyond the scope of the proceeding and should be rejected.⁴⁶

The NRC Staff opposes admission of this contention for the same reasons cited by the Applicant. Additionally, however, the Staff argues that to be litigable in any proceeding, contentions concerning emergency planning exercises must allege that the exercise revealed a fundamental flaw in the emergency plan. A fundamental flaw is defined as a failure of an essential element of the plan that can only be corrected through a significant revision of the plan itself. Under this standard, minor or isolated problems on the day of the exercise do not constitute fundamental flaws in the emergency plan. According to the Staff, MFP has not advanced any rationale for concluding that the flaws cited in its contention are indicative of a pervasive breakdown of any essential element in the emergency preparedness program sufficient to constitute a fundamental flaw in the program. Accordingly, for reasons cited by the Applicant, and for the asserted failure to allege a fundamental flaw in the emergency plan, the Staff concludes that the contention is inadmissible.⁴⁷

c. Board Analysis

The Commission has limited the scope of litigation on emergency preparedness exercises to a consideration of whether the results of an exercise indicate that emergency preparedness plans are fundamentally flawed. It has determined that minor or ad hoc problems occurring on the day of the exercise are not

⁴⁶ PG&E Response at 43-45.

⁴⁷ Staff Response at 36-38.

relevant to licensing and may be excluded from consideration in a hearing. The Commission has explained that a fundamental flaw in the plan is a deficiency that would “preclude a finding of reasonable assurance that protective measures can and will be taken.” *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986).

A fundamental flaw in an emergency preparedness plan has two essential components. First, the deficiency must reflect a failure of an essential element of the plan; and second, the deficiency must be sufficiently serious that it can be remedied only through a significant revision of the plan. With respect to the first factor, an essential element should be determined by reference to the sixteen emergency planning standards set forth in 10 C.F.R. § 50.47(b) and the requirements of 10 C.F.R. Part 50, Appendix E. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 505 (1988).

Deficiencies that alone do not constitute a fundamental flaw can be considered collectively provided that “they are pervasive and show a pattern of related or repeated failures associated with a particular essential element of the plan.” However,

[w]here the deficiency is the result of a particular person's failure to follow the requirements of the emergency plan itself, such deficiency is not a fundamental flaw unless that person performs a critical role under the plan and there is no backup structure or provision that would mitigate the effects of the individual's failure.

Id. at 505-06 (footnote omitted).

The second factor requires consideration of how the deficiency can be corrected. “If the involved portion of the plan itself must be reassessed and reconceived to a significant extent in order to prevent such a failure in the future, then there is a fundamental flaw.” However, “where the problem can be readily corrected, the flaw cannot reasonably be characterized as fundamental.” *Id.* at 506. “Any contention alleging that an exercise revealed a fundamental flaw in the emergency plan must address both of these factors” *Id.*

In this case, the Petitioner has submitted the results from three recent emergency preparedness exercises as bases for its belief that the Diablo Canyon Plan is fundamentally flawed. The contention together with the accompanying bases urge the Board to consider the individual exercise deficiencies collectively in support of Petitioner's assertion that both the Applicant and local government personnel lack the requisite preparedness or training to effectively protect the public health and safety in an emergency. Training and preparedness of personnel are one of the sixteen essential elements of emergency preparedness set forth in 10 C.F.R § 50.47(b)(15). To that extent, the petition partially meets the criteria for an admissible contention.

However, there is no basis provided that suggests that the cited deficiencies constitute a pervasive breakdown in a training program and the Petitioner does not address the question of actions required to remedy the deficiencies. Nothing in Petitioner's filing suggests that the Applicant's program for radiological emergency response training must be reassessed or reconceived in order to prevent such failures in the future.

The deficiencies cited by MFP appear to be attributable to individual failures to follow procedures occurring on the day of the exercise. No reason is given why such deficiencies could not be corrected by instructions to the individuals instead of restructuring the emergency plan.

Both the Applicant and Staff assert that the deficiencies have in fact been addressed by the Applicant and closed out by the Staff. While such action is not sufficient *per se* to cause rejection of a contention, it places a burden on petitioners under the pleading requirements of 10 C.F.R. § 2.714(b)(2) to state with specificity why the Staff remedy is inadequate and why an essential element of the plan must be reconceived. This has not been done.

The Board concludes that the Petitioner has not satisfied the Commission's particular requirements for admission of a contention based on alleged fundamental flaws in emergency preparedness exercises or its general pleading requirements set forth in section 2.714(b)(2). Accordingly, Contention VIII is not admitted.

10. Contention IX

The Emergency Preparedness program for Diablo Canyon Nuclear Power Plant is inadequate to protect the public health and safety during an earthquake. The importance of an effective program was demonstrated recently by the lack of an adequate response to the effects of Hurricane Andrew in Florida.⁴⁸

a. MFP Position

As basis for this contention, the Petitioner cites seismic dangers of the Hosgri Fault and the Commission's asserted prior refusal to consider impacts of an earthquake that either caused, or occurred coincidentally with, an accident at Diablo Canyon. The Petitioner claims that the impact of Hurricane Andrew on the Turkey Point Emergency Planning Zone demonstrates that it is unsafe for NRC to ignore effects of local natural phenomena on emergency planning for Diablo Canyon. Restricted emergency access assertedly due to storm-caused road blockage at Turkey Point is cited as basis for Petitioner's assertion by analogy that earthquake damage to roads and bridges near Diablo Canyon would

⁴⁸ MFP Supplement at 40.

inhibit emergency response during a simultaneous nuclear accident. Petitioner buttresses the point with assertions that storm warnings were available at Turkey Point prior to Hurricane Andrew while earthquakes would strike suddenly and without warning at Diablo Canyon. Thus, says Petitioner, there is no assurance that PG&E or the local government could respond rapidly to a sudden earthquake. Finally, MFP cites a newspaper article that asserts that new seismic information exists that brings into question PG&E's assessment of ground motion during an earthquake.

The Petitioner urges that the Diablo Canyon Emergency Plan be revised to take into account new seismic information and that it include plans for a simultaneous earthquake and nuclear accident.

b. Applicant and Staff Positions

The Applicant opposes admission of this contention because principles of collateral estoppel and res judicata preclude consideration of this issue. The Applicant cites prior litigation in which Petitioner was a party where issues related to simultaneous plant accident and earthquake were adjudicated and resolved by a tribunal of competent jurisdiction.⁴⁹ The Staff also opposes admission of this contention on the basis that established doctrines of collateral estoppel and res judicata prevent relitigation of issues decided against Petitioner in previous litigation.⁵⁰

c. Board Analysis

The Board concludes that litigation of issues related to simultaneous earthquake and plant accident at Diablo Canyon is prohibited by the doctrines of collateral estoppel and res judicata. The Board also concludes that MFP has not provided an adequate basis to support revisiting this issue based on new seismic information that may have been developed since the operating license hearings were held.

Petitioner attempted to save its contention at the prehearing conference by denying that it was interested in relitigating the issue of simultaneous earthquake and plant accident. It claimed instead that it was concerned about diminished resistance of the plant to earthquake stresses caused by aging components (Tr. 184-85). This claim, however, is contrary to the wording of the contention as

⁴⁹ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-12, 20 NRC 249 (1984); CLI-84-13, 20 NRC 267 (1984); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *reh'g granted*, 760 F.2d 1320 (D.C. Cir. 1985), *aff'd*, 789 F.2d 26 (D.C. Cir. 1986). See PG&E Response at 45-46.

⁵⁰ Staff Response at 39-40.

it was filed with the Board and parties, and it came too late and with too little basis (i.e., no scientific data) to permit admission of a revised contention. For all of the foregoing reasons, Contention IX is not admitted to this proceeding.

We have every confidence, however, that the Staff has examined, or will examine, any new information bearing upon the resistance of plant SSCs to earthquakes.

11. Contention X

The San Luis Obispo Mothers for Peace believes that PG&E is not justified in their request to extend their operating license for Diablo Canyon Nuclear Power Plant.⁵¹

Although not apparent from the text of the contention, MFP is here challenging the appropriateness of a "no significant hazards consideration" finding by the Staff in this proceeding. MFP admitted as much at the prehearing conference (Tr. 189). As we advised the parties and Petitioner at that prehearing conference, this contention is beyond our authority to consider (Tr. 190). It is solely within the province of the NRC Staff. 10 C.F.R. § 50.58(b)(6). Accordingly, we reiterate our earlier denial of this contention (Tr. 192).

We note that, at the time of the Notice of Opportunity for Hearing in this proceeding, the NRC also sought public comment on a proposed "no significant hazards" finding. 57 Fed. Reg. 32,571-72, 32,575 (July 22, 1992). The Staff, to our knowledge, has not yet issued a final finding (which does no more than determine the timing of any evidentiary hearing).⁵² We asked the Staff to consider this proposed contention as a public comment on the proposed finding, and the Staff agreed it would do so (Tr. 189).

12. Contention XI

The San Luis Obispo Mothers for Peace contends that before permitting the extension of PG&E's license for the Diablo Canyon Nuclear Power Plant, PG&E must weigh the costs and benefits of continued operation of the plant — as required by the National Environmental Policy Act (NEPA) 42 USC 4332.⁵³

a. Parties' Positions

Through this contention, MFP seeks to have an Environmental Impact Statement issued for the proposed amendments. It also seeks to have the question of need for power explored.

⁵¹ MFP Supplement at 43.

⁵² At the time of the prehearing conference, the Staff had not yet made such a finding. Tr. 188.

⁵³ MFP Supplement at 45.

As the Applicant and Staff each point out, recapture amendments of the type involved here are not among those actions for which an EIS is required (10 C.F.R. § 51.20) or categorically excluded (10 C.F.R. § 51.22). They are among those for which the Staff must prepare an Environmental Assessment (EA) determining whether an EIS need be issued. 10 C.F.R. § 51.21. As of the time of the prehearing conference, the Staff had not yet prepared its EA but indicated its intent to do so in the near future (Tr. 193). The Board in the *Vermont Yankee* recapture proceeding noted, however, that EISs had not been prepared in any of the prior recapture actions. 31 NRC at 97-98.

b. Board Analysis

Insofar as this contention seeks an EIS, therefore, it is premature. We are denying it on that basis. After the Staff issues its EA, and assuming that the EA will not call for an EIS, MFP may submit a late-filed contention calling for an EIS. Such a contention, to be accepted, would have to be based on substantial and significant information indicating why an EIS is called for.

As for the question of need for power, that question appears not to be open to us to explore. 10 C.F.R. §§ 51.53(a), 51.95(a), 51.106(c). We deny outright that aspect of the contention.

13. Conclusion with Respect to Contentions

As set forth above, we have found two of the contentions (I and one aspect of V) to meet the Commission's revised requirements for contentions. (Certain bases set forth for other contentions may also be considered under those contentions.) Coupled with our finding of standing, therefore, MFP has satisfied the intervention requirements and will be admitted as a party/intervenor into the proceeding.

III. OTHER MATTERS

1. On December 9, 1992, the California Public Utilities Commission filed a Notice of its intent to participate as an interested state, pursuant to 10 C.F.R. § 2.715(c). (We did not receive this Notice until December 14, 1992, subsequent to the prehearing conference.) No party opposed this request. We could not grant the request until we had formally authorized a hearing. We do so now.

2. At the prehearing conference, we advised the parties that, were we to accept any contentions, we would arrange a telephone conference call to arrange for discovery schedules and schedules for a further prehearing conference, if necessary, and the evidentiary hearing. We plan to hold this telephone

conference during the period of January 27, 1993–February 3, 1993, and will contact the parties to arrange a convenient time.

IV. ORDER

For the foregoing reasons, and in light of the entire record of this proceeding, it is, this 21st day of January 1993, ORDERED:

1. The request for a hearing and petition for leave to intervene of the San Luis Obispo Mothers for Peace (MFP) is hereby *granted*.

2. MFP Contentions I and V, to the extent indicated in this Opinion, are hereby *admitted*.

3. MFP Contentions II, III, IV, VI, VII, VIII, IX, X, and XI are hereby *denied*. (Certain bases for these contentions may be included in the adjudication of one or the other of the contentions we are admitting, as described in this Order.)

4. The request of the State of California Public Utilities Commission to participate as an interested state pursuant to 10 C.F.R. §2.715(c) is hereby *granted*.

5. A telephone conference call for the purpose of developing discovery schedules and considering schedules for further prehearing conferences and the evidentiary hearing is scheduled for the period of January 27, 1993–February 3, 1993, at a time to be established in the near future.

6. This Order is subject to appeal to the Commission in accordance with the requirements of 10 C.F.R. § 2.714a (particularly 10 C.F.R. § 2.714a(c)). Any such appeal must be filed within ten (10) days after service of this Order.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE**

**Dr. Jerry R. Kline (by C.B.)
ADMINISTRATIVE JUDGE**

**Frederick J. Shon
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland
January 21, 1993**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-445
50-446TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*
(Comanche Peak Steam Electric
Station, Units 1 and 2)

January 15, 1993

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Michael D. Kohn on behalf of the National Whistleblowers Center and certain confidential allegers. The Petition alleged that: (1) Texas Utilities Electric Company (TUEC or Licensee) made material false statements before the Atomic Safety and Licensing Board (ASLB) during hearings on TUEC's application for an operating license in order to conceal significant safety flaws in the design for pipe support systems at Comanche Peak Steam Electric Station (CPSES); namely, that in violation of 10 C.F.R. Part 50, Appendix B, TUEC transferred pipe support packages for review and certification between pipe support design groups that used different, multiple design criteria; (2) TUEC's material false statements delayed construction of CPSES Unit 1 and thus were germane to a contention in a related proceeding that TUEC had intentionally delayed construction of CPSES Unit 1; (3) TUEC, Citizens Association for Sound Energy (CASE), and the NRC Staff deliberately withheld information from the ASLB about the transfer of pipe support reviews between pipe support design groups; and (4) TUEC employees responsible for making material false statements to the NRC continue to perform critical engineering and quality assurance tasks at CPSES. Petitioners requested that the NRC provide the following relief: (1) hold licensing hearings to determine whether the Licensee has the requisite character and competence to operate a nuclear power facility; (2) fine and otherwise penalize TUEC for making material false statements

to the NRC: (3) investigate whether the NRC Staff knew of TUEC's alleged material false statements and failed to act on such knowledge; and (4) determine which high-level managers were responsible for TUEC's making material false statements, and ban such persons from all licensed nuclear facilities.

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

I. INTRODUCTION

On July 30, 1991, Michael D. Kohn submitted a request (Petition) addressed to the Chairman and to the Executive Director for Operations of the Nuclear Regulatory Commission (NRC) on behalf of the National Whistleblowers Center and certain confidential allegers (Petitioners) to take action with regard to the Texas Utilities Electric Company's (TUEC or the Licensee) Comanche Peak Steam Electric Station (CPSES). Petitioners request that the NRC provide the following relief: (1) hold licensing hearings to determine, in view of TUEC's having made material false statements to the NRC, whether the Licensee has the requisite character and competence to operate a nuclear power facility; (2) fine and otherwise penalize TUEC for making material false statements to the NRC; (3) investigate whether the NRC Staff knew of TUEC's alleged material false statements and failed to act on such knowledge;¹ and (4) determine which high-level managers were responsible for TUEC's making material false statements, and ban such persons from all licensed nuclear facilities.

Petitioners assert as bases for their requests that (1) TUEC made material false statements before the Atomic Safety and Licensing Board (ASLB) during hearings on TUEC's application for an operating license² to conceal significant safety flaws in the design of CPSES pipe support systems; namely, in violation of 10 C.F.R. Part 50, Appendix B, TUEC transferred pipe support packages for review and certification between pipe support design groups that used different, multiple design criteria; (2) TUEC's material false statements delayed construction of CPSES Unit 1 and thus were germane to a contention in a related proceeding³ that TUEC had intentionally delayed construction of CPSES Unit 1; (3) TUEC, Citizens Association for Sound Energy (CASE), and the NRC Staff deliberately withheld information from the ASLB about the transfer of pipe support reviews between pipe support design groups; and (4) TUEC employees

¹ As noted in my letter of August 28, 1991, to Petitioners, a copy of the Petition was forwarded to the NRC Office of Inspector General. This Director's Decision does not address allegations of NRC Staff misconduct.

² NRC Docket Nos. 50-445 and 50-446.

³ The January 20, 1986 application of TUEC to extend its construction permit was the subject of a related NRC licensing proceeding, NRC Docket No. 50-445-CPA. See ALAB-868, 25 NRC 912 (1987).

responsible for making material false statements to the NRC continue to perform critical engineering and quality assurance tasks at CPSES.

The Licensee responded to the Petition by letter dated July 2, 1992 (hereinafter, "Response").⁴

I have now completed my evaluation of the Petition and have determined, for the reasons set forth below, that no adequate basis exists to take action against the Licensee. Accordingly, the Petition is denied.

II. DISCUSSION

A. Pipe Support Certification Process at CPSES

Petitioners assert that TUEC certified individual pipe supports in violation of 10 C.F.R. Part 50, Appendix B, because, after field engineers made design changes to pipe supports during construction, TUEC routinely transferred responsibility for review of the field changes from the pipe support design group that originally designed the pipe support to another pipe support design group that used different design criteria. Petitioners contend that, as a result, the Licensee applied "multiple design criteria" to individual pipe supports.⁵

1. *Description of the Pipe Support Design Review and Certification Process*

A summary of TUEC's pipe support design review and certification process, and its evaluation by the NRC Staff and by the ASLB in the Comanche Peak licensing proceeding provides a frame of reference for evaluating Petitioners' contentions.

TUEC originally contracted the responsibility for pipe support design at CPSES to ITT-Grinnell. After it became apparent that ITT-Grinnell could not handle all the pipe support design work, TUEC contracted with an additional company, Nuclear Power Services, Inc. (NPSI), and established its own pipe support design group, Pipe Support Engineering (PSE).

All three pipe support design groups were required to comply with design criteria contained in the American Society of Mechanical Engineers (ASME)

⁴The Response was titled "10 CFR 2.206 Petition Submitted by Kohn, Kohn & Colapinto Regarding Comanche Peak Steam Electric Station."

⁵This same claim was made to the NRC Staff as one of more than 60 allegations by S.M.A. Hasan in January 1986. Resolution of those allegations was transmitted to Mr. Hasan by a letter dated January 6, 1988, and signed by Philip F. McKee, Deputy Director, Comanche Peak Project Division, Office of Special Projects. The Staff concluded that, because the Stone & Webster Engineering Corporation (SWEC) pipe support requalification program would use one engineering approach, "[a]ny identified deficiencies which might have resulted from the use of inconsistent design criteria will be corrected," and the "allegation associated with the use of inconsistent pipe support design criteria by the previous design groups has been adequately resolved." (Enclosure 1 at 2.)

Boiler and Pressure Vessel Code hereafter referred to as the "ASME Code" and in Gibbs and Hill Project Specification MS-46A. Because neither the ASME Code nor Specification MS-46A dictates in detail the means by which an engineer is to satisfy the design criteria, differences in engineering methodologies or design approaches to achieve compliance with the design criteria occurred between the three parallel pipe support groups.

After a pipe support design group completed a pipe support design, it was released to the field for construction. If, during construction, the field engineering organization determined that changes were necessary to the design of a pipe support, TUEC authorized implementation of the change before review and approval by the design organization. Changes by the field organization, as a result, were subject to possible disapproval by the design organization and a requirement to rework the pipe support in question.

In response to the Petition, the Licensee described its review of field engineering changes to pipe support design at CPSES. In most cases, the group that created the original pipe support design would also review field engineering changes to that design. In a few cases, however, the pipe support design group that originally designed the support did not have an established methodology for analyzing the acceptability of the field engineering changes under the ASME Code and Project Specification MS-46A or could not approve the changes using its established methodologies. In such cases, TUEC transferred responsibility for review and certification of the entire pipe support design to another pipe support design group, and the review and certification was performed on the entire pipe support design, not just the field changes in isolation. For example, ITT-Grinnell did not have a design approach for Richmond inserts used in conjunction with tube steel. If the field organization modified a pipe support originally designed by ITT-Grinnell to include Richmond inserts in conjunction with tube steel, then ITT-Grinnell would be unable to analyze the modified design. Therefore, responsibility for review and certification of the entire pipe support design would have been transferred to the PSE group, which did have the capability to analyze such a change.

During the CPSES licensing proceedings, Messrs. Mark Walsh and Jack Doyle raised nineteen broad concerns about the pipe support engineering program at CPSES, including technical issues, organizational issues, and design interface issues (an interface is the communication path and the coordination of the design process between various groups or organizations). The NRC Staff conducted a comprehensive special inspection that consumed 1322 inspector-hours. The NRC Staff evaluated each of the Walsh and Doyle concerns, inspected the design procedures and practices of the pipe support design organizations, and

inspected a sample of 100 pipe support designs that had gone through the entire design review process.⁶

The three pipe support design groups were all required to comply with the design criteria contained in ASME Code and Project Specification MS-46A. Based in part on the NRC Staff analysis of the Walsh and Doyle concerns about the pipe support engineering program, the ASLB found that the differences among the three pipe support design groups in "design approach" and "engineering approach," or in application of and interpretation of the ASME Code and Project Specification MS-46A design criteria, did not create a safety concern or violate NRC requirements because each group had a specific scope of responsibility for a specific group of pipe supports, and the three design groups did not share common in-line design responsibility for any individual pipe support.⁷

Nonetheless, the ASLB found that TUEC failed to demonstrate that design deficiencies were being promptly corrected and failed to satisfactorily resolve several design questions. The ASLB required TUEC to file a plan to resolve the Board's doubts.⁸ In June 1985, TUEC notified the ASLB that TUEC would resolve all remaining issues through the Comanche Peak Response Team (CPRT). TUEC also developed a Corrective Action Program (CAP) that resulted in the validation of the design of all safety-related and seismic Category II pipe supports at CPSES. As part of the CAP, SWEC became solely responsible for the design of pipe supports at CPSES, and the three pipe support design groups were released. SWEC revalidated all pipe supports to ensure that the pipe supports complied with the ASME Code and Project Specification MS-46A, and in doing so, used a single engineering approach. In Supplement 14 to the Safety Evaluation Report (March 1988), the NRC Staff concluded that CAP provided a comprehensive program for resolving technical concerns identified by the ASLB, CASE, NRC Staff, and CPRT, and that the CAP ensured that the design of pipe supports at CPSES satisfied applicable requirements of 10 C.F.R. Part 50. (NUREG-0797, SSER 14, at iii.)

2. *Multiple Design Criteria*

In evaluating the Walsh and Doyle concerns, which included possible use of multiple design criteria, the ASLB found that all three pipe support design groups used the same design criteria, the ASME Code and Project Specification M46-A, but applied different "engineering approaches" or "design approaches," and that this arrangement was in compliance with 10 C.F.R. Part 50.⁹

⁶ See Special Inspection Team Report 50-445/82-26 and 50-446/82-14 (Feb. 15, 1983).

⁷ LBP-83-81, 18 NRC 1410, 1450-51 (1983).

⁸ *Id.* at 1452-56.

⁹ *Id.* at 1450-51.

TUEC agrees that the three pipe support design groups interpreted and applied the design criteria of the ASME Code and of Project Specification MS-46A with different design approaches. TUEC denies, however, that multiple design criteria were used for any individual pipe support.

TUEC states in its Response that when responsibility for review and certification of field changes to pipe support design was transferred from the original pipe support design group to another pipe support design group, responsibility for review and certification of the entire pipe support design, rather than just the field engineering change, was also transferred. The Licensee also asserts that only one pipe support group had responsibility for any individual pipe support design at one time. (Response at 3.) Petitioners provide no facts to contradict this description of the review and certification process. Moreover, it would not be possible, as an engineering matter, to review a field change in isolation from the entire pipe support design. The pipe support design group that reviewed the field change would necessarily have reviewed the entire pipe support design with the same design criteria used by all three groups, albeit with its own design approach.

Since the three pipe support design groups used the same design criteria but different design approaches, transfers of responsibility for review of field changes could have resulted in application of multiple design approaches to an individual pipe support. However, because only one group was responsible for an individual pipe support design at any one time and because such transfers resulted in a review of the entire pipe support design by the responsible group, rather than the field change in isolation, the transfers did not result in application of different design approaches to any individual pipe support. Not only were the same design criteria applied to all pipe supports, but individual pipe supports were reviewed and certified with a single design approach.

Accordingly, I conclude that Petitioners have not demonstrated that TUEC used multiple design criteria for any pipe supports; nor did they show that multiple design approaches were applied to any individual pipe support. Petitioners provide no basis to disturb the findings of the ASLB that the use of three different design approaches by the three pipe support design groups did not present a safety concern and did not violate 10 C.F.R. Part 50.

3. Transfer of Design Review Responsibility Between Pipe Support Design Groups

Petitioners contend that the Licensee's transfer of responsibility for review of field changes from one pipe support design group to another was in violation of NRC requirements. To the contrary, NRC requirements explicitly permit such transfers:

Design changes, including field changes, shall be subject to design control measures commensurate with those applied to the original design and be approved by the organization that performed the original design unless the applicant designates another organization.¹⁰

10 C.F.R. Part 50, Appendix B, Criterion III.

Moreover, since the transfers of design review responsibility between the three pipe support design groups did not result in the application of multiple design criteria to any individual pipe support, but rather in application of a uniform engineering approach or design approach to the required design criteria for individual pipe supports, no safety concern was raised by the transfers.

Accordingly, I conclude that there is no basis to conclude that the transfer of responsibility for review and certification of field changes to pipe support designs either violated NRC requirements or raised a safety concern.

B. Material False Statements

Petitioners identify the Licensee's alleged material false statements as certain statements made in testimony and affidavits by TUEC managers and employees, between 1982 and 1985, during the NRC hearing on TUEC's application for an operating license for CPSES. Specifically, Petitioners cite:

1. Testimony of John C. Finneran, Jr., Manager of Civil Engineering, that field changes to a pipe support design went to the original design organization for review and certification.¹¹
2. An affidavit of Mr. Finneran and others that states that changes made by Structural Engineers to an original design were reviewed by the original designers before the design was sent to the field for construction, and that each organization and group had separate and distinct responsibilities for the design of pipe supports.¹²
3. An affidavit by Mr. Finneran that design changes created by CMC's were reviewed by the "responsible design organization" for certification.¹³

Petitioners contend that not only did TUEC deliberately introduce false evidence that design changes were reviewed by the "original" design organization, but that TUEC also repeatedly made material false statements that pipe supports "were not being transferred between various pipe support groups" and were "not

¹⁰ Additionally, as the Licensee notes, ANSI N45.2.11-1974 also permits such transfers:

Normally, the procedures for effecting design changes shall require that changes be reviewed and approved by the same groups or organizations which reviewed and approved the original design documents. Where an organization which originally was responsible for approving a particular design document is no longer responsible, the plant owner shall designate the new responsible organization. . . .

¹¹ Tr. 4971, 4985-86, and 5013. See Petition at 4.

¹² Affidavit of D.N. Chapman, J.C. Finneran, Jr., D.E. Powers, R.P. Deubler, R.E. Ballard, Jr., and A.T. Parker, dated July 3, 1984, at 13, 36. See Petition at 6-7.

¹³ Affidavit of John C. Finneran, Jr., dated June 17, 1984, at 4. See Petition at 6.

being certified using multiple sets of design criteria"¹⁴ (Petition at 8), and that TUEC never revealed the transfers to the ASLB, despite orders and requests of the ASLB to be kept informed of potentially significant developments. Petitioners also allege that the Licensee falsely testified before the ASLB that interfaces between the three pipe support design groups were "separate" and "distinct."

The NRC may revoke a license because of material false statements made to the NRC:

Any license may be revoked for any material false statement in the application or any statement of fact required under section 182. . . .

Atomic Energy Act, § 186a, 42 U.S.C. § 2236.

At the time of the alleged material false statements, a material false statement within the meaning of section 186 of the Atomic Energy Act was a false statement, or omission of information, that was material. A material statement is one that is capable of influencing the agency decisionmaker.¹⁵ Petitioners contend that in this case the alleged material false statements were made with the intent to deceive the NRC about serious safety flaws in pipe support design, namely that multiple design criteria were applied to pipe supports.¹⁶

Petitioners have not demonstrated that the Licensee made any false statements to the NRC. First, Petitioners assert that the Licensee "repeatedly" gave testimony before the ASLB that TUEC "pipe supports were *not* being transferred between the various pipe support groups and were not being certified using multiple sets of design criteria." (Petition at 9, emphasis added.) Petitioners, however, provide no record citation to demonstrate that the Licensee either explicitly made such a statement or made any statement that could be interpreted in that manner. Second, in the context of the questions asked and answers given in the testimony cited by Petitioners, it cannot be concluded that the Licensee provided testimony to the effect that review of field changes or other changes to a pipe support design was always performed by the original pipe support design group, or was never performed by any other of the three pipe support design groups. The testimony cited by Petitioners, that review

¹⁴ Since the Licensee was not, in fact, using multiple design criteria (see Section II.A, *supra*), any statement by the Licensee that it was not using multiple design criteria cannot be considered false.

¹⁵ *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 487 (1976), *aff'd sub nom. Virginia Electric and Power Co. v. NRC*, 571 F.2d 1289, 1291 (4th Cir. 1978); *United States v. Weinstock*, 231 F.2d 699, 701 (D.C. Cir. 1956); *United States v. Diaz*, 690 F.2d 1352, 1357-58 (11th Cir. 1982).

¹⁶ In 1987, some 2 to 5 years after the alleged material false statements, the NRC adopted new rules implementing section 186 of the Atomic Energy Act. Those rules require that any information submitted by licensees to the NRC must be complete and accurate in all material respects. See 10 C.F.R. § 50.9(a). The Commission decided to exercise its discretion in the application of the term "material false statement" by limiting the use of the term to egregious situations where there is an element of intent to mislead. Statements of Consideration, "Completeness and Accuracy of Information," 52 Fed. Reg. 49,362, 49,367 (Dec. 31, 1987).

of changes was done by the original pipe support design group, was given in response to questions seeking to determine whether changes were reviewed by a pipe support design organization at all. The testimony was not elicited in response to inquiries whether the original, as opposed to another, pipe support design group conducted reviews of design changes made by the field engineers or other engineers. If any such inquiries were made, Petitioners cite none. Moreover, as Petitioners note, Mr. Finneran also testified that review of changes to pipe support designs were performed by the "responsible" pipe support design group. As TUEC stated in its Response, responsibility for review of each pipe support was assigned to only one group at any time; following any transfer, the new design group, or "responsible design group," evaluated the design of the entire support. (Response at 3, 9-10.)

Petitioners claim that testimony of TUEC managers and employees in a complaint proceeding before the Department of Labor (DOL)¹⁷ demonstrates that TUEC had attempted to conceal the transfers between pipe support design groups and the use of multiple design criteria from the ASLB during the earlier NRC operating license proceeding. Petitioners argue that this testimony shows that interfaces between the three pipe support groups were not "separate" and "distinct" as represented by TUEC, but instead that the three pipe support groups routinely transmitted pipe support packages "back and forth" among themselves (Petition at 9-12), presumably to mean that the groups in fact shared common design responsibility for individual pipe supports.

Petitioners' assertion that multiple design criteria were used for individual pipe supports rests upon a confounding of "design criteria" with interpretation and application of design criteria (i.e., "design approach" and "engineering approach"). As the Licensee explains, this confusion was created when Licensee employees in their testimony before the ASLB and before the DOL used the term "design criteria" interchangeably with the terms "design approach" and "engineering approach." (Response at 19-24.)

Petitioners do not dispute that all three groups were required to comply with and did apply the requirements of the ASME Code and Project Specification MS-46A. The testimony upon which Petitioners rely, when read in context, was that each group interpreted and applied those requirements with its own guidelines, design approach, or engineering approach. The testimony of the Licensee's managers before the DOL, upon which Petitioners rely, was to the effect that review of field changes was sometimes transferred to another pipe support design group if the original design group could not certify the changes, either because

¹⁷ *Hasan v. Nuclear Power Services, Inc.*, DOL Case No. 86 ERA-24. Mr. S.M.A. Hasan charged that he had been terminated and blacklisted for raising safety concerns about pipe support design at CPSES, in violation of section 210 of the Energy Reorganization Act. Mr. Hasan's complaint was denied after hearing before an Administrative Law Judge. See Recommended Decision and Order, October 21, 1987. The Secretary of Labor affirmed the denial. See Final Decision and Order, June 26, 1992.

it did not have the analytical capability or because the design change could not be certified under the original design group's methodology.¹⁸ As the Licensee explained, Mr. Rencher, upon whom Petitioners rely, also testified that each of the three pipe support groups had its own "design guidelines," which differed in some respects, but that each pipe had to be qualified under one of these three design guidelines. (Response at 22-23.) The ASLB found that, by whatever name, the different interpretations by the three pipe support groups of the ASME Code and Project Specification MS-46A did not violate NRC requirements.¹⁹ Petitioners incorrectly assume that because transfers took place, there must have been a common or shared design responsibility between the three pipe support design groups, which necessarily resulted in the application of multiple design criteria to individual pipe supports. Because the pipe support design group that assumed responsibility after a transfer reviewed and certified the entire pipe support, there was, in fact, no common or shared design responsibility between the three pipe support design groups. (Section II.A, *supra*.)

By letter dated July 8, 1987, CASE suggested to the ASLB that the Licensee should provide the ASLB with all documents from the DOL proceeding because some unidentified testimony was of potential significance to the Comanche Peak licensing proceedings. However, CASE did not disclose the nature or significance of that testimony, and Petitioners fail to demonstrate that the matter was either pursued by CASE or taken up by the ASLB. There is no basis to conclude, as Petitioners contend, that the Licensee's failure to disclose the transfers during the CPSES operating license proceeding violated any ASLB order or constituted withholding of evidence from the ASLB. Because the transfers neither constituted a safety concern nor violated NRC requirements, it cannot be concluded that the Licensee had an obligation to inform the ASLB of the transfers. Moreover, on May 17, 1988, CASE provided the ASLB with the January 6, 1988 NRC Staff resolution of Mr. Hasan's sixty-five allegations, including allegations about multiple or inconsistent design criteria, because CASE considered the information to be potentially significant.²⁰ Since the Comanche Peak operating license proceeding was dismissed on July 5, 1988, based on a settlement and joint stipulation of the parties, without mention of that information,²¹ it cannot be concluded that the ASLB necessarily considered the fact of the transfers to be a potentially significant development.

In support of their allegation of intentional withholding of evidence from the ASLB, Petitioners also rely on and request consideration of a letter dated October 5, 1990, sent to NRC Region IV Office of Investigations. Petitioners

¹⁸ See Petition at 10-11, and 12 n.9.

¹⁹ LBP-83-81, 18 NRC at 1450-51.

²⁰ See note 5, *supra*.

²¹ LBP-88-18B, 28 NRC 103 (1988).

request that the identity of the alleged named in the letter and the contents of that letter remain confidential. (Petition at 14.) That letter does not recite any factual information beyond that contained in the Petition, and does not provide any information not provided in similar allegations, which were found to be without merit.

Accordingly, I find that the Licensee's statements cited by Petitioners, when evaluated in the context of their utterance, were not false. I also find that Petitioners have not demonstrated that the Licensee was obligated to inform the ASLB of the transfers of review responsibility between pipe support design groups. Because the Licensee made no false statements, and because the transfers neither resulted in the application of multiple design criteria nor raised safety concerns, it cannot be concluded that the Licensee intended to deceive the NRC about the transfers in order to conceal safety concerns. Therefore I find that there is no basis to conclude that the Licensee made material false statements to the NRC or to the ASLB.

C. Delay of Construction Because of Alleged Material False Statements

Petitioners contend that TUEC's material false statements in the operating license proceeding delayed construction of CPSES Unit 1. (*Id.* at 8 n.4.) However, Petitioners have not demonstrated that the Licensee made the alleged material false statements, and Petitioners have not explained how the alleged material false statements could have delayed, or did in fact delay, construction of Unit 1. Accordingly, there is no basis to conclude that the construction of CPSES Unit 1 was delayed by any statements of the Licensee in the operating license proceeding.

Petitioners also contend that the Licensee's testimony in Mr. Hasan's complaint proceeding before the DOL, regarding the transfer of review responsibility between pipe support design groups, shows that the Licensee deliberately misled the ASLB in the construction permit amendment proceeding before the NRC, regarding the Licensee's intentional delay of the construction of CPSES Unit 1. (*Id.* at 2.) Petitioners have not explained, nor is it apparent, how transfers of responsibility between pipe support design groups for review and certification of pipe support design could have delayed, or in fact did delay, construction of CPSES. It is just as likely that transfers of review and certification responsibility from a pipe support design group without the capability to analyze or certify a field design change, to a pipe support design group with the capability to analyze or certify a field design change, would speed construction. Even if such transfers had delayed construction, there is no basis to conclude that any delay was deliberate.

For the reasons given above, I conclude that Petitioners have provided no basis to conclude that the Licensee deliberately delayed the construction of CPSES

or that the Licensee misled the ASLB regarding any delay in construction of CPSES.

III. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. §2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175-76 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that I have applied to determine whether the action requested by Petitioners, or other enforcement action, is warranted.

For the reasons discussed above, there is no basis for taking the actions requested by the Petitioners. The NRC Staff has carefully reviewed the Petition, assessed the specific references and citations in the Petition, and reviewed additional documents regarding Petitioners' allegations. Petitioners have not demonstrated that the Licensee, in violation of NRC requirements, transferred responsibility for review of field changes to pipe support designs or that multiple pipe support design criteria were applied to any individual pipe support. Petitioners have presented no basis to conclude that any such transfers raised safety concerns. Petitioners have not demonstrated that the Licensee deliberately delayed construction of CPSES Unit 1. Finally, Petitioners have not demonstrated that the Licensee made any material false statements to the NRC or the ASLB, violated any orders of the ASLB, or withheld evidence from the NRC or the ASLB.

Accordingly, Petitioners' requests for hearings to determine whether the Licensee has the requisite character and competence to operate a nuclear power facility, for imposition of a fine or other penalties on the Licensee, and to ban certain of the Licensee's managers from all licensed nuclear facilities for making material false statements to the NRC are denied.

As provided by 10 C.F.R. §2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 15th day of January 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-445

TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*
(Comanche Peak Steam Electric
Station, Unit 1)

January 15, 1993

The Director of the Office of Nuclear Reactor Regulation concludes that a petition filed by Sandra Long Dow and Richard E. Dow raised no substantial health or safety concern to call into question the continued safe operation of Comanche Peak Steam Electric Station (CPSES) and, therefore, denies the petition. In a Motion to Reopen the Record filed by Petitioners in the CPSES operating license proceeding for Units 1 and 2, Petitioners alleged that Texas Utilities Electric Company (TUEC or Licensee) repeatedly made false and misleading statements to the Atomic Safety and Licensing Board (ASLB) regarding the pipe support design process at CPSES, and that the ASLB relied on this false information when it issued an operating license for Unit 1.

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

By Memorandum and Order of January 17, 1992, CLI-92-1, 35 NRC 1, the U.S. Nuclear Regulatory Commission (NRC) referred to the NRC Staff under 10 C.F.R. § 2.206 allegations by Sandra Long Dow and Richard E. Dow (Petitioners) concerning the pipe support design process at the Comanche Peak Steam Electric Station (CPSES), Unit 1. These allegations were contained in a Motion to Reopen the Record (Motion) filed by Petitioners in the CPSES

operating license proceedings for Units 1 and 2. In the Motion, Petitioners alleged that Texas Utilities Electric Company's (TUEC or Licensee) witnesses repeatedly made false and misleading statements to the Atomic Safety and Licensing Board (ASLB) between 1982 and 1985.

In my letter of February 18, 1992, I acknowledged receipt of the Petition and stated that the NRC would take action on the Petitioners' request. I have now completed my evaluation of the issues in the Petition and determined for the reasons set forth below that no adequate basis exists to take action against the Licensee for CPSES Unit 1.

II. DISCUSSION

Petitioners asserted that TUEC's witnesses repeatedly made false and misleading statements to the ASLB between 1982 and 1985 and that these false and misleading statements prompted the ASLB to rely on and adopt false or misleading facts concerning the question of pipe support design when issuing its December 28, 1983, Memorandum and Order, LBP-83-81, 18 NRC 1410, in the operating license proceeding for CPSES Unit 1. Petitioners also alleged that after the ASLB issued LBP-83-81, TUEC filed a series of motions for summary disposition that included affidavits in which the affiant knowingly made false statements to the effect that each of the three design organizations had separate and distinct responsibilities for the design of pipe supports and all design changes during construction were returned to the original designer for correction and rechecking.

These allegations of material false statements by TUEC to the ASLB are identical to those made in a 10 C.F.R. § 2.206 petition filed by Michael D. Kohn on July 30, 1991. Both petitions assert that the ASLB relied on false information when issuing LBP-83-81,¹ and both petitions cite the same testimony of a TUEC witness to support the allegation of material false statements.² I found Mr. Kohn's allegation that TUEC officials made material false statements or intentionally misled the ASLB regarding the pipe support design process to be unsubstantiated. (DD-93-1, Section II.B.) As Petitioners have provided no

¹ Specifically, Petitioners allege that the false information led the ASLB to believe that:

The evidence establishes that each of the three pipe support design organizations has its own specific scope of responsibility for a specific group of supports. There is no need for cross communication between the three groups since they share no common, in-line design responsibility The Board concludes that the Applicants have adequately defined and documented the responsibility and paths of communication between . . . the pipe support design groups. No NRC regulation has been violated.

See Dow Petition at 4-5; Kohn Petition at 6.

² The Dows cite the July 3, 1984 affidavit of Mr. J.C. Finneran, Jr., on pages 13 and 36. The Kohn Petition cites the same testimony, in addition to Mr. Finneran's testimony before the ASLB. Although the Dows do not provide any citations to Mr. Finneran's testimony before the ASLB, the Staff assumes they are referring to the same testimony cited by Mr. Kohn.

information beyond that already provided by the Kohn Petition,³ these allegations remain unsubstantiated, and I conclude that Petitioners have not raised any safety concerns.

III. CONCLUSIONS

The NRC Staff has reviewed Petitioners' allegation that TUEC's witnesses provided false and misleading information to the ASLB regarding the pipe support design process at the Comanche Peak Steam Electric Station Unit 1. The NRC Staff assessed the specific references and citations in the Petition and reviewed the documents attached to the Petition as well as many additional documents regarding the allegations in the Petition. On the basis of its entire review, the Staff has not found any substantial health and safety issues that would call into question the continued safe operation of CPSES.

The institution of proceedings pursuant to 10 C.F.R. §2.202 is appropriate only when substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that I have applied to determine whether the action requested by Petitioners, or other enforcement action, is warranted.

For the reasons discussed above, no basis exists for taking any action in response to the Petition because Petitioners raised no substantial health or safety issues. Accordingly, no action pursuant to 10 C.F.R. § 2.206 is being taken in this matter.

The Staff will file a copy of this Decision with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 15th day of January 1993.

³In fact, the Dows have provided substantially less information than provided in the Kohn Petition of July 30, 1991.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 50-446-CPA

**TEXAS UTILITIES ELECTRIC
COMPANY, *et al.***
(Comanche Peak Steam Electric
Station, Unit 2)

February 3, 1993

The Commission denies the request of B. Irene Orr and D.I. Orr for a stay of the issuance of the low-power operating license for Comanche Peak Unit 2. The Commission finds that Petitioners' stay request cannot properly be considered in the operating license proceeding because they are neither parties to that proceeding nor have they addressed in their stay request the five factors for late-filed intervention petitions. Furthermore, the Commission cannot consider Petitioners' stay request in the construction permit amendment proceeding, to which Petitioners are a party, because they have failed to relate the stay request to any action in that proceeding.

RULES OF PRACTICE: STAY OF AGENCY ACTION

Where petitioners who have filed a request to stay issuance of a low-power license are not parties to the operating license proceeding, and where petitioners' request does not address the five factors for late intervention found in 10 C.F.R. § 2.714(a)(1)(i)-(v), the request cannot properly be considered in that operating license proceeding.

RULES OF PRACTICE: STAY OF AGENCY ACTION

The provision for stays in 10 C.F.R. §2.788 provides only for stays of decisions or actions in the proceeding under review.

RULES OF PRACTICE: STAY OF AGENCY ACTION

Where petitioners do not relate their stay request to any action in the proceeding under review, the request for stay is beyond the scope of 10 C.F.R. §2.788. Such a request is more properly a petition for immediate enforcement action under 10 C.F.R. §2.206.

RULES OF PRACTICE: STAY OF AGENCY ACTION (CRITERIA)

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

RULES OF PRACTICE: STAY OF AGENCY ACTION (CRITERIA)

Pursuant to 10 C.F.R. §2.788(e)(1)-(4), the factors to be considered in determining whether to grant or deny an application for a stay are: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless the stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies.

RULES OF PRACTICE: ORAL ARGUMENT

The Commission requires that a party seeking oral argument must explain how oral argument would assist it in reaching a decision.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a motion filed by B. Irene Orr and D.I. Orr ("Petitioners")¹ seeking a stay of the issuance of the low-power license

¹We presume that the request is filed on behalf of the Orrs because it is filed by their counsel. Nowhere in the stay request are their names mentioned.

by the NRC Staff for Comanche Peak Unit 2. Petitioners seek a stay of the low-power license pending, *inter alia*, our resolution of their appeal from a decision issued by the Atomic Safety and Licensing Board ("Licensing Board") denying their petition to intervene in the construction permit amendment ("CPA") proceeding involving this facility. The Texas Utilities Electric Company ("TU Electric" or "Licensee") has responded in opposition. For the reasons stated below, we deny the stay request.

II. BACKGROUND

Prior to filing this action, Petitioners have made no attempt to participate in the Comanche Peak Unit 2 operating license ("OL") proceeding, in which the low-power license is to be issued. Instead, their participation has been limited to participation in the CPA proceeding. In the CPA proceeding, TU Electric seeks to amend the Unit 2 construction permit to extend the latest construction completion date to August 1, 1995. The NRC Staff issued an "Environmental Assessment and Finding of No Significant Impact" analyzing the proposed extension on June 23, 1992. *See* 57 Fed. Reg. 28,885 (June 29, 1992). The Staff then issued an order extending the latest construction completion date, as requested, on July 28, 1992. *See* 57 Fed. Reg. 34,323 (Aug. 4, 1992).

In response to the Environmental Assessment, Petitioners filed a petition to intervene and a request for a hearing. Both the Licensee and the NRC Staff opposed Petitioners' request. After preliminary proceedings, the Licensing Board issued an order denying Petitioners' request for intervention, based upon their failure to submit an admissible contention. LBP-92-37, 36 NRC 370, 384 (1992). Petitioners have perfected a timely appeal which is now pending before the Commission.

On Monday, February 1, 1993, the NRC Staff provided notice to Petitioners that the Staff intended to issue the low-power license late on the afternoon of Tuesday, February 2, 1993, approximately 24 hours later. While the Staff was actually preparing to sign the license, Petitioners filed a request for a stay of that license by facsimile transmission. The Licensee immediately filed a response in opposition to the stay request by facsimile transmission. After reviewing both Petitioners' request and the Licensee's response, the NRC Staff issued the low-power license.

III. ANALYSIS

Petitioners have attempted to file their request in the OL proceeding for Unit 2 as well as the CPA proceeding. However, Petitioners are not parties to the

OL proceeding. Inasmuch as their request does not address the five factors for late-filed petitions to intervene found in 10 C.F.R. § 2.714(a)(1)(i)-(v), this stay request cannot properly be considered in the operating license proceeding.

The provision for “stays” in the Commission’s regulations, by its terms, applies only to “a decision or action of a presiding officer” 10 C.F.R. § 2.788. In short, this provision provides only for stays of decisions or actions in the proceeding under review — in this case, the CPA proceeding. However, Petitioners do not relate their request to any action in the CPA. Therefore, the request for stay is beyond the scope of section 2.788 and is more properly a petition for immediate enforcement action under 10 C.F.R. § 2.206. However, in view of the need for a prompt NRC decision to remove uncertainty regarding the status of the low-power license, we proceed below to consider the petition without referring it to the Staff for a decision, which is our normal practice.²

The only allegation raised by Petitioners is that TU Electric has “secreted” information from the NRC, Motion at 2-3, and that this action may raise doubts about TU Electric’s “character and competence” to operate [Comanche Peak] safely.” *Id.* at 3. As a result, Petitioners now ask the Commission to direct TU Electric to turn that information over to them. *Id.* at 4. However, Petitioners cite no evidence for their allegation other than a generalized reference to the “entire record” before the Licensing Board. *Id.* at 2 n.1. Such a generalized reference provides no aid whatever in evaluating Petitioners’ motion and is simply insufficient for the purposes of issuing a stay of the low-power license.

Petitioners do include as an exhibit a letter from the NRC Staff to TU Electric which directs TU Electric to take certain steps regarding agreements between TU Electric and its former minority co-owners in which TU Electric purchased the minority owners’ shares in Comanche Peak. *See* Letter from Thomas E. Murley, NRC, to William J. Cahill, TU Electric (January 12, 1993). However, there is no showing that any actions that the NRC directed TU Electric to take in that letter will have any impact on low-power operation. As mandated in that letter, TU Electric’s response will be in the Commission’s hands — and in the

²Even assuming *arguendo* that section 2.788 did apply to this situation, we find that Petitioners have failed to address — much less satisfy — that section’s requirements. Section 2.788 specifies that “an application for a stay . . . must contain . . . [a] concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section.” 10 C.F.R. § 2.788(b)(2). Those factors, in turn, are: “(1) [w]hether the moving party has made a strong showing that it is likely to prevail on the merits; (2) [w]hether the party will be irreparably injured unless a stay is granted; (3) [w]hether the granting of a stay would harm other parties; and (4) [w]here the public interest lies.” 10 C.F.R. § 2.788(e)(1)-(4). Petitioners’ “stay request” does not address those factors at all and, therefore, must be denied on its merits. Moreover, although the Petitioners were only informed of the Staff’s specific schedule on February 1, they were advised well over a week previously by Commission counsel of the likely near-term issuance of the low-power license. Thus, any stay request should have been filed much earlier than virtually the minute the license was actually due to issue. Their unreasonable delay in seeking relief cuts against granting it.

public domain — within 30 days of the NRC's letter. This response will be filed before issuance of the full-power license becomes an issue.³

In conclusion, we find that there is no reason to delay the effectiveness of the low-power license and we deny the request before us.⁴

It is so ORDERED.

For the Commission⁵

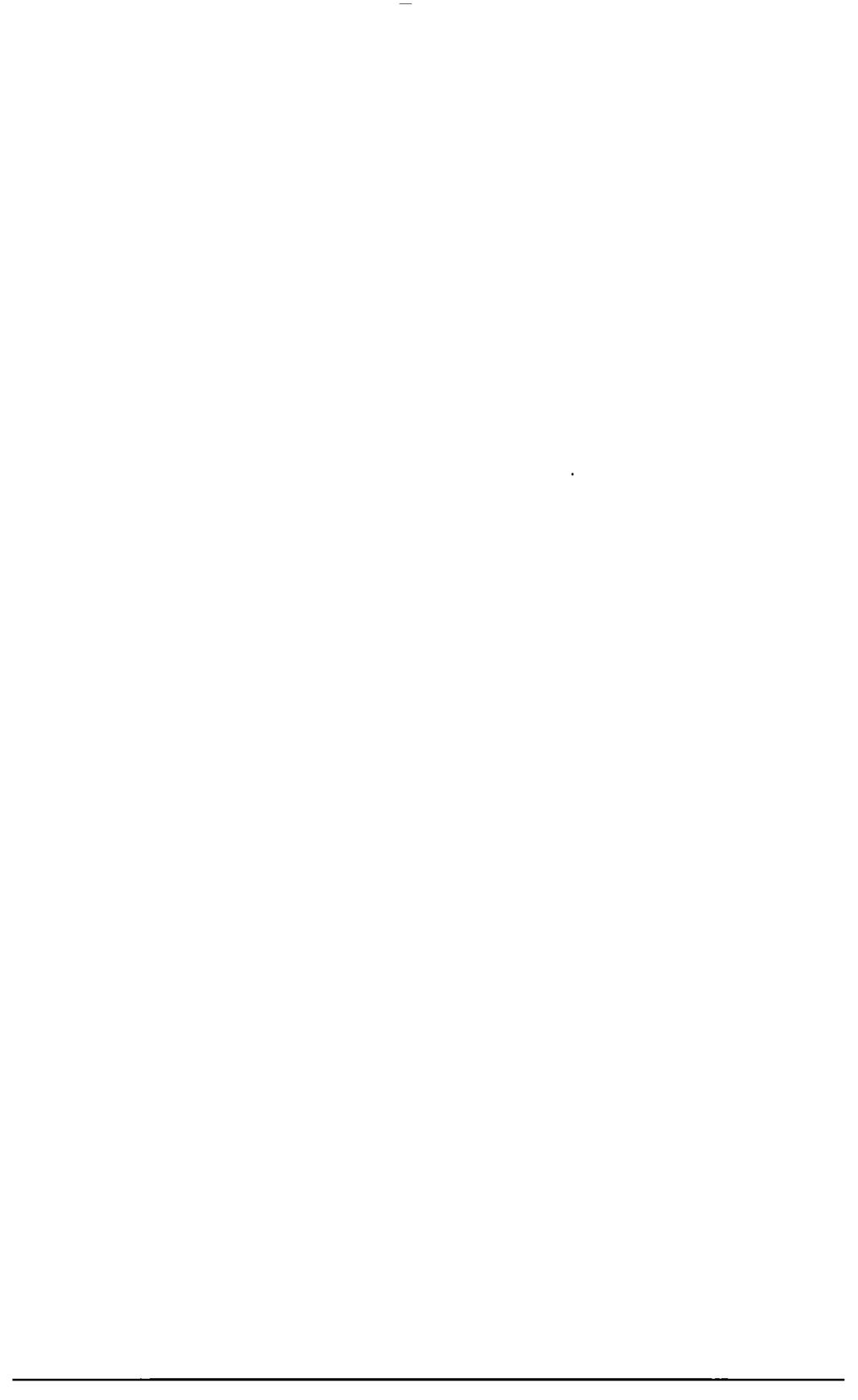
SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of February 1993.

³ Moreover, as we have pointed out on other occasions, the risks of low-power operation are minimal. See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399 (1989); *Cuomo v. NRC*, 772 F.2d 972 (D.C. Cir. 1985).

⁴ We also deny Petitioners' request for oral argument on this motion. Motion at 4. Petitioners have failed to demonstrate "how [oral argument] would assist us in reaching a decision." *In re Joseph J. Macktal*, CLI-89-12, 30 NRC 19, 23 n.1 (1989); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992).

⁵ Commissioners Curtiss and de Planque are not available to participate in this matter.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

**Ivan W. Smith, Chairman
Dr. Richard F. Cole
Dr. Walter H. Jordan**

In the Matter of

**Docket No. 030-20693-EA
(ASLBP No. 93-670-01-EA)
(Materials License
No. 29-1822205-02)**

**GEO-TECH ASSOCIATES, INC.
(Geo-Tech Laboratories,
43 South Avenue,
Fanwood, New Jersey 07023)**

February 1, 1993

**MEMORANDUM AND ORDER
(Terminating Proceeding)**

SYNOPSIS

The NRC Staff moves for dismissal of the request for hearing by Geo-Tech Associates, Inc. The Licensing Board grants the Staff's motion on the separately sufficient grounds that: (1) Geo-Tech has failed to comply with the Board's order to respond to charges against it; (2) Geo-Tech has failed to comply with the Board's order to explain why its hearing request was late; and (3) Geo-Tech has failed to answer the Staff's motion to dismiss the request for hearing.

BACKGROUND

On August 11, 1992, the NRC's Deputy Chief Financial Officer/Controller issued an order revoking the materials license of Geo-Tech Associates for failure to pay its annual license fee. The Revocation Order, properly issued pursuant to the provisions of 10 C.F.R. § 2.202, directed Geo-Tech to submit within 30 days an answer to the order, admitting or denying each charge.

On September 16, 1992, Geo-Tech through its legal counsel requested a hearing. The request failed to answer any of the charges supporting the Revocation Order as required by that order and by NRC regulation 10 C.F.R. § 2.202(b). The Commission referred the matter for consideration by an adjudicatory presiding officer. CLI-92-14, 36 NRC 221 (1992). This Board was established in accordance with the Commission's directive.

On November 6, 1992, the NRC Staff moved to deny Geo-Tech's request for a hearing. We denied the Staff's motion in our order of November 18, 1992. In that order, we directed Geo-Tech to answer the charges against it. LBP-92-33, 36 NRC 312. In pertinent part the order provided:

1. Within 20 days following the service of this Order, Geo-Tech must respond, by answer in writing and under oath or affirmation, to the Order dated August 11, 1992, revoking the materials license held by it. The answer shall specifically admit or deny each allegation or charge made in the Order, and shall set forth the matters of fact and law upon which Geo-Tech relies. The answer shall state any reasons why Geo-Tech believes the Order should not have been issued or should be set aside

Id. at 315.

In addition, pursuant to the Commission's order in CLI-92-14, the Board directed Geo-Tech to demonstrate good cause, if any, why its hearing request and any answer to the order revoking the license was not filed on time. *Id.*

Geo-Tech has not responded to the Board's order of November 18, 1992. No communication whatever has been received by this Board from Geo-Tech since that order issued.

As noted, the NRC Staff, on January 14, 1993, filed its motion to dismiss the proceeding on the grounds of default. Geo-Tech did not answer the Staff's motion.

DISCUSSION

The Board deems that Geo-Tech has abandoned its request for a hearing by its willful failure to assert a defense against the charges set out in the Revocation Order, as directed by the Board's order of November 18, 1992. Geo-Tech's failure to answer the Staff's January 14, 1993 motion to dismiss the

proceeding also supports the inference that Geo-Tech has abandoned its request for a hearing.

In addition, because Geo-Tech has failed to address the reasons for and significance of its failure to file its hearing request on time, the Board rules that the late request may not be entertained in accordance with the provisions of 10 C.F.R. § 2.714(a)(1).

ORDER

The Board *dismisses* Geo-Tech's request for a hearing with *prejudice*. This proceeding is *terminated*. The Board also deems Geo-Tech's defaults, as recited above, to be a consent to the Order of August 11, 1992, revoking Geo-Tech's materials license. Therefore that Order is *final* and *effective* in accordance with the provisions of 10 C.F.R. § 2.202(d).

THE ATOMIC SAFETY AND LICENSING BOARD

Richard F. Cole
ADMINISTRATIVE JUDGE

Walter H. Jordan (by I.W.S.)
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
February 1, 1993

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.
(Calborne Enrichment Center)

February 2, 1993

RULES OF PRACTICE: DISCOVERY; PRIVILEGED MATTER

Interrogatories that seek the disclosure of the factual bases and legal requirements that underlie contentions constitute proper discovery of the intervenor so long as the interrogatories do not seek the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the proceeding."

RULES OF PRACTICE: DISCOVERY; PRIVILEGED MATTER

A party objecting to a discovery request on the basis that the information is protected by the attorney work product privilege has the burden of establishing that the materials are protected by 10 C.F.R. § 2.740(b)(2). A mere assertion that the information withheld constitutes attorney work product is insufficient to meet the objector's burden of establishing the attorney work product privilege.

MEMORANDUM AND ORDER
(Ruling on Applicant's Motion to Compel Discovery)

We have before us for decision a motion filed by Applicant Louisiana Energy Services, L.P. (LES), dated December 24, 1992, for an order to compel Intervenor Citizens Against Nuclear Trash (CANT) to answer specified questions in "Applicant's Interrogatories to Citizens Against Nuclear Trash's Contentions B, I, J, K, L, M, and Q," dated August 11, 1992.

CANT had responded to the interrogatories in an answer dated December 2, 1992. LES considers CANT's answers to certain questions pertaining to the contentions, except for L and M, to be inadequate because of CANT's claim that its analysis is incomplete, that CANT is awaiting NRC analysis, that the information sought is protected by the attorney work product rule, or the answer is incomplete and evasive. CANT takes issue with the objections to its responses and requests that the Licensing Board deny Applicant's motion to compel.

DISCUSSION

A. Incomplete Analysis

1. Applicant finds objectionable CANT's responses to interrogatories B.1-2, B.1-2.1, B.1-2.2, B.4-2, B.4-3, B.4-4, B.4-6, B.5-1, J.4-1, J.4-2.a, J.4-2.c, J.4-2.d, J.4-2.f, J.6-1.b, J.9-3, J.9-4.a, J.9-4.b, K-2.a, and Q-2 that it could not, at this time, respond to the interrogatories because the persons who may be testifying with respect to these questions have not yet completed their analysis of the encompassed issues.

Applicant contends that the foregoing is not a sufficient ground to support an objection to discovery. It asserts that the Commission's rules contemplate that parties' positions may not be complete during discovery and may evolve during a licensing proceeding. It cites 10 C.F.R. § 2.740(e), which requires the supplementation of discovery responses under certain circumstances, as acknowledgment of the evolutionary process that requires parties to supplement their answers if the information is no longer correct. LES also cites *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-67, 16 NRC 734, 736 (1982), in which the Licensing Board stated that "[s]hould applicant develop new, relevant evidence, it would be under a continuing obligation to update its answer." Applicant contends that an analysis not yet completed is not grounds to withhold information from discovery.

2. CANT does not dispute that discovery is an evolutionary process that requires parties to supplement their answers as additional information becomes available. It states that at present CANT has not yet received an analysis from

its potential witnesses regarding many of the contentions and that CANT does not yet have within its knowledge the information that LES seeks in some of its interrogatories. Intervenor asserts that it will respond to the interrogatories as soon as it has received and developed sufficient data to form a preliminary response. It will then supplement its answers as the analysis of the issues is further refined.

CANT notes that the discovery deadline for technical issues is not until September 3, 1993, and for environmental issues, July 11, 1994. Intervenor points out that LES has responded to several of its discovery requests with the statement that Applicant has not selected witnesses to testify nor has the substance of their testimony and affidavits been identified.

3. The Licensing Board finds that the granting of the motion to compel, where CANT acknowledges its responsibility to respond but looks for time to comply, would be inappropriate at this time.

CANT does not dispute the need to respond to the interrogatories. It raises the question of when, a matter not addressed by LES. We recognize that some time may be required to respond to the new matters raised in the interrogatories. That occurs where Applicant had amended its application or provided additional information and bases its interrogatories on that material.

We do not see the need for the same amount of time to respond to interrogatories B.5-1, J.4-2.c, J.4-2.f, J.9-4.a, and J.9-4.b, where they seek information regarding the contentions as filed by CANT. CANT had to perform a preliminary analysis to formulate its contentions and should be in a position to respond to those interrogatories in a quicker fashion than for those based on additional submittals.

The proceeding should move forward in a timely manner. The parties will be given an opportunity to establish a schedule for responding to the interrogatories. Should they be unable to establish a schedule, we will set one after considering their positions on the matter.

B. Awaiting NRC Analysis

1. Applicant requests that the Licensing Board order Intervenor to answer interrogatories I.1-b through I.11-b that relate to Contention I which alleges that the LES application is incomplete in eleven specified areas. LES asserts that Intervenor based its contention on an NRC Staff letter that requested additional information. Applicant states that it provided the requested information to Staff and Intervenor, and it has updated the application. It claims that it is entitled to know why CANT now considers the license application to be incomplete. Proper responses would permit it to prepare for the hearing and to begin procedure and design development based on commitments in the application. Applicant asserts that CANT's response to the interrogatories that it "continues to evaluate this

aspect of contention I, and is also waiting for the NRC Staff's evaluation" is inadequate.

LES claims that it appears that CANT is waiting for Staff to define issues and is trying to avoid the late-filed contention standard in 10 C.F.R. § 2.714(a)(1). It also views CANT's action as an attempt to use Staff studies as a sort of precomplaint discovery tool. LES also objects to the response that CANT is continuing to evaluate the subject matter of the interrogatories on the grounds that a claim of continuing evaluation is not sufficient for withholding information from discovery, a matter it objected to under A.1 above.

2. CANT disagrees with LES's interpretation of its response. Intervenor states that it was merely indicating that it had no formulated analysis yet to offer, and that as part of the evolutionary discovery process, ultimately CANT may be factoring in details that surface in Staff reports as part of CANT's analysis. CANT denies that it is waiting for the Staff to define the issues or that it was attempting to employ Staff studies as a sort of precomplaint discovery. It points to the fact that it has eight admitted contentions as disproving the allegations.

3. The Board finds that the Licensing Board need not compel CANT to respond to the specified interrogatories at this time. CANT recognizes its obligation to respond to the interrogatories independent of when Staff completes its studies. As with A.1, above, it becomes a matter of when a timely response is due. That should be worked out in the same manner as the preceding dispute.

C. Attorney Work Product

1. Applicant objects to CANT's refusal to answer interrogatories B.5-1, J.4-2.c, J.4-2.d, J.4-2.f, J.6-1.b, J.9-3, J.9-4.a, J.9-4.b, K-2.a, and Q-2 on the grounds that Applicant seeks to discover the legal theories of CANT's attorneys. LES states that the interrogatories seek a fact or citation to a regulation or regulatory guidance and not the attorney's legal theories.

LES relies on the requirements of 10 C.F.R. § 2.714(a)(2) and (b)(2)(ii), which require that contentions be supported by facts or expert opinion on which a petitioner intends to rely, together with references to specific sources on which petitioner intends to rely to establish those facts or expert opinions. Applicant contends that the interrogatories asking for facts and citations to specific regulations and regulatory guidance are proper and should be responded to.

For each of the specified interrogatories, Applicant points out that its inquiries extended to the facts and citations CANT relies on to support the contentions.

2. CANT defends its refusal to respond to the interrogatories on the grounds that Applicant seeks the mental impressions of the party's attorneys which are protected by the attorney work product rule. It relies on *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), for the proposition that "[p]roper preparation of a client's

case demands that [the lawyer] assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”

CANT uses interrogatory J.4-2.f as an example of LES clearly asking CANT to reveal mental impressions of its attorneys when it asks for the “analysis” CANT’s attorneys used to reach the legal conclusion that the costs of the project outweigh the benefits. CANT claims that this is a pattern repeated throughout the interrogatories.

LES asked CANT the following in J.4-2.f:

In Contention J you state that “[o]n the whole, the costs of the project far outweigh the benefits of the proposed action.” What bases, facts and *analysis* were used to reach this conclusion? [Emphasis added]

Intervenor considers as inapposite to discovery Applicant’s reliance on Commission requirements that contentions be supported by certain facts and references to specific rules and regulations to have contentions admitted in the first instance.

3. The Licensing Board finds that the motion to compel, insofar as CANT refuses to respond to the interrogatories on the grounds of protection under the attorney work product rule, should be granted.

The attorney work product rule is contained in 10 C.F.R. § 2.740(b)(2) and provides as follows:

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

The rule was adopted from Rule 26(b)(3) of the Federal Rules of Civil Procedure. Where an NRC rule of practice is based on a Federal Rule of Civil Procedure, judicial interpretations of that federal rule can serve as guidance for the interpretation of the analogous rule. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983). *See also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1159-62 (1982).

The purpose of the rule has been described as to protect “[s]ubject matter that relates to the preparation, strategy, and appraisal of the strengths and weaknesses

of an action, or to the activities of the attorneys involved, rather than to the underlying evidence" 4 Moore's Federal Practice ¶26.64[1] (2d ed. 1991), at 26-349.

Where a party asserts a privilege in objecting to a discovery request, the burden is upon the objecting party to establish the existence of the privilege. A mere assertion by the intervenor that the material withheld constitutes attorney work product is insufficient to meet that burden. *Seabrook*, LBP-83-17, 17 NRC at 495.

That is the case we have at hand. CANT merely proclaims that movant seeks papers that bear on the theory of the case and litigation strategy, but its allegation remains unsubstantiated.

It is proper to inquire into the foundation of an intervenor's own contention. In *Seabrook*, 17 NRC at 493-94, where the inquiry requested any "study, calculation or analysis" on which an answer to a specific inquiry was based, the Licensing Board stated, "[i]nterrogatories which inquire into the basis of a contention serve the dual purposes of narrowing the issues and preventing surprise at trial." The Licensing Board went on to find that the intervenor had failed to meet its burden of showing that the material it sought to withhold was protected under 10 C.F.R. § 2.740(b)(2).

In *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 82 (1986), the Licensing Board stated:

However, a review of the interrogatories in question reveals that the majority of them ask for information which is basic to an understanding of the People's position in the proceeding. We agree with the proposition put forward by counsel for Kerr-McGee at the September 11 prehearing conference (see Tr. 324-28) that, having raised these important issues, the People have an obligation to participate meaningfully in their resolution.

CANT has not shown that the interrogatories do not seek the underlying evidence and law that form the foundation for the contentions but rather the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the proceeding."

The support for CANT's claim that the ten interrogatories seek attorney work product is the language appearing in only one, J.4-2.f, where LES asks "[w]hat bases, facts, and analysis were used to reach this conclusion?" CANT stated "LES is clearly asking CANT to reveal mental impressions of its attorneys when it asks for the "analyses" CANT's attorneys used to reach the legal conclusion that the costs of the project outweigh the benefits.

Intervenor would have us believe that the mere request for an analysis means Applicant is seeking attorney work product. It provides no basis to equate the request for an analysis with a request for attorney work product and therefore we find CANT's position to be without merit. The same conclusion is reached

for the other nine interrogatories where no "analysis" was sought. The relevant portion of the motion to compel shall be granted.

CANT, as part of its response to the ten interrogatories, also based its failure to respond on the grounds that it did not yet have an analysis in hand to offer to LES. This again is not a refusal to respond but involves the issue of when a response shall be made. There is no need for an order at this time to compel CANT to respond as to this aspect. This matter will be handled as part of the need for scheduling responses.

D. Incomplete and Evasive Answer

1. Applicant objects to CANT's response to interrogatory J.3-2 as constituting an incomplete and evasive answer. In answering the interrogatory, CANT stated that LES should see the answer to interrogatory J.3-1. That answer was not responsive to J.3-2.

2. Intervenor states that the reference it made to the answer to interrogatory J.3-1 was a typographical error. CANT intended to refer back to a response that invoked the attorney work product rule, and also noted that CANT did not yet have a formulated analysis to respond to the interrogatory.

3. The Licensing Board grants the motion to compel a response to interrogatory J.3-2 for the same reasons and to the same extent as was done under C.3, above.

ORDER

Based upon all of the foregoing, it is hereby ordered that:

1. CANT is compelled to answer interrogatories B.5-1, J.3-1, J.4-2.c, J.4-2.d, J.4-2.f, J.6-1.b, J.9-3, J.9-4.a, J.9-4.b, K-2.a, and Q-2;
2. The motion to compel is otherwise denied;
3. All interrogatories that are the subject of the motion shall be answered by CANT in accordance with a schedule to be further ordered by the Licensing Board;
4. LES and CANT shall confer regarding the establishment of a schedule;
5. Should they not be successful in establishing a schedule mutually agreed upon, they shall separately notify the Licensing Board in writing of their preferred scheduling, with their reasons, by the close of business February 17, 1993.

6. Parties may file responses to the others' filings within 7 days thereafter.

**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
February 2, 1993**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

G. Paul Bollwerk, III, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket No. 70-135-DCOM
(ASLBP No. 92-667-03-DCOM)
(Decommissioning Plan)
(Materials License No. SNM-145)

BABCOCK AND WILCOX
(Apollo, Pennsylvania Fuel
Fabrication Facility)

February 5, 1993

Ruling on the request of five individual Petitioners for an informal hearing to contest licensee Babcock & Wilcox's amendment application seeking agency approval of its proposed decommissioning plan for its Apollo, Pennsylvania fuel cycle facility, the Presiding Officer denies the Petitioners' hearing request for lack of standing and terminates the proceeding.

ATOMIC ENERGY ACT: STANDING TO INTERVENE

RULES OF PRACTICE: STANDING

The Commission has chosen to apply contemporaneous judicial concepts of standing to ascertain who, under section 189a(1) of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a)(1), is a "person whose interest may be affected by the proceeding" so as to be entitled to a hearing regarding a licensing action. *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); *Portland General Electric Co.*

(Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

ATOMIC ENERGY ACT: STANDING TO INTERVENE

RULES OF PRACTICE: STANDING

To satisfy these judicial standards, a prospective party must show (1) that it could suffer an actual "injury in fact" because of the licensing proceeding, and (2) that its interest arguably is within the "zone of interests" to be protected by the pertinent statutes under which the petitioner seeks to challenge the licensing action. *See, e.g., Rancho Seco*, CLI-92-2, 35 NRC at 56; *Pebble Springs*, CLI-76-27, 4 NRC at 613.

**ATOMIC ENERGY ACT: STANDING TO INTERVENE
(INJURY IN FACT)**

RULES OF PRACTICE: STANDING (INJURY IN FACT)

The three components of the injury in fact requirement are injury, cause, and remedial benefit. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). *See generally* 13 Charles A. Wright, *et al.*, *Federal Practice and Procedure* §§3531.4-.6 (2d ed. 1984). The showing necessary to satisfy these elements recently has been characterized as follows:

Although variously described, the asserted injury must be "distinct and palpable" and "particular [and] concrete" as opposed to being "conjectural . . . [.] hypothetical," or "abstract." The injury need not already have occurred but when future harm is asserted, it must be "threatened," "certainly impending," and "real and immediate." Additionally, there must be a causal nexus between the asserted injury and the challenged action. In other words, the alleged harm must have "resulted" in a "concretely demonstrable way" from the claimed infractions. There must also be a sufficient causal connection between the alleged harm and the requested remedy so that the complaining party "stand[s] to profit in some personal interest."

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121 (1992) (footnotes omitted). *See also Lujan v. Defenders of Wildlife*, 119 L. Ed. 2d 351, 364 (1992).

**ATOMIC ENERGY ACT: STANDING TO INTERVENE
(INJURY IN FACT)**

RULES OF PRACTICE: STANDING (INJURY IN FACT)

When a petitioner is challenging the legality of government regulation of someone else, injury in fact as it relates to factors of causation and redressability is “ordinarily ‘substantially more difficult’ to establish.” *Lujan*, 119 L. Ed. 2d at 365 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976); and *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

**ATOMIC ENERGY ACT: STANDING TO INTERVENE
(INJURY IN FACT)**

RULES OF PRACTICE: STANDING (INJURY IN FACT)

A hearing petitioner bears the burden of establishing that the various injuries alleged to occur to its AEA-protected health and safety interests or its National Environmental Policy Act (NEPA)-protected environmental interests satisfy the three components of the injury in fact requirement. See *Perry*, LBP-92-4, 35 NRC at 120. See also *Lujan*, 119 L. Ed. 2d at 364.

**ATOMIC ENERGY ACT: STANDING TO INTERVENE
(INJURY IN FACT)**

RULES OF PRACTICE: STANDING (INJURY IN FACT)

For purposes of assessing injury in fact (or any other aspect of standing), a hearing petitioner’s factual assertions, if uncontroverted, must be accepted. See, e.g., *Lujan*, 119 L. Ed. 2d at 364-65; *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988).

**ATOMIC ENERGY ACT: STANDING TO INTERVENE
(INJURY IN FACT)**

RULES OF PRACTICE: STANDING (INJURY IN FACT)

In evaluating a petitioner’s claims of injury in fact, care must be taken to avoid “the familiar trap of confusing the standing determination with the assessment of petitioner’s case on the merits.” *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted), cert. denied, 117 L. Ed. 2d 460 (1992).

ATOMIC ENERGY ACT: STANDING TO INTERVENE

**RULES OF PRACTICE: STANDING; SUMMARY DISPOSITION
(STANDING)**

In the face of contravening factual submissions made by the licensee and the NRC Staff, it is appropriate, in a manner akin to a summary disposition determination, to undertake a merits-type evaluation of the sufficiency of factual bases for a hearing petitioner's claims of standing. See *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978). See also 13A Wright, *et al.*, *supra*, § 3531.15, at 97-99.

ATOMIC ENERGY ACT: STANDING TO INTERVENE

**RULES OF PRACTICE: STANDING (COMMERCIAL POWER
REACTOR)**

To establish standing in NRC licensing adjudications, petitioners often seek to rely upon proximity to a licensed facility, particularly under what is commonly referred to as the "fifty-mile rule." This so-called "rule," which is more in the nature of a presumption, is derived from a string of commercial power reactor adjudicatory determinations. The common thread in these decisions is a recognition of the potential effects at significant distances from the facility of the accidental release of fissionable materials. Through their reliance on this singular factor, these cases now stand for the general proposition that a petitioner living within approximately fifty miles of a commercial power reactor will be considered to have the requisite injury in fact for standing to contest a request for issuance of a facility construction permit, an operating license, or an amendment to such a permit or license that has obvious and potentially wide-ranging offsite radiological consequences. See, e.g., *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 223-26 (1974).

ATOMIC ENERGY ACT: STANDING TO INTERVENE

**RULES OF PRACTICE: STANDING (MATERIALS LICENSING
ACTION)**

The Commission has made it clear that the "fifty-mile" presumption utilized for commercial power reactors does not apply in materials licensing actions. Instead, a petitioner must show, in accordance with 10 C.F.R. § 2.1205(g), what particular impact the planned licensing action will have upon its legitimate (e.g.,

health, safety, or environmental) interests. See 54 Fed. Reg. 8269, 8272 (1989). Therefore, to meet the burden of proving that it has the requisite injury in fact, a petitioner in a materials licensing proceeding must provide some evidence of a causal link between the distance it resides from the facility and injury to its legitimate interests.

NEPA: REQUIREMENTS

By its terms, NEPA imposes procedural rather than substantive constraints upon an agency's decisionmaking process: The statute requires only that an agency undertake an appropriate assessment of the environmental impacts of its action without mandating that the agency reach any particular result concerning that action. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

NEPA: STANDING (INJURY IN FACT)

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

The Supreme Court has recognized that the procedural rights accorded a person by a statute such as NEPA are accorded "special" consideration when deciding whether there has been injury in fact regarding those rights. Injury in fact to those procedural rights can be successfully established with a less rigorous showing on the normal injury in fact elements of redressability and immediacy. See *Lujan*, 119 L. Ed. 2d at 372 n.7 (person living near dam site may be able to challenge environmental impact statement (EIS) relating to dam license even though unable to establish with certainty that the EIS will cause license to be withheld or altered and despite the fact dam will not be completed for many years). This relaxation does not, however, extend to the requirement that a petitioner must suffer some concrete injury from the proposed agency action, which still must be shown apart from any interest in having the procedures observed. See *id.* at 372 n.8; cf. *Rancho Seco*, CLI-92-2, 35 NRC at 60-61 (alleged "informational injury" is of "questionable value" as basis for standing to challenge failure to prepare adequate EIS).

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

Assuming that the Petitioners' claims regarding injury to economic interests (e.g., property values, local tax revenues) as a result of licensed activities are cognizable in this proceeding, the Petitioners' formulation of their concerns in

terms of undefined economic injury to the local community as a whole fails to address the question most relevant to their standing to participate, i.e., what is the economic injury each of them would suffer.

RULES OF PRACTICE: DISCRETIONARY INTERVENTION

If a hearing petitioner does not request permission to intervene in a proceeding as a matter of discretion, *see Pebble Springs*, CLI-76-27, 4 NRC at 614-17, it is not necessary to determine whether it could be afforded such intervention.

MEMORANDUM AND ORDER **(Denying Hearing Request and Terminating Proceeding)**

Pursuant to 10 C.F.R. Part 2, Subpart L, individual petitioners Cynthia Virostek, Virginia Trozzi, William Whitlinger, and Helen and James Hutchison (Petitioners) seek an informal adjudicatory hearing. In that hearing, the Petitioners wish to challenge the application of Babcock & Wilcox (B&W) to amend the 10 C.F.R. Part 70 license for its nuclear fuel fabrication facility in Apollo, Pennsylvania. B&W seeks this amendment to obtain authorization to decommission the facility according to its Apollo Decommissioning Plan (Plan), Rev. 2 (May 11, 1992, as supplemented May 19 & 22, 1992, and June 11, 1992).

B&W and the NRC Staff, the other participants in this proceeding, oppose the grant of the Petitioners' hearing request, as supplemented. They assert that, contrary to the dictates of 10 C.F.R. § 2.1205(d), (g), the Petitioners have failed to establish their standing to maintain this action. In addition, B&W and the Staff contend that the areas of concern the Petitioners have proposed for litigation are not "germane" to the subject matter of this proceeding, as also is required by section 2.1205(g).

In this instance, it is not necessary to explore the question of whether the Petitioners' litigation issues are "germane." For the reasons detailed herein, it is evident that the Petitioners have not discharged their burden of establishing their standing to obtain a hearing regarding the challenged amendment. As such, their hearing request must be denied.

I. BACKGROUND

On June 18, 1992, the Staff issued a notice that it was considering granting B&W's request for an amendment to the license for its Apollo facility that would allow extensive decommissioning activities in accordance with the Plan.

That notice, published in the *Federal Register* on June 25, 1992,¹ also indicated that, pursuant to the National Environmental Policy Act of 1969 (NEPA) and the Commission's implementing regulations,² the Staff had prepared an Environmental Assessment (EA) regarding the amendment request. According to the notice, the Staff had determined, on the basis of the EA, that the proposed amendment did not involve any significant environmental impact requiring the preparation of a full Environmental Impact Statement (EIS). In addition, the notice declared that any person whose interest may be affected by the proposed amendment could request a hearing within thirty days. Although the notice gave no indication about when the Staff intended to act on the amendment application, on the same day the notice was published in the *Federal Register*, the Staff granted B&W's decommissioning authorization request, which is denoted as Amendment No. 21, and made its licensing action effective immediately.³

The Petitioners filed a timely hearing request on July 27, 1992.⁴ In their petition, they describe themselves as "property owners who live in close proximity to the B&W site."⁵ They also provide a list of twenty areas of concern about the amendment request and the accompanying EA that they wish to litigate in any hearing.⁶

¹ 57 Fed. Reg. 28,539 (1992).

² 42 U.S.C. § 4321 *et seq.*; 10 C.F.R. Part 51.

³ See Letter from J. Hickey to B. Haertjens (June 25, 1992).

⁴ See Request for Hearing (July 27, 1992) [hereinafter Petitioners' Hearing Request]. Initially, the hearing petition was filed on behalf of the Petitioners, in their individual capacities and as the apparent representatives of the organization Save Apollo's Future Environment (SAFE). See *id.* at 2. Subsequently, the Petitioners indicated that because they comprise the active members of SAFE, that organization was being dropped as a participant in this proceeding. See Supplement to Petitioners' Request for Hearing and Request to Immediately Cease Site Cleanup Activities (Oct. 9, 1992) at 1 [hereinafter Petitioners' Hearing Request Supplement]. The termination of this proceeding applies to SAFE as well, whether by reason of its voluntary withdrawal or the failure to establish that any of its members has standing.

⁵ Petitioners' Hearing Request at 2.

⁶ Synopsized slightly, the Petitioners' twenty concerns regarding the Plan and the associated EA are as follows:

1. No assessment of the acute and chronic health impacts for both children and adults.
2. The depressing economic impact of concerns about site-related contamination on local property values.
3. The managerial integrity of B&W to disclose properly and remedy the contamination in Apollo and surrounding communities.
4. The lack of qualifications of McDermott International and B&W officials to remediate the onsite contamination properly.
5. NRC's failure to investigate and analyze fully all reasonable alternatives for contamination cleanup at the site and in surrounding communities.
6. NRC's failure to require proper reporting and cleanup of all nonradioactive and mixed wastes on and from the site.
7. NRC's failure to coordinate activities between all federal and state agencies to ensure a complete and safe cleanup of the B&W site and surrounding communities.
8. NRC's failure to evaluate the health risks fully and properly.
9. NRC's failure to evaluate historical contaminate emissions from the site fully and properly.
10. NRC's failure to evaluate fully contamination in the Apollo sewer system caused by the B&W facility.

(Continued)

In an August 11, 1992 response, B&W asserts that their hearing request should be dismissed because the Petitioners lack standing and they failed to present germane areas of concern.⁷ By memorandum and order dated August 14, 1992, the Presiding Officer requested that the Petitioners, B&W, and the Staff address the issue of the Presiding Officer's authority to allow the Petitioners to supplement their hearing request.⁸ After studying the participants' responsive filings, on September 4, 1992, the Presiding Officer issued a memorandum and order permitting the Petitioners to supplement their hearing request and providing for B&W and Staff rejoinders to that supplement.⁹ In that order, among other things, the Presiding Officer noted on the matter of standing that for the Petitioners "one of the critical elements is their ability to establish their 'injury in fact.' . . . [T]his requires that they show how any alleged harmful radiological, environmental, or other legally cognizable effects that will arise from activities under the decommissioning plan at issue will cause injury to each individual" ¹⁰

In an October 9, 1992 supplement to their hearing request, the Petitioners provide additional information to support their standing to attain party status and to establish that their twenty areas of concern are germane to this proceeding.¹¹ Both B&W and the Staff declare in their October 26, 1992 responses that,

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11. NRC's failure to comply with the requirements of NEPA by not preparing a full EIS.
 12. The failure of the site owners, operators, and their agents to comply with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), the Clean Air Act, the Clean Water Act, and Pennsylvania solid and hazardous waste and clean water laws.
 13. NRC's failure to test and evaluate site contamination, including mixed waste, fully and completely.
 14. NRC's failure to ensure the Plan complies with the laws specified in Concern 12.
 15. The improper selection of an unproven, untested, and unsafe crushing technology.
 16. NRC's failure to evaluate fully and completely the groundwater and surface water impacts of contaminants from the B&W site and decommissioning activities.
 17. NRC's failure to ensure a viable future use for the site by failing to have contamination cleaned up to a safe standard.
 18. NRC's failure to provide information and permit informal public comment before its NEPA finding of no significant impacts.
 19. The socioeconomic impacts of site contamination, offsite emissions, and cleanup processes.
 20. The financial impact on Apollo Borough from site contamination, offsite emissions, and cleanup processes.

See id. at 2-5. *See also* Petitioners' Hearing Request Supplement at 2-9.

⁷ *See* Response of Licensee to Request for Hearing (Aug. 11, 1992).

⁸ *See* Memorandum and Order (Requesting Information) (Aug. 14, 1992) at 2 (unpublished). At the time this memorandum and order issued, the Staff had not declared whether, in accordance with 10 C.F.R. § 2.1213, it wished to participate as a party in this proceeding. It subsequently made such an election. *See* Letter from M. Finkelstein to [Presiding Officer and Special Assistant] (Aug. 17, 1992).

⁹ *See* LBP-92-24, 36 NRC 149 (1992).

¹⁰ *Id.* at 153.

¹¹ *See* Petitioners' Hearing Request Supplement at 1-9. In their supplemental filing, the Petitioners also asked that the Presiding Officer issue an order staying the effectiveness of Amendment No. 21 pending the outcome of this proceeding. On November 12, 1992, the Petitioners' request was denied as untimely and for failing to make an adequate showing under the four-factor test governing the issuance of stays. *See infra* note 25.

even with this supplemental material, the Petitioners have not demonstrated that they have the requisite standing or that the issues they specify are litigable in this proceeding.¹² Additionally, in response to information requests from the Presiding Officer,¹³ the participants have submitted filings dated November 30, December 7, 9, and 14, 1992, and January 7 and 14, 1993, regarding offsite characterization activities relative to facility decommissioning under Amendment No. 21 and the status of onsite decommissioning activities.¹⁴

II. ANALYSIS OF PETITIONERS' STANDING

A. General Principles

The Commission has chosen to apply contemporaneous judicial concepts of standing to ascertain who, under section 189a(1) of the Atomic Energy Act (AEA),¹⁵ is a "person whose interest may be affected by the proceeding" so as to be entitled to a hearing regarding a licensing action.¹⁶ To satisfy these standards, a prospective party must show (1) that it could suffer an actual "injury in fact" because of the licensing proceeding, and (2) that its interest arguably is within the "zone of interests" to be protected by the pertinent statutes under which the petitioner seeks to challenge the licensing action.¹⁷

In this instance, there is no question that the Petitioners satisfy the "zone of interests" test. The various health, safety, and environmental concerns they outline regarding the Plan and the EA clearly come within the zone of interests safeguarded by the AEA and NEPA.¹⁸ For the Petitioners, the more difficult question is whether they will suffer the requisite "injury in fact."

¹² See Licensee's Response to Petitioners' Supplemental Hearing Request (Oct. 26, 1992) [hereinafter B&W Hearing Request Supplement Response]; NRC Staff Response to Petitioners' Request for Hearing and Supplement to Petitioners' Request for Hearing (Oct. 26, 1992) [hereinafter Staff Hearing Request/Hearing Request Supplement Response].

¹³ See Memorandum and Order (Requesting Supplemental Information) (Nov. 20, 1992) (unpublished); Order (Requesting Status Information) (Dec. 23, 1992) (unpublished).

¹⁴ See Licensee's Response to November 20, 1992, Memorandum and Order (Nov. 30, 1992) [hereinafter B&W Offsite Characterization Response]; NRC Staff Response to Presiding Officer's November 20, 1992 Memorandum and Order (Requesting Supplemental Information) and Request to Respond to Petitioners' Reply Pleading (Nov. 30, 1992) [hereinafter Staff Offsite Characterization Response]; Petitioners' Response to November 20, 1992, Memorandum and Order (Dec. 7, 1992); Licensee's Reply to Petitioners' Response Dated December 7, 1992 (Dec. 9, 1992); Licensee's Response to the Presiding Officer's Order (Requesting Information) (Jan. 7, 1993) [hereinafter B&W Status Response]; NRC Staff Request for Leave to Respond to Petitioners' Reply, if Any, to Licensee's Response to the Presiding Officer's Order (Requesting Information) (Jan. 14, 1993).

¹⁵ 42 U.S.C. § 2239(a)(1).

¹⁶ See, e.g., *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

¹⁷ See, e.g., *Rancho Seco*, CLI-92-2, 35 NRC at 56; *Pebble Springs*, CLI-76-27, 4 NRC at 613.

¹⁸ In their Concerns 12 and 14, the Petitioners also have alleged a failure by B&W and the NRC to comply with various other federal and state environmental statutes. See *supra* note 6. It is not necessary to reach the

(Continued)

The three components of the injury in fact requirement are injury, cause, and remedial benefit.¹⁹ The showing necessary to satisfy these elements recently has been characterized as follows:

Although variously described, the asserted injury must be "distinct and palpable" and "particular [and] concrete" as opposed to being "'conjectural . . . [,] hypothetical,'" or "abstract." The injury need not already have occurred but when future harm is asserted, it must be "threatened," "certainly impending," and "'real and immediate.'" Additionally, there must be a causal nexus between the asserted injury and the challenged action. In other words, the alleged harm must have "resulted" in a "concretely demonstrable way" from the claimed infractions. There must also be a sufficient causal connection between the alleged harm and the requested remedy so that the complaining party "stand[s] to profit in some personal interest."²⁰

The Petitioners bear the burden of establishing that the various injuries they allege will occur to their AEA-protected health and safety interests or their NEPA-protected environmental interests satisfy these requirements, thereby providing the requisite injury in fact.²¹

B. Petitioners' Allegations of Injury in Fact

As portrayed in their areas of concern regarding the license amendment request that is now Amendment No. 21,²² the harm that the Petitioners allege they will suffer from the Plan-authorized decommissioning activities and the EA comes from three different sources: (1) purported radiological contamination resulting from onsite cleanup activities or supposed residual radiological contamination that, even after decommissioning activities are completed, will remain onsite and offsite (Concerns 1-5, 7-10, 12-17, 19-20); (2) purported nonradiological or mixed waste contamination resulting from onsite cleanup activities or supposed residual nonradiological or mixed waste contamination that, even after decommissioning activities, will remain onsite and offsite (Concerns 1-10, 12-14, 16-17, 19-20); and (3) violations of the NEPA procedural process

issue whether the Petitioners' concerns come within the zone of interests created by those statutes because, as is explained below, the Petitioners' have failed to establish they have suffered any injury in fact cognizable under those statutes. See *infra* note 57.

¹⁹ See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). See generally 13 Charles A. Wright, et al., *Federal Practice and Procedure* §§3531.A-6 (2d ed. 1984).

²⁰ *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, LBP-92-4, 35 NRC 114, 121 (1992) (footnotes omitted). See also *Lujan v. Defenders of Wildlife*, 119 L. Ed. 2d 351, 364 (1992).

Also in this regard, it has been observed that when, as here, a petitioner is challenging the legality of government regulation of someone else, injury in fact as it relates to factors of causation and redressability is "ordinarily 'substantially more difficult' to establish." *Lujan*, 119 L. Ed. 2d at 365 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976); and *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

²¹ See *Perry*, LBP-92-4, 35 NRC at 120. See also *Lujan*, 119 L. Ed. 2d at 364.

²² See *supra* note 6.

(Concerns 11, 18). In supporting affidavits accompanying the supplement to their hearing request, the Petitioners have put forth the following specific factual allegations to establish their injury in fact relative to their areas of concern:

1. Residence at distances of approximately 250 feet (petitioners Helen and James Hutchison), 450 feet (petitioners Virotek and Whitlinger), and 10,000 feet (petitioner Trozzi) from the Apollo facility.
2. Receiving an "effective dose" because they live within fifty miles of the facility.
3. Radiological contamination purportedly discovered on the property of petitioner Virotek and other local citizens.
4. A 1976 movie taken while the Apollo facility was operating, a 1992 movie taken during decommissioning activities showing emissions going offsite, and 1992 photographs taken during decommissioning, all of which show offsite emissions or various improprieties concerning B&W onsite decommissioning activities.
5. Various daily activities that take the Petitioners and members of their families outside into their yards and into the community, sometimes to places abutting the Apollo facility, for recreation or to do various chores.
6. Various indicators of a significant increase in cancer deaths in the Apollo borough relating to the facility, including a 1986 Pennsylvania Department of Health (PADH) survey, the affidavit of an expert witness submitted in litigation regarding B&W's Parks Township facility, and a National Research Council study on the hazards of low-level radiation exposures.

For purposes of assessing injury in fact (or any other aspect of standing), a hearing petitioner's factual assertions, if uncontroverted, must be accepted.²³ Moreover, in evaluating a petitioner's claims of injury, care must be taken to avoid "the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits."²⁴ In this instance, however, in response to the hearing petition supplement and additional, related information submitted in support of a request by the Petitioners to stay decommissioning activities,²⁵ both B&W and the Staff have presented sworn statements and supporting documentary information that raise material challenges to the validity

²³ See, e.g., *Lujan*, 119 L. Ed. 2d at 364-65; *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988).

²⁴ *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted), *cert. denied*, 117 L. Ed. 2d 460 (1992).

²⁵ In the supplement to their hearing request, citing as a basis the areas of concern specified in the supplement, the Petitioners asked the Presiding Officer to issue an order staying all decommissioning activities at the Apollo facility. See Petitioners' Hearing Request Supplement at 10. After considering B&W and Staff filings opposing this stay request, the Petitioners' reply to these oppositions, and B&W and Staff responses to the Petitioners' reply, the Presiding Officer denied the stay request. See LBP-92-31, 36 NRC 255 (1992), *reconsideration denied*, LBP-92-35, 36 NRC 355 (1992). It is apparent that the Petitioners' stay filings contain material that further explains or supports several of the largely conclusory factual statements in their hearing request supplement made in support of their standing. This information could and should have been submitted as part of their hearing petition supplement. Nonetheless, there is no prejudice to any participant in considering this material, along with any responses, in making a determination regarding the Petitioners' standing.

of the Petitioners' factual allegations in support of their standing. Consequently, the issue of the Petitioners' standing now rests in an unusual procedural posture. Because of the contravening factual submissions made by B&W and the Staff, it is appropriate in this instance, in a manner akin to a summary disposition determination, to undertake a merits-type evaluation of the sufficiency of the Petitioners' factual bases for their claims of standing.²⁶

C. Sufficiency of Petitioners' Injury in Fact Allegations

1. Petitioners' Sworn Factual Averments Regarding Injury in Fact

a. Distance of Residences from the B&W Facility

In their affidavits, the Petitioners state that they reside at distances ranging from less than an eighth of a mile to approximately two miles away from the B&W facility. Neither B&W nor the Staff contests these declarations; nonetheless, these statements are not enough, standing alone, to establish the Petitioners' standing in this proceeding.

To establish standing in NRC licensing adjudications, petitioners often seek to rely upon proximity to a licensed facility, particularly under what is commonly referred to as the "fifty-mile rule." This so-called "rule," which is more in the nature of a presumption, is derived from a string of commercial power reactor adjudicatory determinations. The common thread in these decisions is a recognition of the potential effects at significant distances from the facility of the accidental release of fissionable materials. Through their reliance on this singular factor, these cases now stand for the general proposition that a petitioner living within approximately fifty miles of a commercial power reactor will be considered to have the requisite injury in fact for standing to contest a request for issuance of a facility construction permit, an operating license, or an amendment to such a permit or license that has obvious and potentially wide-ranging offsite radiological consequences.²⁷

The Commission, however, has made it clear that this "fifty-mile" presumption does not apply in materials licensing actions. Instead, a petitioner must show, in accordance with section 2.1205(g), what particular impact the planned licensing action will have upon its legitimate (e.g., health, safety, or

²⁶ See *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978). See also 13A Wright, *et al.*, *supra*, § 3531.15, at 97-99.

²⁷ See, e.g., *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 223-26 (1974).

environmental) interests.²⁸ Therefore, to show that their interests are affected either by the onsite decommissioning activities that are permitted under Amendment No. 21 (e.g., building demolition, soil remediation), or by the purported contamination that is now offsite or that will remain onsite after decommissioning activities are completed, it is not enough for the Petitioners simply to assert they live close to the Apollo facility. To meet their burden of proving that they have the requisite injury in fact, the Petitioners also must provide some evidence of a causal link between the distance they reside from the facility and injury to their legitimate interests.

Here, they have failed to do so. In the EA relating to Amendment No. 21, the Staff analyzed what it characterizes as the most significant accidents that might arise from the decommissioning process, including what is described as the "event with the greatest potential release of radioactive material," the collapse of the most contaminated section of the main onsite building.²⁹ The Staff concluded that this accident "would have insignificant potential impact" that "does not indicate a significant risk to public health and safety."³⁰ For their part, the Petitioners have not tried to show that, at the distances they reside from the facility, the impacts of this accident upon them would be "distinct and palpable." They also have not sought to establish that there is a credible accident scenario, other than that specified by the Staff, that would have a "particular and concrete" impact at those distances. Nor have they attempted to show any direct link between the distance they reside from the facility and any injury they might suffer from any purported residual onsite contamination.³¹ Thus, the Petitioners' unadorned reliance on the distances they live from the Apollo facility is inadequate to establish their injury in fact concerning the decommissioning amendment.

b. Receiving an "Effective Dose Equivalent"

In their affidavits, the Petitioners' also suggest that their standing is established by the Staff's declaration that they and others living within fifty miles of the Apollo facility will receive an "effective dose." This is an apparent reference

²⁸ See 54 Fed. Reg. 8269, 8272 (1989). Although there is authority suggesting that geographical proximity to a substantial source of radioactive material, in and of itself, is sufficient to establish a petitioner's standing, see *Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility)*, ALAB-682, 16 NRC 150, 153-55 (1982), its continuing viability is doubtful given recent developments regarding judicial standing requirements, see *supra* note 20 and accompanying text, and the Commission's subsequent pronouncements on standing in materials licensing actions.

²⁹ U.S. NRC Office of Nuclear Material Safety and Safeguards, [EA] for Decommissioning of the [B&W] Apollo Site (June 12, 1992) at 5-1 [hereinafter EA].

³⁰ *Id.* at 5-1, -3.

³¹ The distance the Petitioners reside from the Apollo facility has no real bearing on their standing to pursue any of their claims regarding residual offsite contamination. There, the critical factor is the distance they reside from the alleged offsite contamination.

to the Staff's EA finding regarding the total "effective dose equivalent" that an individual living within a fifty-mile radius can be expected to receive over a fifty-year period from decommissioning activities under the Plan.

As B&W points out,³² the Petitioners' attempt to use this Staff finding to establish their standing is rooted in a misconstruction of the term "effective dose." An "effective dose equivalent" is a means of summing dose equivalents to various organs and tissues.³³ "Effective dose" thus is a measuring tool that by itself tells nothing about the impact of decommissioning activities. As such, the fact that the Staff considered whether the general population within a large geographic area around the Apollo facility may be subject to an "effective dose" from decommissioning activities does not equate with injury in fact to the Petitioners.³⁴

c. Radiological Contamination on Local Property

The Petitioners in their affidavits also rely upon purported radiological contamination on the property of petitioner Virostek and other local citizens as establishing they all will suffer injury in fact from any decommissioning activities authorized by Amendment No. 21. Putting aside for the moment the question whether this alleged offsite contamination actually exists, with respect to ongoing onsite cleanup activities the Petitioners have not shown any credible connection between those activities, the claimed contamination, and harm to their interests. For instance, in their affidavits they do not specify when the purported local property contamination was "discovered." From other filings in this proceeding, it nonetheless is apparent that their contamination allegations are based on soil sample tests run by the Pennsylvania Bureau of Laboratories (PABL) on the property of petitioner Virostek and another local citizen in October 1988.³⁵ These tests were conducted long before July 1992 when onsite decommissioning activities began under Amendment No. 21 and cannot provide any evidence concerning injury in fact from decommissioning work.

Nor are the Petitioners' assertions regarding local property contamination sufficient to establish their injury in fact concerning residual offsite radiological

³² See B&W Hearing Request Supplement Response at 4-5.

³³ See 10 C.F.R. § 20.1003.

³⁴ The Staff concluded that the "effective dose equivalent" to the maximally exposed individual within a 50-mile radius of the Apollo facility will be "very small and within regulatory limits." EA at 7-1. The Petitioners have not made any specific challenge to the adequacy of this Staff EA finding or made any assertions regarding the cumulative impact of this dose or any other purported doses relating to decommissioning.

³⁵ See Petitioners' Reply to Opposition Responses Requesting Immediate Cessation of Cleanup Activities (Oct. 29, 1992), exh. B.

contamination.³⁶ Petitioner Virostek alone tries to establish a causal link by maintaining that radiological contamination is on property she occupies. As to her claim, however, the factual submissions of B&W and the Staff establish that the purported contamination on her property is attributable to naturally occurring uranium or atomic weapons testing-related cesium rather than emissions from the Apollo facility.³⁷ This alleged contamination thus provides no basis for a finding of injury in fact to her or any other petitioner.

d. Photographic Evidence of Offsite Contamination

As part of their efforts to document their claims that they will suffer injury in fact from offsite contamination and decommissioning activities, the Petitioners in their affidavits refer to a 1976 movie purported taken during facility operation; another movie that allegedly shows "fugitive dust emissions" coming from the facility during decommissioning activities in August 1992; and 1992 photographs that are purported to show offsite emissions and various improper cleanup activities. Only the photographs were actually presented to the Presiding Officer for consideration.³⁸

As a basis for injury in fact regarding onsite decommissioning activities, the 1976 movie suffers from the same deficiency as the 1988 soil tests discussed above in that it lacks any tie to those activities. Further, as evidence of offsite contamination generally, it is simply too attenuated to establish the type of "distinct and palpable" harm necessary to show injury in fact relating to a licensing action seventeen years later.

With respect to the 1992 movie and photographs, in each instance B&W has contravened the Petitioners' factual assertions with credible evidence showing that the supposed emissions and improprieties did not, in fact, occur. Concerning the 1992 movie, B&W has made an unrebutted showing that Pennsylvania state authorities visited the facility the same day to check on the emissions and were unable to confirm that they were contaminated dust, as opposed to exhaust fumes from construction equipment.³⁹ Further, monitoring equipment in the

³⁶ The Petitioners' allegations regarding harm from offsite radiological contamination have no apparent bearing on their claims concerning injury from residual onsite radiological contamination or residual offsite nonradiological contamination.

³⁷ See LBP-92-31, 36 NRC at 264-65; LBP-92-35, 36 NRC at 361-62.

³⁸ See Letter from James & Helen Hutchison to Presiding Officer (Oct. 29, 1992). The Petitioners failed to include the actual photographs in support of their hearing request supplement. Nonetheless, it is apparent that the photos referred to in the supplement are the same ones provided in support of the Petitioners' reply to the B&W and Staff responses to their stay request.

³⁹ See Licensee's Opposition to Petitioners' Request for Stay (Oct. 21, 1992), exh. 1 at 5-6 [hereinafter B&W Stay Opposition].

area of the purported release evidenced no unusual emissions.⁴⁰ Regarding the 1992 photographs, B&W's sworn evidentiary presentation establishes that the snapshots do not reflect any improper activities resulting in offsite emissions or other decommissioning process deficiencies that would harm the Petitioners' interests.⁴¹ Therefore, both the 1992 movie and photographs are insufficient to establish any injury in fact to the Petitioners.

e. Petitioners' Activities at Home and in the Community

The Petitioners also seek to establish their standing to litigate their claims about purported onsite and offsite radiological contamination by asserting in their affidavits that they conduct various personal and business activities outdoors at home and in the community, some very near the B&W facility. For example, in her statement petitioner Virostek declares that besides visiting local commercial establishments and engaging in outside yardwork and recreational activities, from time to time she helps her sons deliver the local newspaper to homes "very, very close" to the facility. For their part, petitioners James and Helen Hutchison declare they engage in outdoor activities at home and in the community, including frequent visits to an apartment within one foot of the B&W facility. The other petitioners also assert they perform outdoor activities at home and in the community, albeit at unspecified distances from the Apollo facility.

In supporting these "outside exposure" standing claims, it is apparent that, except for the inaccurately categorized contamination on petitioner Virostek's property discussed above,⁴² the Petitioners have not attempted to show that there is any particular existing offsite location where their outdoor activities will expose them to radiological contamination that would constitute "distinct and palpable" injury.⁴³ Nor have they shown that their outside activities at home and in the community will result in any injury that can be traced to present decommissioning activities on the site. For instance, they have not presented any information that would contradict the B&W showings that during decommissioning work any airborne or effluent releases offsite have been a small fraction of regulatory limits,⁴⁴ and that the only known offsite contamination,

⁴⁰ See *id.* (readings during three-day period surrounding alleged emission incident averaged 0.10 percent of maximum permissible concentration (MPC), with a maximum reading at any station being 0.15 percent MPC).

⁴¹ See Licensee's Response to Petitioners' Supplemental Replies (Nov. 5, 1992), attach. I, at 1-27. The only questionable activity established by the Petitioners' photographs was a worker not wearing a safety helmet. See *id.* at 7. While this may be a violation of safety procedures, it does not constitute a hazard to the Petitioners or an injury to their health, safety, or environmental interests.

⁴² See *supra* p. 86.

⁴³ The owner of the "Boltz" property, which was the subject of the other PABL soil test report supplied by the Petitioners, see *supra* note 35, has not sought to intervene in this proceeding and the Petitioners have not indicated that they have any contact with that property.

⁴⁴ See B&W Hearing Request Supplement Response at 5 & n.4; B&W Status Response at 4.

which was previously revealed by B&W offsite characterization activities on an immediately adjacent industrial site, has been effectively remediated.⁴⁵ The Petitioners have failed to put forth any credible basis to support a finding of “particular and concrete” injury in fact to them during their daily activities from facility decommissioning authorized under Amendment No. 21.

f. 1986 PADH Report and Related Expert Witness Affidavit

In another attempt to establish their injury in fact as a result of offsite radiological contamination, in the affidavits accompanying their supplemental petition the Petitioners reference a 1986 Pennsylvania Health Department survey conducted in the Apollo area. They also attach a 1987 affidavit from an expert witness. In this affidavit, which was filed in federal court litigation relating to the nearby B&W Parks Township facility, the witness provides his views on what the 1986 survey suggests about the amount and source of cancer in the Apollo area. Ultimately, however, neither the 1986 report nor the 1987 expert affidavit is sufficient to support a finding of injury in fact to the Petitioners from Apollo facility decommissioning activities.

As B&W notes, the PADH concluded in a 1986 survey and a 1988 follow-up study that the data gathered did not support the contention that cancer mortality in the Apollo area is either significantly elevated or clearly excessive.⁴⁶ In his affidavit, the expert witness draws a different conclusion from the data in the 1986 report. The expert witness characterizes the 1986 PADH study as showing elevated cancer deaths in the Apollo area and suggests there is a link to past operations at the Apollo facility.

The reliability of this “expert” witness is subject to serious question.⁴⁷ Nonetheless, accepting *arguendo* the opinions he puts forth concerning the

⁴⁵ See B&W Offsite Characterization Response at 5-6. See also Staff Offsite Characterization Response at 7.

In responding to the Petitioners’ hearing request, B&W has asserted that any allegations regarding offsite characterization and decommissioning are irrelevant to this proceeding as outside the scope of the amendment request. See B&W Hearing Request Supplement Response at 24-25. A Staff submission on this subject suggests otherwise. According to the attached affidavit of the Staff project manager for Amendment No. 21, “the Licensee is required, pursuant to License Amendment No. 21, which incorporated by reference the [Plan] into Materials License No. SNM-145, to sample as part of its characterization program all suspect areas of the Apollo site and surrounding areas.” Staff Offsite Characterization Response, Affidavit of Keith K. McDaniel Responding to Presiding Officer’s November 20, 1992 Memorandum and Order (Requesting Supplemental Information) at 2. The Staff’s submission also indicates that in the past certain offsite areas near the Apollo facility have been identified as contaminated and that B&W has taken measures to isolate these areas from the public and decontaminate them. See *id.* at 3-5.

⁴⁶ See B&W Hearing Request Supplement Response at 6.

⁴⁷ The affiant, Dr. Ernest Sternglass, has been a witness in other NRC and judicial proceedings and his methodology and conclusions regarding the effects of low-level radiation have been consistently found to be deficient and valueless. See, e.g., *Carolina Power & Light Co.* (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 438 (1984) (given past unreliability of his testimony, proffering Dr. Sternglass as sole expert witness on radiological health effects issues would provide basis for entering summary disposition against sponsoring party on those matters).

impact of past facility operations, the apparent factual dispute that is created does not provide footing for the Petitioners' standing claims. This disagreement simply is not material to the question of the Petitioners' standing because the conclusions of this affiant do not address the central question here — the impact upon the Petitioners of the decommissioning activities undertaken under Amendment No. 21. Once again, the Petitioners have failed to provide sufficient evidence of the causal link between the licensed activities at issue in this proceeding and their purported injury in fact.⁴⁸

g. Residual Onsite Contamination and the National Research Council Study

The only other sworn basis for the Petitioners' standing concerning radiological contamination arises from the purported impact of contamination that will be left onsite at the Apollo facility after decommissioning is completed. Several of the Petitioners' concerns evince a general challenge to the standards (e.g., less than 30 picocuries of uranium per gram (pCIU/g) on average for soil) that B&W is using at the Staff's behest as the cleanup criterion for releasing the site for unrestricted use.⁴⁹ Yet, they have not made any showing that, following decommissioning, they will engage in activities onsite that would expose them to any purported contamination in a manner that would result in "concrete" injury to them.

What the Petitioners have done is reference a research report in an apparent attempt to prove the inadequacy of the Staff's guidance standard and, consequently, the harm that they will suffer by the application of that standard to the

⁴⁸ The same conclusion obtains regarding the only other "documentary" evidence supplied by the Petitioners on the question of offsite contamination. In seeking reconsideration of the Presiding Officer's denial of their motion to stay further decommissioning activities under Amendment No. 21, the Petitioners provided an excerpt from a report by a local union purportedly showing a number of radiological "hot spots" in the town of Apollo. See LBP-92-35, 36 NRC at 361. Yet, the type of information needed to determine whether this supposed contamination would cause any injury in fact to the Petitioners — when or where the hot spots were discovered, the level of contamination exhibited at each location, and the methodology utilized to conclude that any contamination came from the Apollo facility — is not contained in the portion of the report provided. See *id.* at 362. In addition, the report excerpt states that B&W, under NRC supervision, was then taking steps to identify and clean up any contaminated areas near the facility or elsewhere in Apollo and that the NRC was giving close attention to the matter of offsite contamination. See *id.* This hardly supports the Petitioners' assertion that they are likely to suffer some injury in fact from offsite contamination.

⁴⁹ These standards are based upon Staff guidelines that, while not incorporated into the agency's regulations, have received Commission endorsement pending the completion of a recently instituted rulemaking proceeding. See 57 Fed. Reg. 13,389, 13,390 (1992). See also 58 *id.* 4363 (1993) (announcing rulemaking process to establish decommissioning standards). B&W suggests that the Commission's recent endorsement of this guidance is sufficient to protect it from challenge "in the absence of specific information bringing such standards into question." B&W Hearing Request Supplement Response at 26. So long as a challenge to this Staff guidance is "germane" to the licensing proceeding, it is subject to being controverted on the same basis as any other agency regulatory "guidance" that has not been incorporated into the regulations or has not become binding agency precedent as a consequence of withstanding challenge in another licensing or enforcement adjudication. Compare 10 C.F.R. § 2.1239.

residual onsite material. In their affidavits, the Petitioners single out a 1990 study by the National Research Council that they assert shows exposures to low-level radiation pose a cancer risk three to four times greater than previously believed.⁵⁰ The problem for the Petitioners, however, is that this study is intended to address radiation exposure risks generally. It provides no indication about either the adequacy or inadequacy of the particular Staff guidelines used in this instance or the scope of the injury to the Petitioners arising from the use of those guidelines. Nor have the Petitioners attempted to show any link between the report's broad conclusion about radiation risk and the sufficiency of the particular guidance standard as it is used by the Staff in relation to the Apollo facility. Thus, the report alone does not provide a basis for concluding that the Petitioners will suffer any injury in fact concerning residual onsite contamination at the Apollo facility.⁵¹

2. *Petitioners' Additional Factual Averments Relating to Injury in Fact*

In addition to the factual assertions submitted under oath in the affidavits accompanying their hearing request supplement, in support of their various areas of concerns the Petitioners also have presented a number of allegations that arguably touch upon the issue of their standing. For the reasons explained below, these too are insufficient to establish their injury in fact.

a. *Local Sewer Contamination*

The Petitioners have raised concerns about injury arising from radiological contamination resulting from releases into the local sewer system that are alleged to have occurred during operation of the Apollo facility. The Petitioners assert in their hearing petition supplement that "[i]t's a known fact that the Apollo sewer

⁵⁰ Although the Petitioners refer to a 1989 National Research Council study, what they apparently are citing is the study prepared by the National Research Council's Committee on the Biological Effects of Ionizing Radiation entitled "Health Effects of Exposure to Low Levels of Ionizing Radiation — BEIR V" published in 1990.

⁵¹ The same can be said for the only other information the Petitioners provide on the issue of residual onsite contamination standards. As support for their concerns about the adequacy of the Staff's guidelines, in their hearing petition supplement they reference a May 1989 General Accounting Office (GAO) report concerning NRC's decommissioning procedures and a Health Physics Society Standards Committee (HPSSC) proposed report on residual radioactivity on surface contamination for materials, equipment, and facilities that is cited in the GAO report. See Petitioners' Hearing Request Supplement at 4. The GAO report suggests that the HPSSC proposed surface contamination standards, which are described in the report as three to five times lower than NRC limits for natural uranium, uranium-235, and uranium-238, should be taken into account in adopting decommissioning standards. See U.S. General Accounting Office, GAO/RCED-89-119, *Nuclear Regulation: NRC's Decommissioning Procedures and Criteria Need to Be Strengthened* 28 (May 1989). The Petitioners' otherwise unexplicated reference to these proposed standards for contamination on the surface of decommissioned buildings and equipment (which apparently have not been adopted by the relevant standards-setting body, the American National Standards Institute (ANSI)) is insufficient to demonstrate their particular relevance to the Petitioners' injury in fact regarding residual onsite soil and groundwater contamination at the Apollo site.

system is contaminated” and that “[t]here is clear evidence that various types of radioactive and non-radioactive contaminants have been discharged into the Kiski Valley Water Pollution Control Authority [(KVVWPCA)] sewer system.”⁵² Their only showing in support of these statements, however, is their proffer (in their subsequent stay filings) of a 1986 Pennsylvania Department of Environmental Resources (PADER) report they assert shows radiological contamination in the KVVWPCA sewage treatment plant and a 1986 newspaper article regarding that report.

As has been established previously in B&W and Staff factual submissions, the radiological “contamination” reflected in the 1986 report on the KVVWPCA treatment plant indicates nothing more than naturally occurring uranium or atomic weapons testing-related cesium.⁵³ The newspaper article provides nothing that sustains a contrary conclusion.⁵⁴ Moreover, in their filings contesting the Petitioners’ hearing request, both B&W and the Staff point to the sewer contamination characterization efforts described in the Plan and the EA. Both note that those activities undertaken regarding the potentially impacted Apollo Borough and KVVWPCA systems have revealed that only one portion of the Apollo Borough sewer system, the so-called north sewer line located on the B&W site, has evidenced any signs of contamination.⁵⁵ As to this sewer line, it has been rerouted, a replacement sewer line installed, and the former sewer line and the adjacent soil have been remediated. In addition, B&W and the Staff have submitted sworn statements showing that effluent measurements from the site taken during the ongoing cleanup activities have not reflected any releases that are more than a small fraction of regulatory limits.⁵⁶

In the face of persuasive information submitted by B&W and the Staff challenging their assertions about sewer line contamination, the Petitioners have failed to provide any information to substantiate that such contamination now exists. Nor have they attempted to establish that, as a result of their residence or daily activities in the Apollo area, they would suffer any “concrete” harm from the purported contamination. The Petitioners’ failure to show any injury in fact flowing to them relative to liquid effluent discharges from the site once again is fatal to their efforts to establish standing.

⁵² Petitioners’ Hearing Request Supplement at 5.

⁵³ See LBP-92-31, 36 NRC at 264-65 & n.28. See also LBP-92-35, 36 NRC at 360.

⁵⁴ See LBP-92-35, 36 NRC at 360-61.

⁵⁵ See B&W Hearing Request Supplement Response at 31-33; Staff Hearing Request/Hearing Request Supplement Response at 25. See also B&W Status Response, Affidavit of Richard V. Carlson Updating the Status of Decommissioning Activities at the Apollo Site at 2-3 [hereinafter Carlson Affidavit]. In its response to the Petitioners’ hearing request, B&W also indicates that their implied concern that there is widespread contamination in the Apollo Borough sewer system is inconsistent with the physical orientation of this north sewer line, which is at the lowest point in the system. See B&W Hearing Request Supplement Response at 32.

⁵⁶ See B&W Stay Opposition, exh. 1, at 5. See also B&W Status Response, Carlson Affidavit at 2.

b. Nonradiological Contamination and Mixed Waste

Besides their various claims relating to radiological contamination on and off the Apollo site, the Petitioners also assert that because of past operations there is nonradiological (i.e., chemical) contamination or mixed waste (i.e., waste with both radiological and chemical contamination) on or off the Apollo site that must be remediated. As with their claims regarding radiological contamination, however, they have failed to make any showing indicating how they will suffer any injury in fact from the purported contamination.

The Petitioners assert in their hearing request that unspecified chemical contamination or mixed waste exists at the Apollo facility and that there has been no comprehensive testing for such contamination or mixed wastes.⁵⁷ The petition, however, is silent on the nature and extent of this purported contaminated material, as well as any explanation about the nature and extent of the harm they will suffer because of this unidentified contamination. In response to the hearing petition, both B&W and the Staff have provided information showing that, consistent with the provisions of the Plan, efforts have been made to identify chemical contamination and mixed waste at the facility and that no significant contamination of either type has been revealed.⁵⁸ In this light, the Petitioners' failure to explain how they will suffer any injury from this alleged nonradiological contamination or mixed waste places an insurmountable hurdle in the path of their efforts to establish their standing to litigate any of their contamination concerns.⁵⁹ Similarly, in the face of the B&W and Staff submissions, the Petitioners' failure to mount a credible demonstration either that

⁵⁷ Both B&W and the Staff argue that the agency lacks regulatory jurisdiction over the Petitioners' assertions about nonradiological contamination, as well as their claims that B&W and the Staff have failed to abide by or enforce various federal and state environmental statutes dealing with such contamination, including RCRA, CERCLA, the Clean Air Act, the Clean Water Act, and Pennsylvania solid waste and clean water laws. See B&W Hearing Request Supplement Response at 36; Staff Hearing Request/Hearing Request Supplement Response at 18-19. The agency's jurisdiction in this regard is doubtful. See 57 Fed. Reg. 24,018, 24,021 (1988). See also *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). Nonetheless, this is not a question that need be definitively resolved given the Petitioners' failure to establish any injury in fact regarding such contamination.

⁵⁸ See B&W Hearing Request Supplement Response at 20-21, 39-40; Staff Hearing Request/Hearing Request Supplement Response at 19-20. On the matter of mixed waste, in a sworn statement accompanying B&W's January 1993 status report on Apollo decommissioning activities, the General Manager of B&W's Nuclear Environmental Services Division with responsibility for decommissioning the Apollo facility notes that with 90 percent of the potentially contaminated soil evacuated, no mixed waste has been identified. See B&W Status Response, Carlson Affidavit at 2.

⁵⁹ The only information supplied by the Petitioners that provides any backing for their assertions about the existence of nonradiological contamination are two November 1992 newspaper articles submitted in support of their motion to reconsider the denial of their stay request. The articles indicate that an organization acting as technical advisor to a local citizens group contends that, on the basis of the results of 1990 hydrogeological testing at the Apollo site, there is onsite chemical contamination. See LBP-92-35, 36 NRC at 362. As was discussed in the December 1992 memorandum and order denying the reconsideration motion, the validity of the 1990 testing program is largely suspect. Improper testing procedures apparently were used in the 1990 testing, as subsequent test programs in 1991 and 1992 have shown that onsite soils do not contain hazardous constituents above characteristic levels defined in EPA regulations and that there is no significant groundwater contamination. See *id.* at 362-63.

the supposed chemical contamination or mixed waste exists or that the Staff and B&W characterization activities regarding such contamination are inadequate dooms their attempt to establish their standing to litigate any concerns about such contamination.

3. NEPA Procedural Concerns

Besides their claims that Amendment No. 21 suffers from a variety of substantive health, safety, or environmental deficiencies, the Petitioners also assert that the NEPA process concerning the amendment involved several procedural violations. Specifically, they maintain that a full EIS, rather than an EA, was required concerning the amendment and that the EA process was insufficient because of a failure to obtain public comments on the EA finding of "no significant impacts" regarding the amendment.⁶⁰

By its terms, NEPA imposes procedural rather than substantive constraints upon an agency's decisionmaking process: The statute requires only that an agency undertake an appropriate assessment of the environmental impacts of its action without mandating that the agency reach any particular result concerning that action.⁶¹ And with regard to the procedural rights accorded a person by a statute such as NEPA, the Supreme Court has recognized that they are accorded "special" consideration when deciding whether there has been injury in fact regarding those rights. According to the Court, injury in fact to those procedural rights can be successfully established with a less rigorous showing on the normal injury in fact elements of redressability and immediacy.⁶² This relaxation does not, however, extend to the requirement that the petitioner must suffer some concrete injury from the proposed agency action, which still must be shown apart from any interest in having the procedures observed.⁶³

In trying to establish their standing to pursue their concerns regarding the NEPA procedures used to assess the Plan, the Petitioners are faced with the predicament that, for the reasons explained above, they have not met their burden of showing concrete harm to any legitimate health, safety, or environmental interest supposedly impacted by the amendment and the decommissioning plan

⁶⁰ See *supra* note 6. In their statement of concerns, the Petitioners raise a number of challenges to the analysis of various matters in the EA. Because the EA was developed as part of the NEPA process, these claims might be categorized as procedural matters as well. Nonetheless, given their substantive flavor, these concerns have been treated as matters relating to the Petitioners' substantive interests for the purpose of determining the Petitioners' standing to litigate them.

⁶¹ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

⁶² See *Lujan*, 119 L. Ed. 2d at 372 n.7 (person living near dam site may be able to challenge EIS relating to dam license even though unable to establish with certainty that the EIS will cause license to be withheld or altered and despite the fact dam will not be completed for many years).

⁶³ See *id.* at 372 n.8; cf. *Rancho Seco*, CLI-92-2, 35 NRC at 60-61 (alleged "informational injury" is of "questionable value" as basis for standing to challenge failure to prepare adequate EIS).

it sanctions.⁶⁴ By failing to do so, they are unable to establish their standing to pursue their concerns about the agency's compliance with NEPA's procedural requirements.

III. CONCLUSION

Dismissal of the Petitioners' hearing request for lack of standing is not predicated upon a finding that they (or any other Apollo resident) can never establish their right to participate in a section 189a hearing concerning a licensing action regarding the Apollo facility. Instead, this action is compelled solely by the Petitioners' failure to meet their burden to show their standing to participate in this proceeding.⁶⁵ The Petitioners have not provided convincing information that counters (or even creates a material factual dispute regarding) the well-documented factual showings of B&W and the Staff demonstrating that the Petitioners do not suffer any injury in fact relative to the amendment request at issue. Accordingly, the Petitioners' hearing request must be denied.⁶⁶

For the foregoing reasons, the Petitioners' July 27, 1992 request for hearing is *denied* and this proceeding is *terminated*. In accordance with the provisions of 10 C.F.R. § 2.1205(n), as it rules upon a hearing request this order may be appealed to the Commission within ten days after it is served.

⁶⁴ The Petitioners' central focus in challenging the amendment at issue here is the impact to their health, safety, or environmental interests. In their Concerns 2 and 20, however, they make claims regarding injury to economic interests (e.g., property values, local tax revenues) as a result of the decommissioning activities authorized. *See supra* note 6. Assuming that such economic interests are cognizable in this proceeding, the Petitioners nonetheless have framed their concerns in terms of undefined economic injury to the local community as a whole. This formulation fails to address the question most relevant to the Petitioners' participation, i.e., what is the economic injury each of them would suffer.

⁶⁵ The Petitioners' lack of success on the threshold issue of standing, an area of the law that one prominent commentator has described as marked by "inordinate complexity," 4 Kenneth C. Davis, *Administrative Law Treatise* § 24:1, at 208 (2d ed. 1983), may reflect the disparity in legal and technical expertise available to them by reason of what they repeatedly have asserted are their meager financial resources. The Commission cannot aid them in this regard because the agency is precluded by statutory directive from providing any funding to those who wish to intervene in agency adjudicatory or regulatory proceedings. *See* Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, § 502, 106 Stat. 1315, 1342 (1992) (covering fiscal year 1993). Moreover, to whatever degree this circumstance might have been a factor in the Petitioners' failure to carry their burden on the question of standing, it does not provide cause for overlooking the shortcomings in their pleadings.

⁶⁶ Because the Petitioners have not requested permission to intervene in this proceeding as a matter of discretion, *see Pebble Springs*, CLI-76-27, 4 NRC at 614-17, it is not necessary to determine whether they could be afforded such intervention.

It is so *ORDERED*.

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland
February 5, 1993

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)

February 18, 1993

The Licensing Board grants the intervention petition of a person who lives 7 days per month in a house located 35 miles from a nuclear power plant in a license amendment case. Licensee sought through the amendment to transfer operating authority over its plant to a new operating company. Petitioner alleged that the new operating company lacked the character and competence to operate the plant.

Licensee and the Staff argued that relief could not be granted because denial of the requested amendment would not solve the alleged problem, which relates to individuals involved both in the new operating company and in the present company. The Board reasoned that standing can be based on alleging that the transfer of operating authority would violate regulatory requirements for character and competence of operators of nuclear power plants, and it also ruled that standing to intervene cannot be destroyed because the alleged problem may also affect the current operations of the plant.

RULES OF PRACTICE: STANDING; CHARACTER AND COMPETENCE

In a license amendment case involving allegations of management's lack of the required character and competence, there is an obvious potential for offsite consequences, so standing is analogous to that in an operating license case. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989).

RULES OF PRACTICE: STANDING; DISTANCE FROM PLANT

In a license amendment case involving allegations of the unfitness of management, there is an obvious potential for offsite consequences, so standing is analogous to that in an operating license case. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989). Consequently, standing was granted to a petitioner who lived 35 miles from the nuclear power plant for 7 days per month.

OPERATION OF NUCLEAR POWER PLANT: CHARACTER AND COMPETENCE

The license to operate a nuclear power plant may only be transferred to a company that has the necessary character and competence to provide an adequate assurance of safety through its management practices.

OPERATION OF NUCLEAR POWER PLANT: ALIENATION OF CONTROL

A contention was admitted that alleged that a licensed operator of a nuclear power plant had improperly alienated control of its plant without written approval from the NRC. The Board said that this might adversely reflect on the character and competence of the individuals who took control of the plant.

CONTENTIONS REQUIREMENT: 10 C.F.R. § 2.714(b)(2); ALLEGATION OF AN ADMISSION

A contention may be admitted to the proceeding in satisfaction of the contentions requirement if it alleges adverse facts, not included in the amendment application, that would entitle petitioner to relief.

MEMORANDUM AND ORDER

(Admitting a Party)

Memorandum

We have decided to grant the petition of Allen L. Mosbaugh to be admitted as a party to this case.

We find that Mr. Mosbaugh's petition meets the applicable criteria. He suffers an injury in fact because he has alleged, with an adequate basis, that an operating license for a nuclear power plant should not be transferred to an entity that employs in senior positions individuals alleged to have submitted material false and misleading safety information to the United States Nuclear Regulatory Commission (NRC). The allegation establishes, for the purpose of determining standing, the seriousness of the situation to which Mr. Mosbaugh may be exposed. He is at risk because he owns a house 35 miles from the Vogtle Electric Generating Plant (Vogtle) and lives there one week a month.¹

The Staff of the Nuclear Regulatory Commission (Staff) and Georgia Power Company, *et al.* (Georgia Power) have argued that Mr. Mosbaugh may not intervene in this license amendment case because the management deficiencies he alleges, if true, are already present in Georgia Power and that no new risk is added by amending the license to transfer authority to Southern Nuclear. We disagree with this way of conceptualizing the risk. Mr. Mosbaugh has standing because he has alleged, with an adequate basis, that the proposed amendment does not meet the safety requirements of the NRC. We would not deprive him of his right to intervene because the material safety deficiencies he has alleged may already be occurring.²

I. BACKGROUND

Georgia Power proposes to amend its license to operate Vogtle. The proposed amendments would have no effect on the ownership of Vogtle, but they would allow Southern Nuclear Operating Company, Inc., ("Southern Nuclear") to become the operator — thus, operation would pass from one wholly owned subsidiary of Southern Company (Georgia Power) to another (Southern Nuclear).

On October 22, 1992, Allen L. Mosbaugh and Marvin B. Hobby filed a petition to intervene. Staff filed its answer on November 2, 1992 ("Staff

¹ See below, beginning on p. 107, for further facts about standing.

² Georgia Power also has argued that Mr. Mosbaugh should be denied standing because he has already filed a 10 C.F.R. § 2.206 petition. However, that argument is invalid. That a petition concerning Georgia Power may be pending does not preclude intervention in this license amendment case.

Answer"). Georgia Power filed its answer on November 6, 1992 ("Georgia Power Answer"). Mr. Hobby's petition was dismissed for lack of standing by our Memorandum and Order of November 17, 1992 (unpublished).

Even though the proposed amendment would transfer the authority to operate Vogtle from Georgia Power to Southern Nuclear, executive management would continue to be the same key people. To summarize how similar the staffing would be, we quote verbatim (with footnote numbers changed to be consecutive within this opinion) from the NRC Staff's Response to Licensing Board Questions, February 5, 1993 (Staff Response to Board), at 3-4:

Southern Nuclear has been identified, since March 1991, in chapter 13 of the Final Safety Analysis Report (FSAR), as providing support services for the Vogtle facilities.³ See Revision 1, dated March 1991; Revision 3, dated December 1992.⁴ The Vogtle Electric Generating Plant FSAR § 13.1.1.2, Rev. 1 3/91, sets forth the organizational arrangement regarding Vogtle in terms of the corporate affiliation of various management officials. The executive vice president for nuclear operations is an officer of Georgia Power Company, Alabama Power Company, and Southern Nuclear Operating Company, Inc. FSAR § 13.1.1.2.1.1. The senior vice president for nuclear operations is an officer of all three *supra* named corporations. FSAR § 13.1.1.2.1.2. The vice president for nuclear for the Vogtle facilities is an officer of Georgia Power Company and Southern Nuclear Operating Company, Inc. FSAR § 13.1.1.2.1.5. Since March 1991, the FSAR has shown that a number of officers of Georgia Power Company are also officers of Alabama Power Company and Southern Nuclear Operating Company, Inc. See also Figure 13.1.1-1.⁵

Mr. Mosbaugh's principal allegation is that Southern Nuclear lacks the character and competence to operate a nuclear power plant. Briefly, Mr. Mosbaugh alleges that in 1988 Southern Company began making changes at Vogtle that eventually would lead to the filing of the pending application. The first operative step was the organization of a Southern Nuclear Operating Company (SONOPCO) project. At the time, Mr. Mosbaugh served as Superintendent of Engineering Service, at the Vogtle Plant, with 400 employees reporting to

³ [Staff footnote 1.] 10 C.F.R. § 50.34(b)(6) requires that the FSAR submitted on application for an operating license shall provide, among other matters: "The following information concerning facility operation: (i) The applicant's organizational structure, allocations or responsibilities and authorities, and personnel qualifications requirements." Although that regulation does not require revisions to an FSAR after a plant is licensed, 10 C.F.R. § 50.71(e) provides that a licensee shall periodically update its FSAR to keep it current, and submit those revisions to the Commission.

⁴ [Staff footnote 2.] A copy of Revision 3 was sent to the Licensing Board by Licensee's counsel on January 21, 1993.

⁵ [Staff footnote 3.] Further, Southern Nuclear's provision of technical support services for the Vogtle facility has been discussed among Georgia Power Company and NRC's Office of Nuclear Reactor Regulation and NRC's Regional Office in Atlanta, Georgia, since 1988. See NRC Meeting Summary, dated March 25, 1988 The NRC conducted an inspection of the Vogtle facilities in the summer of 1991. As a part of that inspection, NRC inspectors visited the Southern Nuclear Operating Company offices in Birmingham, Alabama. The primary purpose was to gain a more detailed working knowledge of the various Vogtle support activities and groups. The inspection report concluded: "No violations or deviations were identified." NRC Inspection Report Nos.: 50-424/92-22 and 50-425/92-22 at pages 13 and 15, dated October 28, 1991. . . .

him.⁶ Mr. Mosbaugh concluded that the organization of SONOPCO marked a change from a "conservative" to a more "risk taking" attitude in the operation of Vogtle.⁷ He was particularly concerned that SONOPCO seemed less concerned about NRC reporting requirements.⁸ Mr. Mosbaugh alleges that, subsequent to the time that SONOPCO began to have influence, Georgia Power filed false and misleading reports with the NRC and its officials filed material false statements in response to NRC questions.⁹ At least some of the charges initiated by Mr. Mosbaugh are sufficiently serious that the Staff has referred them to the United States Justice Department for evaluation with respect to possible criminal prosecution.¹⁰

II. CONTENTIONS AND BASES

Traditionally, contentions are discussed in cases involving intervention only after there has been a finding of standing. However, in license amendment cases there may be an interrelationship between what is alleged in the contentions and whether there is standing. This occurs because "injury in fact" in an amendment case depends on whether the alleged risk to health and safety is significant and involves "obvious potential for offsite consequences."¹¹

A. Legal Background

We are convinced that the granting of the requested amendment legally requires that Southern Nuclear have the character and competence to operate a nuclear power plant. The brief¹² of the Staff of the Nuclear Regulatory Commission is highly persuasive on this point, and we adopt it verbatim (footnotes changed to be consecutive in this opinion), as follows:

Section 182 of the Atomic Energy Act, 42 U.S.C. § 2231, provides that the Commission, by rule or regulation, may require such information as it determines to be necessary to decide the "character of the applicant." The Commission has enacted no regulations in regard to the

⁶ Recommended Decision and Order, *Allen Mosbaugh v. Georgia Power Co.*, 91-ERA-1, 11 (Oct. 30, 1992) (Mosbaugh Labor Case), at 4-5; "Georgia Power Company's Answer to the December 9, 1992 Amended Petition of Allen L. Mosbaugh," December 22, 1992 (Georgia Power's Second Answer), Exh. 3.

⁷ Mosbaugh Labor Case at 6. We consider that this information, submitted by Georgia Power, places the allegations in context.

⁸ *Id.*

⁹ "Amendments to Petition to Intervene and Request for Hearing" (Mosbaugh), December 9, 1992 (Amendments to Petition), at 15-19.

¹⁰ "NRC Staff Response to Allen L. Mosbaugh's Amendments to Petition to Intervene and Request for Hearing and Contingent Motion to Defer the Staff's Reply to Contentions and Rulings on Contentions," December 30, 1992 (Staff's Second Response), at 6-7.

¹¹ See a further explanation of this legal standard below, beginning on p. 106.

¹² NRC Staff Response to Licensing Board Questions (Feb. 5, 1993) at 4-6.

"character" of an applicant. However, the Commission addressed the character of licensees and applicants in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291 (1980); see also *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1206-08 (1984), and *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 673-79 (1984). Each of the cited decisions indicates that the character of an applicant may be considered in appropriate licensing actions. In *Three Mile Island*, 21 NRC at 1136-37, the Commission stated:

A generally applicable standard for integrity is whether there is reasonable assurance that the Licensee has sufficient character to operate the plant in a manner consistent with public health and safety and applicable NRC requirements. The Commission in making this determination may consider evidence regarding licensee behavior having a rational connection to the safe operation of a nuclear power plant. This does not mean, however, that every act of licensee is relevant. Actions must have some reasonable relationship to licensee's character, i.e., its candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety. In addition, acts bearing on character generally should not be considered in isolation. The pattern of licensee's relevant behavior, including corrective actions, should be considered [footnote omitted].

In *South Texas*, 12 NRC at 291, the Commission stated:

In large part, decisions about licenses are predictive in nature, and the Commission cannot ignore . . . abdication of knowledge by a license applicant when it is called upon to decide if a license for a nuclear facility should be granted.¹³

We believe that the above issues relating to technical competence and to character permeate the pleadings filed by Citizens. They do deserve a full adjudicatory hearing, as they will no doubt get in the operating license proceeding, and they do deserve expeditious treatment because they could prove disqualifying.¹⁴

The licensee has requested that amendments be issued to the Vogtle licensees to grant permission for Southern Nuclear instead of Georgia Power to operate the Vogtle facilities. The issuance of an operating license or amendment requires an affirmative finding of compliance with the Atomic Energy Act, the Commission's regulations and reasonable assurance of health and safety of the public. 10 C.F.R. § 50.57. If personnel who will be involved in the operation of the facility lack character to operate the facility, then the requested operating license or amendment may not be issued. *South Texas, supra*, 19 NRC at 669 and 831, and *Three Mile Island, supra*, 21 NRC at 1137 n.37.

¹³ [Staff footnote 4.] Equally, and perhaps of more concern, the Commission cannot ignore false statements in documents submitted to it. Congress has specifically provided that licenses may be revoked for "material false statements," see section 186a of the Atomic Energy Act, and we have no doubt that initial license applications or renewal applications may also be denied on this ground, certainly if the falsehoods were intentional, *FCC v. WOKO*, 329 U.S. 223 (1946), and perhaps even if they were made only with disregard for the truth. *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454 (D.C. Cir., 1980); *Virginia Electric and Power Co. v. NRC*, 571 F.2d 1289 (4th Cir. 1978).

¹⁴ [Footnote 5 in original.] We include, of course, the false statements charge in this category.

B. Contentions

1. De Facto Transfer of Control

Contention 1 states:

The Southern Company (working in conjunction with its corporate affiliates and officers) effectuated transfer of control of the operation of the Vogtle Electric Generating Plant from the licensees to a *de facto* corporation, known as the Southern Nuclear Operating Company, without the knowledge or consent of the co-owners of Plant Vogtle. The corrupt corporate policy effecting the creation of the *de facto* Southern Nuclear Operating Company resulted in the creation of a management chain of command so lacking in character, competence, integrity, candor, truthfulness and willingness to abide by regulatory requirements as to represent a threat to the health and safety of the public and/or represent a potential unsafe operating condition which must be corrected before formal transfer of operating responsibility may pass to the Southern Nuclear Company, Inc.

Immediately, the Board notes that the part of the contention alleging lack of knowledge or consent of the co-owners of Vogtle has not been shown to be relevant. For similar reasons, the word "corrupt" in the second sentence of the contention also has not been shown to be relevant or appropriate. On the other hand, as a legal basis for this contention, Mr. Mosbaugh cites¹⁵ 10 C.F.R. § 50.54(c) (hereinafter "nonalienation requirement"), which states:

Neither the license, nor any right thereunder . . . shall be transferred, assigned, or disposed of in any manner, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of the act and give its consent in writing.¹⁶

He also cites 10 C.F.R. § 50.34(b)(6)(i) (hereinafter "reporting requirement"),¹⁷ which requires the NRC to be informed about: "The applicant's organizational

¹⁵ "Petitioner's Brief in Response to the Board's Request for Information," February 5, 1993 (Mosbaugh Response to Board) at 2.

The cited regulation is relevant to Mr. Mosbaugh's contention but relates to facts that the other participants do not accept as true. See, particularly, "Georgia Power Company's Brief in Response to the Board's January 15, 1993 Request for Information and Briefs," February 4, 1993 (Georgia Power's Response to Board) at 11-19. (Also see *id.* at 10, asserting that "since each of the Vogtle units began operation, it [Georgia Power] has been in control of the operation of Plant Vogtle")

¹⁶ Our record does not indicate that the U.S. Nuclear Regulatory Commission has given its consent in writing to any change of control of operations. See Tr. 74 (Georgia Power's counsel states that Southern Nuclear is not mentioned in the license) and Tr. 74-75 (Georgia Power's counsel does not provide reference to "any formal way in which the NRC was informed of or agreed to that kind of organizational structure"); but see Georgia Power's Response to Board at 14-15. (Use of Southern Nuclear as a support services company and the double-hating of officers were disclosed in three Updated Final Safety Analysis Reports. No mention of formal NRC approval. No statement concerning control having passed away from Georgia Power, as alleged.)

¹⁷ Georgia Power also cites 10 C.F.R. §§ 50.36(c)(5), 50.36(b)(6)(i), and Generic Letter No. 88-06. According to its view of the facts, it is in compliance with these requirements. But Georgia Power does not discuss Mr.

(Continued)

structure, allocation of responsibilities and authorities, and personnel qualification requirement.”

He then states that, contrary to the nonalienation and reporting requirements, that Southern Company established a *de facto* board of directors of what was called the “SONOPCO” project. Mr. Joseph M. Farley is alleged to have been the chairman of that Board and to have reported directly to the Board of Southern Company about Georgia Power Company’s nuclear units. Mr. Farley was not an officer of Georgia Power Company.¹⁸ Mr. R.P. McDonald, who is involved in the running of Southern Nuclear,¹⁹ allegedly had a set of joint responsibilities with Mr. Farley — who served in “non-operating areas” — and the two jointly served as chief executive of the project with respect to administrative matters.²⁰ Mr. Farley also is alleged to have worked closely with the SONOPCO Technical Services vice president.²¹ Mr. McDonald, who was an officer of Georgia Power, allegedly gave contradictory and misleading testimony about the management structure and formation of SONOPCO.²² Georgia Power’s Senior Executive Vice President testified that he thought Mr. Farley was an officer of Georgia Power.²³

Georgia Power’s principal defense is that these allegations — involving past actions — are irrelevant to the license amendment application. We find, however, that this conclusion is not warranted. Mr. Mosbaugh has adequately alleged, with basis, that the formation of Southern Nuclear’s relationship to Vogtle violated NRC regulations, evidencing a lack of a trustworthy character in Southern Nuclear. If this contention were sustained, we might direct that the license amendment be denied or conditioned on changes in the structure and personnel of Southern Nuclear.

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

Mosbaugh’s allegations. Hence, its argument is more helpful in understanding its underlying factual position than in determining whether to admit the contention. The decision about whether to admit does not require us to make determinations concerning the truth of the allegations.

¹⁸ Mosbaugh cites *Hobby v. GPC*, 90-ERA-30, at 308, 39-40, 13-14, attached to a 10 C.F.R. § 2.206 petition filed by Mosbaugh on July 8, 1991; see Amendments to Petition at 6-14.

¹⁹ See “Phase III Proposed Southern Nuclear Organization Chart (Plants Hatch and Vogtle only are shown),” tendered by Georgia Power, ff. Tr. 116.

²⁰ Amendments to Petition; see especially *id.* at 7.

²¹ Mosbaugh cites *Hobby v. GPC*, 90-ERA-30, at 37-38, attached to a 10 C.F.R. § 2.206 petition filed by Mosbaugh on July 8, 1991; see Amendments to Petition at 9.

²² Amendments to Petition at 10-11, 12.

²³ Mosbaugh cites *Hobby v. GPC*, 90-ERA-30, Hearing Tr. at 690-91, attached to a 10 C.F.R. § 2.206 petition filed by Mosbaugh on July 8, 1991; see Amendments to Petition at 9.

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

For the reasons we have just stated, we find that this contention — amended to delete irrelevant material, as determined in the beginning of this section of our memorandum — has met the criteria of 10 C.F.R. § 2.714(b)(2) and shall be admitted as a contention.

2. *Character of Southern Nuclear*

Mr. Mosbaugh attempts to show a factual basis for Contentions 2, 3, and 4 in one fell swoop.²⁴ However, Contentions 2 and 3 deal with Southern Nuclear, and we have decided to consider those two contentions separately from Contention 4, which relates to Southern Company. Contention 2 states:

The Southern Nuclear Operating Company, Inc., does not possess the requisite character, competence and integrity, and does not have the candor, truthfulness and willingness to abide by regulatory requirements to become the licensee to operate the Vogtle Electric Generating Plant.

Contention 3 states:

The Southern Nuclear Operating Company, Inc., a wholly owned subsidiary of The Southern Company, does not possess the requisite character, competence and integrity, and does not have the candor, truthfulness and willingness to abide by regulatory requirements to become the licensee of the Vogtle Electric Generating Plant, and as such transfer of the license represents an increased risk to the health and safety of the public and/or represents a potential unsafe operating condition which must be corrected before responsibility for operating plant Vogtle can be transferred to the Southern Nuclear Operating Company, Inc.

As a basis for his contentions, Mr. Mosbaugh alleges that, “SONOPCO’s highest levels of management conspired to submit and did submit materially false information to the NRC concerning critical safety-related information pertaining to a March 1990 Site Area Emergency.”²⁵ In support of this allegation, Mr. Mosbaugh describes evidence that, among other things, implicates Mr. R.P. McDonald — an officer of Southern Nuclear — in material false statements in Licensee Event Report 90-006. One of the alleged material false statements is the intentional falsification of data on diesel engine starts in order to persuade the NRC to permit Vogtle to restart.²⁶ The evidence that Mr. Mosbaugh intends to introduce includes Mr. Mosbaugh’s own eyewitness testimony plus tape recordings of relevant conversations. He states that he made the tape recordings,

²⁴ Amendments to Petition at 14-19.

²⁵ *Id.* at 15.

²⁶ *Id.* at 18-19, particularly n.15.

which are currently in the possession of the NRC's Office of Investigations (OI).²⁷

Mr. Mosbaugh also claims that he made tape recordings, currently in possession of OI, that provide irrefutable evidence that Mr. McDonald swore to a variety of other false statements before the NRC.²⁸ From his memory of events, refreshed by these tape recordings, it would appear that Mr. Mosbaugh also could provide eyewitness testimony of the underlying events.

We find that there is adequate basis for Mr. Mosbaugh's contention that at least one senior officer of Southern Nuclear is lacking in character and competence and that Southern Nuclear lacks the integrity required of a licensee for the operation of a nuclear power plant. If this contention were sustained, we might direct that the license amendment be denied or conditioned on changes in the structure and personnel of Southern Nuclear.

For the reasons above, these contentions have met the criteria of 10 C.F.R. § 2.714(b)(2) and shall be admitted.

3. *Character of Southern Company*

Contention 4 states:

The Southern Company, by virtue of the corporate structure and make-up of the Southern Nuclear Operating Company, Inc., Board of Directors, controls and directs the management of its wholly owned subsidiary, the Southern Nuclear Operating Company, Inc. Because the Southern Company does not have the requisite character, competence and integrity, and does not have the candor, truthfulness and willingness to abide by regulatory requirements required of a licensee and because the Southern Company exercises substantial control over management of the Southern Nuclear Operating Company, Inc., transfer of the Vogtle Electric Generating Plant license to the Southern Nuclear Operating Company, Inc., represents an increased risk to the health and safety of the public and/or represents a potential unsafe operating condition which must be corrected before said transfer can occur.

We have considered this contention and find that Mr. Mosbaugh has not provided an adequate basis for questioning the character of Southern Company, its officers or directors, beyond the allegation already admitted as Contention 1.²⁹ Consequently, we will not admit this separate contention. However, our denial of this contention will not in itself bar Mr. Mosbaugh from introducing evidence relevant to appropriate remedies involving Southern Company if he first succeeds in demonstrating the need for remedies by establishing wrongdoing by Southern Nuclear or its organizational predecessor.

²⁷ *Id.* at 15-16.

²⁸ *Id.* at 17-19.

²⁹ *See id.* at 15-20.

III. STANDING

As set forth in *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196 (1992), a petitioner for intervention must, as a prerequisite to achieving party status, establish that it has standing and that it has proffered at least one viable contention. To establish standing, a petitioner must demonstrate an "injury in fact,"³⁰ that the injury falls within the zone of interests sought to be protected by the statutes, and that the injury may be redressed by a favorable decision in this proceeding. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991).

In *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989), the Commission noted that, in construction permit or operating license proceedings for nuclear reactors, residence of a person within 50 miles of a facility would be sufficient to confer standing. The Commission went on to hold that this 50-mile presumption did not apply in all operating license amendment proceedings but only in those involving a significant amendment involving "obvious potential for offsite consequences." *Id.*, 30 NRC at 329-30.

In our Memorandum and Order of November 17, 1992 (unpublished), slip op. at 7, we noted:

that petitioner alleges that he resides 35 miles from the plant and that he has some additional contacts with the plant. For an amendment case, residence at that distance, with some additional contacts, does not automatically result in standing. *Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985) (petitioner, who lived 43 miles from the plant and allegedly consumed fish and cranberries, did not show a reasonable scenario through which the amendment could produce an injury), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985).

We also noted:

³⁰To establish the basis for standing, petitioner must show injury in fact. It is easy to misunderstand this standard because the phrase "injury in fact" as used in this context does not bear its normal everyday meaning. For example, a person living 45 miles from a nuclear power plant who canoes in the general vicinity of the plant has been found to suffer "injury in fact" from an amendment of a power plant license in order to permit the expansion of the capacity of the spent fuel pool. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 (1979).

Careful analysis reveals that, of course, the fuel pool was not even built at the time "injury in fact" was alleged. No accident had occurred. No release of nuclear materials had occurred. Hence, *in fact*, there had not been any injury to the petitioner as those words are commonly used. Nevertheless, he was said to have been injured in fact because of the possibility of an accident. Of course, this was an early stage of the case in which he had not yet proved that there was a possibility of an accident. What the petitioner had to do to obtain party status was to submit contentions (with an adequate basis) whose subsequent proof could result in a finding of injury in fact to him. So: injury in fact is indeed the same, in this context, as an allegation that a real injury might reasonably be expected to occur in the future.

that Georgia Power challenges Mr. Mosbaugh's statement that he actually *resides* at the property he owns 35 miles from the plant. It bases its claim on the fact that he receives electric bills at an address in the State of Ohio. It also apparently has some other undisclosed source of "information and belief." This is enough of a basis for us to require Mr. Mosbaugh to amend his petition to state specifically how much of the time he resides at his Georgia residence.

As a result of our concerns about standing, we held an evidentiary hearing on this limited subject at our prehearing conference in Augusta, Georgia, on January 12, 1993. As a result of that hearing, and after evaluation of all the evidence, we find that the significant facts concerning standing are:

- Mr. Alan Mosbaugh owns a detached house located approximately 35 miles from the Vogtle Plant.³¹
- From about 1985 to fall of 1990, Mr. Mosbaugh and his family resided full time in the house he built.³²
- Since August of 1991, Mr. Mosbaugh's family has resided in Ohio but Mr. Mosbaugh has continued to live in his house in Georgia about 7 days of every month.³³
- Mr. Mosbaugh is currently seeking employment either in Georgia or Ohio. He also is considering starting his own business. The outcome of this job-seeking process will cause him to live either in Georgia or in Ohio.³⁴

Mr. Mosbaugh has alleged that his health, safety, property rights and personal finances could be affected by an order granting Georgia Power's request to transfer control of Vogtle to Southern Nuclear.³⁵ We conclude that the exposure that Mr. Mosbaugh has to Vogtle is sufficient to sustain the claim for standing.

IV. CONCLUSION

We conclude that Mr. Mosbaugh has met all the requirements for standing. He has proffered at least one viable contention, demonstrated an "injury in fact," alleged a health-and-safety injury that falls within the zones of interest sought to be protected by the statutes, and demonstrated that the injury may be redressed by a favorable decision in this proceeding.

³¹ Tr. 15.

³² Tr. 15-16, 30.

³³ Tr. 17, 18, 39-40. (Mosbaugh's family also comes to Georgia about 3 weeks per year.) Tr. 49-50, 51.

We note that Georgia Power and the Staff would have us decide standing based on legal residence. To determine whether Mr. Mosbaugh has had sufficient exposure to Vogtle to support standing, we do not consider it necessary to determine, either as a matter of state law or of federal common law, whether Mr. Mosbaugh is a legal "resident" of the State of Georgia.

³⁴ Tr. 36-37, 44-46.

³⁵ Petition at 2-3.

Southern Nuclear must meet the regulatory requirement that it demonstrate its character and competence before it be granted operating authority over a nuclear power plant. Where the contention raised alleges, as here, that Southern Nuclear officials have intentionally withheld material safety information from the NRC, the issue is one that affects the safety of the entire plant. The risk of non-safety-conscious management is as great as many other risks that could be adjudicated in an operating license case. For this reason, we are considering a significant amendment involving "obvious potential for offsite consequences." *St. Lucie*, CLI-89-21, *supra*.

In this case, a few key individuals who are currently employed by the licensee, Georgia Power, are also employed by the prospective licensee, Southern Nuclear.³⁶ Because they are key employees of Southern Nuclear, their character is relevant to approval of the requested amendment. However, Georgia Power and the Staff would deny Mr. Mosbaugh standing because the proposed amendment will not increase the risk to which he is already exposed. We have concluded that this argument is not valid.

Mr. Mosbaugh has raised a valid safety concern related to the transfer of authority that is being requested in the pending license amendment. We have concluded that it is not a defense to Mr. Mosbaugh's allegations of deficiencies that those deficiencies may already exist. We do not recognize as a defense the conditional argument that if key people in Southern Nuclear are lacking in character and competence then the same people working for Georgia Power are similarly lacking and therefore there is no loss or "injury" to Mr. Mosbaugh due to the transfer of authority.

An analogous issue was decided in *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 203, 208-11 (1992) (*Millstone*). *Millstone* concerned an amendment necessitated by a calculational error that would have permitted a fully loaded spent fuel pool at Millstone to have had a criticality constant or K_{eff} of as much as 0.963, which is in excess of the maximum value of 0.95 permitted by NRC regulations. The purpose of the amendment was to place new restrictions on the fuel pool and to require new blocking devices so that the maximum permitted K_{eff} would not be exceeded. Thus, it is clear that the amendment would have made things *safer*. Nevertheless, the Licensing Board ruled that it would admit a contention that alleged that the new, admittedly safer fuel pool arrangement, still did not meet regulatory requirements. The Licensing Board said, 36 NRC at 211:

We return to Licensee's argument that it was the prior calculational error, not the amendment, which caused a reduced margin of safety, therefore an injury in fact. That argument depends too heavily on compartmentalized reasoning. The potential for reduced

³⁶ A detailed description of the extent of overlap of senior personnel is set forth beginning at p. 99, above.

safety here (injury in fact) is both the prior calculational error and an amendment that does not redress that error but permits operation of the spent fuel pool according to its terms. The two concepts are logically inseparable.

Assuming that the record of the proceeding were to demonstrate that the risk from the calculational error is not abated by Amendment 158, interested persons may have redress by a denial of that amendment.³⁷ True, as Licensee states, that action would not correct the prior calculational error, but it would remove the authority to operate the spent fuel pool under an inadequate amendment. Such a denial would return the matter to the Licensee and the NRC enforcement staff for a proper resolution of the problem.

In our case, Mr. Mosbaugh should be given the opportunity to oppose the issuance of an amendment. He would be injured if the authority to operate Vogtle were transferred to people who lack the character and competence to operate that nuclear power plant. See *Seabrook*, CLI-91-14, 34 NRC at 267 (appearing to suggest that petitioner would have had standing to challenge the transfer of *operating* authority over the Seabrook plant on the grounds of character — alleged harassment of workers at another plant).

V. STAFF MOTION FOR DELAY

Staff stated that it could not respond to Mr. Mosbaugh's contentions because a pending criminal investigation of Mr. Mosbaugh's charges has been referred to the Department of Justice for its action. Staff stated:

Each of Mr. Mosbaugh's contentions maintains that the proposed transfer for which permission is sought in the subject license amendment may not take place because of an alleged lack of "candor, truthfulness and a willingness to abide by regulatory requirements" of the proposed transferee, Southern Nuclear Operating Company, Inc. As a basis for contentions 2, 3 and 4, Mr. Mosbaugh makes allegations regarding material false statements attributed to officers and [he also mentions] a related investigation. See Amendments to Petition at 15-16, n.10. *These allegations are being pursued by the Department of Justice for possible criminal prosecution, and until this investigation is complete the NRC Staff is unable to take a position on the allegations contained in the contentions.* [Emphasis added; concluding footnote omitted.]

We do not find that the Staff provided us with an adequate reason not to comment on the proffered contentions, as there is no indication that the materials forwarded by this agency for potential criminal prosecution would be relevant to the adequacy of the basis provided by Mr. Mosbaugh for his contentions. It would appear that the material being kept confidential would either be

³⁷ [Footnote 11 in the original.] In the real world of NRC adjudications, applicants for licenses and amendments to licenses accept modification as a condition of issuance. Seldom are NRC adjudicators faced with an up or down choice.

irrelevant or would provide additional grounds for questioning the character and competence of Southern Nuclear. There is no reason to believe that the allegedly confidential materials would destroy the basis for the contentions.

We recognize that Georgia Power could be suffering from a potential difficulty. Access to these confidential files could permit it to rebut the basis for the proffered contentions. However, the standard for assessing the basis for contentions is far less than what would be required to accept their truth. Part of the basis for the contentions is the personal knowledge of Mr. Mosbaugh. Part is tapes that Mr. Mosbaugh says he made and apparently has listened to. His statements, about what he has seen and about what he believes to be in the tapes, provide adequate basis for his contentions. Hence, we have been able to act on the contentions even though the Staff did not file its comments on them.

We note that Georgia Power did respond to these contentions in Georgia Power Company's Answer at 20-26, as well as some general remarks that preceded these pages.

VI. CONSOLIDATION OF CONTENTIONS

We have examined the contentions we have admitted and have determined, in the interest of efficiency, that they amount to the following one contention:

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

We shall order that the admitted contentions all be consolidated so that this one contention, originally submitted in slightly altered form as Contention 2, will be the only one pending before us.³⁸

VII. DISCOVERY — NEGOTIATIONS; STAFF TO SHOW GOOD CAUSE

It is the policy of this agency to adjudicate all its cases promptly and efficiently. There is an opposing policy: to protect the confidentiality of documents contained in criminal prosecutions pursued by the agency. In this

³⁸ Contention 1, which we have admitted, alleges a lack of character of Southern Nuclear allegedly occurring from the actions of Southern Company. The principal issue in Contention 1 is stated in the consolidated contention. Should Mr. Mosbaugh demonstrate the truth of the consolidated contention, we would then need to fashion a remedy and might at that point admit evidence (or stipulations) concerning the role of Southern Company, for the purpose of fashioning a remedy.

case, these apparently conflicting interests could be harmonized if the parties could reach an agreement on how the relevant information can be shared pursuant to a protective order that contains a carefully constructed provision that would keep all potential defendants, and all potential counsel for those defendants, ignorant of the contents of the investigation.

If those negotiations succeed, discovery or partial discovery of investigative documents can commence. If they fail, we will need to harmonize the policies for efficient adjudication and those for protecting criminal prosecution. To assist us in doing that, we will schedule filings by the parties. The first filing will be that of the Staff, to show cause why discovery of prosecution documents should not start immediately. In its filing, the Staff should include answers to the following questions: (1) What deadline, if any, can the Staff agree to as the latest date that discovery can start? (2) How does the Staff compare the importance of the civil questions relating to the adequate assurance of safety for the continued operation of the plant and a decision on the license amendment, to the importance of possible criminal prosecution?

VIII. OTHER DISCOVERY AND SCHEDULING

Other discovery, which may not be related to confidential documents that are possessed by the Office of Investigation or the United States Justice Department, may commence immediately. The parties shall commence negotiations concerning an appropriate schedule for this "other discovery," which may be reopened after other documents become available. If there is no agreement on a schedule before March 8, 1993, the parties shall simultaneously file suggested discovery and trial schedules on that date.

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 18th day of February 1993, ORDERED that:

1. Mr. Allen L. Mosbaugh is admitted as a party to this case.
2. The following contention is admitted as the only contention in this case:

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

3. Discovery shall commence immediately.

4. Negotiations among the parties shall commence immediately, concerning: (a) a protective order and an insulating wall that might make the discovery of investigative documents possible at this time, and (b) a schedule for concluding discovery and holding a prehearing conference and a hearing.³⁹

5. On March 8, 1993, the Staff shall file a brief showing cause why discovery of prosecution-related documents should not commence immediately. On that same date, the parties shall simultaneously file their suggested schedule for the case, including the events mentioned in the accompanying Memorandum. On March 18, 1993, Mr. Mosbaugh and Georgia Power Company shall file their response to the Staff's March 8 brief.

**FOR THE ATOMIC SAFETY AND
LICENSING BOARD**

**James H. Carpenter
ADMINISTRATIVE JUDGE**

**Thomas D. Murphy
ADMINISTRATIVE JUDGE**

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

Bethesda, Maryland

³⁹ The schedule should include a future date on which the parties will discuss the scheduling of witnesses during the hearing, stipulations to reduce the need for live testimony, and any other prehearing matters the parties choose to raise.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Dr. Thomas E. Murley, Director

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY (Comanche Peak Steam Electric Station, Units 1 and 2)	Docket Nos. 50-445 50-446
CAROLINA POWER AND LIGHT COMPANY (Brunswick Station, Units 1 and 2)	Docket Nos. 50-324 50-325
CAROLINA POWER AND LIGHT COMPANY (Shearon Harris Nuclear Power Plant)	Docket No. 50-400
DETROIT EDISON COMPANY, et al. (Enrico Fermi Atomic Power Plant, Unit 2)	Docket No. 50-341
WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS Nuclear Project No. 2)	Docket No. 50-397
GULF STATES UTILITIES COMPANY (River Bend Station, Unit 1)	Docket No. 50-458 February 1, 1993

By a petition dated July 21, 1992, the Nuclear Information and Resource Service and others (Petitioners) requested pursuant to 10 C.F.R. § 2.206 that

the U.S. Nuclear Regulatory Commission (NRC) take enforcement actions in light of fire barrier test failures. Fire barriers are generally required at operating commercial nuclear power plants by the NRC's regulations or facility license conditions. Petitioners submitted additional filings on August 12, 1992, September 3, 1992, and December 15, 1992. Specifically, Petitioners requested that the NRC Staff issue, by September 5, 1992, Generic Letter (GL) 92-XX which had been circulated for public comment on February 11, 1992, and which discussed test results and recommended actions regarding Thermo-Lag 330-1 fire barrier material. Petitioners also requested that the NRC close nuclear power plants that cannot prove through independent testing that they meet NRC fire barrier requirements and that the NRC issue a stop-work order regarding the installation of fire barrier material at Comanche Peak Steam Electric Station (CPSES).

On February 1, 1993, the Director of the Office of Nuclear Reactor Regulation issued a Partial Director's Decision that granted in part and denied in part the relief sought by Petitioners.

To the extent Petitioners sought issuance of the Generic Letter, relief was granted. On December 17, 1992, the NRC Staff issued GL 92-08, "Thermo-Lag 330-1 Fire Barriers." With regard to the other requests, relief was denied. Specifically, for operating facilities, the Director concluded that fire watches permitted by the NRC requirements applicable to the facilities in question provided reasonable assurance of adequate protection of public health and safety. As for stopping work at CPSES Unit 2, the Director concluded that the Licensee proceeded at its own risk during the construction phase and that the NRC Staff would evaluate the safety issues associated with installation of Thermo-Lag material at the operating license stage.

Issues raised by Petitioners in their December 15, 1992 submittal were not considered in the Partial Director's Decision, but will be considered in a Final Director's Decision.

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

I. INTRODUCTION

By a petition dated July 21, 1992, the Nuclear Information and Resource Service (NIRS), Alliance for Affordable Energy, and Citizens Organized to Protect Our Parish (the Petitioners), requested that the U.S. Nuclear Regulatory Commission (NRC) take enforcement action regarding the Gulf States Utilities' (sometimes referred to as GSU) River Bend Station, demanding its operating

license be suspended until GSU can demonstrate, through independent testing, that it meets the NRC's fire protection regulations (Appendix R to Part 50 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. Part 50)). In addition, the Petitioners demanded that the NRC Staff immediately issue Generic Letter (GL) 92-XX, the draft of which was circulated for public comment on February 11, 1992, and close any nuclear power plant for which the licensee cannot prove, through independent testing, that it meets fire protection regulations until it does meet them. By an addendum to the petition dated August 12, 1992, the Petitioners requested immediate action related to the Comanche Peak, Shearon Harris, Fermi-2, Ginna, WNP-2, and Robinson nuclear facilities. Joining in filing the addendum are a number of other organizations: Citizens for Fair Utility Regulation, Don't Waste New York, Citizens Against Radioactive Dumping, Coalition for Alternatives to Shearon Harris, Conservation Council of North Carolina, Safe Energy Coalition of Michigan, Steve Langdon, Essex County Citizens Against Fermi-2, Natural Guard, and Northwest Environmental Advocates.¹ The petition and addendum (sometimes collectively referred to as Petition) were submitted under the provisions of 10 C.F.R. § 2.206 of the NRC's regulations. Notice of receipt of the Petition was published in the *Federal Register* on August 26, 1992 (57 Fed. Reg. 38,702).

The Petition alleges a number of deficiencies concerning Thermo-Lag 330-1 (Thermo-Lag) material, including failure of Thermo-Lag fire barriers during 1-hour and 3-hour fire endurance tests, deficiencies in procedures for installation, nonconformance with NRC regulations for quality assurance and qualification tests, the combustibility of the material, ampacity miscalculations, lack of seismic tests, the failure to pass hose stream tests, the high toxicity of substances emitted from the ignited material, and the declaration by at least one utility, GSU, of the material as inoperable at its River Bend Station. The Petition also alleges that a fire watch cannot substitute for an effective fire barrier indefinitely and that the NRC Staff has not adequately analyzed the use of fire watches.

On the basis of these allegations, the Petitioners requested emergency enforcement action to immediately suspend the operating licenses for River Bend Station, Comanche Peak Unit 1, Shearon Harris, Fermi-2, Ginna, and Robinson, pending a demonstration that these facilities meet NRC fire protection requirements. The Petitioners also requested that the NRC issue a stop-work order regarding the installation of Thermo-Lag at Comanche Peak Unit 2 and a generic letter by September 5, 1992, that would require licensees to submit information to the NRC demonstrating compliance with fire protection requirements. Where facilities cannot demonstrate compliance, the Petitioners requested immediate suspension of the operating licenses for such facilities until such time as com-

¹ Reference to Petitioners shall also include these entities.

pliance with NRC fire protection requirements can be shown. The Petition was referred to the Office of Nuclear Reactor Regulation for preparation of a response.

In a letter dated August 19, 1992, the Director, Office of Nuclear Reactor Regulation, denied the Petitioners' request for emergency relief. The NRC Staff concluded that the immediate suspension of the operating licenses for River Bend Station, Comanche Peak Unit 1, Shearon Harris, Fermi-2, Ginna, and Robinson was not warranted. The NRC Staff also determined that a stop-work order or the suspension of the construction permit for Comanche Peak Unit 2 was not warranted and concluded that issuance of the generic letter would be in accordance with the NRC Staff's action plan regarding the Thermo-Lag issue and that acceleration of the issuance of the generic letter was not deemed necessary.

On September 3, 1992, the Petitioners filed an "appeal" with the Commission in response to the NRC Staff's denial of August 19, 1992, of the request for emergency enforcement action. In the "appeal," Petitioners removed the Ginna and Robinson plants from their request and added Brunswick Units 1 and 2. Petitioners again alleged that Thermo-Lag is an inadequate fire barrier, that compensatory measures do not substitute for regulatory compliance, and that fire watches are inadequate substitutes for fire barriers.

In a letter dated November 9, 1992, from the Secretary of the Commission, the Petitioners were informed that their "appeal" request had been referred to the NRC Staff for appropriate consideration in conjunction with its review of the Petition.

Upon consideration of the information set forth in the Petition,² I have determined that the Petitioners have not presented any information that would constitute a basis to

- issue a stop-work order suspending installation of Thermo-Lag in, or to suspend the construction permit for, Comanche Peak Unit 2;
- immediately suspend the operating licenses for Comanche Peak Unit 1, Shearon Harris, Fermi-2, WNP-2, Brunswick Units 1 and 2, and River Bend Station;
- have issued GL 92-XX before September 5, 1992.

² As hereafter referred to, the Petition includes the "appeal" request of September 3, 1992. On December 15, 1992, NIRS filed another petition pursuant to 10 C.F.R. § 2.206 raising additional issues regarding Thermo-Lag fire barrier material. The December 15, 1992 NIRS petition will be considered as a supplement to the Petition submitted by NIRS and others on July 21, 1992. The issues raised in the December 15, 1992 submittal will be addressed in a Final Director's Decision to be issued within a reasonable time.

II. DISCUSSION

BACKGROUND

Reports of problems regarding Thermo-Lag began to surface in the late 1980s when GSU at River Bend Station (sometimes referred to as River Bend or RBS) discovered cracks and wear damage and declared the material inoperable as a fire barrier. It further discovered a Thermo-Lag panel from which stress skin had been removed during installation, and, on further investigation, discovered that this condition was common for 3-hour Thermo-Lag fire barriers installed in the fuel building. GSU received assurances from Thermal Science, Inc. (TSI), the vendor, that Thermo-Lag would function adequately without stress skin. However, GSU conducted joint tests with TSI to determine if a panel without stress skin would perform its fire barrier function. The barrier failed to meet the test acceptance criteria. On the basis of these test results, GSU established fire watches for all 3-hour Thermo-Lag fire barriers installed at RSB.

In March 1989, GSU discovered stress skin missing from some 1-hour barriers; at the same time, TSI completed a series of tests on upgraded configurations. Some of the upgraded configurations passed; however, differences existed between the tested configurations and the installations at River Bend. As a result, GSU contracted with Southwest Research Institute (SwRI) to conduct an independent test of a 30-inch cable tray in October 1989. The test report shows that the tray failed on temperature rise within 60 minutes and collapsed in less than 90 minutes. The failure of this test raised concerns regarding the adequacy of Thermo-Lag cable tray enclosures.

Gulf States Utilities categorized all 1-hour and 3-hour barriers as indeterminate and implemented compensatory measures in the form of fire watches pursuant to RBS Technical Specification 3.7.7.a.

In February 1991, the NRC Staff received allegations that Thermo-Lag did not provide protection for electrical cables as claimed by TSI. In response, in May 1991, the NRC Staff visited River Bend Station to review the installation procedures and fire endurance test results and concluded that a generic concern existed with 30-inch-wide trays.

In June 1991, the NRC Office of Nuclear Reactor Regulation established a Special Review Team to investigate the safety significance and generic applicability of technical issues regarding allegations and operating experience concerning Thermo-Lag fire barriers at the River Bend Station. The results of fire test failures and installation problems were discussed in Information Notices (INs) 91-47, "Failure of Thermo-Lag Fire Barrier Material to Pass Fire Endurance Test," and 91-79, "Deficiencies in Procedures for Installing Thermo-Lag Fire Barrier Materials." In the "Final Report of the Special Review Team for the Review of Thermo-Lag Fire Barrier Performance," which was an attachment

to IN 92-46, "Thermo-Lag Fire Barrier Material Special Review Team Final Report Findings, Current Fire Endurance Testing, and Ampacity Calculation Errors," the Special Review Team reached the following conclusions:

- The fire-resistive ratings and the ampacity derating factors for the Thermo-Lag fire barrier system are indeterminate.
- Some licensees have not adequately reviewed and evaluated the fire endurance test results and the ampacity derating test results used as the licensing basis for their Thermo-Lag barriers to determine the validity of the tests and the applicability of the test results to their plant designs.
- Some licensees have not adequately reviewed the Thermo-Lag fire barriers installed in their plants to ensure that they meet NRC fire protection requirements and guidance such as that provided in GL 86-10, "Implementation of Fire Protection Requirements" (April 24, 1986).
- Some licensees used inadequate or incomplete installation procedures during the construction of their Thermo-Lag barriers.

The NRC Staff has provided additional information regarding Thermo-Lag in IN 92-55, "Current Fire Endurance Test Results for Thermo-Lag Fire Barrier Material"; Bulletin 92-01, "Failure of Thermo-Lag 330 Fire Barrier System to Maintain Cabling in Wide Cable Trays and Small Conduits Free from Fire Damage"; Bulletin 92-01, Supplement 1, "Failure of Thermo-Lag 330 Fire Barrier System to Perform its Specified Fire Endurance Function"; and IN 92-82, "Results of Thermo-Lag 330-1 Combustibility Testing."³

The NRC Staff has prepared an action plan that provides a process to resolve the technical issues identified with Thermo-Lag fire barrier systems. The action plan requires industry to address these issues. The Nuclear Management and Resources Council (NUMARC) has agreed to coordinate industry efforts which include testing. The action plan also provides for issuing inspection guidance to the NRC regional offices and conducting a testing program to determine fire endurance performance and cable ampacity derating.

The NRC's defense-in-depth fire protection concept relies on protecting safe shutdown functions by achieving a balance in (1) fire prevention activities; (2) the ability to rapidly detect, control, and suppress a fire; and (3) physical separation of redundant safe shutdown functions. Weaknesses in one area may be dealt with by enhancing the protection capabilities of the remaining areas.⁴ The NRC foresaw cases in which fire protection features would be inoperable and

³The Special Review Team Final Report, INs, and bulletins are available for public inspection at the NRC's Public Document Room and Local Public Document Rooms.

⁴The defense-in-depth concept is detailed in NRC Standard Review Plan, NUREG-0800, § 9.5.1, Fire Protection Program, at 9.5.1-10. See *In re Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 421 (1978).

required licensees, through technical specifications or approved fire protection plans made legally binding by license conditions, to provide compensatory measures for the deficient condition.

Recent fire endurance testing described in Bulletin 92-01 and Bulletin 92-01, Supplement 1, confirmed that certain Thermo-Lag fire barrier configurations compromise one facet of the fire protection defense-in-depth.⁵ The affected licensees have established either continuous or periodic fire watches in accordance with their technical specifications or license conditions as a compensatory measure. Fire watches are personnel trained and dedicated by the licensees to inspect for the control of ignition sources and combustible materials, to look for signs of incipient fires, to provide prompt notifications of fire hazards and fires, and to take actions to begin fire suppression activities.

ISSUES

The Petitioners generally assert that River Bend Station is in violation of NRC regulations because repeated testing of Thermo-Lag in various configurations has “conclusively” demonstrated that this material at RBS does not meet the requirements of 10 C.F.R. § 50.48 and Appendices A and R of 10 C.F.R. Part 50. They further allege that the “clear and present danger” occurring as a result of GSU’s failure to meet essential NRC safety regulations requires a suspension of the license until GSU removes and replaces its Thermo-Lag with a new fire barrier that can meet the NRC’s requirements.

The Petitioners also assert that since Shearon Harris, Fermi-2, and WNP-2 use Thermo-Lag and there is no independent testing that would demonstrate that Thermo-Lag installations at those facilities meet NRC fire protection requirements, the NRC cannot make a finding that these plants are in compliance with NRC regulations. According to the Petitioners, these plants are “seriously *out of compliance* with regulations and present a clear hazard to the public’s health and safety.”⁶

Specific issues raised by the Petitioners are summarized below, together with the NRC Staff’s evaluation.

⁵The Petitioners stated strong objection to the notion that any test results of fire barriers be considered “proprietary.” The Petitioners requested that the NRC Staff release the full test results of all fire barrier material tests. All fire endurance test reports submitted to the NRC as part of a particular plant’s licensing basis are available in the Public Document Room (PDR). The NRC is taking steps to place all other documentation regarding fire barrier tests results that are not exempt from disclosure in the PDR. See 10 C.F.R. § 9.17(a)(4).

⁶Addendum (Aug. 12, 1992) at 5-6.

A. Regulatory Compliance

The Petitioners have alleged that the River Bend facility fails to comply with the "NRC's requirements for fire protection," and that all of the reactors named by the Petitioners are in "direct violation of NRC regulations, and pose an immediate threat to the health and safety of citizens living near these plants."⁷ The Petitioners have cited two Atomic Energy Commission Appeal Board decisions in support of the proposition that "[c]ompliance with NRC safety regulations is a prerequisite to safe operation of a nuclear power plant."⁸ The basis of the Petitioners' charges is that Thermo-Lag fire barriers, which have been installed in the plants identified by the Petitioners, have failed various performance tests, and thus do not meet the 1-hour or 3-hour fire endurance rating criteria contained in section III.G of Appendix R to 10 C.F.R. Part 50 of the Commission's regulations. The failure to meet the Appendix R criteria, according to the Petitioners, constitutes a failure to satisfy Appendix A to 10 C.F.R. Part 50 (General Design Criteria for Nuclear Power Plants), and in turn 10 C.F.R. § 50.48 (Fire Protection). As will be discussed in greater detail later in this Decision, the NRC Staff acknowledges that certain tests have demonstrated that Thermo-Lag barriers may not meet the fire endurance rating criteria set forth in section III.G of Appendix R. This does not mean, however, that there no longer is reasonable assurance of adequate protection of the public health and safety.

It should first be noted that Appendix R, which sets forth criteria for specific fire protection features to protect safe shutdown systems, is applicable only to facilities that commenced operation prior to 1979. Such plants would include Brunswick Units 1 and 2 identified by the Petitioners. Facilities commencing operation on or after January 1, 1979, while not bound by Appendix R, generally are bound by requirements that follow the criteria set forth in Appendix R through license conditions.⁹ The facilities identified by the Petitioners, other than Brunswick Units 1 and 2, are in this category. Accordingly, to the extent that the Petitioners have relied upon "violations" of Appendix R as a basis to conclude that the plants they have identified are unsafe, their reliance is misplaced at the outset regarding plants other than the Brunswick units since facilities that commenced operation prior to 1979 are the only ones that are directly required to comply with, and thus may violate, Appendix R.

⁷ See Petition (July 21, 1992) at 15; Appeal (Sept. 3, 1992) at 3.

⁸ See Petition (July 21, 1992) at 16.

⁹ In addition, there are a very limited number of plants, which commenced operation on or after January 1, 1979, that are not subject to specific license conditions but have made commitments to comply with NRC fire protection requirements, including section III.G of Appendix R. The NRC is in the process of elevating such commitments to license conditions.

Even assuming, *arguendo*, that all of the plants identified by the Petitioners are not in compliance with Appendix R, it does not follow that the failure to comply with a regulation indicates the absence of adequate protection.¹⁰ The Commission has explained that:

[W]hile it is true that compliance with all NRC regulations provides reasonable assurance of adequate protection of the public health and safety, the converse is not correct, that failure to comply with one regulation or another is an indication of the absence of adequate protection, at least in a situation where the Commission has reviewed the noncompliance and found that it does not pose an "undue risk" to the public health and safety.

Ohio Citizens for Responsible Energy, Inc., Denial of Petition for Rulemaking, 53 Fed. Reg. 41,180 (1988).

The Petitioners have noted an Appeal Board statement that "once a regulation is adopted, the standards it embodies represent the Commission's definition of what is required to protect the public health and safety." Petition at 16, quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 528 (1973). More recently, however, the Commission made it clear that its "rules do not, strictly speaking, 'define' adequate protection, . . . they only presumptively assure it." 53 Fed. Reg. 41,180 (1988). The Petitioners further refer to the *Maine Yankee*¹¹ Appeal Board decision in support of the proposition that compliance with NRC regulations is a "prerequisite to safe operation of a nuclear power plant." Petition at 16. However, at issue in *Maine Yankee* was not a purported *failure* to comply with a regulation, but rather whether the Licensing Board below could find adequate protection of the public health and safety on the basis of demonstrated compliance with regulations, notwithstanding "residual risks" stipulated to by the parties. The issue raised here by the Petitioners — whether a finding of inadequate protection is compelled by reason of demonstrated noncompliance with a regulation — is the converse to the *Maine Yankee* issue; thus, consistent with the Commission's views set out above, *Maine Yankee* is not precedent for the Petitioners' position that failure to comply with Appendix R means plants are necessarily unsafe.

All of the plants identified by the Petitioners have instituted fire watches as required by their action statements regarding inoperable barriers contained in their technical specifications or fire protection programs subject to license conditions.¹² Generally, action statements provide alternative remedial ac-

¹⁰ Perhaps the clearest illustration of this point is when an exemption has been granted pursuant to 10 C.F.R. §50.12. In such cases, although compliance with a particular regulation is no longer required, there is still no undue risk to the public health and safety. See 10 C.F.R. §50.12(a)(1).

¹¹ *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003 (1973).

¹² The Petitioners' assertion that River Bend Station fails to comply with the "Commission's requirements" for fire protection may not be accurate if the Petitioners' use of the term "requirements" is not strictly limited to regulations, given River Bend Station's compliance with the required remedial action measures contained in its technical specifications.

tions to shutting down a plant when limiting conditions for operations are not met.¹³ Compliance with the required remedial actions provides reasonable assurance that the public health and safety is adequately protected notwithstanding the plant's continued operation and failure to meet the respective limiting condition for operation. Here, since all of the identified plants have implemented the required fire watches in accordance with plant-specific requirements, their continued operation does not pose an undue risk to the public health and safety.

The Petitioners have asserted that fire watches are "acceptable only as a temporary measure while the plants are shut down to replace Thermo-Lag,"¹⁴ that the Staff response of August 19, 1992, "gives no indication that these compensatory measures will be temporary," and that fire watches are essentially "indefinite generic exemption[s] . . . [without a] legal basis."¹⁵ In general, provisions for remedial action may include time limits by which the relevant limiting condition must be restored. Here, however, fire watches without specified time limits are judged by the NRC to be acceptable compensatory measures adequate to protect the public health and safety. They have not been determined to be permanent measures; thus, fire watches are not "generic exemptions" without a legal basis,¹⁶ as asserted by the Petitioners, but in fact are legally sanctioned remedial actions based on 10 C.F.R. § 50.36(c)(2).¹⁷

In sum, notwithstanding the failure to have operable fire barriers meeting the fire endurance rating criteria specified by section III.G of Appendix R, a plant is not necessarily unsafe to continue operation. To the contrary, fire watches, as

¹³ See generally 10 C.F.R. § 50.36(c)(2), which in relevant part provides that:

Limiting conditions for operation. Limiting conditions for operation are the lowest functional capability or performance levels of equipment required for safe operation of the facility. When a limiting condition for operation of a nuclear reactor is not met, the licensee shall shut down the reactor or follow any remedial action permitted by the technical specifications until the condition can be met.

For example, in the River Bend Unit 1 technical specifications regarding fire-rated assemblies, the Limiting Condition for Operation provisions state:

LIMITING CONDITION FOR OPERATION

3.7.7 All fire barrier assemblies shall be operable. . . .

ACTION:

a. With one or more of the above required fire-rated assemblies or sealing devices inoperable, within 1 hour establish a continuous fire watch on at least one side of the affected assembly and/or sealing device or verify the OPERABILITY of fire detectors on a least one side of the inoperable assembly or sealing device, and establish an hourly fire watch patrol.

Remedial actions may also be specified in a plant's approved fire protection program subject to a license condition.

¹⁴ Addendum (Aug. 12, 1992) at 6.

¹⁵ Appeal (Sept. 3, 1992) at 5.

¹⁶ Even accepting *arguendo* the Petitioners' characterization, in each case where there has been approval of technical specifications or license conditions permitting fire watches without specified time limits, the NRC, when licensing the affected facilities, made mandated findings relating to adequate protection of the public health and safety required under the Atomic Energy Act. Even if the procedural steps set forth by 10 C.F.R. § 50.12 required to grant an exemption may not have been followed in each case, that does not undermine the ultimate conclusion that there is adequate protection of the public health and safety when a fire watch is implemented.

¹⁷ In instances where fire protection programs have been moved from technical specifications and are now subject to license conditions, the NRC's approval of the fire protection programs subject to license conditions provides the legal basis for the implementation of fire watches as a remedial measure.

will be discussed in greater detail below in response to the particular concerns raised by the Petitioners, are judged by the NRC to be adequate remedial measures that provide reasonable assurance that the public health and safety is protected. By reason of full compliance by River Bend and all other facilities named by the Petitioners with their technical specifications or fire protection program action statements requiring the implementation of fire watches, adequate protection of the public health and safety is still reasonably assured for such plants. No significant health or safety issue has thus been raised. Because the Commission has discretion regarding enforcement of its regulations, and given the circumstances here where no significant health and safety issues have been raised, enforcement action of the nature requested by the Petitioners is not warranted.

B. Sufficiency of Compensatory Measures Contained in License Conditions or Technical Specifications

The central argument in the Petitioners' allegations is that the measures taken by Licensees to compensate for degraded barrier conditions, specifically fire watches, are not adequate to protect the public health and safety. The Petitioners' concerns may be broadly categorized as follows:

- the performance of assigned functions by fire watch personnel;
- the ability of fire watches to compensate for a degraded barrier, even assuming full performance.

1. Performance by Fire Watches of Their Assigned Functions

(i) Falsification of Records

The Petitioners have alleged that, whatever a fire watch is intended to do, the watches are not always being performed. In support of this assertion, Petitioners claim that there is adequate documentation that utility personnel have not always taken fire watches seriously and have falsified records attesting that fire watches have been undertaken when such was not the case.

The NRC considers falsification of records and inattentiveness serious offenses which could subject licensees to enforcement sanctions. In addition, the NRC Staff conducts periodic inspections that are effective in identifying specific instances of inattentiveness or falsifications. In those few cases where deficiencies have been identified in the performance of fire watches, appropriate enforcement action has been taken. For example, Texas Utilities Electric Company has paid a fine of \$50,000.00 for missed fire watches and falsified fire watch records at Comanche Peak (EA 91-015). Such an enforcement action serves as an example to the nuclear industry that fire watches serve an important function

and must be adequately performed. Isolated instances of nonperformance do not indicate that, in general, fire watches are not being performed adequately.

Licensee responses to NRC Bulletin 92-01 and Bulletin 92-01, Supplement 1, indicate that appropriate fire watches have been implemented. While there is no absolute guarantee that every stated fire watch is in fact being performed, absent substantial evidence that instances of nonperformance are not isolated, and given enforcement sanctions and the measure of assurance they provide, the NRC Staff concludes that there is reasonable assurance that fire watches, as required by technical specifications or license conditions, are being performed.

(ii) Toxicity of Thermo-Lag

The Petitioners have alleged that, based on the results of tests conducted by SwRI, Thermo-Lag has been shown to emit extremely high amounts of hydrogen cyanide gas when exposed to fire. They assert that fire watch personnel could discover a fire and be overcome or otherwise harmed by the toxic gases, rendering them unable to perform their functions.

The test report referenced by the Petitioners has been reviewed and evaluated by the NRC Staff. Questions concerning the toxicity of Thermo-Lag, in part raised by the SwRI test report, prompted the NRC Staff to conduct an independent toxicological evaluation of the combustion products of Thermo-Lag fire barrier material. The NRC, in conjunction with the National Institute of Standards and Technology (NIST), determined that the products of combustion do not include high amounts of hydrogen cyanide and are comparable in toxicity to the burning of Douglas Fir lumber. The thermal decomposition of Thermo-Lag under actual fire conditions does not increase the toxicity of the expected fire gases being produced as a result of a fire that burns other typical in-plant combustibles. The toxicity levels evaluated did not suggest that precautions above and beyond those that would normally be taken during an in-plant fire should be considered. Thus, the Staff has concluded that fire watch personnel can perform their function of finding incipient fires and notifying appropriate response personnel without sacrificing personal safety.

2. Ability of Fire Watches to Compensate for a Degraded Barrier

(i) Thermo-Lag Deficiencies

The Petitioners have alleged a number of deficiencies concerning Thermo-Lag material, including failure of the barriers during 1-hour and 3-hour fire endurance tests, failure of the barrier to pass a hose stream test, lack of seismic tests and inability of the material to survive a seismic event, and combustibility of the material. The Petitioners have also alleged that the material has been

improperly installed and failed to meet NRC quality assurance requirements and qualification tests, which contribute further to the poor performance of Thermo-Lag.

The NRC Staff acknowledges and has stated that certain Thermo-Lag fire barrier configurations have failed to demonstrate the ability to perform their fire resistance functions. In this regard, the NRC Staff, in Bulletin 92-01, Supplement 1, has stated that Thermo-Lag fire barriers should be treated as inoperable until licensees can declare the fire barriers operable on the basis of successful, applicable tests. The NRC Staff also has recognized that Thermo-Lag barriers have failed hose stream tests. A failure of a fire barrier to pass a hose stream test in and of itself does not imply a probability of short circuits because the cable insulation is designed to protect the cable from a short if the cable becomes wet. However, cables may be damaged by the thermal effects of the fire if the barrier fails as a result of a hose stream, and thus would be more likely to short.¹⁸

The NRC Staff also recognizes that Thermo-Lag is combustible¹⁹ as shown by the results of the American Society for Testing and Materials (ASTM) E-136 tests conducted for the NRC.²⁰

In addition, the NRC Staff has concluded that Thermo-Lag may crack or crumble into small fragments during a seismic event.²¹

Given the forgoing deficiencies identified for Thermo-Lag, the NRC Staff agrees that compensatory measures are necessary until a licensee can declare fire barriers operable on the basis of applicable tests that demonstrate successful barrier performance.

¹⁸ Recognizing this, the NRC Staff will require the successful completion of a hose stream test in fire barrier qualification.

¹⁹ The Petitioners have stated that "Appendix A and Appendix R both refer specifically to a requirement for non-combustible materials for fire barriers." Appeal at 10. While Appendix A expressly states only that "[n]oncombustible and heat resistant materials shall be used wherever practical[,] . . ." combustibility is still an issue that warrants consideration.

²⁰ Under this testing standard, the material is considered to be "combustible" if three out of four samples tested exceed the following criteria: (1) the recorded temperature of the specimen's surface and interior thermocouples, during the test, rises 54°F (30°C) above the initial furnace temperature; (2) there is flaming from the specimen after the first 30 seconds of irradiance; and (3) the weight loss of the specimen, due to combustion during the testing, exceeds 50 percent. Of the four Thermo-Lag specimens tested, all experienced a weight loss of greater than 50 percent and flaming continued in excess of 30 seconds.

In Information Notice 92-82, "Results of Thermo-Lag 330-1 Combustibility Testing," issued December 15, 1992, licensees were provided with the results of the NRC tests and were asked to review the information for applicability to their facility where Thermo-Lag may be used to enclose intervening combustibles and for constructing radiant energy heat shields inside containment.

²¹ The particular seismic issue raised by the Petitioners, that, during a seismic event, Thermo-Lag could shatter cable trays and shear cables used for safe shutdown systems, is addressed in Section C, below.

(ii) *Adequacy of Fire Watches*

The Petitioners have questioned the effectiveness of fire watches in providing adequate protection since tests have shown that Thermo-Lag can fail in a shorter time than a 1-hour roving or periodic fire watch could detect, and a 1-hour periodic watch does not provide continuous fire detection capability. In addition, the Petitioners claim that a fire watch is an additional way to detect a fire while a fire barrier is a mode of physically protecting a reactor against fire. Therefore, a fire watch duplicates fire detection but does not provide a barrier or shield capability that has been lost through the degradation of a barrier. Further, the Petitioners argue that the fire watch was intended as a short-term, stop-gap measure, not as a final solution to the [Thermo-Lag] problem.

Despite the acknowledged shortcomings identified with Thermo-Lag fire barriers and after fully considering the arguments presented by the Petitioners regarding the ability of fire watches to provide adequate compensation, the NRC Staff has determined that the fire watch compensatory measures are adequate and acceptable to ensure public health and safety.

The use of fire watches in instances of degraded or inoperable barriers is an integral part of NRC-approved fire protection programs. These NRC Staff-approved compensatory measures require the establishment of a *continuous* fire watch or an hourly fire watch if automatic detection systems protecting the affected components have been verified. While it is true that Thermo-Lag is intended as a barrier, and fire watch personnel cannot act as physical shields, a fire watch provides more than simply a detection function. Personnel assigned to fire watches are trained by the licensee to inspect for the control of ignition sources and combustible materials, to look for signs of incipient fires, to provide prompt notifications of fire hazards and fires, and to take appropriate actions to begin fire suppression activities. Fire watch personnel are capable of determining the size, actual location, source, and type of fire — valuable information that cannot be provided by an automatic fire detection system.

During a plant fire, temperatures are likely to be much less severe at the early stages. On the basis of enhanced capabilities provided by fire watches and notwithstanding that the level of barrier-type protection may be reduced, the NRC Staff has determined that there is a margin of safety to ensure adequate protection in cases where fire watches were approved.²²

Finally, the Petitioners argue that fire watches were intended as a short-term compensatory measure and not as a final solution. The NRC Staff agrees that fire watches are not a final solution. The NRC Staff's action plan is directed

²²In specific cases, the NRC Staff may have granted exemptions to Appendix R requirements partially on the basis of the ability of a fire barrier to perform its function. In cases where the barrier is now treated as inoperable, the licensee must implement a continuous or hourly fire watch, as appropriate, to compensate for the inoperable barrier.

toward restoring the functional capability of fire barriers on an expedited basis. It is true that there has never been a time limit associated with the use of fire watches as a compensatory measure.²³ Given the significant margin of safety a fire watch brings to a fire protection program, as discussed above, the NRC Staff has determined that fire watches without specified time limits may serve as a compensatory measure while barriers are inoperable, and has issued technical specifications and license conditions for all operating nuclear power plants specified by the Petitioners that permit fire watches without specified time limits. This does not alter, however, the NRC Staff's position that fire watches are not a final solution.

The NRC Staff has carefully evaluated the use of fire watches to compensate for any degradation in the effectiveness of required fire barriers, and has concluded that fire watches continue to assure adequate protection of the public health and safety. Therefore, the Petitioners' assertion that the use of Thermo-Lag insulation at nuclear power facilities warrants immediate shutdown of these facilities is without merit.

C. Seismic Issues

The Petitioners have alleged that Thermo-Lag, as a heavy cementitious preformed plate, can break up during a seismic event, act as a shear severing cables, and shatter cable trays necessary for safe shutdown. Moreover, according to the Petitioners, if a seismic event should occur and the product shatters the cable tray, safe shutdown is further jeopardized by fire incidence.

In defining the term "safe shutdown earthquake" (SSE) in section III(c) of Appendix A to 10 C.F.R. Part 100, the regulation requires certain structures, systems, and components to remain functional under the postulated SSE. These structures are required to be designed to withstand the effects of the postulated SSE with adequate margins of safety against their functional failure (e.g., large deformations). The margin of safety against shattering of the tray is substantially larger than margins against deformations.

To the NRC Staff's knowledge, TSI has not performed seismic tests of pre-fabricated panels. However, Dr. Philip L. Gould, Professor of Civil Engineering, Washington University, St. Louis, Missouri, as an independent consultant to TSI, has performed a seismic analysis of Thermo-Lag material attached to cable trays and conduit sections. The NRC Staff reviewed the analysis²⁴ and observed the following:

²³ See *supra* text accompanying notes 14-17.

²⁴ Philip L. Gould, "Stress Analysis of Thermo-Lag Subliming Compound Coating Applied to Electrical Power Trays and Conduit," performed for Thermal Science, Inc., in Technical Notes 41582 dated April 15, 1982; 12683 and 12983 dated January 12, 1983; and 12584 dated February 1984.

- The analysis was performed on the most commonly used cable tray configurations and conduit sections with Thermo-Lag material attached in accordance with TSI's installation procedures.
- The bounding analysis was performed with the applied horizontal seismic acceleration of 7.5g combined with the vertical seismic acceleration of 5.0g.
- The maximum acceptable stresses in the material are limited to one-half the strengths of the material in tension, flexure, and shear.

The NRC Staff believes the maximum amplified accelerations (MAAs) expected under the postulated SSEs in the plants east of the Rocky Mountains are considerably lower than those used in the analysis, and the MAAs expected in the West Coast plants are in the same range or lower than the ones used in the analysis. It is the NRC Staff's judgment after a thorough review of Dr. Gould's analysis, that preformed Thermo-Lag panels are not likely to get detached from cable trays or conduits during an SSE. The material, however, may crack or crumble into powdery material or small fragments under an SSE. This crumbling and cracking behavior would not damage safe shutdown systems. Recognizing the design requirements for the raceways and the above attributes of the material, the NRC Staff concludes that shattering of raceways or severing of the cables required for safe shutdown under an SSE are not credible scenarios.

D. Ampacity Derating Errors

The Petitioners have essentially alleged that an error in ampacity derating could result in the use of inappropriate cables, which, if undersized, could prematurely age, or worse, overheat and ignite. The Petitioners noted that in NRC IN 92-46 the NRC Staff reported that TSI made a calculation error on the ampacity derating factor for Thermo-Lag. The Petitioners have also asserted that TSI has not performed a qualified ampacity test to date and that the Underwriters Laboratory (UL) Report 86NK23826 (file no. R6802) has been cited as "indeterminate" by the NRC Staff because assembly of the test fixture was not reviewed or witnessed by UL personnel.

Ampacity derating is the lowering (derating) of the current carrying capacity of cables enclosed in electrical raceways protected with fire barrier materials because of the insulating effect of the fire barrier material. This insulating effect limits the ability of the cable insulation to shed heat. If not accounted for, the increased cable insulation temperature could lead to premature insulation failure. Other factors also affect ampacity derating, including the extent of cable fill in the raceway, cable type, raceway construction, and ambient temperature. The National Electrical Code, Insulated Cable Engineers Association (ICEA) publications, and other industry standards provide ampacity derating factors for open-air installations. These standards do not provide derating factors for

fire barrier systems. Although a national standard test method has not been established, ampacity derating factors for raceways enclosed with fire barrier material are determined by testing for the specific installation configuration.

The manufacturer of Thermo-Lag has documented a wide range of ampacity derating factors that were determined by testing, for raceways enclosed with fire barrier materials. On October 2, 1986, TSI informed its customers that, while conducting tests in September 1986 at UL, it found that the ampacity derating factors for Thermo-Lag barriers were greater than previous tests indicated. However, the cable fill and tray configuration were different for each test than those tested previously. In addition, the NRC Staff learned that UL performed a duplicate cable tray test that resulted in an even higher derating factor. The NRC Staff also learned of the determination of other derating factors during its review of other tests conducted at SwRI.²⁵

The NRC Special Review Team concluded, as the Petitioners asserted, that ampacity test results thus far, including the UL test results, were indeterminate. This conclusion was based on observed inconsistencies in the derating test results of the various testing laboratories. There is no national consensus test standard (e.g., Institute of Electrical and Electronics Engineers (IEEE) or American National Standards Institute (ANSI)) for conducting these tests. In addition, some licensees have not adequately reviewed ampacity derating test results to determine the validity of the tests and the applicability of those test results to their plant design. The Special Review Team recognized that, in hypothetical cases, nonconservative ampacity derating factors could have been instrumental in the installation of inappropriate cables, which as a result, could suffer premature cable jacket and cable insulation failures over a period of time. However, the NRC Staff has determined that in practice the ampacity derating factor resulting from Thermo-Lag insulating properties represents only one of many variables used in determining the design ampacity for cable systems and that, as discussed below, sufficient margin exists in this area to preclude any immediate safety concerns.

²⁵The test procedures and test configurations differed among the testing laboratories. Therefore, the results from the different ampacity tests may not be directly comparable to each other.

The NRC Staff is concerned that the ampacity derating factors, as determined in UL tests for Thermo-Lag barrier designs, are inconsistent with TSI results for similar designs because different times were allowed for the temperature to stabilize before taking current measurements. Inconsistent stabilization times would call into question the validity of previous TSI results. The NRC also noticed during the review of the Industrial Testing Laboratories (ITL) test reports that ambient temperature and maximum cable temperature were allowed to vary widely for some tests. Therefore, those tests in which the ambient and maximum cable temperatures were not maintained within specified limits may be questionable. Additionally, a licensee discovered a mathematical error for the ampacity derating factor published in an ITL test report. A preliminary assessment of the use of a lower-than-actual ampacity derating factor indicates that higher-than-rated cable temperatures are possible for Thermo-Lag installations. Higher-than-rated cable temperatures could accelerate the aging effects experienced by the cable.

For actual installations, various derating factors are typically applied to the ICEA ampacity values provided for each cable size. In general, it can be expected that the cables typically used in actual installations have higher current carrying capacity than the ICEA ampacity values.²⁶ Also, cables are sized based on full-load current plus a 25% margin to account for starting current requirements of the load. Given the short duration of typical equipment starts, this margin is available to compensate for any errors in ampacity derating. Further, use of a cable size larger than normal may be required as a result of voltage drop considerations for long circuit lengths. In typical applications this also provides additional current carrying capacity. Given these conservatisms inherent in the design ampacity of cable systems and, in addition, the fact that most power cables required for safe shutdown are not normally energized but are typically operated during surveillance testing for short time periods, the likelihood that cables could ignite as a result of Thermo-Lag ampacity derating errors has been judged by the NRC Staff to unlikely. In addition, based on these conservatisms and the currently available information on existing plants, ampacity design and operating history, the NRC Staff believes that the ampacity derating issue is not an immediate safety issue but rather is an aging issue to be resolved over the long term.²⁷

E. Issuance of a Generic Letter

The Petitioners contend that even though the NRC Staff has recognized the generic implications of the repeated test failures of Thermo-Lag material (see draft GL 92-XX, "Thermo-Lag 330-1 Fire Barriers," February 11, 1992), it has delayed issuing a generic letter, apparently because of industry pressure. The Petitioners state as an example that, on July 7, 1992, despite overwhelming evidence of the failures of Thermo-Lag to pass meaningful tests, the nuclear industry trade association NUMARC continued to badger the NRC Staff to change its definition of Thermo-Lag from "inoperable" to "degraded." In addition, the Petitioners assert that NUMARC repeatedly balked at the idea of requiring utilities to test their Thermo-Lag installations.

The Petitioners' concern with regard to GL 92-XX ignores the fact that the NRC Staff has issued a Bulletin and Supplement in 1992 dealing with the

²⁶ICEA ampacity values include conservatisms to compensate for skin and proximity effects and shield and/or sheath losses, which may or may not apply in specific situations.

²⁷On December 17, 1992, the NRC Staff issued Generic Letter 92-08, "Thermo-Lag 330-1 Fire Barriers," which requires licensees to review the ampacity derating factors used for all raceways protected by Thermo-Lag 330-1 (for fire protection of safe shutdown capability or to achieve physical independence of electrical systems) and to determine whether the ampacity derating test results relied upon are correct and applicable to the plant design. The licensees' findings and any corrective actions and compensatory measures taken by licensees are to be identified in a written report to the NRC Staff. Future actions being contemplated by the NRC Staff include independent ampacity testing and an analysis of the industry testing program results.

Thermo-Lag issue. In NRC Bulletin 92-01 and its Supplement, issued on June 24, 1992, and August 28, 1992, respectively, the NRC Staff informed licensees to consider certain Thermo-Lag barriers as inoperable and take compensatory actions. For licensees to consider these barriers operable in the future, analyses and/or testing will be in order. These actions on the part of the NRC Staff accomplished much of what the NRC Staff intended to accomplish with GL 92-XX. These actions indicate that the NRC Staff has responded aggressively to the Thermo-Lag problem and has not succumbed to industry pressure.

The NRC Staff has carefully evaluated the issues associated with using Thermo-Lag material in an action plan presented to and reviewed by the Commission. The action plan provided for the issuance of the generic letter according to a NRC Staff-developed schedule. During an August 12, 1992 public meeting with NUMARC, the NRC Staff stated that it had considered public comments it had received on the draft GL and that it had assigned a high priority to issuing the letter. As discussed herein, the NRC Staff has determined that the Petitioners have not raised any immediate significant health or safety issues; thus, there was no need for the NRC Staff to deviate from its established schedule for the issuance of GL 92-XX. On December 17, 1992, the NRC Staff issued GL 92-08 in accordance with its action plan.

The Petitioners further allege that only the manufacturer of Thermo-Lag knows exactly which licensees have purchased and installed Thermo-Lag, and even this company may not know all the different configurations in which this material has been installed at these plants.

To the contrary, the NRC Staff is aware of all plants that use Thermo-Lag. NRC Bulletin 92-01 and Supplement 1, required operating reactor licensees to identify areas of their plants that had Thermo-Lag installed and determine the plant areas that used this material for the protection and separation of safe shutdown capability. The NRC Staff also required that this information be submitted to the Staff within 30 days of receipt of the bulletin and supplement. The NRC Staff's review of licensees' responses to Bulletin 92-01 shows that eighty-three operating plants have Thermo-Lag installed and twenty-eight operating plants do not. In addition, all licensees with Thermo-Lag installed for protection of safe shutdown capability have reported that they have implemented compensatory measures consistent with their technical specifications or license conditions for an inoperable fire barrier.

F. Request for Stop-Work Order for Comanche Peak Unit 2

In their August 12, 1992 addendum to their initial Petition, the Petitioners requested that the NRC Staff immediately issue a stop-work order to Texas Utilities regarding continued installation of Thermo-Lag at Comanche Peak Unit 2. This request was generally based on the Petitioners' conclusion that Thermo-

Lag is "in violation of the NRC's fire protection regulations." In response, the NRC Staff through its acknowledgment letter dated August 19, 1992, stated that it was not necessary to issue an order to stop continued installation of Thermo-Lag at Comanche Peak Unit 2 or to suspend the facility's construction permit because the licensee proceeded with construction at its own risk, and the NRC would ensure at the operating license stage that "issues related to Thermo-Lag at Comanche Peak Unit 2 are sufficiently resolved to ensure adequate protection of the public health and safety."²⁸ The Petitioners in turn alleged in their "appeal" dated September 3, 1992, that to allow continued installation of Thermo-Lag is irresponsible, will result in unnecessary costs to ratepayers who will have to pay for replacement, and at worst will result in a "risk of meltdown caused by fire."²⁹

As has been made abundantly clear by earlier discussion in this Decision, various deficiencies concerning Thermo-Lag have been acknowledged by both the NRC and licensees. Testing of the material in all configurations, however, has not been completed, leaving open the possibility that certain installations of Thermo-Lag may be found to be acceptable. One cannot say with certainty at this juncture that any and all installations of Thermo-Lag at Comanche Peak Unit 2 would still yield "a truly major deficiency" in adequate fire protection.³⁰ Further, as the Petitioners themselves recognize, Thermo-Lag and fire barriers in general may be removed, reinstalled, or replaced practically at any time during the construction or operating life of the plant. This is in sharp contrast to a situation where defects may not be curable or even subject to identification beyond a certain point in time during plant construction, or may adversely affect the construction activities of other plant components, thus perhaps warranting a stop-work order. For example, in *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7 (1974), where field inspectors had found serious deficiencies in cadwelding operations (a process for fusing together metal bars used in reinforced concrete construction), the successful completion of which is "a prerequisite for performance of further construction work on significant structures and components important to nuclear safety," *id.* at 11-12, the Commission upheld a show-cause order that had immediately suspended cadwelding activity without prior written notice.

As indicated previously in the NRC Staff's acknowledgment letter, "[a] licensee pursues construction work under a construction permit at its own risk pending approval of the final design of the plant." *Commonwealth Edison Co.*

²⁸ Letter from T. Murley to M. Mariotte (Aug. 19, 1992) at 4.

²⁹ Appeal (Sept. 3, 1992) at 8.

³⁰ See generally *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), DD-85-11, 22 NRC 149, 161 (1985) ("If a truly major deficiency or deficiencies on the part of a licensee are identified through the inspection process, or otherwise, the agency is authorized to issue a variety of orders, including stop-work orders, to assure appropriate remedial action.")

(Byron Station, Units 1 and 2), DD-81-5, 13 NRC 728, 731 (1981). Moreover, before the granting of an operating license for Comanche Peak Unit 2, Texas Utilities "will be required to do anything necessary to ensure safe operation of the plant." *Id.* Thus, to the extent that the Petitioners' fear that continued installation of Thermo-Lag at Comanche Peak Unit 2 will somehow result in an unreasonable "risk of a meltdown," such fear is unfounded given the NRC's statutory mandate to ensure safe operation before granting an operating license. Further, given that not all configurations of Thermo-Lag have been excluded from possibly being able to meet regulatory standards, it is not at all clear that continued installation will result in "unnecessary costs to ratepayers." Accordingly, a stop-work order, as requested by the Petitioners, is not warranted in this instance.

III. CONCLUSION

The Petitioners request that the NRC order the immediate suspension of the operating license of River Bend, Shearon Harris, Fermi-2, WNP-2, Brunswick 1 and 2, and Comanche Peak 1. In addition, the Petitioners ask that a stop-work order or, if necessary, an order suspending the construction permit be issued for Comanche Peak Unit 2. The Petitioners ask that these orders be in place until a tested and effective fire barrier, in accordance with Appendices A and R to 10 C.F.R. Part 50, is installed. The Petitioners also request that the NRC Staff immediately issue a generic letter (GL 92-XX dated February 11, 1992).

On December 17, 1992, the NRC Staff issued GL 92-08, "Thermo-Lag 330-1 Fire Barriers." To the extent Petitioners sought the issuance of the Generic Letter, this relief is granted. With regard to the other requests made by the Petitioners, the institution of proceedings pursuant to 10 C.F.R. § 2.202 to shut down certain facilities using Thermo-Lag fire barrier material and to issue a stop-work order regarding continued installations of Thermo-Lag material at Comanche Peak Unit 2, as requested by Petitioners, is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). For the reasons discussed above, I find no basis for taking such actions. Rather, on the basis of the review efforts by the NRC Staff, I conclude that no substantial health and safety issues have been raised by the Petitioners. Accordingly, the Petitioners' remaining requests for action pursuant to 10 C.F.R. § 2.206 are denied.

A copy of this Decision will be placed in the Commission's Public Document Room, Gelman Building, 2120 L Street, N.W., Washington, D.C. 20555, and at the Local Public Document Room for the named facilities.

A copy of this Decision will also be filed with the Secretary for the Commission's review as provided in 10 C.F.R. § 2.206(c) of the Commission's regulations.

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation**

**Dated at Rockville, Maryland,
this 1st day of February 1993.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
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 3, 1993

The Commission grants, in part, Environmental and Resources Conservation Organization's (ECO's) appeal of the Atomic Safety and Licensing Board's order, LBP-92-23, 36 NRC 120 (1992), in that the Commission grants discretionary intervention, admits one contention, and permits ECO to amend another. Also, the Commission treating this case *sui generis*, as a matter of discretion, directs Staff not to issue the decommissioning order pending completion of the proceeding before the Licensing Board. The Commission denies ECO's appeal with respect to all other contentions.

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission has the authority to grant intervention, as a matter of discretion, pursuant to the Commission's authority to hold hearings and to permit participation in its proceedings.

RULES OF PRACTICE: CONTENTIONS

The pleading requirements set out in 10 C.F.R. §2.714 do not preclude a party from filing contentions in the original request for hearing and petition to intervene, but to be admissible the contentions must meet the specific pleading requirements set out in section 2.714(b) and (d).

RULES OF PRACTICE: BRIEFS

Parties who appear before the Commission bear responsibility for any possible misapprehension of their position caused by the inadequacies of their briefs.

NEPA: CONSIDERATION OF ALTERNATIVES

“Resumed operation” is an alternative to the decision to cease operation of a plant and, as such, need not be considered as an alternative to a proposal to decommission except perhaps in extraordinary circumstances (e.g., national emergency).

NEPA: RULE OF REASON

Under the National Environmental Policy Act (NEPA) the Commission’s consideration of the “no-action” alternative need not go into environmental impacts of decommissioning a facility that could be avoided only by the highly speculative and not reasonably foreseeable resumed operation of a facility. *See NRDC v. Callaway*, 524 F.2d 79, 92-93 (2d Cir. 1975).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

A petitioner may not rely solely on fact that Staff has posed questions to a licensee to support the petitioner’s contention where the licensee has filed a detailed response to Staff’s inquiry and the petitioner has had substantial opportunity to review the response prior to the filing of its contentions.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

A contention will be deemed admissible if the petitioner identifies a deficiency that is obvious on the face of a licensing document that is required to be filed. *See* 10 C.F.R. § 2.714(b)(2)(iii).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

In submitting an affirmative safety contention, as opposed to alleging a deficiency that is obvious on the face of a licensing document that is required to be filed, a petitioner must identify the specific bases for the contention, allege facts or expert opinion that support the contention, provide references to specific sources and documents on which petitioner intends to rely to establish those facts or expert opinion, and identify a material factual legal dispute with the applicant. *See* 10 C.F.R. § 2.714(b) and (d).

RULES OF PRACTICE: SERVICE OF DOCUMENTS

Information exchanged between Staff and licensee is not considered offered for filing in an adjudication and, thus, is not subject to the provisions of 10 C.F.R. § 2.701. Petitioners have access to such information that is placed in the public document room.

RULES OF PRACTICE: RESPONSIBILITIES OF PARTIES

Staff and licensee clearly have an obligation to keep the Licensing Board and the petitioner apprised of any relevant and material new information.

RULES OF PRACTICE: CONTENTIONS

An unfettered opportunity to amend contentions extends only until 15 days prior to the first prehearing conference. 10 C.F.R. § 2.714(a)(3).

RULES OF PRACTICE: CONTENTIONS

A petitioner may seek to amend his or her contentions or file new contentions if data or conclusions in subsequent NRC environmental review documents differ significantly from the data or conclusions in the applicant's environmental documents. 10 C.F.R. § 2.714(b)(2)(iii). Such contentions are subject to late-filed criteria set out in 10 C.F.R. § 2.714(a)(1)(i)-(v). However, when the information in the Staff environmental documents is otherwise unavailable, it is possible that the "good cause for lateness" factor may be satisfied by this unavailability.

MEMORANDUM AND ORDER

Environmental and Resources Conservation Organization (ECO) has filed an appeal before the Commission pursuant to 10 C.F.R. § 2.714a (1992). This appeal challenges an Atomic Safety and Licensing Board's August 20, 1992 order that denied ECO's intervention petition and request for hearing on the Nuclear Regulatory Commission (NRC) Staff's proposed order approving of a decommissioning plan for, and authorizing decommissioning of, the Rancho Seco Nuclear Generating Station (Rancho Seco). The Licensing Board concluded that ECO had failed to establish standing either as a matter of right or of discretion and had failed to set forth at least one viable contention. LBP-92-23, 36 NRC 120. For the reasons set forth below, we withhold a final decision on ECO's petition and remand the matter to the Licensing Board for a determination on the admissibility of any amended or new contention filed in accordance with terms of this order. Thus, to a limited extent, ECO's appeal is granted.

I. BACKGROUND

The Licensee, Sacramento Municipal Utility District (SMUD), shut down Rancho Seco after a June 6, 1989 public referendum came out against SMUD's continued operation of this facility. The Licensee has since ceased production of power, defueled the reactor, and obtained from the NRC conversion of its operating license to a "possession-only" license, which permits only possession of the facility and radioactive material, but not plant operation. ECO unsuccessfully sought to intervene in the prior proceeding that authorized the possession-only license.¹

On May 20, 1991, the Licensee filed its application for termination of its license and a proposed decommissioning plan. The plan provides for 10 to 20 years of onsite storage (SAFSTOR)² followed by the removal of the residual radioactivity. The Licensee subsequently provided a supplement to its Environmental Report on October 21, 1991, and provided additional information regarding both the decommissioning plan and environmental report on April 15, 1992, in response to NRC Staff inquiries.

ECO filed its petition to intervene and request for hearing pursuant to a March 19, 1992 Notice of Opportunity for Hearing with respect to both the

¹ See CLI-92-2, 35 NRC 47 (1992), *appeal docketed*, No. 92-70202 (9th Cir. Apr. 2, 1992) (briefs have been filed on ECO's appeal, and the parties are awaiting the scheduling of oral argument).

² SAFSTOR is a method of decommissioning in which the nuclear facility is placed and maintained in a condition that allows both safe storage and subsequent decontamination. See Final Rule, General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,022 (June 27, 1988); NRC's Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (NUREG-0586) (hereinafter, GEIS) at 2-6.

decommissioning plan and the Environmental Report submitted by SMUD.³ A prehearing conference was held before the Licensing Board on July 14, 1992. Following the prehearing conference, on July 17, 1992, ECO filed a motion requesting that the Licensing Board withhold issuing an order wholly denying ECO's petition for leave to intervene and request for a hearing until after the Licensee had filed its supplemental environmental report and after Staff had issued either an Environmental Assessment or Draft Environmental Impact Statement, whichever occurred first.

The Licensing Board in LBP-92-23 concluded that ECO had failed to demonstrate standing in its own right or as a representative of one or more of its members. Additionally, the Licensing Board rejected ECO's request for discretionary intervention because the Licensing Board was unconvinced that ECO would assist in building a sound record on which the Commission could base its decision. The Licensing Board also based its determination as to discretionary intervention on its finding that ECO had failed to proffer at least one viable contention. Finally, the Licensing Board denied ECO's motion for the Licensing Board to withhold issuing an order wholly denying ECO's intervention. According to the Licensing Board, this motion contemplated that ECO would be allowed to amend its contentions after the prehearing conference and such deferral would be counter to the long-standing Commission practice that contentions must be submitted prior to the first prehearing conference or otherwise are considered "late-filed" and judged accordingly.

II. ARGUMENTS BEFORE THE COMMISSION

On appeal, ECO, argues that it has established standing based on the three alternative theories. First, ECO asserts that it established standing as a representative of a member of its organization who otherwise had standing in his own right, but who has authorized ECO to represent his interests.⁴ ECO maintains that its member, David R. Crespo, who lives within 43 miles of Rancho Seco, will be environmentally harmed if Rancho Seco is not preserved for resumed operation, or in the alternative Mr. Crespo will be radiologically harmed if Rancho Seco is decommissioned by the method set forth in SMUD's decommissioning plan. Second, ECO argues that it has met the standing criteria based on harm to its own organizational interests. According to ECO, decommissioning Rancho Seco will constitute an adverse change to the physical environment which requires the agency, pursuant to the National Environmental

³ 57 Fed. Reg. 9,577 (Mar. 19, 1992).

⁴ Environmental and Resources Conservation Organization Brief in Support of Appeal from LBP-92-23 filed September 8, 1992 (hereinafter ECO Brief).

Policy Act (NEPA), to prepare an Environmental Impact Statement (EIS). ECO maintains that the failure to prepare an EIS creates a risk that serious environmental impacts will be overlooked.⁵ Third, ECO asserts that its pleadings were sufficient to warrant intervention as a matter of discretion. According to ECO, the expertise of its identified members could aid in the development of a sound record, and it had proffered both viable environmental and safety contentions.⁶

NRC Staff argues that ECO has not established standing as a representative of the interests of one of its members or based on its own interests. According to Staff, the allegations of harm to the identified member are vague and the alleged harm, even if true, is derived from the decision not to operate Rancho Seco rather than from the decommissioning order which is at issue here.⁷ Moreover, Staff asserts that ECO did not allege sufficient harm to its own interests. According to Staff, ECO only asserted a desire for information from an EIS and did not link any harm to the decommissioning order itself.⁸

Additionally, Staff argues that the Licensing Board correctly denied discretionary intervention because no admissible contentions were set forth and ECO failed to show expertise that would aid the Commission in its determination on decommissioning.⁹ Staff maintains that none of ECO's contentions "remotely complied" with the pleading requirements for admissibility provided in 10 C.F.R. § 2.714 (1992). Staff agrees with the Licensing Board's denial of ECO's motion to withhold issuance of an order denying standing until ECO was given an opportunity to amend its contentions. According to Staff, once standing is denied, a petition should be denied irrespective of contentions.¹⁰ Moreover, Staff argues that ECO did not review all publicly available documents pertinent to this proceeding and only speculated that new information would be revealed in future documents.¹¹

The Licensee's arguments are essentially the same as Staff's. The Licensee asserts that ECO's arguments are difficult to understand and that any uncertainty regarding the bases for ECO's appeal should be resolved against ECO.¹² In addition, the Licensee argues, as both it and Staff did before the Licensing Board, that discretionary intervention is not permitted in this proceeding because the only potential intervenor was denied standing.

⁵ ECO Brief at 3-4.

⁶ *Id.* at 25.

⁷ NRC Staff Response in Opposition to Appeal from LBP-92-23 Filed by the Environmental Conservation and Resources Organization, September 23, 1992, at 12 (hereinafter Staff's Response).

⁸ Staff Response at 11.

⁹ *Id.* at 15.

¹⁰ *Id.* at 29-30

¹¹ *Id.* at 31-32.

¹² Licensee's Brief in Opposition to the Appeal of Environmental and Resources Conservation Organization (hereinafter Licensee's Brief) at 5-6, filed September 23, 1992.

IV. ANALYSIS

This controversy centers on whether ECO has met the minimum requirements for intervention in NRC proceedings. A petitioner wishing to participate in an NRC proceeding must establish both standing and also present at least one viable contention. 10 C.F.R. § 2.714 (1992). The Commission is presently reviewing the process for review and approval of decommissioning plans, including the timing and scope of public participation in the decommissioning process.¹³ The arguments raised by ECO in support of its standing here present complex questions of law and fact. Although ECO did not clearly present a case showing the requisite interest to participate in an NRC proceeding, ECO did present several difficult questions which, if resolved in its favor, would support standing. Moreover, ECO has submitted one viable contention and will be permitted to amend another. For these reasons and in light of our on-going review of our provisions for public participation on decommissioning matters, we have chosen to leave the question of standing as of right unresolved and to grant ECO discretionary intervention. To the extent that we have decided this appeal without resolving the petitioner's standing as a matter of law, we rest our decision on our discretionary authority to hold hearings and to permit participation in our proceedings.¹⁴ We do so in view of the unusual circumstances presented by this case. Our decision should not be viewed as precedent for any other matter that may come before the Commission. We therefore turn directly to ECO's contentions.

A. Contentions

In its supplement, ECO submitted an environmental contention and safety contentions. ECO also raised a number of procedural matters which it labeled as contentions, though these matters did not concern the substantive merits of the Licensee's decommissioning plan.

¹³ See SECY-92-382, Decommissioning — Lessons Learned (Nov. 10, 1992).

¹⁴ *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976). See also *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188 (1991); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442 (1980); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1420-21 (1977).

1. Standards

The standards for an admissible contention are established in 10 C.F.R. §§2.714(b) and (d).¹⁵ Section 2.714(b) provides that each contention must consist of a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contention, a concise statement of the "facts or expert opinion" that support the contention, together with references to specific sources and documents of which the petitioner is aware and upon which the petitioner intends to rely. Further, the contentions must include sufficient information to show that a genuine dispute exists on a material issue, making reference to the specific portions of the application (including the applicant's environmental report and safety report). A contention may be refused if does not meet the requirements of section 2.714(b) or if the contention, even if proven, would "be of no consequence in the proceeding because it would not entitle the petitioner to relief." 10 C.F.R. § 2.714(d)(2)(ii).

2. ECO's Attempt to Incorporate Its Petition by Reference

In this proceeding, consistent with section 2.714(b)(2), the Licensing Board directed ECO to supplement its original petition with its list of contentions and supporting documentation by June 29, 1992. Memorandum and Order (Filing Schedules and Prehearing Conference) dated May 15, 1992. Pursuant to this order, ECO filed a supplement to its initial petition. At the prehearing conference, ECO attempted to incorporate part of its original petition as contentions. Prehearing Conference Transcript (hereinafter Tr.) at 109 (July 14, 1992). The Licensing Board ruled that "only information appearing in the supplement would be considered as contentions." LBP-92-23, 36 NRC at 132.

On appeal, ECO asserts that the Licensing Board's exclusion of "contentions" identified in ECO's original petition was arbitrary and capricious, an abuse of discretion, and a violation of ECO's rights pursuant to the AEA, NEPA, and the Administrative Procedure Act (APA).¹⁶ As a general matter, section 2.714 does not preclude a party from filing contentions in the original intervention petition. In this case, however, ECO did not label contentions as such in its initial petition, and the pleading is not organized in such a way that it is obvious that it included contentions. To the contrary, the petition was obviously organized in a way to comply with section 2.714(a), which sets forth the requirements for a party to demonstrate its interest in a proceeding, how that interest may be affected, and specific aspects of the subject matter of the proceeding as to which the petitioner

¹⁵The applicable rules in 10 C.F.R. §2.714 were amended in 1989 "to raise the threshold for the admission of contentions." 54 Fed. Reg. 33,168 (Aug. 11, 1989).

¹⁶ECO Brief at 26.

wishes to intervene. Specific pleading requirements for the admissibility of contentions are set out in section 2.714(b). Moreover, on appeal ECO (1) did not specifically identify any particular "contention" from its initial petition that was not considered by the Licensing Board, and (2) did not specifically identify any argument from the original petition that was ignored by the Licensing Board and that, if considered, would have changed the ultimate conclusion regarding ECO's intervention petition.¹⁷ Thus, we do not find that the Licensing Board erroneously rejected portions of ECO's original petition as contentions.

3. ECO's Environmental Contention

ECO's environmental contention alleges that "SMUD's environmental report is inadequate."¹⁸ According to ECO, SMUD's October 21, 1991 Supplement to its Environmental Report is "totally inadequate" because it fails to address impacts of decommissioning that are required to be considered under 10 C.F.R. § 51.45. Further, ECO maintains that the NRC's GEIS provides inadequate consideration of the specific impacts of decommissioning Rancho Seco as well. Finally, ECO argues that SMUD's discussion of a loss of offsite power ("LOOP") is inadequate and that the NRC Staff's request for further information constitutes a *de facto* admission that SMUD's Environmental Report is unacceptable.

The Licensing Board denied ECO's environmental contention, for the most part, because it found that the environmental impacts that ECO seeks to litigate relate only to the cessation of operations, rather than to decommissioning. LBP-92-23, 36 NRC at 133-36. Because the Commission has previously ruled that such matters are outside the scope of a decommissioning proceeding, the Licensing Board determined that ECO's environmental contention was not admissible. In view of the Commission's earlier determination that cessation of operations does not require NRC approval but is left to the licensee, the Licensing Board found that resumed operation need not be considered in this instance in conjunction with the request for decommissioning.¹⁹ The Licensing Board also rejected ECO's assertion that Staff's questions to the

¹⁷ ECO cannot fault the Licensing Board for misapprehension of ECO's pleadings where ECO failed to follow specific pleading requirements. ECO's counsel is no stranger to NRC proceedings and in fact was reminded in the earlier proceeding on the possession-only license that parties who appear before the Commission "bear full responsibility for any possible misapprehension of [their] position caused by the inadequacies of [their] brief. . . ." *Rancho Seco*, CLI-92-2, 35 NRC at 55 n.2 (quoting *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 278 (1982)).

¹⁸ Supplement at 16-28.

¹⁹ LBP-92-23, 36 NRC at 135. The Licensing Board stated that its determination that all that need be considered in this proceeding is the adequacy of the decommissioning proposal itself (not resumed operation) "is consistent with cases holding that, under NEPA, an agency need consider only alternatives that lead to the objective of the proposal." *Id.*, citing *City of Angoon v. Hodel*, 803 F.2d 1016, 1020-22 (9th Cir. 1986) (*per curiam*), *cert. denied*, 484 U.S. 870 (1987); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991).

Licensee regarding the Licensee's Environmental Report further supported ECO's contention that the Environmental Report is inadequate. LBP-92-23, 36 NRC at 136. According to the Licensing Board, this assertion did not comply with specific pleading requirements for admissible contentions in that ECO failed to describe the matters to which Staff questions are addressed or why they might constitute a defect in the Environmental Report.

ECO argues on appeal that the Licensee's Environmental Report's discussion of impacts of decommissioning is deficient under NEPA and Council on Environmental Quality (CEQ) regulations because it does not adequately consider the "no-action" alternative to decommissioning Rancho Seco.²⁰ ECO does not define "no action" but states that "appropriate versions of the 'no action' alternative would *preserve the potential* for future operation and approval of decommissioning would *destroy* that potential." See ECO Brief at 28 (emphasis in original). ECO apparently recognizes that NEPA and CEQ regulations are applicable only to an agency's environmental review, not a licensee's, but ECO avers that to the extent that the Environmental Report must discuss such requirements, SMUD's Environmental Report is inadequate.²¹

ECO argues that SMUD's Environmental Report contains only a summary dismissal of the "no-action" alternative without any detailed or quantitative consideration of the direct, indirect, and cumulative costs and benefits of that alternative. According to ECO, the Environmental Report is also deficient for not addressing the nonradiological impacts of decommissioning presented in its supplement. In its supplement, ECO asserted that nonradiological impacts of premature decommissioning include harm from replacement energy sources (e.g., pollution and dependence on foreign oil), threat to the reliability of the electrical system and lack of assurance of electricity at reasonable rates. ECO Supplement at 9, and Crespo Affidavit at 4.

Despite ECO's urging,²² we decline to reconsider our prior determination that resumed operation is not to be considered as an alternative to a proposal to decommission a facility except perhaps in extraordinary circumstances (e.g., national emergency) not present here.²³ Under NEPA, an agency need only

²⁰ ECO Brief at 31.

²¹ ECO pointed out in its supplement that, pursuant to 10 C.F.R. § 51.45, SMUD's Environmental Report is required to include a discussion sufficiently complete to aid the Commission in developing and exploring, pursuant to NEPA, appropriate alternatives to the recommended courses of action. ECO Supplement 17-23.

²² ECO Brief at 29.

²³ See *Shoreham*, CLI-90-8, 32 NRC at 207; sections 108, 186(c), 188 of the Atomic Energy Act, 42 U.S.C. §§ 2138, 2236, 2238. Even if "resumed operation" were an alternative to decommissioning, we would not be required to consider it under the NEPA "rule of reason." *NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975). SMUD has decided not to operate the plant based upon the decision of the voters, and neither the voters nor SMUD show any signs of backing away from their decisions. Moreover, even if we determined that great environmental benefits would flow from the "resumed operation" of Rancho Seco, we have no authority to overturn the determination to cease operation. Indeed, as we have previously held, the Commission lacks authority to direct a licensee to operate a licensed facility, except in extraordinary circumstances not present here.

consider the range of alternatives “reasonably related” to the scope and goals of the proposed action.²⁴ The goal of decommissioning is to return the facility to a condition that “permits release of the property for unrestricted use” 10 C.F.R. § 50.2 (1990); GEIS at 2-5. Accordingly, such environmental analysis in this proceeding, which involves Staff’s order approving of a decommissioning plan for, and decommissioning of, Rancho Seco need not address resumed operation as an alternative. The broadest NRC action related to Rancho Seco’s decommissioning will be how that decommissioning will be accomplished. Thus, it follows that in considering NEPA alternatives the NRC, and thus the Licensee, need be concerned at present only with whether the decommissioning plan provides a safe and environmentally sound decommissioning. *Shoreham*, CLI-90-8, 32 NRC at 208.

The Commission does generally consider in connection with the proposal for agency action the “no-action” alternative, i.e., not taking the proposed action. In this case, “no action” on the proposed approval of the Rancho Seco decommissioning plan would simply be not to approve the plan, or, more generally, not to approve decommissioning at Rancho Seco at all. ECO argues that a detailed cost-benefit analysis of such a “no-action” alternative must be performed pursuant to NEPA. ECO’s theory appears to be that “no action” on decommissioning will preserve Rancho Seco for resumed operation. Therefore, this argument goes, the NEPA analysis of “no action” must address the nonradiological impacts of alternative power sources that might be avoided if Rancho Seco is not decommissioned and if the plant is someday put back into operation.

The “ifs” show the defect in ECO’s line of argument. Even if we were to prevent SMUD from decommissioning, it is speculative, at best, that the alleged nonradiological impacts could be prevented. For example, to reach ECO’s desired goal — the avoidance of pollution and its related effects, dependence on foreign oil, and a reasonably priced and reliable electricity source — the NRC would have to conclude from its NEPA review that the decommissioning plan should be rejected; SMUD then would have to decide to resubmit the question of operating the plant to the voters or sell the plant to a willing buyer ready and able to operate Rancho Seco; and the NRC would have to find the facility safe and ready for renewed operations. As the courts have held, “there is no need to consider alternatives of speculative feasibility or alternatives which could only be implemented after significant changes in governmental policy or legislation or which require similar alterations of existing restrictions. . . .”

²⁴ *Process Gas Consumers Group v. U.S. Department of Agriculture*, 694 F.2d 728, 769 (D.C. Cir. 1981); see *City of Angoon*, 803 F.2d at 1021 (“[w]hen the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved”); *Citizens Against Burlington*, 938 F.2d at 195 (a “proposed alternative is reasonable only if it will bring about the ends of the federal action”).

NRDC v. Callaway, 524 F.2d at 93; *Shoreham*, CLI-90-8, 32 NRC at 206. Accordingly, consideration of the "no-action" alternative need not go into environmental impacts that could be avoided only by the highly speculative and not reasonably foreseeable resumed operation of Rancho Seco. Thus, we reject ECO's attempt to reintroduce as "no action" the "resumed operation" alternative that the Commission has already declined to consider.

ECO's environmental contention does not, however, depend solely on ECO's asserted interest in resumed operation. ECO also argues that the Environmental Report is inadequate because SMUD's discussion of radiological impacts appears to rely merely on general NRC regulations, guidance, and reports.²⁵ As an example, ECO alleges that SMUD's discussion of the probability of a loss of offsite power ("LOOP") is inadequate. ECO argues that where the Environmental Report "states in conclusory fashion that the 'probability of a LOOP . . . is less than once in 20 years' (ER at 5-6) there is *no* reference to a particularized study to allow independent verification of the conclusion."²⁶

According to SMUD, "the frequency [of a LOOP] was calculated in accordance with the guidelines of Regulatory Guide 1.155. . . ." ²⁷ However, Regulatory Guide 1.155 does not provide the complete guidelines for determining the frequency of a LOOP. Moreover, we do not find that the record before us demonstrates that ECO otherwise has obvious access to the analysis used to determine this probability. Therefore, ECO's contention that there is no reference to a particularized study to allow independent verification of the conclusion that the probability of a LOOP is less than once in 20 years is admitted. SMUD is ordered to provide ECO with the basis for its conclusion regarding the frequency of a LOOP. ECO will then be permitted 14 days from service of SMUD's submittal in which to file an amended contention, if it chooses, taking into consideration the information provided by the Licensee in accordance with this order.²⁸

We agree with the Licensing Board that ECO's attempt to incorporate by reference Staff's March 12, 1992 questions to the Licensee was insufficient to support the admissibility of its contention that the Environmental Report is inadequate. LBP-92-23, 36 NRC at 136. Staff's questioning does not indicate *per se* that the Environmental Report is inadequate, especially when, as in this case, the Licensee has filed a detailed response to Staff's inquiry.²⁹ At

²⁵ ECO Supplement at 25-26; ECO Brief at 30-31.

²⁶ ECO Supplement at 26 (citing SMUD's Supplement to Rancho Seco Environmental Report — Post Operating License Stage at 5-6 (Oct. 21, 1991)) (emphasis in original).

²⁷ Licensee's Answer to ECO's Amendment and Supplement to Petition for Leave to Intervene and Request for a Hearing at 22 (July 8, 1992).

²⁸ When filing this amended contention, ECO need not satisfy the criteria for a late-filed contention.

²⁹ See Response to the Request for Additional Information in Support of the Rancho Seco Decommissioning Plan and Associated Environmental Report from J. Shetler, Deputy Assistant General Manager, SMUD, to Seymour Weiss, NRC (Apr. 15, 1992).

present, the record before us on this point indicates nothing more than that Staff requested further information and analysis from the Licensee and the Licensee has provided a response to this inquiry. It does not establish that a genuine dispute exists with the Applicant on a material issue of law or fact with respect to the Environmental Report. *See* 10 C.F.R. § 2.714(b)(2)(iii).

Subsequent to the prehearing conference, ECO in its July 17, 1992 Motion to Compel Service argued that Licensee's April 15, 1992 response was not adequate. However, ECO was remiss for not putting forth this argument in its supplement when it relied on Staff's questions. ECO has an "ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."³⁰ ECO's attempt to provide further support for its environmental contention after the prehearing conference amounted to an unauthorized, untimely supplement to its contentions and, thus, will not be considered.³¹

4. *Safety Contentions*

In part IV of ECO's supplemental petition, ECO set forth a number of safety-related contentions (IV(A)-IV(C) and IV(F)). In addition, the Licensing Board designated Mr. Crespo's preference for the DECON method of decommissioning over SAFSTOR, raised in his affidavit, as a safety contention. The Licensing Board rejected all proffered contentions. We will address each of ECO's safety-related contentions separately, except for IV.C, which ECO does not raise on appeal.

a. *Contention IV(A)*

ECO contends that a large part of SMUD's decommissioning plan has been invalidated by SMUD's request to "terminate" NRC review of the hardened SAFSTOR portion of the decommissioning plan which relies on installation and use of an Independent Spent Fuel Storage Installation (ISFSI). Although ECO

³⁰ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983). At the Prehearing Conference ECO admitted that it had not reviewed the April 15, 1992 response filed by SMUD. *See* Tr. at 131-33. We take official notice of the fact that the Licensee's response was available for public inspection in the Nuclear Regulatory Commission's Public Document Room by April 28, 1992, two full months prior to ECO's June 29, 1992 filing of its supplement. The Commission can take official notice of "a matter beyond reasonable controversy" and one that is "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." *Shoreham*, CLI-92-2, 33 NRC at 75 (quoting *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 147 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) (citations omitted)).

³¹ *See* 10 C.F.R. § 2.714(b)(1); *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 535-36 (1978) (it is "incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenor's position and contentions").

cited in its supplement no support for its belief that SMUD had abandoned its application for an ISFSI, ECO's counsel indicated at the Prehearing Conference that ECO was relying on a March 20, 1992 letter from Licensee that requests the NRC Staff to "terminate" its review of the Rancho Seco ISFSI Safety Analysis Report.³² The Licensing Board accepted both Licensee's and Staff's explanation that the ISFSI application had not been abandoned; although the safety analysis with respect to the fuel storage cask, which the Licensee had not selected, was suspended, the environmental review of the ISFSI was continuing. LBP-92-23, 36 NRC at 136.

On appeal, ECO insists that ISFSI is no longer being considered, but ECO has provided no adequate basis to overturn the Licensing Board's construction of the March 20, 1992 letter. We find that the Licensee's letter cannot be read reasonably to suggest that SMUD has abandoned an ISFSI for Rancho Seco. Moreover, ECO has not offered any other supporting documentation or facts on which it intends to rely to support this contention. Therefore, ECO has not shown that a genuine dispute exists with the applicant to support admission of its contention.

b. Contention IV(B)

ECO contends that the decommissioning funding plan should be reviewed in this proceeding or approval of decommissioning should be stayed pending approval of SMUD's decommissioning funding plan in another proceeding. ECO Supplement at 29. The Licensing Board rejected this contention because it determined that ECO failed to establish a material factual or legal dispute. LBP-92-23, 36 NRC at 136-37.

Although SMUD's funding plan was submitted with its proposed decommissioning plan, ECO did not raise any specific contention regarding the adequacy of the funding plan or its contents before the Licensing Board. Instead, ECO stated at the prehearing conference that it intended to challenge the adequacy of the funding plan in another proceeding. However, there is no other proceeding in which ECO can challenge the adequacy of the funding plan. ECO's confusion apparently stems from an earlier exemption from complying with the funding requirements in 10 C.F.R. § 50.75(e)(1)(ii) granted by Staff to SMUD.³³ Staff withdrew the exemption when Staff realized that the exemption had been issued without honoring Staff's commitment to provide an opportunity for public participation on matters related to the decommissioning of Rancho Seco. Staff then noticed the proposed exemption and ECO filed comments to which SMUD

³² Tr. at 89. SMUD provided the Board and parties a copy of the letter with its July 8, 1992 answer to ECO's Supplement.

³³ See 57 Fed. Reg. 15,117 (Apr. 4, 1992).

responded.³⁴ However, at the prehearing conference, Staff counsel informed the Licensing Board, SMUD, and ECO that an exemption was not necessary now in view of the final rule permitting a case-by-case determination of the appropriate period for collecting funds to compensate for shortfall of decommissioning funds for plants like Rancho Seco that cease operation before the full term of their operating license expires.³⁵ Despite Staff's assertion, the point remained unclear as evidenced by the Licensing Board's discussion of this contention. The Licensing Board stated that ECO's comments would be taken into consideration by Staff in Staff's determination regarding whether or not to grant an exemption "consistent with a newly revised version of 10 C.F.R. § 50.75." LBP-91-23, 36 NRC at 137. As a result of this confusion, although ECO stated that it was intending to challenge the adequacy of the funding plan, such challenges were not raised in this proceeding.

The only challenge ECO formally raised in this proceeding regarding the funding plan was that a funding plan must be provided with a decommissioning plan. However, neither the Board, the Licensee, nor the Staff disagreed. Approval of the decommissioning plan is contingent on the Licensee having an approved funding plan. See 10 C.F.R. § 50.82(b). Thus, ECO's challenge appears to be a bare request that the Staff comply with our regulations in approving the decommissioning plan. Such a request fails to raise a genuine dispute over the legal requirements in section 50.82 and is rejected. However, in light of the confusion regarding the exemption, ECO will be permitted 14 days from the service of this order in which to amend its contention challenging the adequacy of SMUD's proposed funding plan, consistent with this order.³⁶

c. Contention IV.F

ECO attempts again to incorporate by reference Staff's March 12, 1992 questions to Licensee. This contention is similarly worded to the environmental contention in which ECO also attempted to incorporate Staff's questions. In this instance, instead of asserting that Staff's inquiry supported the inadequacy of the environmental report, ECO asserts that the questions are a *per se* reflection of defects in the decommissioning plan. ECO Supplement at 30-31.

On appeal, ECO maintains that it "is not incorporating the NRC questions to raise the substantive issues addressed therein, but only as support for [ECO's] proposition that the application is inadequate." ECO Brief at 40. However, Staff's March 12, 1992 inquiry does not *per se* indicate that the decommissioning plan is inadequate. The Licensee provided a detailed response to Staff's inquiry

³⁴ See 57 Fed. Reg. 20,718 (May 14, 1992).

³⁵ See Tr. at 140 ("[i]n order to make a case by case determination there no longer needs to be an exemption").

³⁶ When filing this amended contention, ECO need not satisfy the criteria for a late-filed contention.

on April 15, 1992, which supplemented the decommissioning plan. The mere fact that Staff asked Licensee to provide further information regarding the decommissioning plan, which the Licensee did, does not establish that at present a genuine dispute exists with the Applicant on a material issue of law or fact with respect to the supplemented decommissioning plan. See 10 C.F.R. § 2.714(b)(2).

Both Staff's questions and the Licensee's response were available prior to ECO's filing of its supplemental petition.³⁷ In its supplement ECO did not mention the April 15, 1992 response and at the prehearing conference ECO suggested that ECO had not reviewed the response,³⁸ although ECO had an obligation to do so in formulating its contentions.³⁹ On appeal, ECO argues that it informed the Licensing Board in ECO's July 17, 1992 Motion to Compel Service (filed after the prehearing conference) that the Licensee's April 15, 1992 response, for several reasons, did not affect the validity of ECO's contentions.⁴⁰ This attempt to add further support for its contention after the holding of a prehearing conference again constituted an unauthorized, untimely supplement and, thus, will not be considered.⁴¹ Therefore, this contention was properly rejected by the Licensing Board.

d. DECON v. SAFSTOR

The Licensing Board believed that an "isolated sentence" in Mr. Crespo's affidavit "might also be deemed a safety contention." LBP-92-23, 36 NRC at 138-39. Mr. Crespo stated that DECON is a better method of decommissioning than SAFSTOR, the planned method, because it would best protect the public health and safety by removing the radiological hazard most promptly and it would offer better assurance that the economic costs of decommissioning would be minimized. This general averment, absent greater specificity, is insufficient to support a contention. In submitting an affirmative safety contention, as opposed to alleging a deficiency that is obvious on the face of a licensing document that is required to be filed, ECO must identify the specific bases for the contention, allege facts or expert opinion that support the contention, provide references to specific sources and documents on which ECO intends to rely to establish those facts or expert opinion, and identify a material factual or legal dispute with the applicant.⁴² The Licensing Board determined, and we agree, that ECO met none of these requirements.

³⁷ See *supra* note 30.

³⁸ Tr. at 131-33.

³⁹ See *supra* note 30 and accompanying text.

⁴⁰ ECO Brief at 40.

⁴¹ See *supra* note 31 and accompanying text.

⁴² See 10 C.F.R. § 2.714(b) and (d). Thus, there is no inconsistency between our decision with respect to ECO's LOOP contention, *supra*, and our decision to reject this contention here.

On appeal ECO argues that the affidavits submitted by Mr. Crespo and Mr. Rossin, which are attached to its supplement, identify them as experts to testify on this matter. Even if this is so, ECO has not identified the bases for Mr. Crespo's conclusions that DECON would best protect public health and safety. Although Mr. Crespo mentioned that DECON would most promptly remove the radiological hazard, he never identified any source documentation or data supporting the assertion that it would therefore best protect public health and safety. Moreover, he never identified the supporting documentation to explain why, even if DECON would minimize the cost of decommissioning, DECON would best protect public health and safety.⁴³ Thus, ECO has failed to establish a material legal or factual dispute regarding the choice of decommissioning methods.

ECO also argues that the Licensing Board incorrectly considered Mr. Crespo's assertions solely as a safety contention under the AEA. ECO asserts that it also should have been considered a NEPA contention. ECO Brief at 40. As stated earlier, ECO bears full responsibility for any misapprehension caused by deficiency in its pleadings and cannot fault the Licensing Board. See *supra* note 17. This discussion in Mr. Crespo's affidavit is not even identified in ECO's pleadings as a contention. Thus, it was generous for the Licensing Board to consider it as such. Moreover, even if this is considered a NEPA contention, presumably because Mr. Crespo asserts that the DECON method would minimize economic costs of decommissioning and provide more assurance that the economic cost would be borne by those persons who received the benefits, it too does not meet the pleading requirements for an admissible contention. As ECO points out, it is not challenging the Staff's environmental assessment or an environmental impact statement that has yet to be issued, but rather its contentions are based on alleged inadequacies in SMUD's Environmental Report. ECO Brief at 29-30. However, with respect to the choice of SAFSTOR rather than DECON as a method of decommissioning Rancho Seco, neither Mr. Crespo nor ECO has identified any particular inadequacies in the Environmental Report. This contention not only lacks specificity and bases, but ECO has also failed to allege any facts or submit any documentation in support of its conclusions. See 10 C.F.R. §2.714(b)(2). Thus, the contention was correctly rejected.

⁴³ Particularly in the absence of an identifiable basis for the contention, it is not obvious why Mr. Crespo believes that the DECON method of decommissioning Rancho Seco would best protect public health and safety. While DECON might remove the contaminated material from the site more quickly than SAFSTOR, generic studies show that with SAFSTOR the delay will result in a reduction in occupational dose and radioactive waste volume for some nuclear facilities due to radioactive decay. See GEIS at 15-5, 4-8, Table 4.3-2.

5. ECO's Procedural Contentions

In addition to its contentions concerning environmental and safety matters, ECO raised several contentions related to procedural aspects of the proceeding on SMUD's decommissioning plan. ECO appeals the Licensing Board's disposition of two of these issues.

a. Contention IV(D)

ECO avers that a decommissioning order may not be issued prior to the completion of an adjudicatory hearing. As stated previously, the Commission is presently reviewing its process for review and approval of decommissioning plans, including the question as to whether it will offer a hearing on decommissioning plans and the timing of any hearing that it may decide to offer on such plans. Thus, we have decided to leave unresolved the generic issues regarding the timing of a hearing in decommissioning cases at this time.⁴⁴ Accordingly, we have decided to treat this case *sui generis* and, wholly as a matter of Commission discretion, to direct Staff not to issue the decommissioning order pending completion of the proceeding before the Licensing Board. Therefore, ECO will have an opportunity to file amended contentions consistent with this decision, and the Licensing Board will review the admissibility of any amended or late-filed contentions and hold a hearing or otherwise resolve any litigable matter that may be raised before issuance of the decommissioning order.

b. Contention IV(E)

ECO states that it was entitled to, but was not provided, service of all documents filed with NRC Staff by SMUD and its attorneys after ECO submitted its original petition for intervention and request for hearing. Pursuant to 10 C.F.R. § 2.701(b), ECO is entitled to service of all adjudicatory filings made by SMUD or the Staff.⁴⁵ However, this provision does not require service of documents exchanged between the Licensee and Staff in the review process.⁴⁶

⁴⁴ However, section 191 of the AEA on which ECO relies is not dispositive of the question. Section 191 specifies neither the scope nor the timing of hearing rights under the AEA.

⁴⁵ The term "party" used in section 2.701 and 2.712 refers to all participants in a proceeding, even petitioners who have yet to be granted intervenor status. To interpret the regulations differently would lead to the result that petitioners would not have to be served and would not have to follow the general procedures for service of documents unless and until they were granted intervenor status. This would clearly run counter to NRC practice.

⁴⁶ Information exchanged between the Staff and a licensee is not considered offered for filing in an adjudication and, thus, is not subject to the provisions of 10 C.F.R. § 2.701. Moreover, section 2.701 does not contain prescriptive requirements for which documents must be filed in the course of an adjudication. The petitioners have access to such information that is placed in the public document room. However, Staff and SMUD clearly

(Continued)

To the extent that Staff and Licensee have been required in other proceedings to serve intervenors with information that was not offered for filing, this requirement did not come from a particular regulation but was based on the circumstances in each case.⁴⁷ Staff apparently is already serving ECO with all Staff-generated correspondence, but ECO requests service of correspondence generated from SMUD as well.⁴⁸ SMUD has not indicated, nor can we see, any significant burden on SMUD to provide ECO with this correspondence. Therefore, SMUD is directed to serve ECO with all documents it has submitted or will submit to Staff after July 14, 1992 (the date of the prehearing conference) until the termination of this proceeding.

c. Motion to Withhold Denial of Intervention

We next consider ECO's claim that the Licensing Board should have granted ECO's motion requesting that the Licensing Board withhold an order wholly denying the petition for leave to intervene and the request for a hearing until ECO was given an opportunity to file contentions after issuance of the agency's environmental and safety review documents.

With respect to the contentions already filed by ECO, the Licensing Board was correct that withholding a ruling on these contentions would run counter to NRC procedure and precedent. LBP-92-23, 36 NRC at 140. In general, an unfettered opportunity to amend contentions extends only until 15 days prior to the first prehearing conference. 10 C.F.R. § 2.714(a)(3). Because the focus of a hearing is on whether the application satisfies the NRC's regulatory requirements and the license application should include sufficient information to form a basis for contentions, as a general matter the Commission has not permitted deferral

have an obligation to keep the Licensing Board and ECO apprised of any relevant and material new information. See *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 626 (1973); *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2, and 3), ALAB-677, 15 NRC 1387, 1394 (1982); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 656-57 (1984).

⁴⁷ See, e.g., *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2112 (1982) (the licensing board weighed the intervenors' desire to have prompt notice of any significant development against the burden that would be placed on the licensee to provide additional copies of each document and determined that service was necessary but the licensee only had to serve the lead intervenors in each area rather than all of the individual intervenors). See also *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-184, 7 AEC 229, 237 (1974) (in a licensing proceeding, consideration of fairness required prompt notice to intervenors of any significant development); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 183 (1974) (intervenors entitled to service of all correspondence between Staff and applicant throughout the period during which the final agency decision was subject to judicial review).

⁴⁸ At the prehearing conference, counsel for ECO stated that ECO is on the NRC's mailing list, but ECO stated that it was not being served with documents submitted to Staff by SMUD. Counsel for SMUD stated that from the time ECO filed its intervention petition until the prehearing conference held on July 14, 1992, SMUD had not submitted any documents to the Staff. Tr. at 106-07.

of the filing of all contentions in proceedings until the NRC Staff has issued its environmental and safety review documents.⁴⁹

However, the Licensing Board did not acknowledge the changes to section 2.714, effective in September 1989, which expressly recognize prior agency case law which makes it clear that a petitioner may seek to amend his or her contentions or file new contentions if data or conclusions in subsequent NRC environmental review documents differ significantly from the data or conclusions in the applicant's environmental documents. 10 C.F.R. § 2.714(b)(2)(iii). Such contentions are subject to the late-filed criteria set out in 10 C.F.R. § 2.714(a)(1)(i)-(v).⁵⁰ However, when the information in the Staff environmental documents is otherwise unavailable, it is possible that the "good cause for lateness" factor may be satisfied by this unavailability. In any event, as is always the case under our rules of practice, ECO is permitted to file contentions in accordance with 10 C.F.R. § 2.714(b)(2)(iii) provided that it satisfies the late-filing criteria of section 2.714(a)(1). In view of our determination that this case will be treated *sui generis* and a pre-effectiveness hearing will be offered, we will require in this case that any such contentions filed pursuant to section 2.714(b)(2)(iii) be filed within 14 days of service of the Staff's environmental review document. At that time, ECO must address the five factors found in 10 C.F.R. § 2.714(a)(1)(i)-(v).

After ECO has submitted all of its contentions in accordance with this order, the Licensing Board should establish a briefing schedule for the Staff and Licensee responses to all of ECO's contentions.

V. ORDER

Consistent with the foregoing opinion, the Commission orders:

1. Within 14 days of service of this Order, SMUD shall provide ECO with the basis for SMUD's determination in its environmental report that the probability of a LOOP at Rancho Seco is less than once in 20 years. Within 14 days of service of SMUD's submittal, ECO may file an amended contention related to the LOOP issue as affected by SMUD's submittal with the Licensing Board.

⁴⁹ See *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041 (1983); Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170-72 (Aug. 11, 1989), *aff'd sub nom. Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990).

⁵⁰ In promulgating this change, we emphasized that we were not altering the standards of section 2.714(a) respecting late-filed contentions or exempting contentions on environmental matters from the application of those standards. 54 Fed. Reg. at 33,172. See generally *Catawba*, CLI-83-19, *supra*. Of course, ECO may submit late-filed contentions at any time by addressing these factors.

2. Within 14 days of service of this Order, ECO may file an amended contention challenging the adequacy of the decommissioning funding plan.

3. Staff shall serve ECO a copy of its environmental assessment or other document reflecting Staff's environmental review when complete. ECO is to file any contentions in accordance with 10 C.F.R. § 2.714(b)(2)(iii), regarding Staff's environmental review, or other late-filed contentions, with the Licensing Board within 14 days after service of Staff's environmental assessment or other documents reflecting Staff's environmental review.

4. Within 14 days of service of this Order, SMUD shall provide ECO with all correspondence related to decommissioning and decommissioning funding submitted to Staff by or on behalf of SMUD after July 14, 1992, and SMUD shall continue to serve such information on ECO until the agency has issued its final determination in this proceeding.

5. In all other respects, the Licensing Board's decision, LBP-92-23, is affirmed and ECO's contentions are dismissed.

6. Pending further order of the Commission following action by the Licensing Board on remand, the Staff is directed to withhold issuance of the Decommissioning Order.

7. This case is remanded to the Licensing Board for proceedings consistent with this Order. If ECO does not file an amended or new contention within the time permitted by our Order, the Licensing Board shall dismiss ECO's petition. It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of March 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

**Ivan Sellin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque**

In the Matter of

Docket No. 50-446-OL

**TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*
(Comanche Peak Steam Electric
Station, Unit 2)**

March 9, 1993

The Commission denies a petition for late intervention because Petitioner's unjustified lateness with the petition, failure to demonstrate that it could contribute to the development of the record, and the delay that would result from the institution of new proceedings more than counterbalanced the two minor factors in Petitioner's favor.

**RULES OF PRACTICE: LICENSING PROCEEDING;
JURISDICTION (10 C.F.R. § 2.206 PETITIONS)**

Issuance of a full-power license closes out an operating license proceeding and associated construction permit proceeding. Any subsequent challenges on those matters must be in the form of a section 2.206 petition.

RULES OF PRACTICE: NONTIMELY INTERVENTION PETITIONS

Late intervention is possible until issuance of a full-power license. Therefore, issuance of a low-power license does not bar late intervention.

RULES OF PRACTICE: NONPARTY PARTICIPATION

Under traditional principles, *res judicata* and collateral estoppel, the bar against subsequent litigation of an issue already litigated extends only to parties to that proceeding. Here, CFUR was never a party.

RULES OF PRACTICE: MOTIONS TO REOPEN RECORD; NONTIMELY INTERVENTION PETITIONS

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

RULES OF PRACTICE: INTERVENTION (STANDING)

A prospective petitioner has an affirmative duty to demonstrate that it has standing in *each* proceeding in which it seeks to participate since a petitioner's status can change over time and the bases or its standing in an earlier proceeding may no longer obtain.

RULES OF PRACTICE: INTERVENTION (STANDING)

A petitioner may seek to rely on prior demonstrations of standing if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing.

RULES OF PRACTICE: NONTIMELY INTERVENTION PETITIONS; INTERVENTION PETITION (PLEADING REQUIREMENTS)

CFUR has been aware of the issue of the installation of Thermo-Lag at Comanche Peak Unit 2 for over 6 months and that it had been — or should have been — aware of the general issue of Thermo-Lag for several years. Therefore, CFUR has failed to demonstrate that it has "good cause" for its late filing.

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); NONTIMELY INTERVENTION PETITIONS

Petitioner satisfies the second and fourth parts of the five late intervention criteria in 10 C.F.R. § 2.714(a)(1)(i)-(v). When there is currently no proceeding, assuming *arguendo* that the petitioner has standing, there will generally be no

other means by which that interest can be protected. Likewise, because there is currently no proceeding, there will be no other party to represent petitioner's interest. However, these two factors are the least important of the five factors.

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); NONTIMELY INTERVENTION PETITIONS

CFUR's request provides no reason to conclude that it could contribute to the development of a sound record. Vague assertions regarding petitioner's ability or resources are insufficient. CFUR fails to list any specific document it plans to introduce or on which it intends to rely, in spite of the documentation developed by the NRC and placed in the public domain. CFUR also fails to identify any single expert or summarize its proposed testimony.

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); NONTIMELY INTERVENTION PETITIONS

The fifth factor for late intervention, the potential for delay if the petition is granted, weighs heavily against Petitioner. Granting CFUR's request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a request by the Citizens for Fair Utility Regulation ("CFUR" or "Petitioner") for late intervention in the operating license ("OL") proceedings for Unit 2 of the Comanche Peak Steam Electric Station ("Comanche Peak"). This is the second attempt by CFUR to reintervene in the Unit 2 OL proceeding in as many months. The Licensee, Texas Utilities Electric Company ("TU Electric" or "Licensee"), and the NRC Staff have responded in opposition to the request. After due consideration, we are denying CFUR's request for the reasons stated below.

II. BACKGROUND

CFUR has been an on-again and off-again player in the litigative history of Comanche Peak's licensing. In 1979, CFUR filed a timely petition to intervene

and a request for a hearing in response to TU Electric's request for an operating license for both Unit 1 and Unit 2 of Comanche Peak and was admitted as a party to the proceeding. See *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-18, 9 NRC 728 (1979). Subsequently, the Licensing Board issued an unpublished order on April 2, 1982, granting CFUR's request to withdraw from the proceeding. A second intervenor had already withdrawn in 1981.

The proceeding continued with the Citizens Association for Sound Energy ("CASE") as the sole intervenor until the parties reached a settlement agreement dismissing the OL proceeding for both Unit 1 and Unit 2 as well as a separate construction permit amendment ("CPA") proceeding involving TU Electric's request for an extension of the Unit 1 construction permit which had been consolidated with the OL proceeding. See LBP-88-18A, 28 NRC 101 (1988); LBP-88-18B, 28 NRC 103 (1988).

At that time, CFUR filed its first petition for late intervention in an attempt to re-intervene in the proceeding. However, the Commission found that CFUR's petition failed to meet the criteria for late intervention in 10 C.F.R. § 2.714(a)(1)(i)-(v). See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609-12 (1988), as modified, CLI-89-6, 29 NRC 348 (1989). CFUR filed a petition for judicial review of that denial but the Commission's decision was upheld. *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir.), cert. denied, 111 S. Ct. 246 (1990).

On January 13, 1993, CFUR filed a petition asking the Commission to offer a new opportunity for a hearing on the operating license for Comanche Peak Unit 2. The Commission denied that request. CLI-93-1, 37 NRC 1 (1993) ("CLI-93-1"). The Commission found that CFUR was in effect seeking an opportunity for late intervention in the Unit 2 OL proceeding without meeting the late-filed intervention criteria or explaining why it believes those criteria should not be applied in this case. CLI-93-1, 37 NRC at 3. The Commission pointed out that CFUR could file "a renewed request for a hearing that addresses the relevant regulatory standards." *Id.* at 4 & n.2.

The NRC Staff issued a full-power operating license to TU Electric for Comanche Peak Unit 1 on April 17, 1990. On February 2, 1993, after we had issued CLI-93-1, the NRC Staff issued a low-power license to Comanche Peak Unit 2. On February 19, 1993, CFUR filed the instant petition for late intervention, which we now address.

III. ANALYSIS

A. The Unit 1 Proceedings

Initially, we must address CFUR's apparent attempt to reintervene in the Unit 1 proceedings. CFUR captioned its petition as being filed in both the Unit 1 OL and CPA proceedings. However, as we recently noted in rejecting another petition for late intervention in the Comanche Peak proceedings, the issuance of the full-power license for Comanche Peak Unit 1 closed out the opportunity for a hearing on the Unit 1 operating license under the 1979 *Federal Register* notice and the opportunity for a hearing on the Unit 1 construction permit extension. CLI-92-12, 36 NRC 62, 67 (1992) ("CLI-92-12"). As we noted there, "[a]ny challenge to the Unit 1 license must take the form of a petition under 10 C.F.R. §2.206 for an order issued under 10 C.F.R. §2.202." *Id.* Therefore, we deny CFUR's request insofar as it purports to address the Unit 1 proceedings.

B. The Unit 2 Proceedings

1. *The Existence of a Proceeding*

In its response to CFUR's petition, TU Electric argues that "CFUR's Request should be rejected out of hand since no proceeding currently exists for which a hearing . . . can be granted." TU Electric Response at 5. Briefly, TU Electric argues that the issuance of the Unit 2 low-power license bars any attempt by CFUR to seek late intervention with regard to "an[y] issue already disposed of by the NRC as part of issuance of the low-power license[]" and that issuance of an NRC Staff Supplemental Safety Evaluation Report ("SSER") that approved the Unit 2 fire protection program, including the use of Thermo-Lag, acts as a bar to relitigating the Thermo-Lag issue. *Id.* at 5-6. In essence, TU Electric argues that (1) there is no proceeding and (2) if there is a proceeding, the issue of the use of Thermo-Lag is precluded by the SSER. The NRC Staff does not address this issue.

First, it is clear that there is a "proceeding" in which CFUR can seek late intervention and TU Electric unaccountably fails to address our holding in CLI-93-1 affirming that such a proceeding exists. See CLI-93-1, 37 NRC at 3 ("until the full-power license for Unit 2 has been issued . . ." (emphasis added)). See also *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1, 6 n.5 (1992) ("CLI-92-1"); *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1727 n.2 (1982). Thus, it is clear that the issuance of the low-power license, in and of itself, does not bar late intervention in the full-power OL proceeding.

Second, assuming *arguendo* that issuance of the low-power license might act as a bar to relitigating issues *necessarily* resolved before the issuance of the low-power license, it is clear that under the traditional rules of *res judicata* and collateral estoppel such a bar would apply only to those who were parties to such a proceeding. Clearly, CFUR was not a party to the “proceeding” that culminated in the issuance of the SSER and the low-power license, and TU Electric has not explained how we can disregard the fundamental requirement of “party” status. Therefore, we find that CFUR is not precluded from raising this issue. In sum, we find that issuance of the SSER and the low-power license does not, in and of itself, preclude CFUR’s petition for late intervention in order to challenge the use of Thermo-Lag at Comanche Peak, Unit 2.

2. CFUR’s Failure to Address Reopening Standards

TU Electric also argues that because CFUR has petitioned for late intervention without seeking to reopen the record of the closed proceeding at the same time, the petition is insufficient on its face and must be dismissed for that reason alone. TU Electric Response at 21-22.

As we noted above, in order to obtain a new hearing when the record has been closed, as in this case, a potential intervenor must “satisfy [both] the late intervention and reopening criteria.” CLI-93-1, 37 NRC at 3. While neither the late intervention nor the reopening regulations specifically mandate that the two separate criteria be addressed in the *same pleading*, our decisions require that both be addressed when a petitioner seeks to intervene late in a proceeding for which the record has closed. Assuming *arguendo* that CFUR were successful in addressing the late intervention criteria, it would, of course, be required fully to satisfy the requirements of 10 C.F.R. § 2.734 in order to have the Unit 2 proceeding actually reopened and to have any proposed contention actually litigated. While a person *may* file separate pleadings to address the late-filing criteria and the reopening standards, both sets of standards must be addressed and satisfied in order for the petitioner to get a hearing in the circumstances of this case. As we explain below, it is in the petitioner’s interest to address both sets of standards contemporaneously,¹ although there is no explicit requirement

¹In CLI-93-1, we noted that CFUR “must first become a *party* to a proceeding before seeking to reopen that proceeding.” CLI-93-1, 37 NRC at 4 n.1 (emphasis in original). See also CLI-92-1, 35 NRC at 6. While we were simply trying to explain the legal process for late intervention and reopening, a possible reading of CLI-93-1 — especially by a nonlawyer — is that CFUR must “first” seek late intervention and “then” seek to reopen the record. We regret any implication that the two criteria *must* be addressed separately and in sequence, none was intended. Because of this possible reading of CLI-93-1, we will not reject CFUR’s petition in this case on the ground that CFUR failed simultaneously to address both the late filing criteria and the reopening standards. As we explain, *infra*, however, these criteria should be addressed together, since, as we have made abundantly clear in prior decisions, both sets of criteria must be satisfied for a petitioner to be granted late intervention and a hearing in these cases.

to that effect in our regulations. In fact, CLI-92-12, cited above, addresses a request for a hearing in which the petition for late intervention and the motion to reopen the record were filed sequentially, although closely together.

Having concluded that a single filing is not explicitly mandated by our regulations, we hasten to point out that it is in a potential intervenor's best interests to address both the late filing and reopening criteria in the same pleading. Quite simply, filing both requests together clearly allows all parties, including the Commission, to address both pleadings at the same time, saving a substantial amount of time and effort. Leaving these items for a second pleading unavoidably delays resolution of the issue to the detriment of all involved. Finally, any delay in filing and considering a second motion, i.e., the motion to reopen the record, could be charged as a part of the delay factor to be considered under 10 C.F.R. § 2.714(a)(1)(v). Thus it is clearly in a petitioner's best interests to address both criteria in the same pleading.²

3. *CFUR's Standing*

Under our regulations, each potential intervenor must demonstrate that it meets the interest requirements of 10 C.F.R. § 2.714(a)(2); i.e., that it has "standing" to participate in the proceeding. In its petition, CFUR states that

[b]ecause of the numbers of filings CFUR has made in this docket, it respectfully requests the Commission to incorporate by reference CFUR's previous filings establishing its background and standing, as well as the affidavits of CFUR members who live and work and play in the vicinity of the Comanche Peak plant and whose lives and safety could be adversely affected by operation of and/or any accident at or inadvertent release of radiation from the nuclear power plant. Both the Commission and the NRC staff in previous orders and responses have recognized and established in fact that CFUR has standing through its members to intervene in this docket

Petition at 2. See, e.g., CLI-88-12, 28 NRC at 608 n.4. However, CFUR does not take any other affirmative steps to demonstrate that it has standing to participate in this proceeding now. In response, TU Electric argues that CFUR's failure to demonstrate affirmatively that it now has standing is fatal. TU Electric Response at 6-10. The Staff does not address the issue.

In arguing that a potential intervenor cannot rely on its participation in another proceeding to demonstrate that it has standing to participate in *this* proceeding,

² Moreover, addressing the issues that are pertinent to a motion to reopen the record clearly would be relevant to a petitioner's chances of satisfying the late-filing criteria. For example, satisfying the "timeliness" criteria of 10 C.F.R. § 2.734(a)(1) would tend to support a petitioner's claim that it had satisfied the "good cause for lateness" factor of 10 C.F.R. § 2.714(a)(1)(i). Likewise, satisfying the "significance" criteria of section 2.734(a)(2) and the "materially different result" criteria of 10 C.F.R. § 2.734(a)(3), could have a bearing on a petitioner's assertion that it could make a contribution to the development of a sound record. 10 C.F.R. § 2.714(a)(1)(iii).

the Licensee relies in the main upon *Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 1 and 2)*, LBP-75-22, 1 NRC 451, 454-55 (1975). In that case, the petitioners sought to rely on their prior participation in other NRC proceedings to establish their standing. The *Peach Bottom* Board held that "the interest of the Petitioners and how that interest might be affected . . . must be specifically pleaded in the Petition . . ." *Id.* at 455. However, in *dicta* the *Peach Bottom* Board also opined that "this defect alone would not be sufficient to cause an outright rejection of the Petition since it could be cured by affording the Petitioners reasonable time to supply specific details relating to their interest." *Id.* Instead, the licensing board dismissed the petition in that case because those petitioners failed to submit a valid contention, i.e., they had failed to submit an otherwise valid petition.

We agree that a prospective petitioner has an affirmative duty to demonstrate that it has standing in *each* proceeding in which it seeks to participate since a petitioner's status can change over time and the bases or its standing in an earlier proceeding may no longer obtain. We would acknowledge that, in certain situations, a petitioner may seek to rely on prior demonstrations of standing if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing. However, in this case, CFUR's latest filing was in its 1988 attempt to reintervene, well over 4 years ago, and CFUR has not demonstrated that these documents reflect the status of its current membership or the basis for its current claim of standing.³ Thus, we agree that the petition is deficient in this regard.

But while we agree with the Licensee that the petition is indeed flawed in this regard, we need not rely on that flaw to deal with this petition. Rather, we will dismiss this petition for failure to meet other necessary requirements.

4. The Late Intervention Criteria

Our standards for late intervention are found at 10 C.F.R. § 2.714(a)(1)(i)-(v). Those factors are, respectively: (1) the "good cause," if any, for the lateness of the petition; (2) the availability of other means to protect the petitioner's interests; (3) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which petitioner's interests may be represented by existing parties; and (5) the extent to which petitioner's participation will broaden the issues or delay the proceeding. Accordingly, we must determine whether a balancing of these five factors weighs in favor of granting CFUR's petition.

³And at this late date, we are not inclined to give CFUR still another opportunity to perfect its pleading and demonstrate its standing — as it was required to do in its initial petition.

a. *Good Cause for Late Filing*

In its petition, CFUR alleges that "good cause" for its late filing

can be established by the fact that the issue of safety regarding the installation of Thermo-Lag in Unit 2 has become a licensing issue for the NRC since the closing of the hearings in July of 1988 and that since that time the full extent of the Thermo-Lag failures at Comanche Peak have only recently become known to this petitioner.

Petition at 4 (emphasis added). However, CFUR incorrectly relies on its alleged "recent" acquisition of knowledge about the installation of Thermo-Lag to support its assertion of "good cause." Moreover, as we show below, CFUR has been aware of the controversy surrounding the installation of Thermo-Lag at Comanche Peak Unit 2 for a long enough period of time for us to deny CFUR's assertion that it only "recently" became aware of the issue.

As we noted above, we recently denied another petition for late intervention in the Comanche Peak proceedings. See CLI-92-12, *supra*. As we pointed out there,

[t]he test for "good cause" is not simply when the Petitioners became aware of the material they seek to introduce into evidence. Instead, the test is when the information became available *and* when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be *new* information, not information already in the public domain.

CLI-92-12, 36 NRC at 70 (emphasis in original). For example, information publicly available 6 months prior to the date of a petition has been held as insufficient to establish "good cause" for late intervention. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982).

It is clear that the question of possible defects in the product Thermo-Lag is not a new issue. On August 12, 1992, CFUR joined an Addendum to a petition under 10 C.F.R. § 2.206 regarding the use of Thermo-Lag filed by the Nuclear Information and Resources Services ("NIRS"). As the NIRS Addendum pointed out, the issue of Thermo-Lag's adequacy as a fire protection barrier was raised at the River Bend Station more than 5 years previously. NIRS Addendum at 2. Thus, CFUR is well aware that Thermo-Lag's adequacy has been an issue in the public domain for a number of years, not just months. Moreover, the NRC Staff has issued numerous information notices, generic letters, and bulletins regarding Thermo-Lag which have been placed in the public domain. See Letter from Thomas E. Murley, NRC, to Mr. Michael Mariotte, Nuclear Information and Resource Service (Aug. 19, 1992), at 2-4 (responding to both the NIRS Petition and the NIRS Addendum).

In particular, with regard to *this* proceeding, CFUR has clearly been aware of the issue of the installation of Thermo-Lag at Comanche Peak Unit 2 for at least 6 months. For example, the NIRS Addendum that CFUR joined asked, *inter alia*, for an immediate stop-work order preventing further installation of Thermo-Lag at Comanche Peak Unit 2 and for a suspension of the operating license for Comanche Peak Unit 1. NIRS Addendum at 3-4. Clearly, in joining the NIRS Addendum, CFUR was well aware of the issue of the installation of Thermo-Lag at Comanche Peak by that time, 6 months before it filed the instant petition for late intervention; yet it did not seek intervention at that time. As we noted above, information that has been in the public domain for 6 months will not constitute "good cause" for late intervention. *Fermi*, ALAB-707, *supra*.

In summary, we find that CFUR has been aware of the issue of the installation of Thermo-Lag at Comanche Peak Unit 2 for over 6 months and that it has been — or should have been — aware of the general issue of Thermo-Lag for several years. Therefore, CFUR has failed to demonstrate that it has "good cause" for its late filing.

b. The Remaining Four Factors

"[W]here no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong." *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977). "When the intervention is extremely untimely . . . and the petitioner utterly fails to demonstrate any 'good cause' for late intervention, it must make a 'compelling' case that the other four factors weigh in its favor." *Comanche Peak*, CLI-88-12, 28 NRC at 610 (citing cases) (denying CFUR's 1988 petition for late intervention). As we demonstrate below, CFUR has failed to make such a "compelling showing" on the remaining four factors.

The Staff concedes — and we agree — that the Petitioner satisfies the second and fourth factors of the five-part test. Assuming *arguendo* that the Petitioner has an "interest" in the proceeding, i.e., that Petitioner does have standing to participate, there is no other means by which that interest can be protected. Likewise, because there is currently no proceeding, there is no other party to represent the Petitioner's interest. However, as we noted in CLI-92-12, "these two factors are the least important of the five factors." CLI-92-12, 36 NRC at 74 (citing cases).

More importantly, in our view, CFUR's request provides no reason to conclude that it could contribute to the development of a sound record. As we noted in dismissing CFUR's petition for late intervention in 1988,

[w]hen a petitioner addresses this . . . criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.

Comanche Peak, CLI-88-12, 28 NRC at 611, quoting *Grand Gulf*, ALAB-704, 16 NRC at 1730. "Vague assertions regarding petitioner's ability or resources . . . are insufficient." *Grand Gulf*, ALAB-704, 16 NRC at 1730.

Stated otherwise, there appears to us to be no reason to allow an inexcusably belated intervention petition to trigger a hearing unless there is cause to believe that the petitioner not only proposes to raise at least one substantial safety or environmental issue but, as well, is equipped to make a worthwhile contribution to it.

Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180-81 (1983). Moreover, this factor "assumes yet greater importance in cases . . . in which the grant or denial of the petition will also decide whether there is to be any adjudicatory hearing." *Id.* at 1180 (citation omitted).

In its petition, CFUR simply alleges that it

will rely on the NRC's own documents and those of TU as well as documentation developed independently by outside groups such as [NIRS] and CFUR's own experts, to develop this [issue] for litigation

Petition at 6. However, CFUR fails to list any specific document it plans to introduce or on which it intends to rely, in spite of the documentation developed by the NRC as listed above and placed in the public domain. We do not believe that CFUR can claim to be unaware of whatever documents do exist related to this issue because all documents related to the Thermo-Lag issue at Comanche Peak were placed in the local Public Document Room associated with Comanche Peak in a timely fashion. Moreover, the NRC Staff outlined the documents in the public domain in its August 19, 1992 response to the NIRS Petition and Addendum, which CFUR had joined. Likewise, CFUR fails to identify any single expert or summarize their proposed testimony. In short, as we noted in response to its 1988 attempt to reintervene, CFUR has "identified no special expertise or experience that its members possess which would enable it to address those issues." *Comanche Peak*, CLI-88-12, 28 NRC at 611. Instead, all we have before us are "vague assertions . . . [that] are insufficient." *Grand Gulf*, ALAB-704, 16 NRC at 1730.⁴

⁴ While CFUR's petition fails to demonstrate any ability to contribute to the development of a sound record, we have invited CFUR to address its concerns over the installation of Thermo-Lag at Comanche Peak Unit 2 on March 15, 1993, at the meeting in which the Licensee and the NRC Staff will review the status of the Unit 2
(Continued)

Finally, the fifth factor, the potential for delay if the petition is granted, weighs heavily against Petitioner. Granting CFUR's request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule. As the Appeal Board noted in ALAB-704, addressing a similar situation in which a petition for late intervention was filed after issuance of the low-power license in an uncontested proceeding, "it is manifest to us that the grant of an intervention petition at this very late hour, after the Director of Nuclear Reactor Regulation has issued a low power operating license in an uncontested proceeding, will perforce broaden the now non-existent adjudicatory issues and delay conclusion of the proceeding." *Grand Gulf*, ALAB-704, 16 NRC at 1730. See, e.g., *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650-51 (1975) (opinion of Mr. Rosenthal speaking for the entire Board on this point).

IV. CONCLUSION

In conclusion, reinstating a formal OL proceeding for Comanche Peak Unit 2 at this stage would certainly prolong the licensing process and delay the licensing of Unit 2 while CFUR has provided no reason to believe that useful light would be shed on the issue it seeks to raise in the process. Balancing the unjustified lateness of the petition, CFUR's absolute failure to demonstrate that it can contribute to the development of the record, and the delay that would result from the institution of an adjudicatory proceeding in an otherwise uncontested proceeding in which a low-power license has already been issued, against the two minor factors in CFUR's favor, we conclude that the petition for late intervention should be denied.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of March 1993.

full-power license. We have extended this invitation to speak at this previously scheduled meeting in the interest of openness, recognizing that this will not delay the proceeding or adversely affect any party. This does not confer party status on CFUR and the meeting does not constitute an adjudicatory proceeding within the meaning of section 189a of the Atomic Energy Act.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Sellin, Chairman
Kenneth C. Rogers
James R. Curtliss
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 15, 1993

The Commission denies the intervenor's motion for reconsideration of CLI-93-3 which, *inter alia*, granted intervention as a matter of discretion, admitted one contention, permitted amendment of another, and affirmed the Atomic Safety and Licensing Board's rejection of all other contentions.

RULES OF PRACTICE: STAFF AUTHORITY

There is no general duty, even in contested proceedings, for Staff to inform an intervenor of Staff's every communication with the licensee that takes place during the usual course of Staff's review of an application.

RULES OF PRACTICE: RESPONSIBILITIES OF PARTIES

Staff and licensee have an obligation to keep the licensing board and intervenor apprised of any relevant and material new information.

ORDER

On March 5, 1993, Environmental and Resources Conservation Organization (ECO) filed a petition for reconsideration of portions of the Commission's March 3, 1993 Memorandum and Order, CLI-93-3, 37 NRC 135. The Memorandum and Order addresses ECO's appeal of an Atomic Safety and Licensing Board's August 20, 1992 order which denied ECO's intervention petition and request for hearing on the Nuclear Regulatory Commission (NRC) Staff's proposed order approving of a decommissioning plan for, and authorizing decommissioning of, the Rancho Seco Nuclear Generating Station (Rancho Seco). In CLI-93-3, the Commission granted ECO intervention as a matter of Commission discretion and established a schedule for the filing of any amended or supplemental contentions with respect to certain aspects of the decommissioning plan. ECO now makes two requests: (1) that we extend the time for filing a contention on the decommissioning funding plan and, (2) that we also expand our order to require the Licensee, the Sacramento Municipal Utility District (SMUD), to inform ECO of the substance of oral as well as written communications with the NRC Staff. SMUD opposes ECO's request.¹ The Staff also opposes ECO's request for an extension of time.²

First, ECO requests that the time for filing an amended contention consistent with our order on the decommissioning funding plan be extended from the original 14 days provided in ¶ V.2 of the Commission's order to 19 days from service of any documentation submitted to ECO by SMUD in accordance with ¶ V.4 of the Commission's order.³ ECO asserts that it needs the additional time to review any correspondence that the Licensee provides ECO in accordance with ¶ V.4 of the order. The order provided 14 days from the date of its service for SMUD to provide ECO with such correspondence and for ECO to file an amended funding plan contention. In its response to ECO's petition, SMUD objects to granting additional time in view of the availability of SMUD's correspondence at the time the Commission's order was issued, in the Commission's public document room. SMUD asserts that none of the documentation relates to decommissioning funding, but more importantly, that it provided ECO by hand delivery on March 9 the documents specified in ¶ V.4 of our order.

¹Licensee's Response to ECO's Petition for Reconsideration (March 9, 1993) (hereinafter Licensee's Response). On March 10, 1993, the Licensee filed its own motion for reconsideration of CLI-93-3. The Commission will address that motion in due course. Our decision here is without prejudice to our consideration of the Licensee's motion.

²NRC Staff's Opposition to ECO's Petition for Reconsideration (March 12, 1993) (hereinafter Staff's Opposition).

³See 37 NRC at 154, 155. In CLI-93-3, we permitted an opportunity to file an amended contention in light of apparent confusion over the necessity of an exemption from Commission regulations with respect to approving a period of time for collecting funds to compensate for any shortfall of decommissioning funds for a plant like Rancho Seco that ceases operation before the full term of its operating license expires. *Id.* at 148-49.

In view of SMUD's prompt submittal of the documents to ECO, we do not see any compelling reason to grant ECO additional time to file a contention.⁴ Our order did not abrogate the applicability of 10 C.F.R. § 2.710 which permits additional time for filing depending on the method of service used on a party. By virtue of service of CLI-93-3 on ECO through the United States mail, ECO has until March 22 to file its contention. Thus, ECO will have had 12 days to review SMUD's documents before the day its contention is due to be filed. We see no substantial reason to grant ECO's request for additional time in which to file a contention on the decommissioning funding plan.

Second, ECO requests that the Commission require SMUD to provide ECO not only with correspondence between SMUD and the Staff, but also with other information provided to Staff by means other than written communications, e.g., in face-to-face meetings. SMUD objects to this request and states that it has identified no "information" other than the documents it provided in response to ¶ V.4 of the order.⁵

We see no reason to expand the reach of our order beyond service of correspondence (i.e., documents) exchanged between SMUD and the Staff. ECO apparently would have us require SMUD or the Staff to apprise ECO of any other communication, presumably by requiring that the substance of the communications be reduced to writing. We would expect the Staff to confer with SMUD representatives by telephone or in meetings during the usual course of the Staff's review of SMUD's decommissioning plan and the Staff's preparation of its own safety and environmental reviews. See 10 C.F.R. § 2.102(a) (1992). Even in contested proceedings, however, there is no general duty to inform all parties of the occurrence or substance of every such communication. See *Northeast Nuclear Energy Co.* (Montague Nuclear Power Station, Units 1 and 2), LBP-75-19, 1 NRC 436, 437 (1975). Nonetheless, as we noted in CLI-93-3, 37 NRC at 152 n.46, we expect Staff and SMUD to adhere to their obligation to keep the Licensing Board and ECO informed of relevant and material new information. See *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973). Further, as a matter of practice, the Staff has followed an open meeting policy for meetings between the Staff and license applicants. See "Open Meetings and Statement of NRC Staff Policy," 43 Fed. Reg. 28,058 (June 28, 1978). Although we expect that the Staff and SMUD may confer on SMUD's submittal, any decision on SMUD's decommissioning

⁴We need not determine whether the correspondence provided to ECO by SMUD in accordance with our order has any bearing on the decommissioning funding plan. SMUD has identified 13 documents that fall within ¶ V.4 of the order, according to the list that SMUD provided with its response to ECO's petition for reconsideration.

⁵With respect to the second request in ECO's petition for reconsideration, the Staff "does not object to broadening the word 'correspondence' to 'documents,' but [Staff] does not understand how non-recorded material, if any, can be served on the parties." Staff's Opposition at 3 n.1. Our original order used the words "correspondence" and "documents" interchangeably. 37 NRC at 152-53. SMUD appears to have interpreted our order correctly. See Licensee's Response at 2-3.

plan must rest on the public record, not on undisclosed oral communications. Therefore, we see no purpose in burdening SMUD or the Staff with a general duty to memorialize and inform ECO of their past or future oral communications.

For the reasons stated in this order, we deny ECO's petition for reconsideration of CLI-93-3.⁶

IT IS SO ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of March 1993.

⁶Commissioner Remick would grant ECO's request for additional time. Commissioner Curtis was not available for the affirmation of this order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtliss
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)

March 18, 1993

The Licensee, Georgia Power Company, applied for a stay pending appeal of the licensing board's order, LBP-93-5, 37 NRC 96 (1993), granting intervention to Allen L. Mosbaugh in an amendment proceeding concerning the transfer of operating authority under the licenses. Because the Licensee's principal ground for a stay, i.e., its objection to proceeding with discovery during the pendency of a criminal investigation of the Licensee and its employees, was related to Staff objections to discovery still before the Licensing Board for determination, the Commission refers the stay application to the Licensing Board for consideration.

ORDER

The Licensee, Georgia Power Company (GPC), has filed a timely appeal under 10 C.F.R. § 2.714a (1992) of a Memorandum and Order, LBP-93-5, 37 NRC 96 (1993), issued by the Atomic Safety and Licensing Board in this proceeding. The proceeding concerns a proposed amendment to transfer the operating authority under the licenses for the Vogtle Electric Generating Station from GPC to Southern Nuclear Operating Company (SNOC). In its memorandum and

order, the Licensing Board granted the petition for intervention filed by Allen L. Mosbaugh and admitted a single contention for litigation which, in sum, alleges that SNOC does not have the requisite character, competence, and integrity to be an NRC licensee. 37 NRC at 111. GPC contends on appeal that the Board erred in concluding that Mr. Mosbaugh has established standing and that he has proffered a good contention.

Concurrently with its appeal, GPC has also filed an application under 10 C.F.R. § 2.788 (1992) for a stay of the Licensing Board's order pending a Commission decision on its appeal. The NRC Staff has responded on March 16, 1993, by supporting GPC's stay application, although the Staff opposes GPC's appeal. Mr. Mosbaugh has asked for additional time to respond to GPC's appeal and stay application, which the Commission is granting by separate order. In addressing the criteria for a stay in section 2.788(e), GPC argues that it will suffer irreparable injury because —

[i]f the Board's Order is not stayed, GPC employees could be subject to depositions and interrogatories on precisely the same issues that are being investigated by the DOJ [U.S. Department of Justice]. This situation has the potential for undermining the Fifth Amendment privilege rights of GPC employees, expanding the rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), exposing the basis of GPC's and its employees' defenses to any criminal prosecution in advance of trial, or otherwise prejudicing the case.

GPC's Application for a Stay at 4.

In LBP-93-5, the Licensing Board ordered the parties to negotiate an appropriate schedule for discovery or to file by March 8, 1993, each party's suggested discovery and trial schedule. The NRC Staff was also directed to show cause why discovery of prosecution-related documents should not commence. 37 NRC at 111. On March 8, the Staff filed a response to the Board's order in which the Staff maintains that discovery against the Staff related to ongoing investigatory efforts should be deferred in order to avoid possible prejudice to DOJ's consideration of possible criminal prosecution as well as to potential NRC enforcement actions. The Staff estimates that the pending investigations will be complete in approximately 6 months. The Staff reiterates many of the same arguments that it made before the Licensing Board in its reply supporting GPC's stay application.

Although GPC and the Staff argue different grounds, their positions are rooted in the same underlying cause, a pending criminal investigation and potential prosecution, and they seek similar relief through deferred discovery. GPC alludes to the Board's discussion of the Staff's concerns with proceeding with discovery, but it does not appear that GPC has put its own objections to certain discovery before the Board. Under these circumstances, the Commission is referring GPC's application for a stay and the parties' responses to the Licensing Board for consideration in conjunction with the Board's resolution

of the Staff's position on discovery and its fashioning of an appropriate order governing discovery and other pretrial matters. This approach will permit the Licensing Board to address GPC's and the Staff's related, though distinct, claims in a coherent manner and will avoid the possibility that the Board and the Commission separately may reach inconsistent results. To the extent that the Licensing Board may require a greater specification of GPC's claims of harm, the Commission does not object to the Board's solicitation of additional filings from GPC and the other parties.

Our referral is without prejudice to GPC's or any other party's filing of a subsequent application for stay under 10 C.F.R. § 2.788 or for interlocutory review under 10 C.F.R. § 2.786(g), provided the pertinent criteria are met, in the event a party believes it has been aggrieved by a future Licensing Board order. The Commission is reviewing GPC's appeal of LBP-93-5 and will decide the appeal in due course.

For the reasons stated in this order, GPC's application for stay dated March 4, 1993, and the parties' responses thereto (including Mr. Mosbaugh's response, due to be filed on March 22) are hereby referred to the Licensing Board for further consideration consistent with this order.

IT IS SO ORDERED.

For the Commission¹

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of March 1993.

¹ Commissioner Remick was not available for the affirmation of this Order; if he had been present, he would have approved the Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

**Ivan Sellin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque**

In the Matter of

**Docket No. 40-8027-MLA
(Source Material License
No. SUB-1010)**

SEQUOYAH FUELS CORPORATION

March 18, 1993

The Commission acknowledges Sequoyah Fuels Corporation's notification to NRC of the withdrawal of its application for a materials license amendment pertaining to groundwater monitoring, treats it as a request to withdraw the application, and grants permission for withdrawal of the application. Consequently, the Commission denies a request by Native Americans for a Clean Environment and the Cherokee Nation for a hearing on the materials license amendment.

**RULES OF PRACTICE: LICENSE AMENDMENT (WITHDRAWAL
OF APPLICATION)**

The Commission will treat a licensee's announced withdrawal of a license amendment application prior to a notice of hearing as a request to the Commission, pursuant to 10 C.F.R. § 2.107(a), for permission to withdraw the application.

MEMORANDUM AND ORDER
(Ruling on Request for Hearing and Request for
Withdrawal of Application)

I. SYNOPSIS

This responds to the Request for Hearing, including a request to be admitted as intervenors, filed on August 19, 1992, by Native Americans for a Clean Environment and the Cherokee Nation (hereafter "Petitioners"), with respect to the application of Sequoyah Fuels Corporation ("SFC"), dated April 1, 1992, for amendment of Materials License No. SUB-1010. On July 21, 1992 (57 Fed. Reg. 32,244), the NRC published notice of the opportunity to request a hearing pursuant to the requirements of 10 C.F.R. Part 2, Subpart L, "Informal Hearing Procedures for Adjudications in Materials Licensing Proceedings."

For reasons stated below, SFC's withdrawal of the application is acknowledged, deemed to be a request for permission to withdraw the application, and is granted without prejudice. Consequently, the Petitioners' request for hearing on the application is denied.

II. THE PARTIES' POSITIONS

A. SFC's Withdrawal

SFC's license amendment application pertains to implementation of SFC's revised Groundwater Monitoring Plan dated March 31, 1992. By letter dated September 2, 1992, SFC notified the NRC of its withdrawal of its request for license amendment. On the same date, counsel for SFC asked that the NRC deny the request for hearing regarding the license amendment since SFC had withdrawn its request for the amendment.

In connection with the withdrawal, SFC stated that its new Groundwater Monitoring Plan would be incorporated into a revised license renewal application that would be filed on September 30, 1992, in the pending renewal proceeding. SFC declared that the potential benefits of an immediate amendment to its license did not warrant the additional costs of separate hearings. SFC also advised that it would continue compliance with its existing license requirements as well as perform additional tasks under the proposed plan until the license renewal is issued.

B. Petitioners' Response

By letter dated September 11, 1992, the Petitioners responded to SFC's effort to withdraw the license amendment and obtain a denial of the request for a hearing. They contended that the proposed changes to the groundwater monitoring plan constitute an amendment to SFC's operating license, for which a hearing is required under section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a). They argued that withdrawal of the license amendment application and resubmission of the same proposed changes in the pending license renewal proceeding would be an illegal and indefinite postponement of hearing on the license amendment.

Petitioners declared that NRC review of SFC's revised groundwater monitoring plan must proceed expeditiously since SFC has seriously contaminated groundwater under the plant and even the revised Plan is inadequate to avoid further contamination and risk to the public. They also cited the Commission's directive that NRC Staff expedite preparation of an environmental assessment ("EA") for license renewal. Memorandum from Samuel J. Chilk to James M. Taylor re: Staff Requirements — Briefing on Status of Restart of General Atomic's Sequoyah Fuels Facility at 3 (March 27, 1992). In addition, they cited the NRC Staff's commitment to expedite review of the license amendment application. SECY-92-132, Memorandum from James M. Taylor to the Commissioners re: Restart of Sequoyah Fuels Corporation Facility at 6 (April 14, 1992).¹

C. SFC's Reply

In a letter dated September 15, 1992, SFC replied to the arguments for a hearing that Petitioners had presented in their September 11, 1992 letter. SFC contended that the license amendment was not required since additional, voluntary groundwater monitoring beyond that required by the current licensing requirements does not require a license or constitute a license amendment. SFC declared that the Petitioners have no right to a hearing since there has been no license amendment or other agency action requiring a hearing and the request for the license amendment is withdrawn. In addition, SFC stated that a hearing on the withdrawn license amendment is not necessary to a decision by NRC Staff on whether information, including data from the voluntary program, is sufficient to support preparation of the EA or additional action by SFC is required.

¹By letter to the Commission, dated October 21, 1992, Petitioners offered further argument in support of their view that a hearing on the revised groundwater monitoring plan should not be delayed until its consideration as part of the license renewal application. In particular, they cited results and observations in NRC Inspection Report 92-26 (October 13, 1992) concerning the Sequoyah Fuels uranium processing plant.

SFC indicated that its voluntary commitment to continue the new program as well as the existing groundwater monitoring program until action on the license renewal application made the same information available to NRC Staff that was subject to Staff's expedited review of the license amendment application. SFC also declared that Petitioners would be able to raise their objections to the new plan, and any reliance in the EA on the results of such a program, in the license renewal proceeding.²

D. SFC's Plans for Continued Operations

By letter to the NRC, dated November 23, 1992, SFC advised that it intended to place licensed operations at Gore, Oklahoma, in "standby mode." Specifically, SFC stated its intent to: (1) "clean out" its facility for conversion of yellowcake ore concentrates to UF₆ and then place it in standby mode, within 60 to 90 days; and (2) place its facility for reduction of UF₆ to UF₄ in standby mode after restart of that facility (with the NRC's approval) and fulfillment of an existing contract.³

By letter dated February 16, 1993, SFC notified the NRC that it had decided to proceed with decommissioning of the UF₆ facility. It stated that it also planned to proceed with decommissioning of the facility for reducing UF₆ to UF₄ by July 31, 1993, or earlier, after fulfillment of an existing contract. Thus, SFC advised that it was terminating activities involving materials authorized under License No. SUB-1010, effective July 31, 1993, or earlier. SFC requested termination of the license and submitted a Preliminary Plan for Completion of Decommissioning ("PPCD"). In addition, SFC advised that it would be filing a motion in its license renewal proceeding for withdrawal of its license renewal application as of July 31, 1993, or earlier, and for termination of that proceeding.

In its letter, SFC also expressed its understanding, under the provisions of 10 C.F.R. § 40.42(e), that SFC must comply with all provisions of the license applicable to continuing activities until the NRC notifies SFC that the license is terminated. In specific regard to environmental monitoring, the PPCD provides that SFC is performing environmental monitoring in accordance with Chapter 5 of its license and the additional commitments contained in its letter to the NRC, dated September 2, 1992. The PPCD also states that "[p]roposed changes to the license mandated monitoring, or changes to the program to reflect reduced

²In their Request for Hearing on the license amendment application, Petitioners noted that "[t]he groundwater monitoring issues raised in this proceeding constitute a subset of the concerns raised by NACE and the Cherokee Nation in their petitions to intervene in the license renewal case. . . ." Request for Hearing at 2 (Aug. 19, 1992).

³At a public meeting with NRC Staff on December 1, 1992, SFC stated, however, that it might pursue renewal of its defense contract associated with reduction of UF₆ to UF₄.

activities, will be submitted for NRC approval in the PCD [Plan for Completion of Decommissioning] or in earlier submittals.”

III. DISCUSSION

Neither SFC nor the potential intervenors refer to 10 C.F.R. § 2.107(a), which is the controlling NRC regulation for the withdrawal of applications. It provides:

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application, or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

Accordingly, the Commission will treat the announced withdrawal as a request for permission to withdraw the application.⁴

The Petitioners' suggestion that SFC's implementation of the Groundwater Monitoring Plan amounts to a license amendment overlooked the thrust of SFC's actions. SFC stated that, until license renewal was issued, it would continue compliance with the existing licensing requirements, but would also perform the additional groundwater monitoring actions specified in the Plan.

SFC's notice of termination of licensed activities, along with its request for termination of its license and its anticipated motion for termination of the license renewal proceeding, making it virtually certain that any disputes regarding the Groundwater Monitoring Plan will not be adjudicated in the license renewal proceeding. Under these circumstances, however, the Commission believes that any necessary NRC action regarding the plan should be addressed in decommissioning or enforcement actions or proceedings.

Thus, the Commission concludes that there are sufficient grounds for permitting withdrawal of the application. The Commission also does not foresee substantial prejudice to the Petitioners as a result of this dismissal. Consequently, the withdrawal shall be permitted without prejudice and without any terms or conditions. In addition, there is no need to refer the Request for Hearing to the Atomic Safety and Licensing Board Panel since permission to withdraw the application is granted.

⁴ See *Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), CLI-82-5, 15 NRC 404, 405 (1982).

IV. CONCLUSION

For the foregoing reasons, SFC's request for withdrawal of its license amendment application dated April 1, 1992, is granted without prejudice. The Request for Hearing filed by Native Americans for a Clean Environment and the Cherokee Nation on August 19, 1992, is denied.

IT IS SO ORDERED.

For the Commission⁵

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of March 1993.

⁵ Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

**Docket No. 30-16055-OM
(EA 87-139)
(Decontamination Order)
(Byproduct Material License
No. 34-19089-01)**

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

March 30, 1993

The Commission denies Advanced Medical Systems' (AMS) petition for review of a licensing board order, LBP-92-36, 36 NRC 366 (1992), that dismissed as moot a challenge to two immediately effective decontamination orders issued by the Nuclear Regulatory Commission (NRC) Staff to AMS. The Commission also denies AMS' request for consolidation of all proceedings involving the Licensee.

COMMISSION PROCEEDINGS: PETITIONS FOR REVIEW

In determining whether to grant, as a matter of discretion, a petition for review of a licensing board order, the Commission gives due weight to the existence of a substantial question with respect to the considerations set forth in 10 C.F.R. § 2.786(b)(4) (1992).

MOOTNESS

The mootness doctrine derives from the Constitution's limitation on federal courts' jurisdiction to "cases" or "controversies." Although the Commission is not strictly bound by the doctrine, the agency's adjudicatory tribunals have generally adhered to the principle.

MOOTNESS

A case is moot when there is no reasonable expectation that the matter will recur and interim relief or intervening events have eradicated the effects of the allegedly unlawful action.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Atomic Safety and Licensing Board has dismissed as moot a long-pending proceeding on two related decontamination orders that the Nuclear Regulatory Commission (NRC) Staff issued to Advanced Medical Systems, Inc. (AMS), a byproduct materials licensee. LBP-92-36, 36 NRC 366 (1992). AMS has petitioned the Commission for review of the Board's order in accordance with 10 C.F.R. § 2.786(b). Although AMS has taken the underlying action required by the orders and does not contest the necessity of the decontamination measures, AMS claims that the proceeding is not moot and insists that it is entitled to litigate the legitimacy of the Staff's use of immediately effective orders to require AMS to decontaminate its facility. The NRC Staff opposes AMS' petition for review. Upon consideration of these filings and the record of the proceeding, the Commission finds no clear error or substantial question requiring our review. AMS' petition is, therefore, denied.

II. BACKGROUND

The proceeding stems from two Staff orders issued in 1987. The first order, issued on July 23, 1987, modified AMS' license to require AMS to commence decontamination and other related facility modifications by August 31, 1987. 52 Fed. Reg. 28,366 (July 29, 1987). The order described the existence of significant contamination and radiation levels at AMS' facility on London Road in Cleveland, Ohio, and recited the history of the Staff's efforts to obtain commitments from AMS to develop and implement plans for decontamination

of the facility. After several communications with AMS, the Staff amended AMS' license on June 25, 1986, to require AMS to submit within 60 days a decontamination plan for the facility and a contract for decontamination by a qualified contractor. After AMS identified a contractor in July 1986 and a schedule for developing a decontamination plan, the Staff extended the time for submittal of the plan. AMS submitted a decontamination plan and an associated schedule for its completion in September 1986, and the Staff thereafter issued a license amendment in October 1986 to require initiation of decontamination in accordance with the plan by December 22, 1986. One day after this deadline had passed, AMS requested that the license condition requiring initiation of decontamination be put in abeyance pending resolution of a separate suspension order then in effect against AMS for alleged violations of AMS' license conditions pertaining to service and maintenance of teletherapy units supplied to its customers. The Staff declined such relief, but AMS further requested in March 1987 that its license be modified to defer commencement of decontamination until March 1, 1988.

As a result of the lack of progress toward decontamination of AMS' London Road facility and AMS' violation of specific license conditions pertaining to decontamination activities, the Staff issued its "Order Modifying License, Effective Immediately, and Demand for Information" on July 23, 1987. In view of the continuing degradation of radiological conditions at the site and the potential for significant radiation exposures, and the lack of adequate assurance, as evidenced by AMS' failure to meet the terms of its license, that AMS would undertake decontamination of its facility, the Staff found that the public health, safety, and interest required commencement of decontamination in accordance with AMS' license conditions by August 31, 1987. The Staff therefore made the order "immediately effective" in accordance with the provisions of 10 C.F.R. §§ 2.201(c) and 2.204 (1987).

AMS demanded a hearing on the order, arguing that AMS had taken reasonable steps to undertake decontamination but that the NRC itself had blocked its efforts through delay in reviewing AMS' plans, imposition of unreasonable requirements, and a suspension of AMS' license. AMS also challenged the basis for making the order immediately effective.

AMS subsequently requested relief from the order because its contractor for the decontamination work had gone out of business. The Staff permitted adjustments in the schedule and plan in a "Confirmatory Order Modifying License, Effective Immediately" issued on October 30, 1987.¹ AMS further demanded a hearing on the October order, alleging that the relief granted by

¹ 52 Fed. Reg. 43,693 (Nov. 13, 1987). Although labeled "confirmatory," AMS had not consented to entry of the order; the order only "confirmed" Staff's agreement to provide AMS relief from some of the requirements of the earlier order.

that order did not resolve the underlying controversy over the appropriateness of issuing an order to AMS in the first instance or over the Staff's invocation of its power to make the order immediately effective.

AMS' hearing requests were referred to the Licensing Board. Although there was consideration of whether the Board could conduct some sort of "preliminary hearing" on the immediate effectiveness of the orders, the Licensing Board eventually determined, at a prehearing conference on July 20, 1988, to grant AMS' request to hold the proceeding in abeyance pending completion or resolution of the remaining actions under the order. Tr. 42-43, 47. Although AMS' counsel suggested that some settlement with the Staff might be reached, he maintained that the Staff's use of immediately effective orders would remain a litigable issue even after the underlying requirements of the orders had been satisfied. Tr. at 40. AMS completed the decontamination activities under the order to the Staff's satisfaction in 1989, a point that the Staff has repeatedly stressed to AMS and the Licensing Board. See LBP-92-36, 36 NRC at 367 n.4.

The Staff unsuccessfully sought to reach an agreement with AMS to dismiss the proceeding. Failing that, the Staff then sought, and the Licensing Board granted, dismissal on grounds of mootness. The Licensing Board rested its determination primarily on the fact that AMS had satisfied the decontamination requirements of the Staff's orders. Because the decontamination had been completed, the Licensing Board believed it impossible to fashion any remedy even if AMS were able to convince the Board that the orders had been improperly issued. Thus, the intervening cleanup rendered the controversy moot, and the Board saw no exception to the mootness doctrine.²

III. ANALYSIS

In determining whether to grant, as a matter of discretion, a petition for review of a licensing board order, the Commission gives due weight to the existence of a substantial question with respect to considerations set out in 10 C.F.R. § 2.786(b)(4) (1993). The considerations set forth in section 2.786(b)(4) are: (i) a clearly erroneous finding of material fact; (ii) a necessary legal conclusion that is without governing precedent or departs from prior law; (iii) a substantial and important question of law, policy, or discretion; (iv) a prejudicial procedural error; and (v) any other consideration deemed to be in the public interest. Although AMS does not reference the particular criteria in section 2.786(b)(4), we understand its petition to allege that the Licensing Board departed from prior law and committed a prejudicial error in dismissing the decontamination

²LBP-92-36, 36 NRC at 368 n.7. The Licensing Board also denied for lack of jurisdiction AMS' motion to consolidate this proceeding with two other proceedings in which AMS' appeals are pending before the Commission.

proceeding as moot. Accordingly, AMS asks that we reverse the Licensing Board's order and further that we consolidate this proceeding with two others in which AMS' appeals are presently pending before the Commission.³ We have closely examined AMS' petition and the record of the proceeding, but AMS has not persuaded us that the Licensing Board committed a legal or procedural error warranting our further review or reversal of the Licensing Board's decision.

The mootness doctrine derives from the Constitution's limitation on federal courts' jurisdiction to "cases" or "controversies." *Flast v. Cohen*, 392 U.S. 83, 94 (1968). Although the Commission is not strictly bound by the doctrine, the agency's adjudicatory tribunals have generally adhered to the principle. See, e.g., *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), *remanded on other grounds sub nom. Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). A case is moot when there is no reasonable expectation that the matter will recur and that interim relief or intervening events have eradicated the effects of the allegedly unlawful action. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Even when an agency's order no longer has effect, a case may not be moot if it is "capable of repetition, yet evading review": i.e., if the challenged action was too short in duration to be litigated and there is a reasonable expectation that the same party will be subjected to the same action again. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911); *Securities & Exchange Commission v. Sloan*, 436 U.S. 103, 109 (1978); *Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1170 (D.C. Cir. 1984).

There is no dispute that the decontamination actions required by the orders have been completed satisfactorily. Notwithstanding the Licensing Board's determination that its ability to fashion a remedy had been extinguished by completion of decontamination, AMS insists a litigable controversy remains. We understand AMS' argument to be twofold: first, that the Licensing Board erred in deciding that no live controversy remained in view of the lingering effects of the orders on AMS; and second, that the Board erred in deciding that the case did not fall within an exception to the mootness doctrine.

With respect to the first part of AMS' argument, AMS claims that the orders continue to affect it because the orders will subject AMS to "heightened scrutiny

³ Whatever the merits of the Licensing Board's determination of mootness in the decontamination proceeding, the Board properly denied AMS' motion for consolidation of two other proceedings involving AMS with the decontamination proceeding. Because appeals are pending before the Commission from the Board's decisions in these other proceedings, see LBP-90-17, 31 NRC 540 (1990), and LBP-91-9, 33 NRC 212 (1991), the Licensing Board retained no jurisdiction over those matters. See *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23 (1987). Moreover, we perceive no reason why we should consolidate the proceedings; each proceeding involves substantially different facts and AMS makes no showing that consolidation will be conducive to the proper dispatch of the proceedings and the ends of justice. See 10 C.F.R. § 2.716; *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 89-91 (1992). The Commission expects to render decisions on AMS'S remaining appeals in the near future.

and the potential for escalated fines.” Petition at 8. Under the Commission’s enforcement policy, similar violations identified in prior enforcement actions are considered in escalating enforcement actions or in assessing the amount of civil penalties if such violations occurred within the past 2 years or since the last inspection, whichever time period is longer. See 10 C.F.R. Part 2, Appendix C, § VI.B.2(c), *Licensee Performance*, & Table 2 (1993). To the extent that the Staff’s orders are said to rest on a violation of AMS’ license (i.e., AMS’ failure to commence decontamination activities by the time prescribed in its license conditions), the violation would not be considered under the enforcement policy as a basis for escalating future enforcement actions because it occurred over 6 years ago and was cited in an order issued well over 5 years ago. The Staff has inspected AMS twice since the orders were issued — on November 14-18, 1988, and January 23-26, 1990. See NRC Staff Response in Opposition to AMS’ Combined Motion to Deny the Staff’s Motion for Termination and Request for Order Compelling Staff Response to Interrogatories at 7. The Staff deems the orders satisfied. Thus, we can fathom no real possibility, absent some extraordinary circumstance not described for us here, that the orders would be used as a basis for escalating any future enforcement sanction.

The orders also do not appear to have any other collateral legal effects. Notwithstanding the orders, AMS’ subsequent application for license renewal was granted in 1989.⁴ In these circumstances, AMS’ claim of future adverse effects from the orders is speculative and insufficient to overcome the Board’s finding of mootness. See *Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230, 234 (D.C. Cir. 1988); *Westmoreland v. National Transportation Safety Board*, 833 F.2d 1461, 1463 (11th Cir. 1987); *B & B Chemical Co. v. EPA*, 806 F.2d 987, 990 (11th Cir. 1986).

AMS also claims that it has been subjected to “ongoing negative publicity” from the orders that the Board ignored in its determination of mootness. AMS Petition at 7. To be sure, AMS identified an NRC press release and a few newspaper reports that refer expressly or implicitly to AMS.⁵ However, neither the press release nor the articles refer to the orders. Although one article refers — without identifying AMS — to radioactive hazards requiring decontamination and other protective actions, the article focuses on a general NRC-sponsored study of radiation hazards related to sewage treatment. Davis & Sammon, *supra*

⁴ At the July 1988 prehearing conference, AMS counsel indicated that AMS was concerned with the potential effects of the orders on AMS’ pending license renewal application. Tr. 49-50.

⁵ See AMS’ Combined Motion to Deny NRC Staff’s Motion for Termination of Proceeding and Request for an Order That the NRC Staff Be Compelled to Respond to AMS’ Interrogatories . . . and Cooperate with Discovery, at 8-10 (Sept. 2, 1992). AMS identifies an NRC press release dated April 8, 1992, and three newspaper articles: Dave Davis & Bill Sammon, “Sewage Workers Exposed to Radiation,” *Cleveland Plain Dealer*, Aug. 30, 1992, at 1B; Jay Greene, “NRC Says 5 Cleveland Area Sites Lag in Nuclear Clean-Up,” *Cleveland Plain Dealer*, Apr. 9, 1992, at 1B; Holly Yeager, “EPA Report: Ohio’s Home to 803 Radioactive Sites,” *Lake County News Herald*, Apr. 9, 1992, at 6.

note 5. Any publicity stemming from the NRC press release and the remaining two articles was occasioned not by the 1987 orders but by the NRC's inclusion of AMS in the agency's "Site Decommissioning Management Plan" (SDMP). See "Action Plan to Ensure Timely Cleanup of Site Decommissioning Management Plan Sites," 57 Fed. Reg. 13,389 (Apr. 16, 1992). The SDMP applies to some 40 sites for which the NRC has identified a need for decontamination. AMS remains on the SDMP list because "the NRC's estimated cost for final decommissioning exceeds Licensee's financial assurance statement." SECY-92-200, Updated Report on Site Decommissioning Management Plan, at 50, Table 2 (May 29, 1992); see also *id.*, Appendix A, at A7-A10. The SDMP also indicates that future action will be required to address contamination in AMS' liquid waste holdup tank room ("WHUT"). Decontamination of the WHUT was originally within the scope of the 1987 orders, but the Staff agreed to AMS' proposal to seal the room and to defer development and implementation of decontamination plans to some future date.⁶ Thus, publicity given to the possibility of future actions under the SDMP is not fairly traceable to the 1987 orders. In any event, AMS did not provide the Board with any showing that AMS had suffered any specific and direct injury to its business from the publicity. Cf. *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989) (demonstration of particular adverse effects on airline's business).

AMS also argues that the proceeding falls within the exception to the mootness doctrine for cases that are capable of repetition but that will otherwise evade review. Petition at 8. To fall within the exception, AMS must demonstrate that the challenged action was too short in duration to be fully litigated prior to its cessation or expiration *and* that there is a reasonable expectation that AMS will be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). AMS argues that the decontamination orders were "fleeting" events and that AMS can reasonably expect that it will be subjected to such orders in the future. Petition at 8.

The mootness exception is typically applied in circumstances in which a short-term action expires by its own force before the underlying basis for the action can be adjudicated. See, e.g., *Securities & Exchange Commission v. Sloan*, 436 U.S. 103, 109-10 (1978) (20-day suspension); *ConnAire, Inc. v. U.S. Department of Transportation*, 887 F.2d 723 (6th Cir. 1989) (120-day suspension). As the Staff notes, the orders here were hardly short-lived, fleeting actions, particularly in view of the 2-year time period that it took to achieve compliance with the orders. NRC Staff Response in Opposition to AMS' Petition for Review at 7 n.7. Thus, this order does not fall within the category of *short-term* orders contemplated under the exception. Contrary to AMS' charge

⁶ See Letter from C.E. Norelius, NRC Region III, to Sherry Stein, AMS Counsel (Jan. 23, 1992). Staff plans to review the status of the WHUT in connection with renewal of AMS' license in 1994.

of dilatory tactics by the Staff, AMS' own counsel suggested deferral of litigation pending completion of decontamination, resolution of action with regard to the WHUT, and possible settlement of any remaining matters.⁷

The orders do not appear reasonably capable of repetition. In this case, there is no genuine dispute over the appropriateness of the decontamination that AMS undertook; AMS only disputes the Staff's use of orders — and particularly Staff's invocation of the procedure to make those orders “immediately effective” — to achieve the decontamination objective that AMS otherwise agrees was warranted. The orders themselves and the bases for making them immediately effective were truly *sui generis* in that they involved particular circumstances peculiar to AMS and the Cleveland site, which are unlikely to be repeated. They do not involve the application of any substantive regulatory rule or requirement, the interpretation of which is likely to be invoked again and again in subsequent agency actions. The Staff acknowledges that AMS has satisfactorily performed decontamination within the scope of the orders. Any future orders would be based on matters beyond the scope of the instant orders or on future intervening circumstances. Although AMS as a licensee is certainly subject to future orders,⁸ the legitimacy of such orders is highly fact-dependent, and a mere possibility of future action is not sufficient to eclipse a finding of mootness. *Friends of Keeseville, Inc. v. FERC*, 859 F.2d at 234.

Moreover, such orders and any immediate effectiveness provisions would not evade review in the future. The Commission adopted procedural rules in 1992 that provide for a prompt review of the immediate effectiveness of Staff enforcement orders which the NRC deems final agency action on the question of immediate effectiveness. “Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective,” 57 Fed. Reg. 20,194 (May 12, 1992) (amending 10 C.F.R. § 2.202(c)(2)). AMS has not shown, therefore, that this proceeding satisfies either aspect of the exception to the mootness doctrine.

IV. CONCLUSION

AMS has not identified a prejudicial error in the Licensing Board's dismissal of this proceeding or other substantial question regarding its determination of mootness that would warrant our further review in accordance with 10 C.F.R.

⁷ See Tr. 31, 39-40, 42, 47-48. Counsel stated that the remaining issue was the issuance of an immediately effective order that “goes into our enforcement history”; he also indicated concern over the potential impact of the orders on AMS' then-pending license renewal application. Tr. 39, 49-50. As we have noted, however, AMS' license was renewed in late 1989, and the orders entail no apparent consequences to possible future NRC enforcement actions against AMS.

⁸ In fact, however, no orders have been issued against AMS' license since 1987.

§ 2.786(b). Consequently, AMS' petition for review of LBP-92-36 and its request for consolidation of all proceedings involving AMS are *denied*.
IT IS SO ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selln, Chairman
Kenneth M. Rogers
James R. Curtliss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 70-135-DCOM
(Decommissioning Plan)

BABCOCK AND WILCOX
(Apollo, Pennsylvania Fuel
Fabrication Facility)

March 30, 1993

The Commission had previously extended the time within which the Petitioner could perfect her appeal of a licensing board decision denying her request for hearing and terminating the proceeding. The Commission dismisses the appeal on the ground that the Petitioner failed to file a Statement of Appeal as required by 10 C.F.R. § 2.1205(n).

RULES OF PRACTICE: DISMISSAL OF APPEAL (DEFAULT)

In a Subpart L proceeding, a petitioner's appeal of a licensing board's final order is subject to dismissal if the petitioner fails to file a Statement of Appeal within the time period specified in 10 C.F.R. § 2.1205(n) or within an extended time period permitted by Commission order.

ORDER

On February 15, 1993, Cynthia Virostek ("Petitioner") sought an extension of time within which to file a Statement of Appeal regarding the Presiding Officer's

Memorandum and Order (Denying Hearing and Terminating Proceeding), LBP-93-4, 37 NRC 72, issued on February 5, 1993.¹ The Presiding Officer's order dismissed her petition to intervene for lack of standing. On February 24, 1993, the Commission granted the Petitioner an extension of time until March 8, 1993, within which to serve her Statement of Appeal. However, Petitioner has failed to serve the required Statement of Appeal within the expanded time period allowed by the Commission. Because Petitioner has failed to perfect her appeal, the Commission dismisses the appeal with prejudice and terminates this proceeding.
IT IS SO ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

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

¹ Under 10 C.F.R. § 2.1205(n) (1993) of the Commission's procedural regulations, if a petitioner wishes to appeal a presiding officer's order denying either a motion for hearing or a petition for leave to intervene in a Subpart L proceeding, the petitioner must "fil[e] and serv[e] upon all parties a statement that succinctly sets out, with supporting argument, the errors alleged."

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-446-CPA

TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*
(Comanche Peak Steam Electric
Station, Unit 2)

March 30, 1993

The Commission considers two appeals of a licensing board decision, LBP-92-37, 36 NRC 370 (1992), that denied the appellants' petitions for review and for hearing on a request by Texas Utilities Electric Company to extend the construction permit for Comanche Peak Unit 2. The Commission dismisses the appeals as moot since the Licensee's substantial completion of Unit 2's construction obviates the need for any further extension of the completion date under the construction permit. One of the appeals is dismissed on the additional ground of failure to perfect the appeal by filing a brief. The Commission also vacates the licensing board decision below.

RULES OF PRACTICE: BRIEFS

Commission appellate practice has long stressed the necessity of a brief. A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below.

RULES OF PRACTICE: DISMISSAL OF APPEALS (MOOTNESS)

The mootness doctrine derives from the “case” or “controversy” requirement of article III of the Constitution. The Commission is not bound by the case or controversy requirement, but generally follows the doctrine, absent the most compelling reasons.

RULES OF PRACTICE: DISMISSAL OF APPEAL (MOOTNESS)

Generally, a case will be moot when the issues are no longer “live,” or the parties lack a cognizable interest in the outcome. The mootness doctrine applies to all stages of review, not merely to the time when a petition is filed. Consequently, when effective relief cannot be granted because of subsequent events, an appeal is dismissed as moot.

RULES OF PRACTICE: DISMISSAL OF APPEAL (MOOTNESS)

A licensee’s substantial completion of construction, lawfully undertaken during the pendency of petitioner’s challenge to a construction extension request, renders moot any controversy over further extension of the completion date in the construction permit.

ATOMIC ENERGY ACT: CONSTRUCTION PERMIT AMENDMENTS

Section 185 of the AEA, 42 U.S.C. §2235, establishes that a construction permit will not expire and no rights under the permit will be forfeited *unless* two circumstances are present: (1) the facility is not completed, *and* (2) the latest date for completion has passed. If construction is complete, no further extension of the completion date is required.

ATOMIC ENERGY ACT: CONSTRUCTION PERMITS

Commission regulations provide that the substantial completion of a facility’s construction satisfies the AEA’s requirements regarding completion of the facility. *See* 10 C.F.R. §§ 50.56 and 50.57(a)(1) (1993).

ADMINISTRATIVE PROCEDURE ACT: TIMELY RENEWAL DOCTRINE

Generally, if a licensee files an application for a new license for an activity previously authorized at least 30 days prior to the expiration of the existing

license, the existing license will not be deemed to have expired until the application has been finally determined. See 5 U.S.C. § 558(c) (1992); 10 C.F.R. § 2.109.

COMMISSION PROCEEDINGS: EXTENSION OF COMPLETION DATE

The filing of a timely request for an extension of the completion date maintains the construction permit in force by operation of law and, accordingly, the licensee may lawfully continue construction activities pending a final determination of its application.

COMMISSION PROCEEDINGS: EXTENSION OF COMPLETION DATE (GOOD CAUSE)

The only question litigable in a construction permit extension proceeding — whether the licensee has demonstrated “good cause” for the extension — is no longer of legal interest after the licensee has lawfully completed construction under the permit and requires no further extension of the completion date.

COMMISSION PROCEEDINGS: EXTENSION OF COMPLETION DATE (SCOPE OF PROCEEDINGS)

Proceedings on construction permit extensions are limited in scope to challenges to the licensee’s asserted “good cause” for the extension, and are not an avenue to challenge a pending operating license.

MOOTNESS

A case may not be moot when the dispute is “capable of repetition, yet evading review.” *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). The exception applies only to cases in which the challenged action was in its duration too short to be litigated, and there is a reasonable expectation that the same complaining party will be subject to the same action again.

MEMORANDUM AND ORDER

The Atomic Safety and Licensing Board in LBP-92-37, 36 NRC 370 (1992), has denied two joint petitions for intervention and for hearing with respect to an

amendment to extend the completion date under the construction permit for Unit 2 of the Comanche Peak Steam Electric Station (CPSES). The Board denied the joint petition of B. Irene Orr and D.I. Orr for failure to submit an admissible contention under 10 C.F.R. § 2.714(b)(2).¹ The Board denied the second joint petition, filed by R. Micky Dow and Sandra Long Dow, "doing business as" (*dba*) Disposable Workers of Comanche Peak Steam Electric Station, on the ground that the Petitioners had failed to show the requisite interest for standing. Both the Orrs and the Dows have appealed the Licensing Board's decision.² For the reasons stated in this Order, we dismiss the proceeding and the pending appeals as moot.³

I. BACKGROUND

The construction permit for Unit 2, issued December 19, 1974, established August 1, 1983, as the original construction completion date.⁴ The completion date for construction of Unit 2 has been extended several times. Applications for operating licenses for Units 1 and 2 were filed in 1978, and a notice of opportunity for hearing was published in 1979. 44 Fed. Reg. 6995 (Feb. 5, 1979). At that time, three parties were admitted into the operating license proceeding. Neither the Dows nor the Orrs were among the admitted parties in the operating license proceeding or in any other proceeding concerning extension of the construction permits for either Unit 1 or Unit 2. By 1983 the Citizens Association for Sound Energy (CASE) remained as the sole intervenor in the operating license proceeding and the only contention remaining for litigation challenged the adequacy of quality assurance and quality control over the construction of CPSES. CASE was also granted intervenor status in a construction permit extension proceeding concerning CPSES Unit 1.⁵

In June 1988, CASE, Texas Utilities Electric Company (TU), and the Nuclear Regulatory Commission (NRC) Staff reached an agreement to settle and dismiss the pending adjudicatory proceedings concerning the operating license and the Unit 1 construction permit extension. As a result of the settlement, the Licensing

¹ The Licensing Board also held that Joseph Macktal and S.M.A. Hasan, two other petitioners who filed jointly with the Orrs, had not shown sufficient interest for standing and, accordingly, denied their petition to intervene and request for hearing. LBP-92-37, 36 NRC at 375. Messrs. Macktal and Hasan have not appealed.

² On March 15, 1993, the Orrs filed a motion to stay the issuance of a full-power license for CPSES Unit 2. Their motion, responses thereto, and other related filings are under consideration. The Commission will decide the motion in a subsequent order no later than the time that the Commission determines whether or not to authorize full-power operation of CPSES Unit 2.

³ As discussed in section II of this Order, the Dows' appeal is also dismissed in view of their failure to perfect the appeal by filing a brief.

⁴ Construction Permit No. CPPR-127, 39 Fed. Reg. 44,796-97 (Dec. 27, 1974).

⁵ LBP-86-36A, 24 NRC 575, 581 (1986), *aff'd*, ALAB-868, 25 NRC 912 (1987).

Board concluded that it knew of no remaining matters in controversy,⁶ and on July 13, 1988, the Board dismissed both proceedings.⁷

At TU's request, on November 18, 1988, the NRC Staff granted construction permit extensions for both Units 1 and 2.⁸ The Staff found good cause for the construction delays at both units. As to Unit 1, the "good cause" stemmed from TU's expanded program to reinspect the design and construction of both units. The good cause for the delay at Unit 2 was TU's remedial efforts since mid-1985 at Unit 1, a program that limited the resources directed to Unit 2. The good-cause justification for Unit 2 also included consideration of the Licensee's intention to suspend the construction at Unit 2 for approximately 1 year to allow time for a review of Unit 2. This review would utilize the results gleaned from the reinspection and corrective program at Unit 1, to identify possible modifications that might be required for Unit 2. These extensions were not challenged by anyone, including the parties now before us. The NRC issued an operating license for Unit 1, initially limited to low-power operation, on February 8, 1990, and subsequently permitted full-power operation under the license on April 17, 1990.⁹

Pursuant to 10 C.F.R. § 50.55(b), TU filed the construction extension request that is the subject of this proceeding by letter dated February 3, 1992, as supplemented on March 16, 1992. Although TU estimated that it would complete construction in December 1992, TU sought an extension of the construction completion date from August 1, 1992, to August 1, 1995, in order to provide adequate time for construction and a contingency period for any unanticipated delays.¹⁰ As the good-cause justification, TU asserted that the completion of construction and startup at Unit 1 required more time than had been anticipated, thereby resulting in an extended suspension of intensive construction activities at Unit 2.¹¹ Based upon its determination that good cause had been shown and that no significant hazards considerations were involved, the NRC Staff on July 28, 1992, granted the construction permit amendment.¹²

Two joint petitions to intervene and for a hearing were filed in this proceeding. B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan filed their joint petition on July 27, 1992. These Petitioners filed a Supplement with the following contention on October 5, 1992:

⁶ LBP-88-18A, 28 NRC 101, 102 (1988).

⁷ LBP-88-18B, 28 NRC 103, 104 (1988).

⁸ Order Extending Latest Construction Completion Date, 53 Fed. Reg. 47,888 (Nov. 28, 1988).

⁹ See 55 Fed. Reg. 5525 (Feb. 15, 1990); 55 Fed. Reg. 17,329 (Apr. 24, 1990).

¹⁰ Letter from W.J. Cahill, Jr., to NRC at 2 (Feb. 3, 1992).

¹¹ *Id.* at 1.

¹² Order Extending Construction Completion Date, 57 Fed. Reg. 34,323 (Aug. 4, 1992). The Staff earlier had published a notice regarding its environmental review. Environmental Assessment and Finding of No Significant Impact, 57 Fed. Reg. 28,885 (June 29, 1992).

The delay of construction of Unit 2 was caused by Applicant's intentional conduct, which had no valid purpose and was the result of corporate policies which have not been discarded or repudiated by the Applicant.

TU and the Staff argued that Messrs. Macktal and Hasan did not meet the requirements for standing. TU and the Staff also opposed the petition on the ground that the Petitioners had failed to submit an admissible contention. In LBP-92-37, the Board ruled that Messrs. Macktal and Hasan had failed to demonstrate sufficient interest for standing. 36 NRC at 374-75. The Board also concurred with Staff and the Licensee that, though the Orrs had demonstrated standing, the Petitioners had not submitted a viable contention. Accordingly, the Board denied the petition. 36 NRC at 384.

R. Micky Dow and Sandra Long Dow, "dba" the Disposable Workers of Comanche Peak Steam Electric Station, filed the second joint petition on July 28, 1992. The Board denied the Dows' intervention petition on the ground that the Dows lacked the requisite interest for standing. *Id.* at 389-90.

B. Irene and D.I. Orr timely filed a notice of appeal and supporting brief challenging the Licensing Board's ruling that they failed to submit a viable contention.¹³ On appeal, the Orrs argue that the Board misapplied the requirements for contentions in construction permit extension proceedings.¹⁴ The Staff and the Licensee filed replies opposing the appeal on January 18, 1993. The Dows have also appealed, as described more fully in section II of this Order.

Based in part upon a determination that the facility has been substantially completed, the NRC Staff issued an operating license for CPSES Unit 2 on February 2, 1993.¹⁵ The issuance of this license authorized fuel loading and the operation of Unit 2 at up to 5% of rated power. In our order of March 5, 1993 (unpublished), we directed the parties to the appeals to show cause, given the status of construction, why the Commission should not: (1) dismiss the proceeding and the pending appeals as moot; (2) vacate the Licensing Board's order in accordance with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); and (3) deny any further extension as unnecessary, thereby treating the construction permit as having expired as of the date of a Commission order dismissing the proceeding as moot. The Licensee replied on March 9, 1993, and Staff and the appellants followed with their replies on March 12, 1993.

¹³ Orrs' Notice of Appeal, December 30, 1992; Orrs' Appeal Brief, filed January 8, 1993. By order dated December 31, 1992 (unpublished), the Orrs were granted an extension until January 8, 1993, to file their brief.

¹⁴ Orrs' Appeal Brief at 4-6.

¹⁵ *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), Facility Operating License No. NPF-88, 58 Fed. Reg. 7822 (Feb. 9, 1993).

II. DISMISSAL OF THE DOW'S APPEAL

Before addressing the mootness question, we consider whether the Dows' appeal should be dismissed for failure to file a brief in support of their appeal, as required by 10 C.F.R. § 2.714a. The Dows' notice of appeal and supporting brief were originally due on December 31, 1992. On January 7, 1993, the Dows filed a late notice of appeal with a motion for an extension of time to file a brief. Pursuant to a January 19, 1993 order, the Commission's Secretary granted the Dows their requested extension of time — until January 22, 1993 — in which to file their appellate brief. However, they have never filed a brief and, thus, their appeal has never been perfected.

Commission appellate practice has long stressed the necessity of a brief.¹⁶ A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result "is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below."¹⁷ Accordingly, the appeal filed by R. Micky Dow and Sandra Long Dow, "dba" Disposable Workers of Comanche Peak Steam Electric Station, is dismissed.¹⁸

III. THE PARTIES' POSITIONS ON MOOTNESS

A. Licensee

TU submits that since January 30, 1993, the "design, construction, and pre-operational testing of CPSES Unit 2" has been substantially completed.¹⁹ TU argues that upon the issuance of the operating license for Unit 2, the facility's construction permit converted to the operating license, pursuant to 10 C.F.R. §§ 50.23 and 50.56.²⁰ This conversion, TU maintains, constructively terminated Unit 2's construction permit as of February 2, 1993, the date of the license's issuance. Thus, TU stresses that the appeals before the Commission are moot because a construction permit extension is no longer needed and, given the conversion, is no longer even a relevant issue.²¹ TU concludes that the appeals

¹⁶ See, e.g., *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-92-3, 35 NRC 63, 66 (1992).

¹⁷ *Id.* at 67.

¹⁸ See *Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4)*, CLI-91-5, 33 NRC 238, 240-41 (1991). In response to our March 5, 1993 order, R. Micky Dow presented arguments against a finding of mootness. In view of the Dows' dismissal, we need not consider Mr. Dow's arguments against finding the proceeding moot. Nonetheless, we believe that the merits of his arguments are addressed in our analysis.

¹⁹ On January 30, 1993, TU informed the Staff that CPSES Unit 2 was ready for fuel load and operation. Response of TU Electric to the Commission's Order Dated March 5, 1993, at 13.

²⁰ *Id.* at 8-9.

²¹ *Id.* at 9.

of the Licensing Board's December 15, 1992 decision should be dismissed as moot, that the Commission should vacate the Licensing Board's decision in accordance with *Munsingwear*, and that the Commission should find that the construction permit for Unit 2 expired as of February 2, 1993.

B. NRC Staff

The NRC Staff asserts many of the same arguments as the Licensee. The Staff claims that the construction permit amendment is moot because there no longer exists a construction permit, the permit having been converted to an operating license on February 2, 1993.²² The Staff maintains that the appeals must be dismissed as moot because the Commission simply cannot grant the relief sought by the Petitioners — the denial of the construction permit extension request.²³ The Staff also argues that when a proceeding becomes moot pending appeal, the Commission should vacate the unreviewed decision below, i.e., LBP-92-37, in accordance with *Munsingwear*.²⁴

C. Petitioners

B. Irene and D.I. Orr make several arguments against a finding that the proceeding is moot. The Orrs assert that the Commission should not have allowed TU to continue construction of Unit 2 without first granting them a hearing on the construction permit amendment.²⁵ The Orrs further claim that the Commission cannot issue an operating license until their challenge of TU's asserted "good cause" for the construction permit extension has been adjudicated.²⁶ More specifically, the Orrs argue that TU's ability to have their construction permit converted to an operating license is dependent upon whether TU showed good cause for the construction permit extension and that, consequently, the challenge to TU's asserted "good cause" is not a moot issue.²⁷

²² NRC Staff Response to the Commission's Order to Show Cause Why the Proceeding Should Not Be Dismissed as Moot, March 12, 1993, at 5.

²³ *Id.*

²⁴ *Id.* at 6.

²⁵ Petitioners' Response to the Commission's Order Dated March 5, 1993, at 4-6.

²⁶ *Id.* at 1-4.

²⁷ *Id.* at 8-10.

IV. MOOTNESS ANALYSIS

The mootness doctrine derives from the "case" or "controversy" requirement of article III of the Constitution.²⁸ Generally, a case will be moot when the issues are no longer "live," or the parties lack a cognizable interest in the outcome.²⁹ Unless there is a substantial controversy "admitting of specific relief through a decree of a conclusive character," a case is moot.³⁰ Accordingly, a test for mootness is "whether the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation)."³¹ The mootness doctrine applies to all stages of review, not merely to the time when a petition is filed.³² Consequently, when effective relief cannot be granted because of subsequent events, an appeal is dismissed as moot.³³

In response to our order to show cause, the Licensee and the Staff maintain that this proceeding is moot, primarily on the basis that the construction permit was "converted" into an operating license on February 2, 1993. Although we agree with the Licensee and the Staff that the proceeding is moot, we do not rest our analysis on their arguments regarding conversion of the permit. Rather, the Licensee's substantial completion of construction, lawfully undertaken during the pendency of Petitioners' challenge to the extension request, has rendered moot any controversy over further extension of the construction completion date in the permit.

Our determination that this construction permit amendment proceeding is moot derives from an understanding of the applicable provisions of the Atomic Energy Act (AEA), the Commission's regulations, and the Administrative Procedure Act (APA). With respect to construction permits, section 185 of the AEA, 42 U.S.C. § 2235, provides in pertinent part:

²⁸ The Commission is not strictly bound by the "case or controversy" requirement, but generally follows the doctrine absent the most compelling reasons. See, e.g., *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

²⁹ *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Murphy v. Hunt*, 455 U.S. 478, 481 (1982).

³⁰ *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937)).

³¹ *Air Line Pilots Association Int'l v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990) (citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

³² See *Preiser v. Newkirk*, 422 U.S. at 401; *Roe v. Wade*, 410 U.S. 113, 125 (1973).

³³ See, e.g., *Westmoreland v. National Transportation Safety Board*, 833 F.2d 1461, 1462 (11th Cir. 1987); *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990) ("[a] case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than speculative chance of affecting them in the future"). See also *Fair v. EPA*, 795 F.2d 851, 854-55 (9th Cir. 1986) (sewer assessment district residents' challenge of EPA's approval of construction grant made moot by completed construction of sewer project).

The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.³⁴

The clear implication of the language is that if construction *has* been completed prior to expiration of the permit, then expiration will not occur. Rather, the permit will remain in force to be converted to an operating license following the necessary findings set out in the remainder of section 185. Thus, section 185 establishes that a construction permit will not expire and no rights under the permit will be forfeited *unless* two circumstances are present: (1) the facility is not completed, *and* (2) the latest date for completion has passed. If construction is complete, no further extension of the completion date is required. Under such circumstances, the permit will not expire, and by clear implication the permit holder retains its rights under the permit.³⁵

TU did not complete construction of Unit 2 by August 2, 1992, the completion date specified in the construction permit prior to the latest request for an extension. Although the Staff found good cause for further extension on July 28, 1992, the Orrs contend that in light of their challenge to TU's application, TU should be required to "demonstrate that it did not forfeit its right to construct and, as such, its right to obtain an operating license for CPSES Unit 2."³⁶ They also claim that the Commission should have prohibited TU from continuing construction on Unit 2, once they filed a timely request for hearing.³⁷

The Orrs' arguments overlook, however, the applicability of the "timely renewal" doctrine in section 9(b) of the APA, 5 U.S.C. § 558(c), to TU's application for an extension of the completion date under the construction permit. This doctrine is adopted in NRC regulations at 10 C.F.R. § 2.109. Generally, if a licensee files an application for renewal or for a new license for

³⁴ As we noted in an earlier decision concerning an extension of the completion date for CPSES Unit 1, the reason for requiring a specification of the earliest and latest completion dates for construction of a facility had nothing to do with the safe construction of the facility but was based on concerns over the allocation of scarce fuel at the time the AEA was enacted in 1954. Although the requirement for a termination date has remained in the statute, the policy reasons underlying that requirement have long ceased to exist. See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 117-18 (1986).

³⁵ 42 U.S.C. § 2235. By way of contrast, in the unusual circumstance in which the permit holder allows the completion date to pass without making a prior request for a further extension, the construction permit does not automatically expire, though the permit holder loses its right to continue construction pending further Commission action. See *Comanche Peak*, CLI-86-4, 23 NRC at 120 n.5, *aff'd sub nom. Citizens Association for Sound Energy v. NRC*, 821 F.2d 725 (D.C. Cir. 1987). Commission regulations provide that the "substantial completion" of a facility satisfies the AEA's requirements regarding completion of the facility. See 10 C.F.R. §§ 50.56 & 50.57(a)(1) (1993) ("Pursuant to § 50.56, an operating license may be issued . . . upon finding that . . . [c]onstruction of the facility has been substantially completed . . .").

³⁶ Petitioners' Response to the Commission's Order Dated March 5, 1993, at 2.

³⁷ *Id.* at 4-6. The Orrs did not raise their objections to continued construction at the time that they filed their petition in July 1992; rather, they assert them for the first time in response to our March 5 order to show cause.

an activity previously authorized at least 30 days prior to the expiration of the existing license, the existing license "will not be deemed to have expired until the application has been finally determined."³⁸ In the context of a construction permit, the filing of a timely request for an extension of the completion date maintains the construction permit in force by operation of law and, accordingly, the Licensee may lawfully continue construction activities pending a final determination of its application.³⁹

On February 3, 1992, well before 30 days prior to the August 2, 1992 completion date, TU filed a timely application for an extension of the date specified in the construction permit for completion of Unit 2. Had no petition for intervention and for hearing been received on TU's application, the Staff's determination that good cause had been shown and its concomitant issuance of the order extending the completion date for Unit 2 would have ended the matter. Indeed, the timely renewal doctrine would not have even come into play. However, to the extent that Petitioners' challenge to the application for extension left a final determination of the validity of the permit extension an open question pending any necessary hearing, the construction permit remained in force by virtue of both TU's timely application for an amendment to extend the completion date and the Staff's issuance of the order extending the completion date.⁴⁰ Accordingly, TU did not forfeit its rights under the construction permit and lawfully could continue construction of Unit 2.

The Orrs' argument that TU improperly continued to construct Unit 2 is plainly wrong. Their objection to Staff's issuance of the extension of the permit prior to hearing upon a finding of "no significant hazards consideration" is inapposite. As we held in an earlier case, "[a] finding that the Staff was incorrect in its decision regarding this procedural matter would have no effect

³⁸ 10 C.F.R. § 2.109(e) (1993). A construction permit is a "license" for these purposes. See AEA § 185, 42 U.S.C. § 2235 ("[f]or all other purposes of this Act, a construction permit is deemed to be a 'license'"); see also 10 C.F.R. § 2.4.

³⁹ See *Public Service Co. of New Hampshire (Seabrook Station, Unit 2)*, CLI-84-6, 19 NRC 975, 977 (1984). *Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2)*, CLI-82-29, 16 NRC 1221, 1230 (1982) (hereinafter *WPPSS*). Our interpretation is consistent with the application of the APA's timely renewal doctrine to permits and licenses issued by other federal agencies. See, e.g., *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 213-14 (D.C. Cir. 1988) (continuance of pollution discharge permits); *Committee for Open Media v. FCC*, 543 F.2d 861, 867-68 (D.C. Cir. 1976) (continuance of broadcast license).

⁴⁰ See *supra* note 39. This case stands in marked contrast to the circumstances presented in 1986 when TU allowed the construction completion date for Unit 1 to pass without seeking an extension of the construction permit. In those circumstances, the timely renewal doctrine did not apply, but the court of appeals noted that a timely application automatically would have continued the permit in force pending the outcome of the proceeding. *Citizens Association for Sound Energy v. NRC*, 821 F.2d 725, 731 (D.C. Cir. 1988). Even in *Brooks v. Atomic Energy Commission*, 476 F.2d 924, 925 (D.C. Cir. 1973), on which Petitioners heavily rely, the court declined to order cessation of construction activities pending a hearing on extension of the permit, though the court did not address the applicability of the timely renewal doctrine.

on the continuing substantive validity of the [Licensee's] construction permit pending any final agency action on the merits of the extension request."⁴¹

The Petitioners argue that because they have challenged the underlying validity of the construction permit amendment granted by the Staff in July 1992, it would be an abuse of discretion for the Commission to dismiss this case as moot.⁴² The Orrs thus demand the right to dispute the validity of Staff's finding of "good cause" for TU's delay in completion of Unit 2. In support of their claim, the Orrs refer to *Brooks v. AEC*, 476 F.2d at 928, for its holding that "[t]he continuing validity of the amendment of the construction permit is made subject to the outcome of a hearing on this issue."⁴³

If there existed a need for the amendment granted by Staff, the "continuing validity" of Staff's "good-cause" determination would remain a litigable issue. However, unlike in *Brooks*, the continued validity of the construction permit amendment granted by Staff has become a moot issue. Contrary to the Petitioners' arguments that they are guaranteed a right to a hearing under section 189(a) of the AEA,⁴⁴ the Petitioners have no absolute entitlement to a hearing when a case has become moot, just as there is no statutory right to a hearing where petitioners lack standing or have failed to submit a viable contention.

On January 30, 1993, TU informed the Staff that TU had "substantially completed the design, construction, and pre-operational testing of CPSES Unit 2" and that Unit 2 was ready for fuel load and operation.⁴⁵ The Staff has found that the construction of CPSES Unit 2 is substantially complete.⁴⁶ Under section 185 of the AEA, a construction permit requires an extension only if construction is not complete by the time the permit expires. See 42 U.S.C. § 2235. Here, however, construction was substantially completed before any expiration of the permit. Therefore, during the time that TU continued construction activity, the construction permit did not expire and TU retained all rights under it, given the effect of the timely renewal doctrine under the APA and our regulations. Now that the facility is substantially completed, the Licensee has satisfied the condition that would otherwise cause the construction permit to expire. Under section 185, no further need exists for an extension of the completion date under the construction permit, and TU retains full rights to convert its construction permit, as previously amended, into an operating license in accordance with section 185 and the Commission's regulations.

⁴¹ WPPSS, CLI-82-29, 16 NRC at 1230. Even if the Staff had *denied* TU's application, the permit would have remained in effect pending the outcome of any hearing on that denial.

⁴² Petitioners' Response to the Commission's Order Dated March 5, 1993, at 7.

⁴³ Petitioners' Response at 6.

⁴⁴ *Id.* at 3-4, 10.

⁴⁵ Response of TU Electric to the Commission's Order dated March 5, 1993, at 5-6 (citing Letter to NRC from William Cahill, Jr., Group Vice President (Jan. 30, 1993)).

⁴⁶ NRC Staff Response to the Commission's Order to Show Cause Why the Proceeding Should Not Be Dismissed as Moot at 5.

The construction status of Unit 2, therefore, renders this proceeding moot. Because Unit 2 has been substantially completed, TU no longer requires a construction permit extension for CPSES Unit 2 to prevent the permit from expiring. Consequently, the relief that the intervenors seek — a denial of the construction permit extension — would not make a difference to their interests. The *only* question litigable in the construction permit amendment proceeding — whether TU had demonstrated “good cause” for a construction permit extension for Unit 2 — is no longer of legal interest now that TU lawfully completed construction under the permit and requires no further extension of the expiration date.

This is not a case, as the Orrs imply, where the Commission simply has “dispensed” with a hearing because the Staff has made a “no significant hazards consideration” finding.⁴⁷ The Petitioners’ appeal of the denial of their intervention petition would not be moot if the construction permit extension otherwise remained a “live” issue. Rather, the proceeding has become moot because a *supervening event* — the Licensee’s substantial completion of Unit 2’s construction — has obviated the need for a further extension of the completion date under the construction permit. Thus, the only matter that could be challenged in the proceeding — TU’s asserted “good cause” for an extension — became moot.⁴⁸ No effective relief can be granted the Petitioners even if they were to prevail on their claim that further extension of the permit should be denied, because no further extension is required.

The Petitioners argue that their underlying challenge to the permit extension prevents further action by the Commission to grant TU an operating license for Unit 2. Petitioners’ Response at 8-10. Proceedings on construction permit extensions are, however, limited in scope and are not an avenue to challenge a pending operating license.⁴⁹ The Orrs have not previously sought intervention in the operating license proceedings for CPSES Unit 1 or Unit 2. They cannot now transform their challenge to a now-unnecessary extension of the construction completion date into an attack on the legitimacy of issuing an operating license.⁵⁰ Instead, they must either file a petition for late intervention and a motion to reopen the record of the operating license proceeding *before* issuance of a full-

⁴⁷ See Petitioners’ Response to the Commission’s Order Dated March 5, 1993, at 5.

⁴⁸ Even if we had summarily reversed the Licensing Board within days of receiving the Orrs’ brief and ordered admission of their contention or if the Licensing Board itself had found the contention admissible, it is doubtful that the proceeding would have progressed beyond pretrial discovery and motions before subsequent events mooted the proceeding.

⁴⁹ See *Citizens Ass’n for Sound Energy*, 821 F.2d at 729; WPPSS, 16 NRC at 1227-29.

⁵⁰ Cf. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-68 (1991) (petitioner denied standing where alleged injury would not abate if challenged amendment were denied, and petitioner had failed to challenge separate amendment more directly causing injury).

power license or file a petition under 10 C.F.R. §2.206 after issuance of a full-power license.⁵¹

In addition, this case does not fall within the exception to the mootness doctrine for those disputes “capable of repetition, yet evading review.”⁵² The principle applies only to cases in which both the challenged action was in its duration too short to be litigated, *and* there is a reasonable expectation that the same complaining party will be subject to the same action again.⁵³ There is no “reasonable expectation” that the controversy over a construction permit extension for Unit 2 will recur because construction has been substantially completed and, thus, no further consideration of an extension of the completion date under the construction permit is necessary.

When prior to the end of the appellate process, the proceeding becomes moot through happenstance, we normally vacate the decision below.⁵⁴ Such action is appropriate in the circumstances before us.

V. ORDER

For the reasons stated in this decision, we hereby order that:

1. The appeal filed by R. Micky Dow and Sandra Long Dow, “*dba*” the Disposable Workers of Comanche Peak Steam Electric Station, is *dismissed* both as moot and for failure to perfect the appeal.
2. The appeal filed by B. Irene and D.I. Orr is *dismissed* as moot.
3. The Licensing Board’s decision, LBP-92-37, 37 NRC 370 (1992), is *vacated*, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).
4. The proceeding is *terminated*.

⁵¹ See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 160-62 (Mar. 9, 1993); *id.*, CLI-92-1, 35 NRC 1, 6 (1992).

⁵² *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911).

⁵³ *Securities & Exchange Commission v. Sloan*, 436 U.S. 103, 109 (1978). The Orrs submit that the reasoning in *Sholly v. NRC*, 651 F.2d 780, 787 (D.C. Cir. 1980), *vacated and remanded*, 459 U.S. 1194, *vacated and remanded to the NRC as moot*, 706 F.2d 1229 (D.C. Cir. 1983), prevents this case from being moot. *Sholly* never provided that petitioners are entitled to a hearing when an issue is no longer “live.” Indeed, the court would never have engaged in an extensive mootness analysis had such been its reasoning. In *Sholly*, the proceeding was not moot because the two challenged Commission actions were found “capable of repetition, yet evading review.” 651 F.2d at 785-86. The court, however, stressed that the “decision to maintain the appeal, in the interest of sound judicial administration, is dependent on a prediction of a recurrence” of essentially the same legal dispute. *Id.* at 786.

⁵⁴ See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950); *A.L. Meckling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961); *Fewell Geotechnical Engineering, Ltd.* (Thomas E. Murray, Radiographer), CLI-92-5, 35 NRC 83, 84 (1992); *Consumers Power Co.* (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50, 51 (1982).

IT IS SO ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

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

ONCOLOGY SERVICES CORPORATION

March 26, 1993

In response to an NRC Staff motion for a 120-day delay in conducting a license suspension proceeding, the Licensing Board orders discovery stayed for the requested period.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

In determining whether to delay the conduct of an enforcement hearing pursuant to 10 C.F.R. § 2.202(c)(2)(ii), the appropriate focus for the required "good cause" determination is the guidelines set forth by the Supreme Court in *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency*, 461 U.S. 555 (1983). As described by the Court, this test "involves a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 564.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The first two delay factors — length of the delay and the reason for the delay — are closely related. As the Court pointed out in *\$8,850*, short delays need less justification than long delays. *See id.* at 565.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The issue of “probable cause” is a relevant factor in considering a licensee’s assertion under 10 C.F.R. § 2.202(c)(2)(i) that there is not sufficient evidence to support the immediate effectiveness of a Staff enforcement order. *See* 57 Fed. Reg. 20,194, 20,196 (1992). Clearly, however, in determining whether there are adequate grounds for regulatory action, a Licensing Board is not called upon to assess a licensee’s potential criminal culpability relating to that action. By the same token, the Board’s responsibility under section 2.202(c)(2)(ii) to determine whether a delay in an enforcement proceeding is appropriate does not carry with it the responsibility to render an independent judgment about the “probable cause” for any criminal proceeding put forth as a basis for that delay. Thus, section 2.202(c)(2)(ii) does not sanction such a Board “probable cause” evaluation.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

Relative to the third delay factor — the licensee’s assertion of its right to a hearing — notwithstanding an earlier failure to challenge the basis for the immediate effectiveness of a Staff suspension order, a licensee’s vigorous protest about any delay in a proceeding puts this element on the licensee’s side of the balance.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The final component of the balancing process — injury to the licensee — can be defined to encompass not only injury to the licensee, but harm to others that it asserts will be affected by the delay.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

A Licensing Board must heed the Commission’s admonition to monitor any delay in an enforcement proceeding to ensure that “good cause” for the delay continues to exist. *See* 57 Fed. Reg. at 20,197. This requirement is a recognition that, from the time an order is first entered granting an enforcement hearing delay request, the balance then in favor of delay begins an inexorable reversal

until, at some point, the balance will tilt in favor of going forward with the administrative hearing. It is the Board's duty to ascertain, as precisely as it can, when the balance swings in favor of going forward with the proceeding.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The Commission's statement of considerations regarding the adoption of 10 C.F.R. § 2.202(c)(2)(ii) does not suggest that any distinction between state and federal criminal proceedings is relevant in terms of a "good cause" determination to delay an enforcement hearing. *See* 57 Fed. Reg. at 20,197.

**MEMORANDUM AND ORDER
(Granting in Part NRC Staff Motion to
Delay Proceeding; Requiring Submission of
Staff Status Report and Joint Prehearing Report)**

This proceeding concerns licensee Oncology Services Corporation's (OSC) request for an adjudicatory hearing to contest the NRC Staff's January 20, 1993 order suspending OSC's 10 C.F.R. Part 30 byproduct materials license. With that order, the Staff discontinued OSC's authorization under the license to use sealed-source iridium-192 for human brachytherapy treatments at specified OSC facilities in Pennsylvania. Pending with the Board is an NRC Staff motion, filed pursuant to 10 C.F.R. § 2.202(c)(2)(ii), requesting that we delay the conduct of this proceeding for an initial period of 120 days. The Staff asserts that this delay is needed so as not to prejudice ongoing federal and state investigations regarding the propriety of OSC activities under its license. OSC opposes the Staff's delay request.

For the reasons detailed herein, we grant in part the Staff's delay motion in that we stay discovery by the parties. We direct, however, that counsel for OSC and the Staff prepare a joint prehearing report that details certain information concerning the legal and factual issues the parties intend to pursue in this proceeding. In addition, we provide guidelines for a separate Staff filing regarding the status of the ongoing investigations. We also establish a procedure for requesting an extension of the 120-day delay period, if the Staff finds it necessary to do so.

I. BACKGROUND

The catalyst for this proceeding is the Staff's January 20 immediately effective order suspending OSC's authorization to provide brachytherapy treatments at the Pennsylvania cancer treatment facilities specified in its license.¹ That order details several grounds purportedly supporting the suspension action. The Staff first cites a November 16, 1992 incident involving the treatment of an elderly nursing home patient at OSC's Indiana Regional Cancer Center (IRCC), located in Indiana, Pennsylvania. As part of the patient's treatment, IRCC personnel used a high dose rate (HDR) afterloader to insert iridium-192 sealed sources into five catheters in the patient's abdomen. According to the Staff's allegations,² during this process the wire connecting one sealed source to the afterloader broke. When the patient was returned to the nursing home, unbeknownst to IRCC personnel the sealed source remained in one of the catheters in her body. The sealed source stayed there for some ninety hours until the catheter containing it was dislodged. Nursing home personnel discarded this catheter, with the sealed source inside, as medical waste. The patient, who reportedly received more than one million rads to the wall of the bowels, died on November 21, 1992.

The sealed source was not discovered until nearly a week later when it triggered radiation monitors at a waste disposal company processing the nursing home's refuse. The disposal company was able to trace the waste material containing the source back to the nursing home, which promptly informed OSC. Shortly thereafter, OSC notified the NRC about the misplaced sealed source and took steps to retrieve the material.

Besides this purported misadministration, the Staff also bases its suspension order upon information gathered during its December 1992 inspections to review the Licensee's activities regarding the IRCC incident.³ The Staff alleges that during its inquiry it found a number of deficiencies in the manner in which OSC personnel conducted its licensed activities. These included a corporate management breakdown resulting in, among other things, inadequate personnel training in regulatory requirements and radiation safety protocols, and insufficient corporate radiation safety officer (RSO) oversight of and responsibility for activities at OSC's satellite facilities. As a result, while acknowledging that its investigation of OSC's activities is ongoing, in its January 20 order the Staff

¹ See 58 Fed. Reg. 6825 (1993). Brachytherapy is a cancer treatment procedure in which a radioactive source is placed near or in contact with a tumor. See *Loss of an Iridium-192 Source and Therapy Misadministration at Indiana Regional Cancer Center, Indiana, Pennsylvania, on November 16, 1992*, NUREG-1480, app. C, at C-1 (1993) [hereinafter NUREG-1480]. The treatment involves the use of either high dose rate (HDR) or low dose rate (LDR) sources. See *id.*

² See 58 Fed. Reg. at 6825-26.

³ See *id.* at 6826.

concluded that the deficiencies outlined were sufficient to support suspending OSC's license, effective immediately, in as far as the license authorized performing brachytherapy treatments or any other activities. The Staff did so with the caveat that "[t]he Regional Administrator, Region I, may, in writing, relax or rescind this [suspension] order upon demonstration by the Licensee of good cause."⁴

By letter dated February 2, 1993, OSC made a timely request for a hearing to contest the January 20 suspension order.⁵ Thereafter, on February 8, 1993, OSC filed a timely answer to the Staff's order.⁶ In its answer, OSC asserts that the November 1992 incident regarding the nursing home patient was not attributable to the actions of OSC personnel, but rather to design deficiencies in the HDR afterloader and deficiencies in the afterloader manufacturer's training manual.⁷ OSC also contests the Staff's conclusions regarding other regulatory violations, including corporate management breakdown.⁸ OSC concludes that because there has been no showing by the Staff of any regulatory or license violation by OSC or its corporate RSO, the Staff's suspension order should be rescinded.⁹

This Board was established on February 10, 1993, to conduct a hearing regarding the Staff's suspension order.¹⁰ Pursuant to our suggestion, the Staff on February 23, 1993, filed a motion requesting a temporary delay in this proceeding for an initial period of 120 days.¹¹ The Staff argues in its motion that continuation of this proceeding would interfere with pending criminal investigations and possible criminal prosecutions. In support of this claim, the Staff submits affidavits from the Chief Deputy Attorney General, Western Regional Office for the Office of the Attorney General of the Commonwealth of Pennsylvania (Commonwealth); the Director of the NRC Office of Investigations (OI); and the Assistant Inspector General for Investigations of the NRC Office of the Inspector General (OIG). The Chief Deputy Attorney General asserts that permitting this proceeding to go forward, particularly the discovery process, would impair the Commonwealth's ongoing investigation into possible criminal culpability relating to the nursing home patient's death. He claims a particular concern about the identification of witnesses and the premature disclosure of the scope of the evidence being reviewed to reach a decision on any prosecution

⁴ *Id.* at 6827.

⁵ Letter from Marcy L. Colkitt to NRC Office of the Secretary, *et al.* (Feb. 2, 1993).

⁶ *See* Response of [OSC] to Order of NRC Dated January 20, 1993 Suspending By-product Material License 37-28540-01 (Feb. 8, 1993).

⁷ *See id.* at 10.

⁸ *See id.* at 12-17.

⁹ *See id.* at 20. Although the agency's regulations allow a licensee in its answer to contest the immediate effectiveness of a suspension order, *see* 10 C.F.R. § 2.202(c)(2)(i) (1993), OSC did not do so in this proceeding.

¹⁰ *See* 58 Fed. Reg. 9224 (1993).

¹¹ *See* NRC Staff Motion for Temporary Delay of Proceeding (Feb. 23, 1993) [hereinafter Staff Delay Motion].

relating to the IRCC incident.¹² In their affidavits, the OI Director and the OIG Assistant Inspector General raise similar concerns, stating that their respective offices have ongoing administrative investigations regarding some of the factual allegations underlying the Staff's suspension order, that these investigations could result in federal criminal charges, and that allowing this proceeding to go forward could impair their investigations.¹³ The Staff maintains that, in accordance with section 2.202(c)(2)(ii), these declarations are sufficient to establish the "overriding public interest" necessary to constitute "good cause" for a delay in this proceeding for an initial period of 120 days.

In a March 2 response, OSC declares that the Staff has failed to establish "good cause" for the requested delay.¹⁴ OSC first asserts that an "overriding patient need" supports going ahead immediately with an adjudication of the validity of the suspension order. As support for this position, OSC provides the affidavits of the physicians in charge of its Greater Pittsburgh Cancer Center (GPCC) and its Greater Harrisburg Cancer Center (GHCC). The doctors declare that because of a lack of alternative treatment facilities within the Pittsburgh and Harrisburg areas, patients with a critical need for HDR treatments will be harmed by the suspension.¹⁵ OSC maintains that the suspension is particularly unfair for those patients that use either the GPCC or the GHCC because neither facility has been found in violation of any regulatory requirements. OSC also declares that the allegations concerning ongoing criminal and regulatory investigations and potential criminal prosecutions contained in the affidavits accompanying the Staff's motion are too conclusory to support a delay in this proceeding. OSC asserts that the Staff has failed to establish how discovery in this administrative litigation will hamper any ongoing criminal investigations.

After reviewing the parties' filings, on March 5 we issued a memorandum and order directing that both OSC and the Staff provide details concerning the mechanics of the "good cause" process by which OSC can seek relaxation of the suspension order. Among the matters we asked the parties to address were the number of requests submitted and granted, the time needed to process each request, and the standards governing the Staff's determination on the requests.¹⁶ We also asked that they address the issue of the impact, if any, of this relaxation provision upon OSC's argument that an "overriding patient need" for HDR

¹² See *id.*, Declaration of Chief Deputy Attorney General Lawrence N. Claus, ¶¶ 9-10 [hereinafter Claus Declaration].

¹³ See *id.*, Affidavit of Ben B. Hayes at 2-3 [hereinafter Hayes Affidavit]; *id.*, Affidavit of Leo J. Norton at 2-3 [hereinafter Norton Affidavit].

¹⁴ See Response of [OSC] in Opposition to NRC Staff Motion for 120-day Delay of Proceedings (Mar. 2, 1993) [hereinafter OSC Delay Motion Response].

¹⁵ See *id.*, Verified Statement of Roger Tokars, M.D., at 2-3; Verified Statement of Abdurrahman Unal, M.D., at 2-3.

¹⁶ See Memorandum and Order (Requesting Additional Party Filings Addressing Issue of "Overriding Patient Need") (Mar. 5, 1993) (unpublished).

treatments at OSC facilities skews the "public interest" balance in favor of not delaying this proceeding.

In its response filed March 15, 1993, the Staff declares that the relaxation procedure provides an adequate mechanism for meeting any asserted patient needs.¹⁷ According to the Staff, the procedure's availability supports the conclusion that there is no overriding patient need for a prompt resolution of this proceeding that outweighs the government need to protect the ongoing investigations. In its March 15 submission, as supplemented on March 19, OSC asserts that the relaxation process is unduly expensive and time-consuming.¹⁸ In addition, OSC maintains that this exemption mechanism heightens the asserted deprivation of patient needs by creating uncertainty and concern about when and where patients can obtain necessary HDR treatments.

II. EXISTENCE OF "GOOD CAUSE" FOR DELAY

A. General Principles Governing Delay in Adjudicatory Proceedings

As both parties acknowledge, under 10 C.F.R. § 2.202(c)(2)(ii), we are to accede to a request to delay conducting an enforcement hearing only if we conclude that "good cause" exists for the delay, and then only for "such periods as are consistent with the due process rights of the licensee" In the statement of considerations accompanying the recent rule change that created this provision, the Commission provided the following guidance for interpreting this provision:

It is contemplated that, under the rule, the presiding officer will grant a delay only if there is an overriding public interest for the delay. A prime example would be the temporary need to halt the proceeding where continuation would interfere with [a] pending criminal investigation or jeopardize [a] prosecution. The rule also contemplates that the presiding officer will monitor any delay to ensure that good cause continues to exist for the delay. The rule, as adopted, allows for proper consideration to be given to the public interest as well as the interests of the persons affected by the immediately effective order.¹⁹

¹⁷ See NRC Staff Response to Memorandum and Order (Requesting Additional Party Filings Addressing Issue of "Overriding Patient Need") (Mar. 15, 1993) [hereinafter Staff "Overriding Patient Need" Response].

¹⁸ See Response of [OSC] to Memorandum and Order Requesting Additional Party Filings Addressing Issue of "Overriding Patient Need" (Mar. 15, 1993) [hereinafter OSC "Overriding Patient Need" Response]; Supplement to March 15, 1993 Response of [OSC] to Memorandum and Order Requesting Additional Party Filings Addressing Issue of "Overriding Patient Need" (Mar. 19, 1993) [hereinafter OSC "Overriding Patient Need" Supplement].

¹⁹ 57 Fed. Reg. 20,194, 20,197 (1992). See also 55 Fed. Reg. 27,645, 27,646-47 (1990) (proposed rule statement of considerations explains "[a]s an example of the kind of good cause warranting delay, there may be a need for further investigation by the Commission or the U.S. Department of Justice. In such instances, to allow the Commission to investigate further into the matter or the Department of Justice to undertake criminal investigation without prejudice to possible prosecution of any discovered crime, it may be necessary to hold the hearing on the immediately effective order in abeyance for a reasonable period of time.")

In implementing this general Commission guidance, the appropriate focus for the “good cause” determination is the guidelines set forth by the Supreme Court in *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency*.²⁰ The issue there was the propriety of a government request to delay a civil forfeiture proceeding for currency seized by customs agents pending completion of an investigation into a possible criminal enterprise involving the currency. In resolving the matter, the Court applied the four-part test developed in *Barker v. Wingo*,²¹ to decide when government delay abridges the right to a speedy trial. As described by the Court, this test “involves a weighing of four factors: length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”²²

B. Application of the Four-Part Test Governing Delay in Adjudicatory Proceedings

Looking to each of these factors, we note initially that the first two — length of the delay and the reason for the delay — are closely related. As the Court pointed out in *\$8,850*, short delays need less justification than long delays.²³ The four-month delay sought here is of moderate duration. Moreover, the Staff has made it apparent that this request may not be the last. As a consequence, the Staff must provide a reasonably compelling basis for the requested delay.

The reasons provided by the Staff, i.e., the ongoing state and federal investigations that could result in criminal proceedings, fulfill this criterion and are a significant factor weighing in favor of its delay request. As the Court noted in *\$8,850*, a contemporaneous civil adjudication “could substantially hamper” a criminal proceeding regarding the same general subject matter because it “might serve to estop later criminal proceedings and may provide improper opportunities for the [potential criminal defendant] to discover details of a contemplated or pending criminal prosecution.”²⁴ This latter possibility clearly is at the heart of the Staff’s delay request.

For its part, OSC asserts that the Staff’s reliance on the ongoing investigations and the possibility of criminal prosecutions fails to provide any compelling basis to justify the requested delay. According to OSC, the affidavits submitted in support of the Staff’s delay request lack sufficient specificity to establish the Staff’s claim that permitting this proceeding to go forward will impair any ongoing federal or state investigations or potential criminal prosecutions. OSC

²⁰ 461 U.S. 555 (1983).

²¹ 407 U.S. 514 (1972).

²² *\$8,850*, 461 U.S. at 564 (citing *Barker*, 407 U.S. at 530).

²³ *See id.* at 565.

²⁴ *Id.* at 567.

declares that the identical concern expressed by the Commonwealth, OI, and OIG about the discovery disclosure of the name, address, telephone number, and place of employment of every knowledgeable witness is meaningless because "the witnesses who were interviewed by the NRC [Incident Investigation Team (IIT)] are mostly employees or agents of OSC" to which OSC has access.²⁵ OSC also asserts that it is entitled to the transcribed witness statements taken by the agency's IIT members who investigated the IRCC incident and, accordingly, the Staff cannot deny OSC access to the transcripts by turning them over to other state or federal authorities conducting criminal or other investigations. Finally, OSC maintains that nothing put forth by the Staff, whether in the Commonwealth or agency affidavits or the statements by IIT members during a February 8, 1993 public Commission briefing about the IRCC incident, shows that there is any basis for a criminal proceeding against OSC or any of its employees.

Undoubtedly, as OSC asserts, the witnesses involved in any criminal investigation and prosecution relating to the IRCC incident are "mostly" OSC employees or agents and OSC knows who those employees/agents are. Yet, "mostly" is not "all." The Commonwealth, OI, and OIG affidavits do not specifically indicate that there are witnesses who are not OSC employees/agents. Nonetheless, it is evident from the February 8 briefing cited by OSC and the IIT report that was the subject of that meeting that there are several individuals who are not OSC employees or agents but who have relevant information concerning the IRCC incident and apparently have not been identified publicly up to this point.²⁶ Identification of these witnesses at this time as part of the discovery process in this proceeding is a legitimate concern for state and federal investigators. The same premature disclosure problem applies to the IIT witness interview transcripts. The Commonwealth, OI, and OIG, all of which assert that these interviews are relevant to its ongoing investigation, have a well-grounded concern that "the scope of the evidence being reviewed" not be revealed relative to any possible criminal proceedings.²⁷ This, in turn, provides a valid basis for precluding OSC from now obtaining those transcripts through discovery in this proceeding.

By also asserting that the existing record will not sustain criminal charges based upon state penal laws or violations of federal statutory and regulatory requirements, OSC asks us to make an independent assessment regarding the existence of "probable cause." Earlier in this proceeding, the issue of "probable cause" would have been a relevant factor in considering an OSC assertion

²⁵ OSC Delay Motion Response at 2.

²⁶ To assess the validity of OSC's arguments regarding the impact of the February briefing, we requested that the Staff provide us with a copy of the transcript of the briefing as well as a copy of NUREG-1480, the IIT report that is referred to in the transcript and was made publicly available on the day of the briefing. See Tr. 3-4. During the briefing, it was made clear that the presentation was not intended to present an assessment of the merits of the Staff's suspension order. See Tr. 4-5.

²⁷ Staff Delay Motion, Claus Declaration, ¶ 10; *id.*, Hayes Affidavit at 3; *see id.*, Norton Affidavit at 3.

under section 2.202(c)(2)(i) that there is not sufficient evidence to support the immediate effectiveness of the Staff's order.²⁸ Clearly, however, in determining whether there are adequate grounds for regulatory action, we are not called upon to assess a licensee's potential criminal culpability relating to that action. By the same token, our responsibility under section 2.202(c)(2)(ii) to determine whether a delay in this proceeding is appropriate does not carry with it the responsibility to render an independent judgment about the "probable cause" for any criminal proceeding put forth as a basis for that delay.²⁹ Thus, section 2.202(c)(2)(ii) does not sanction such a Board "probable cause" evaluation.

Relative to the third factor — OSC's assertion of its right — notwithstanding its earlier failure to challenge the basis for the immediate effectiveness of the Staff's suspension order,³⁰ OSC has vigorously protested about any delay in this proceeding. That puts this element on OSC's side of the balance.

OSC also relies heavily on the final component of the balancing process — injury to the defendant. In the context of this administrative proceeding, OSC defines that factor to encompass not only injury to itself, but harm to others that it asserts will be affected by the delay. To establish its injury, OSC makes some conclusory allegations about the "obvious prejudice [it] will suffer,"³¹ and about "the injury [it] has already suffered . . . [and] the cumulative harm [it] continues to suffer, in terms of professional reputation and financial harm."³² Yet, OSC's more detailed, and consequently its more compelling argument

²⁸ See 57 Fed. Reg. at 20,196.

²⁹ Even assuming such a "probable cause" finding is appropriate, OSC's interpretation of the "record" is not convincing in this regard. To counter what it characterizes as the "vague" assertions of wrongdoing in the Commonwealth, OI, and OIG affidavits, OSC relies upon various statements made by the IIT leader at the February 8 briefing. See OSC Delay Motion Response at 5-6. OSC maintains that, because of his access to the witness transcripts that the Staff now wishes to protect, his statements make it apparent there is no "probable cause" to support a criminal prosecution. According to OSC, this failing is highlighted by the IIT leader's statement that the OSC personnel in charge of the brachytherapy treatment had only half a minute to decide about an appropriate response relative to the IRCC incident. See *id.* at 5 (citing Tr. 61). OSC asserts that this statement is telling because its review of the case law has revealed no instance when a physician "has been" convicted, or even indicted, under such circumstances. *Id.* at 5. In addition, as proof that there is no valid basis for any state or federal prosecution, OSC directs our attention to statements by the IIT leader suggesting there is some confusion among staff members in NRC regional offices about the need for a survey using a portable radiation survey instrument following the termination of an HDR brachytherapy treatment. See *id.* at 5-6 (citing Tr. 59, 64).

Regarding OSC's argument that no physician has ever been subject to criminal liability in circumstances such as those outlined by the IIT, we simply observe that "has been" is not the same as "cannot be," which is the pertinent issue relative to any probable cause finding. And as to the purported regulatory "confusion," in terms of probable cause its significance is not readily apparent given the fact that, as also is indicated in the briefing transcript, it is the view of the NRC General Counsel's Office and the NRC headquarters staff in the Office of Nuclear Material Safety and Safeguards that such a survey is required. See Tr. 59. Thus, whether viewed separately or together, these purported exculpatory circumstances are not sufficient to establish a lack of probable cause relative to the IRCC incident or to raise a serious question about the legitimacy of the sworn assertions of the Commonwealth, OI, or OIG regarding the bases for their ongoing investigations and for possible state or federal criminal prosecutions.

³⁰ See *supra* note 9.

³¹ OSC Delay Motion Response at 9.

³² OSC "Overriding Patient Need" Supplement at 3.

concerning delay-related harm is directed to the purported “overriding patient need” for HDR treatments at its facilities.

According to OSC, HDR is the lifesaving treatment of choice for many cancer patients in the most critical condition.³³ In attempting to establish the scope of the harm to these patients, OSC centers on the need to provide HDR treatment at its GPCC and GHCC facilities. OSC declares that the NRC has conceded there have been no identified regulatory problems at either of these facilities.³⁴ OSC maintains, moreover, that there are no viable alternative treatment centers for those patients served by either facility. According to OSC, there is no alternative HDR center in Harrisburg while in the Pittsburgh metropolitan area, of the two other facilities that can administer HDR treatments, one has not performed any HDR procedures and the other has done only one.³⁵ OSC contrasts this with the seventy-five treatments administered at OSC’s GPCC facility since last September.

These claims, however, must be considered in light of the relaxation provision in the suspension order.³⁶ The Staff describes this provision as allowing OSC, on a case-by-case basis, to request a relaxation of the suspension order to administer HDR treatments. As depicted in an affidavit of the Regional Administrator of NRC Region I, the Staff’s judgment about whether the requisite “good cause” exists for a particular relaxation request is based upon its assessment of the ability of OSC Staff at GPCC and GHCC to perform HDR as a result of Staff telephone and onsite interviews about, and previous onsite observations of, OSC’s program, oversight, and procedures at those facilities.³⁷ The relaxation requests initially were to be only for patients not in a treatment plan at these facilities prior to the date of the suspension order; nonetheless, as a result of several OSC requests to treat new patients, the Staff will now consider such a request. OSC, however, must first inform the referring physician of the availability of other treatment facilities in the vicinity and the referring physician must determine, as a matter of medical judgment, that the patient should be treated at the GPCC or the GHCC. The Staff then will grant the relaxation request, provided it is satisfied there is adequate oversight through the physical presence of the facility’s medical director and medical physicist.³⁸

In his affidavit, the Regional Administrator also indicates that the Staff has processed seven requests involving twenty-three patients, at least six of whom

³³ See OSC Delay Motion Response at 3.

³⁴ See *id.* at 7-8.

³⁵ See *id.* at 3.

³⁶ See *supra* note 4 and accompanying text.

³⁷ See Staff “Overriding Patient Need” Response, Affidavit of Thomas T. Martin in Support of NRC Staff’s Response to the [Board’s] March 5, 1993 Memorandum and Order (Requesting Additional Party Filings Addressing Issue of “Overriding Patient Need”) at 12 [hereinafter *Martin Affidavit*].

³⁸ See *id.* at 12-13.

were new patients.³⁹ The Staff granted outright six requests involving twenty-two patients. The seventh request, submitted on February 10, 1993, was an application to treat a new patient at the GPCC. This request was granted with the condition that OSC inform the referring physician about the availability of other treatment facilities in the vicinity of the GPCC. According to the Regional Administrator, OSC later stated that it chose not to provide that notification to the referring physician and that the patient would be treated with external beam radiation (from a linear accelerator) rather than HDR.⁴⁰ The Regional Administrator also states that it has generally taken between one and two days for the Staff to act on OSC's relaxation requests.⁴¹ On this basis, the Staff concludes that the relaxation process provides an adequate mechanism for meeting patient needs for HDR treatment pending a final adjudication of the validity of its suspension order.

OSC acknowledges that since the suspension order was entered on January 20, it has received permission in six instances to provide HDR treatments to a total of twenty-one patients.⁴² OSC also asserts that the February 10 request described above was effectively denied because of the Staff's notification requirement.⁴³ OSC declares that the Staff's good cause determinations are essentially standardless, requiring OSC personnel and referring physicians to make expensive, time-consuming information submissions and to submit to invasive reviews of medical decisions that are beyond the Staff's regulatory purview.⁴⁴ OSC also declares that the Staff's response time to its relaxation requests, while initially short, has gradually lengthened to the point where it took nine days to respond to the February 10 request.⁴⁵ In addition, OSC notes that the Staff has yet to respond to its February 15, 1993 request to grant a general relaxation of the suspension order relative to the GPCC and GHCC facilities, other than to provide a lengthy request for additional information.⁴⁶ OSC concludes that the relaxation process heightens the injury being inflicted upon patients by the suspension because it creates uncertainty that improperly intrudes into a seriously ill patient's reasonable expectation in a regularity of treatment by his or her own physician at known facilities near home.⁴⁷

Based upon the materials submitted by the parties, we conclude that the relaxation process provides a mechanism that substantially alleviates OSC's

³⁹ See *id.* at 4.

⁴⁰ See *id.* at 10.

⁴¹ See *id.* at 13-14.

⁴² See OSC "Overriding Patient Need" Response at 4.

⁴³ See *id.*

⁴⁴ See *id.* at 6-8.

⁴⁵ See *id.* at 5-6.

⁴⁶ See *id.* at 4-6.

⁴⁷ See *id.* at 9-10.

asserted concern that an "overriding patient need" will be negatively impacted by any delay in a hearing on the Staff's suspension order. The Staff's case-by-case review of OSC's relaxation requests over the past sixty days evidences the development of governing standards that are tangible and rational. Indeed, in seeking to ensure that the IRCC incident is not repeated, the Staff has acted reasonably to ensure that at the GPCC and GHCC facilities OSC personnel control and execute the HDR process consistent with regulatory requirements.⁴⁸ While OSC seeks to make much of the time and economic burdens imposed by the Staff relative to its seven relaxation requests, based on the information before us we are unable to conclude that the Staff's actions have resulted in any undue treatment delays or economic hardship for OSC's patients.⁴⁹ Moreover, it is logical to infer that OSC's experience in preparing the seven requests and the Staff's efforts in reviewing the HDR program at the GPCC and GHCC relative to those requests has resulted in a learning curve that will reduce the time and expense involved in obtaining determinations on future relaxation requests. In particular, we expect this will be the case with the Staff's determination on OSC's pending February 15 request for a general relaxation of the suspension order for the GPCC and GHCC facilities.⁵⁰

⁴⁸ In this regard, OSC expresses a particular concern about Staff inquiries intended to ensure that those responsible for recommending that a patient undergo the HDR process at an OSC facility have fully considered the need for HDR, as opposed to LDR, treatments. *See id.* at 7. These Staff requests undoubtedly are a source of irritation to the medical personnel involved. Nonetheless, they are a legitimate component of the Staff's regulatory response to the IRCC incident.

⁴⁹ On the issue of the timeliness of the relaxation process, in all instances but one, the Staff's determination was provided within the time frame specified by OSC in its request. *See* Staff "Overriding Patient Need" Response, Martin Affidavit, exhs. 3-8, 11-19, 22-24. And as to that one — the February 10 request that was conditionally approved — although OSC asserts that there was some delay while alternative treatment arrangements were made, *see* OSC "Overriding Patient Need" Response at 6, it does not make any showing that the patient was harmed by the delay.

On the issue of expenses associated with the relaxation process, the only concrete measure we have been provided comes in an affidavit from OSC's outside counsel stating that OSC has legal bills in the range of \$10,000 relating to its dealings with the Staff of NRC Region I. *See id.*, attach. D at 1 (Verified Statement of Kerry A. Kearney). Counsel's efforts in this regard undoubtedly are reflected by the documents before us, which indicate that six of the seven requests were made by or with the assistance of outside counsel. *See* Staff "Overriding Patient Need" Response, Martin Affidavit, exhs. 5, 7, 11, 14, 16, 22. Left unanswered, however, are the questions why the submission of each relaxation request required the active involvement of, and costs associated with, outside counsel, *cf.* OSC "Overriding Patient Need" Response, attach. E at 1 (Verified Statement of Marcy L. Colkitt) (OSC corporate counsel declares that because of the expense involved, OSC is no longer using outside counsel for preparing relaxation requests), and how the legal expenses accrued by OSC are detrimental to the interests of its patients.

⁵⁰ In response to OSC's February 15 request, on March 5 the Staff asked that OSC provide substantial additional information. *See* Staff "Overriding Patient Need" Response, Martin Affidavit, exh. 21. According to OSC, the parties were scheduled to meet on March 23, 1993, to discuss the Staff's information request. *See* OSC "Overriding Patient Need" Supplement at 2-3. Further, in response to our inquiry, the Staff indicated that once it has a complete response to its March 5 information request, it will need approximately six weeks to make a determination on OSC's request. *See* NRC Staff Response to Order (Granting [OSC's] Request to Supplement Pleading and Requesting Information from the NRC Staff) (Mar. 19, 1993) at 3.

In light of our determination here, it seems obvious that it is in the best interests of both parties to cooperate in reaching a prompt resolution of this pending request. During the 120-day delay period, OSC's best hope of

(Continued)

Thus, despite OSC's protestations to the contrary, for the 120-day period now at issue, the relaxation process in the suspension order addresses the needs of potential brachytherapy patients by providing a viable mechanism for obtaining HDR treatments at OSC's GPCC or GHCC facilities. And, given this process, we do not perceive any compelling harm to the interests of OSC during this period.⁵¹

C. Conclusion

Taking a comprehensive measure of the four relevant factors, it is apparent that OSC's protest against any delay is an element that weighs in its favor. Yet, this alone is not a sufficient counterweight to the Staff's showing that, at present, there are concrete reasons to believe that allowing this adjudicatory proceeding to go forward could visit material harm upon the ongoing Commonwealth, OI, and OIG investigations and any subsequent federal or state criminal prosecutions. Nor has OSC made a persuasive offsetting demonstration that during the proposed 120-day delay period the legitimate interests of OSC or its patients will be significantly harmed. As a result, we conclude that a balancing of relevant factors establishes "good cause" for granting the Staff's request for a temporary delay in this proceeding, subject to the conditions set forth below.

III. FURTHER PROCEEDINGS BEFORE THE BOARD

Having determined that there is good cause for delaying this proceeding, we also must heed the Commission's admonition that we monitor any delay to ensure that good cause continues to exist.⁵² This requirement is a recognition that, from the time an order is first entered granting an enforcement hearing delay request, the balance then in favor of delay begins an inexorable reversal until, at some point, the balance will tilt in favor of going forward with the administrative hearing. It is the Board's duty to ascertain, as precisely as we can, when the balance swings in OSC's favor in this proceeding.

gaining relief from the suspension order, including any perceived burdens of the case-by-case relaxation process, is to respond quickly and completely to the Staff's March 5 information request. On the other hand, for any future Staff request to extend the delay period, the impact of the suspension order's strictures upon OSC and its potential patients, and any Staff measures to mitigate those impacts, will become increasingly weighty considerations.

⁵¹ Before us, OSC has not asserted that the 120-day delay will harm its ability to prepare an adequate challenge to the Staff's suspension order as a result of faded memories or unavailable witnesses or documents. Compare *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), ALJ-87-4, 25 NRC 865, 870-71 (1987). In fact, because the circumstances that are the locus of the Staff's suspension order are a little more than four months old, it is problematic whether, at this juncture, such a consideration would provide any significant support for OSC's position.

⁵² See 57 Fed. Reg. at 20,197.

To this end, we require that forty days from the date of this memorandum and order, the Staff is to provide us with a report, accompanied by supporting affidavits, detailing the status of the Commonwealth, OI, and OIG investigations and/or criminal prosecutions. In its report, Staff should indicate the status of any grand jury proceeding in the Commonwealth and when OI and OIG anticipate making a referral, if any, of their investigative findings to the Department of Justice for consideration of possible criminal prosecution. The Staff also should notify the Board immediately when it becomes aware of any criminal indictment or information filed against OSC or any of its employees or agents relative to the November 1992 IRCC incident or any of the other matters that are the basis of the Staff's January 20 suspension order.

Further, as an adjunct to our responsibility to monitor any delay comes the responsibility to minimize the effects of any delay. To this end, we grant the Staff's motion to delay this proceeding, but do so only as it encompasses discovery and, consequently, any portion of the adjudicatory process that can proceed only after discovery is completed. At this time, we do not see any harm to the ongoing investigative and prosecutorial processes in directing that within forty days of the date of this memorandum and order, the parties file a joint prehearing report discussing certain matters. In that report, based on the legal and factual allegations set forth as the justification for the Staff's suspension order, the parties should describe the issues to be litigated in this proceeding; indicate whether any of those issues, with or without discovery, are amenable to summary disposition; specify the amount of time the parties anticipate will be needed for discovery and an evidentiary hearing when this proceeding ultimately moves forward; and describe the status of any settlement negotiations between the parties.

The delay we afford corresponds to the Staff's request for an "initial" 120-day postponement period. To obtain a delay of this proceeding beyond that time, twenty days before the expiration of that period the Staff must file an additional request with the Board. In its motion, the Staff should indicate the specific period of additional delay it seeks and should state, with supporting affidavits and documentation, the specific reasons why "good cause" exists for the delay. We apprise the Staff now that as the delay period lengthens, the reasons it must provide in support of a delay request must be increasingly specific and detailed. OSC will have ten days within which to respond to a Staff request for additional delay.

Finally, as part of our responsibility to monitor any delay, at this early juncture we want to make clear to the Staff our concern about the potential "whipsaw" effect of separate federal and state proceedings upon OSC's right to a prompt hearing regarding the suspension order. Federal and state authorities have independent responsibility for pursuing investigations and criminal prosecutions

arising from the IRCC incident and related matters.³³ With this separate responsibility, however, comes separate investigative/prosecutorial processes with schedules that may not coincide. Indeed, this may already be the case here because neither OI nor OIG has finished its investigation so as to permit the crucial step of referring its findings to the Justice Department for a determination about whether to initiate federal criminal proceedings. The best way for the Staff to avoid any intimation that separate prosecutorial processes are being manipulated to deprive OSC of its hearing rights is to see that all reasonable steps are taken promptly to complete any agency investigations and to make any referrals to the Justice Department.

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

1. The February 23, 1993 motion of the Staff to delay this proceeding for a period of 120 days is *granted in part* in that all discovery in this proceeding is stayed up through and including *Wednesday, June 23, 1993*, provided, however, that if the Staff files a request for additional delay in accordance with ¶ 5 below, discovery will continue to be stayed pending further order of the Board.

2. The Staff should notify the Board immediately when it becomes aware that a state or federal criminal indictment or information has been filed against OSC or any of its employees or agents relative to the November 1992 IRCC incident or any of the other matters that form the basis for the Staff's January 20, 1993 suspension order.

3. On or before *Wednesday, May 5, 1993*, the Staff should file a report providing the following information:

A. The status of any Commonwealth criminal investigation or grand jury proceeding regarding the IRCC incident, including an estimate of how long Commonwealth officials believe it will take to complete any ongoing grand jury proceeding regarding that incident.

B. The status of any OI or OIG investigations relating to the matters set forth as the basis for the January 20, 1993 suspension order, including an estimate of (i) when OI and OIG anticipate their investigations will be completed and their investigative findings referred to the Department of Justice for consideration for possible criminal prosecution, or (ii) if a referral has been made, when the Justice Department will reach a determination relative to the referral.

³³ OSC has not challenged the Staff's reliance on the pendency of a state, as opposed to a federal, investigation as a basis for delaying this federal administrative proceeding. The Commission's statement of considerations regarding the recent adoption of section 2.202(c)(2)(ii) certainly does not suggest that any state/federal distinction is relevant in terms of a "good cause" determination. See *supra* note 19 and accompanying text. Nonetheless, even if it were, at present the pending OI and OIG investigations provide adequate support for the Staff's delay request.

4. On or before *Wednesday, May 5, 1993*, OSC and the Staff should file a joint prehearing report that contains the following information:

A. Relative to the various legal and factual assertions that form the basis for the Staff's January 20, 1993 order suspending OSC's 10 C.F.R. Part 30 license, a statement outlining the central issues for litigation in this proceeding. In the event the parties cannot agree on the wording or inclusion of any issue, the statement should set forth that issue separately with a notation identifying the sponsoring party.

B. A statement identifying which, if any, of the issues specified in accordance with ¶4.A each party believes is amenable to summary disposition and whether discovery will be needed prior to filing a dispositive motion on that issue.

C. A statement indicating how long the parties estimate they will need to conduct discovery on the issues specified in accordance with ¶4.A.

D. A statement indicating how long the parties estimate will be needed to conduct an evidentiary hearing on the issues specified in accordance with ¶4.A.

E. A statement describing the status of any settlement discussions between the parties.

5. A Staff request for an additional delay of any aspect of this proceeding beyond *Wednesday, June 23, 1993*, must be filed on or before *Thursday, June 3, 1993*. In its motion the Staff must describe in detail, with supporting affidavits and documentation, why "good cause" exists for the delay, including an exposition of the specific reasons why the Board's failure to grant the additional period of delay sought will prejudice any ongoing federal or state investigation or criminal prosecution. OSC will have *ten days* within which to respond to the Staff's request. Both the Staff's motion and OSC's response

should be served on the Board's members and opposing counsel by a method (e.g., express mail) that ensures delivery by the next business day.⁵⁴

**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
March 26, 1993**

⁵⁴ Copies of the memorandum and order are being provided to OSC and Staff counsel by facsimile transmission this date.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-250
50-251
(License Nos. DPR-31
DPR-41)FLORIDA POWER AND LIGHT
COMPANY, *et al.*
(Turkey Point Nuclear Generating
Plant, Units 3 and 4)

March 23, 1993

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Mr. James A. Riccio on behalf of Public Citizen, Greenpeace, Nuclear Information & Resource Service, and the Safe Energy Communication Council (Petitioners). Petitioners requested that the NRC issue an order to show cause to the Florida Power & Light Company (Licensee) as to why the Turkey Point Nuclear Units should not remain closed or have its operating license suspended by the NRC unless and until such time as the Licensee demonstrates full compliance with the NRC's emergency planning regulations. As bases for this request, Petitioners alleged a number of deficiencies regarding emergency planning at the Turkey Point Units as a result of the effects of Hurricane Andrew. Deficiencies were alleged in the following areas: notification during an accident, notification of persons with special needs, evacuation plans, and coordination between the Licensee and federal, state, and local agencies. Petitioners also alleged that the NRC allowed the Licensee to restart the reactor without any coordination, advance notice, or request that FEMA confirm offsite capabilities.

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

INTRODUCTION

By letter of October 23, 1992, James P. Riccio, on behalf of Public Citizen, Greenpeace, Nuclear Information & Resource Service, and the Safe Energy Communication Council (Petitioners), submitted a petition pursuant to 10 C.F.R. § 2.206 to the Executive Director for Operations of the U.S. Nuclear Regulatory Commission (NRC or the Staff). The Petitioners requested that the NRC issue an order to Florida Power and Light Company (FPL or Licensee) to show cause as to why Turkey Point Nuclear Units 3 and 4 should not remain shut down or have their operating licenses suspended by the NRC unless and until such time as the Licensee demonstrates full compliance with the NRC's emergency planning regulations.

The petition alleged a number of deficiencies in emergency planning at Turkey Point because of the effects of Hurricane Andrew. The Petitioners alleged deficiencies in the areas of notification during an accident, notification of persons with special needs, and the evacuation plans for the Turkey Point plume exposure pathway emergency planning zone (10-mile EPZ or EPZ). In alleging these deficiencies, Petitioners relied, in part, on a preliminary status report prepared by the Federal Emergency Management Agency (FEMA) and forwarded to the NRC in a letter dated October 16, 1992. On the basis of circumstances surrounding the initial restart of Turkey Point Unit 4 following Hurricane Andrew, the Petitioners also alleged deficiencies in the coordination between the Licensee, federal, state, and local agencies responsible for radiological emergency response planning. The Petitioners also alleged that the NRC allowed the Licensee to restart Unit 4 without any coordination, advance notice, or request that FEMA confirm offsite emergency preparedness capabilities.

By letter of November 13, 1992, to Mr. Riccio, the Staff acknowledged receipt of the petition and denied the Petitioners' request for immediate action based on a FEMA disaster-initiated assessment of offsite preparedness and compensatory actions, as reported by FEMA to the NRC on October 23, 1992, in a report entitled "Interim Turkey Point Nuclear Power Plant Offsite Emergency Preparedness Assessment Report in the Aftermath of Hurricane Andrew," and on the Staff's safety assessment of plant conditions. The November 13, 1992 letter further informed the Petitioners that, as provided by section 2.206, the NRC would take appropriate action on the specific issues raised in the petition within a reasonable time.

BACKGROUND

On August 24, 1992, Turkey Point Units 3 and 4 were shut down in preparation for landfall of Hurricane Andrew. Extensive onsite and offsite damage occurred at Turkey Point as a result of the storm. FPL and the NRC conducted comprehensive onsite damage assessments and inspections following the storm. FPL identified, and the NRC concurred in, the equipment and other items to be repaired, restored, retested, or otherwise addressed as a prerequisite to plant restart. Following substantial effort on the part of FPL to repair storm-related damage, Unit 4 was ready for restart by late September. Unit 3 remained shut down for a previously planned refueling outage. On September 28, 1992, the NRC Staff agreed that the Licensee was ready to restart Unit 4. Subsequently, the plant commenced startup and attained 30% power by October 1, 1992.

On October 1, 1992, the Licensee agreed to an NRC request to shut down Turkey Point Unit 4 because of FEMA concerns regarding the status of offsite emergency preparedness, based on the unique conditions existing in the EPZ in the wake of Hurricane Andrew as opposed to conditions prior to the hurricane.

Hurricane Andrew had an unprecedented impact upon the emergency preparedness infrastructure and population in the EPZ, necessitating a special reassessment of the affected aspects of offsite emergency preparedness and compensatory actions needed to reestablish impaired state and local emergency response capabilities. The purpose of the FEMA review was to reaffirm that affected offsite jurisdictions were capable of responding adequately to a radiological emergency at the Turkey Point site. The reevaluation was not intended to be a comprehensive review of offsite plans and preparedness. FEMA had already conducted a comprehensive review of the planning and preparedness capabilities of the State of Florida and Dade and Monroe Counties, as part of its process for approving the plans in accordance with 44 C.F.R. Part 350. FEMA has evaluated seven offsite emergency preparedness exercises at Turkey Point through February 1993. The next offsite emergency exercise is scheduled for December 15, 1993. Nevertheless, in its post-storm assessment, FEMA considered all of the principal areas of concern raised by the Petitioners.

In a letter dated October 16, 1992, FEMA forwarded to the NRC a preliminary status report and on October 23, 1992, FEMA provided the NRC an interim report of its review of offsite emergency preparedness capabilities in the 10-mile EPZ around Turkey Point in the aftermath of Hurricane Andrew. On the basis of its assessment and the compensatory measures taken, FEMA reaffirmed, in the October 23, 1992 letter, that there is reasonable assurance that the public health and safety can be protected in the event of a radiological emergency at the Turkey Point site. The NRC reviewed the October 23, 1992, interim FEMA report and concluded that the issues that led to the NRC's request that the Turkey

Point nuclear units not be operated until FEMA had the opportunity to review offsite emergency preparedness had been satisfactorily resolved.

The NRC informed FPL on October 23, 1992, that there was no reason, from the standpoint of nuclear safety, that the Turkey Point units could not resume operation. Turkey Point Unit 4 was returned to service on October 24, 1992. Unit 3 was returned to service on November 28, 1992, following completion of its refueling outage.

For the reasons discussed below, the NRC has concluded that the concerns raised in the petition do not provide a basis for the action requested by the Petitioners and denies the petition.

DISCUSSION

The Petitioners identify four alleged deficiencies in offsite emergency preparedness on and around the Turkey Point site following Hurricane Andrew. Three of the alleged deficiencies are based primarily upon FEMA's preliminary status report to the NRC contained in a letter dated October 16, 1992, on the status of the radiological emergency preparedness capabilities in the 10-mile EPZ surrounding the plant. The three alleged deficiencies identified by the Petitioners, which arose from their reading of the preliminary report, are: (1) the Licensee's offsite emergency response plan fails to meet the requirement for notification of "all segments" of the population; (2) the "special needs" community within the Turkey Point EPZ is largely unreachable and, thus, the requirement for notification of "all segments" of the population cannot be met; and (3) the original evacuation plans for the plume exposure pathway EPZ and the ingestion pathway EPZ are based upon assumptions that are no longer valid, and restart of the plant absent a fully revised and tested radiological emergency response plan constitutes a violation of 10 C.F.R. Part 50, Appendix E, and NRC regulations requiring that FEMA make "findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented. . . ." The Petitioners also alleged deficiencies in the coordination among the Licensee, federal, state, and local agencies responsible for radiological emergency response planning, specifically, that the NRC allowed the Licensee to restart Unit 4 without any coordination, advance notice, or request that FEMA confirm offsite capabilities. The Petitioners asserted that the premature restart of Turkey Point Unit 4 raises serious questions as to the ability and commitment of FPL and the NRC to abide by regulations requiring "that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." The Petitioners argued that this is "yet another instance" in which the NRC has "failed to maintain a proper regulatory relationship with the nuclear industry."

Notification of the Population in the EPZ

Regarding the first issue raised by the Petitioners concerning deficiencies in notification, the Petitioners cited the following statement from the FEMA letter of October 16, 1992, as the basis for their concern:

Due to extensive electric power disruption, it must be assumed that a number of EPZ residents do not have access to the EBS [emergency broadcast system] messages which provide specific instructions relative to the emergency. There is also good reason to believe that most of those residents are living in structures which are or will be condemned and that these structures are spread throughout the EPZ with no identifiable concentrations. Also, as a result of Hurricane Andrew there are residents living in Life Support Centers (tent cities) who may not have access to radio or television.

The Petitioners also stated that to address the above concern, FPL planned to use the siren system in the public address mode; however, according to the Petitioners, FEMA acknowledged that the audibility of such a system had not been verified and would not be verified until full-cycle testing of the system was conducted in November.

FEMA addressed public alert and notification concerns in its October 23, 1992 interim report to the NRC. FEMA reported that the primary alerting and notification system in Dade County, comprising sirens and EBS, was fully operational. However, FEMA believed that many residents and transients in the area might not have ready access to radios for hearing EBS messages because of the lack of electrical power. Therefore, there was a need to compensate for this degradation of notification capability by greater reliance on other means of backup notification, such as route alerting and utilizing the public address capability of the outdoor warning sirens.

The FEMA interim report stated that the State of Florida, Dade County, and FEMA agreed that certain compensatory measures, including the following, would be taken to alleviate the concerns for public alert and notification. Until the status of condemned structures and the number of persons living in them could be determined, the county would employ route alerting, using patrol cars equipped with public address systems to inform residents of protective actions. In addition, the public address capability that is part of the existing siren system would be used to inform residents of the meaning of sirens and appropriate protective actions. Residents of the Life Support Centers (tent cities), or other people incapable of viewing TV or listening to the radio, could be notified of an emergency at Turkey Point through route alerting and the use of the public address capability on the outdoor siren system.

Regarding the public address capability of the siren system, FEMA reported that FPL indicated that the voice coverage of the public address system on the sirens could adequately cover the major devastation areas and the tent cities

located within the EPZ. FEMA stated that the audibility of the public address system would be checked in conjunction with the full-cycle test of the system which was originally scheduled in November 1992, but was actually conducted on December 4, 1992. The results of the test will be included in FEMA's final report on the disaster-initiated review.

The FEMA interim report also stated that FPL was making additional efforts to inform transients and displaced residents of actions they should take in the event of an emergency. These efforts included the installation of outdoor warning signs at exits off major highways, Red Cross Service Centers, tent cities, and other locations in the EPZ, and the development and distribution of handouts and flyers in Spanish and English, throughout the EPZ. FPL also placed copies of its public information brochure at the FEMA trailer sites located within the EPZ.

The impact of the hurricane on the alert and notification capabilities in Monroe County was much less severe than in Dade County. FEMA determined that no specific compensatory measures were necessary to alert and notify people in Monroe County.

Notification of Persons with Special Needs

As the basis for their concern regarding deficiencies in notification of persons with special needs, the Petitioners cite the following statement from FEMA's October 16, 1992 letter:

FEMA attempted to call 42 special facilities; 14 calls were successfully completed, 13 yielded no answer after 10 rings, 7 yielded constant busy signals, 6 were intercepted by a phone company message that the call would not be completed, and 2 yielded only static on the line. FP&L attempted to call 134 PSNs (persons with special needs); only 6 calls were successfully completed.

FEMA addressed this issue in its interim report to the NRC on October 23, 1992. FEMA reported that on October 20-22, 1992, federal observers conducted an independent onsite assessment of the special facilities identified by the Dade County Office of Emergency Management (OEM). FEMA staff visited each nursing home, adult congregate living facility, and day-care center within the EPZ to verify the operational status of the facility and its emergency notification and commercial telephone capability.

As of October 22, 1992, there were 95 special facilities identified by Dade County OEM, of which 15 were co-located with other facilities. Therefore, a total of 80 sites were visited, of which 31 were operating. Of those operating, 24 had commercial telephone capability on the premises and 7 were operating without telephone access. The seven operating without telephones all had access

to either a radio or a television on the premises. Information regarding these facilities was provided to Dade County.

Although sirens and EBS are the primary means of alerting and notifying the public, commercial telephones and other means are also used to provide additional notification capability to special facilities and persons with special needs. To address the problem of disrupted telephone service in the impacted area, and to improve the current tone-alert radio system capability (all schools are equipped with tone-alert radios), Dade County is working on plans to replace the existing tone-alert radio system with a better system. FPL has agreed to purchase up to 100 improved tone-alert radio models, to be installed by March 31, 1993, at facilities identified by the county. The county has indicated to FEMA that the improved tone-alert radios would be placed in all schools, hospitals, nursing homes, police departments, fire departments, and government buildings.

Dade County's registry of persons having special needs (PSN) is maintained on a computer with automatic "call out" capability via commercial telephones. County staff were aware that the needs and locations of PSNs might have changed because of the hurricane. During the week of October 5-9, 1992, FPL surveyed all 134 names on the PSN list by telephone. Only six calls were successfully completed. FPL has mailed a flyer to all residents of the 10-mile EPZ. In addition to general information for all residents, the flyer contained instructions and a telephone number for PSNs to call to identify themselves and their needs. In addition to the flyer, FPL distributed the 1992-93 Turkey Point Safety Planning Brochure on December 28, 1992, to all residents of the 10-mile EPZ. The brochure includes a postpaid reply card for registry of PSNs.

The Petitioners stated that FEMA's recommended compensatory measures did not address the problem of notifying the special-needs population. The FEMA interim report makes it clear that considerable effort had been directed toward identifying and arranging for the notification of special facilities and PSNs. The primary means of alerting and notifying the population in the EPZ, sirens and EBS, were fully operational. The installation of tone-alert radios in special facilities, the use of the public address capability of the siren system, and the use of route alerting as a secondary means of notification, along with the efforts undertaken to update the PSN registry, provided additional assurance that the special-needs population in the EPZ would be notified in a timely manner in the event of an emergency at Turkey Point.

The Petitioners also stated that the special-needs population, as well as those populations that are unable to evacuate, cannot depend on being sheltered, given the widespread devastation in southern Dade County. Sheltering is a protective measure which, if available, can be used by emergency response officials at the time of an emergency depending on the circumstances of the accident. The information from the FEMA survey of special facilities, the results of which were provided to Dade County officials, along with the general knowledge of

the situation concerning residential and other structures in the EPZ, would be factored into any decision by state and local officials concerning the use of sheltering as a protective measure. Moreover, for severe reactor accidents, evacuation of the close-in population is the preferred protective action, rather than sheltering. There is no regulatory requirement that sheltering be available at all times and at all places within the EPZ.

Deficiencies in Evacuation Plans

The Petitioners alleged that the original evacuation plans for the Turkey Point plume exposure pathway EPZ and the ingestion pathway EPZ were based upon assumptions that are no longer valid. They cite several areas in the emergency plans that they believe are deficient.

The Petitioners stated that the original plan calls for residents within the EPZ to use their own vehicles to evacuate. They noted that in its preliminary status report in a letter dated October 16, 1992, FEMA stated: "It is evident that there was considerable loss of personal vehicles caused by Hurricane Andrew. Those residents suffering vehicle loss may have difficulty evacuating the EPZ after being notified."

FEMA addressed this issue in its October 23, 1992 interim report and identified the following compensatory measures:

- (1) The number of evacuee pickup points was increased to include new pickup points at each tent city. The additional pickup points would be modified as the need arose.
- (2) EBS messages have been modified to include the location of the new pickup points.
- (3) Arrangements for additional buses and more pickup points have been documented in a memorandum of understanding between the Dade County Office of Emergency Management (OEM) and Metro-Dade Transit Authority (MDTA).
- (4) Training would be provided to new school bus drivers who could be called on to assist with an evacuation. This training has been completed.
- (5) Each patrol car engaged in route alerting would be followed by an MDTA bus to pick up transportation-dependent evacuees who cannot be advised of regular pickup points.

These measures were considered adequate to compensate for the loss of personal vehicles.

The Petitioners stated that the original plan calls for the sheltering of those populations that are unable to evacuate. As support for their concern that the assumption that sheltering would be available is no longer valid, the Petitioners quoted from the FEMA October 16, 1992 letter that "residents are living in

structures which are or will be condemned and . . . these structures are spread throughout the EPZ with no identifiable concentrations. Also, as a result of Hurricane Andrew, there are residents living in Life Support Centers (tent cities). . . .”

The use of sheltering as a protective measure is discussed above in connection with the sheltering of PSNs (see discussion of Notification of Persons with Special Needs). In summary, state and local emergency response officials would decide at the time of an accident on sheltering or evacuation as a protective measure, based on the severity of the accident, their knowledge of the status of the structures in the EPZ, and other factors concerning the accident.

The Petitioners stated that the original plan assumes that residents have electricity and telephone service and thus can be notified of a radiological emergency in a timely manner. The Petitioners again noted, in support of their concern, that in its October 16, 1992 letter FEMA stated “due to extensive electric power disruption, it must be assumed that a number of residents do not have access to the EBS messages which provide specific instructions relative to the emergency.” This issue is discussed above in connection with the notification of the population in the EPZ (see discussion of Notification of the Population in the EPZ).

The Petitioners stated that FEMA failed to address the disruption of traffic patterns caused by Hurricane Andrew and that failure to address this issue would result in unrealistically low evacuation time estimates (ETEs). Petitioners argued that the disruption in traffic patterns within the EPZ was so significant that FPL’s analysis of evacuation time was essentially meaningless.

FEMA addressed the issue of evacuation routes in its October 23, 1992 interim report. FEMA stated that all of the Dade County evacuation routes within the 10-mile EPZ were open and usable for evacuation. The routes were verified as being open by a FEMA assessment team member who drove the routes on October 5-6, 1992. FEMA reported that, through interviews with the State Division of Emergency Management, it was determined that road signs on most of the major road arteries in Dade County have been replaced. Many of the signs on the local streets have also been replaced; however, this was considered a low-priority item at the time of the assessment. FEMA reported that the assessment team was assured that local or state law enforcement personnel, or both, would be stationed at street corners directing traffic to facilitate any required evacuation.

Regarding the ETE analysis, the primary purpose of the analysis is to identify potential traffic bottlenecks during the planning process that could impede an evacuation. Appropriate measures can then be taken to control the traffic at these points. The commitment to station local or state law enforcement personnel, or both, at street corners to direct traffic in the event of an evacuation fulfills this objective of an ETE analysis. Furthermore, all the evacuation routes in the EPZ

were open. Information obtained during the assessment from state and local officials indicated that the total EPZ population was about the same as it was before the hurricane (140,000). The number of residents who left the area was balanced by the number of transients who arrived after the storm. Given that the evacuation routes are all open and the EPZ population is about the same, the ETEs would not be expected to change significantly. Licensees are expected to reexamine their ETE studies if there are significant changes in the demography surrounding a site.

FEMA has performed a thorough, in-depth assessment of the offsite emergency preparedness capabilities of the jurisdictions located in the 10-mile EPZ for Turkey Point in the aftermath of Hurricane Andrew. On the basis of that assessment and compensatory measures taken, FEMA reaffirmed in its interim report of October 23, 1992, that there is reasonable assurance that the public health and safety could be protected in the event of a radiological emergency at the Turkey Point Nuclear Power Plant. The NRC concurred in this determination.

Deficiencies in Coordination Between the Licensee, Federal, State, and Local Agencies Responsible for Radiological Emergency Response Planning

The Petitioners asserted that in view of the confusion surrounding the premature restart of the Turkey Point Nuclear Units, serious questions have been raised as to the ability and commitment of FPL and the NRC to abide by regulations requiring "that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." The Petitioners stated that there was, as yet, no explanation as to why the Licensee was allowed to attempt a restart of Turkey Point, nor any indication from the NRC as to why it allegedly failed to enforce its own regulations. Petitioners argued that this is yet another instance in which the agency has "failed to maintain a proper regulatory relationship with nuclear industry." The Petitioners indicated that neither Dade County nor FEMA were informed of the Licensee's decision to restart Turkey Point Unit 4 until the reactor was in power ascension. The Petitioners noted that in an October 15, 1992 letter to Senator Graham, FEMA stated that the NRC had indicated that "no restart of Turkey Point was contemplated prior to mid-November at the earliest," and that the NRC allowed FPL to restart the reactor "(w)ithout any coordination, advance notice, or request that FEMA confirm offsite capabilities . . ." as, the Petitioners allege, is required by the April 1985 FEMA/NRC Memorandum of Understanding (MOU).

The unprecedented devastation resulting from Hurricane Andrew in the Turkey Point EPZ caused FEMA to be concerned about the possible impact upon the emergency preparedness infrastructure and population in the EPZ.

FEMA could not conduct an immediate reassessment of offsite emergency preparedness, however, because the first priority of FEMA and state and local agencies was immediate disaster relief activities, which demanded their full attention. Moreover, based upon the Licensee's and NRC's initial post-storm estimates, FEMA expected to have more time to address the question of offsite emergency preparedness before the Turkey Point plant was ready for restart. FPL site cleanup and restart preparations were actually completed much earlier than originally estimated, so that Unit 4 was ready for restart before FEMA could conduct a special disaster-initiated review of offsite emergency preparedness. The NRC did not give FEMA a revised restart schedule and the restart date was not coordinated with FEMA. Accordingly, on October 1, 1992, the NRC requested the utility to suspend Unit 4 restart activities pending further assessment by FEMA of the status of offsite emergency preparedness in the area near the plant. Neither the NRC nor FEMA had made any new findings or determinations regarding the state of offsite emergency preparedness up to that point.

At the request of the NRC, Unit 4 was shut down, and remained shut down until FEMA completed its disaster-initiated assessment and issued its interim report on October 23, 1992. FEMA noted that the report was the product of extensive coordination among FEMA, NRC, the State of Florida, Dade and Monroe County emergency management officials, and FPL.

Circumstances surrounding the restart of the Turkey Point nuclear units following Hurricane Andrew were unprecedented. In the October 23, 1992 letter transmitting its findings and interim report to the NRC, FEMA characterized its effort as "the first time that such a review has been necessitated or conducted as a result of natural disaster impacts on an emergency preparedness infrastructure and population located within the 10-mile EPZ of a commercial nuclear power plant." The FEMA/NRC MOU does not address actions to be taken after such a disaster. However, the NRC and FEMA staffs are planning to expand their MOU to clarify FEMA's responsibility to assess offsite emergency preparedness and the NRC's responsibility for considering such an assessment in the decisions it makes after a disaster regarding the restart or continued operation of an affected operating power reactor. The MOU revisions will also describe FEMA and NRC commitments to inform each other of related plans, schedules, and actions. The NRC Staff is also carefully reviewing all aspects of the Turkey Point post-storm recovery and restart process to ensure that the NRC and all licensees duly consider the possible impact of disasters on offsite emergency preparedness, and consult fully with FEMA and offsite authorities if such rare and unusual circumstances should ever arise again.

The Petitioners alleged that any attempt to restart the Turkey Point nuclear units absent a fully revised and tested radiological emergency response plan would constitute a violation of NRC regulations as well as an abrogation

of the Commission's duty to ensure the public health and safety. However, as stated above, FEMA had previously approved offsite emergency plans for the Turkey Point plant and they had been satisfactorily tested in December 1991, consistent with NRC and FEMA regulations. After assessing the effects of Hurricane Andrew on emergency preparedness for Turkey Point and the compensatory measures taken and ongoing, FEMA concluded that there is "reasonable assurance that the public health and safety can be protected in the event of a radiological emergency at the Turkey Point Nuclear Power Plant."

By letter to Mr. Riccio dated November 13, 1992, the NRC informed the Petitioners that it had concluded, upon reviewing the FEMA letter and interim report of October 23, 1992, that the offsite conditions that delayed restart pending satisfactory completion of a disaster-initiated review have now been rectified. The NRC had previously concluded that plant conditions at Turkey Point Nuclear Units 3 and 4 were such that there is reasonable assurance they could be operated safely. Therefore, on October 23, 1992, the NRC informed the Licensee that, based on FEMA's assessment of offsite emergency preparedness and the NRC's safety assessment, there was no nuclear safety reason that would prohibit the nuclear units at Turkey Point from resuming full-power operation. On October 24, 1992, the Licensee returned Unit 4 to service and on November 28, 1992, following completion of its refueling outage, Unit 3 was also returned to service.

CONCLUSION

The concerns raised by the Petitioners have been addressed by FEMA and the NRC. For the reasons discussed above, the NRC has concluded that the emergency response plans continue to be adequate and there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Turkey Point. The Petitioners have not provided a basis that would warrant the action requested. 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); 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 Petitioners to determine if enforcement action is warranted. Consequently, the Petitioners' request is denied.

A copy of this Decision will be filed with the Secretary for the Commission to review as provided in 10 C.F.R. § 2.206(c).

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation**

**Dated at Rockville, Maryland,
this 23d day of March 1993.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-440
(License No. NPF-58)CLEVELAND ELECTRIC ILLUMINATING
COMPANY, *et al.*
(Perry Nuclear Power Plant,
Unit 1)

March 28, 1993

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by the Lake County Board of Commissioners (Petitioners). Specifically, the petition alleged that the temporary storage of low-level radioactive waste at the Perry Nuclear Power Plant will have to be extended beyond the current 5-year limit for temporary storage, necessitating the need for an environmental impact statement and a public hearing; the risk of storing low-level radioactive waste on site was not envisioned in the original environmental impact statement; and the construction of a storage facility is a fundamental change in the operating license of the plant and a more significant change than anticipated by the 10 C.F.R. § 50.59 procedures. Petitioners requested that the Commission take action so that (1) a public hearing is held prior to construction of an onsite, low-level radioactive waste storage facility at the Perry Nuclear Power Plant and (2) the construction of the storage facility is suspended until (a) the NRC or the Licensee produces an environmental impact statement on the risks due to onsite storage of low-level radioactive waste and (b) the NRC promulgates regulations regarding storage of low-level radioactive wastes at nuclear power plant sites.

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

I. INTRODUCTION

On September 29, 1992, Mr. Steven C. LaTourette submitted a Petition on behalf of the Lake County Board of County Commissioners (the Petitioners), requesting that the Director, Office of Nuclear Reactor Regulation, take certain actions with respect to the proposed construction of an onsite, low-level radioactive waste storage facility at the Perry Nuclear Power Plant (Perry). The Petition specifically requested that (1) a public hearing be held prior to the Licensee's construction of such a facility and (2) the construction of the facility be suspended until either (a) the NRC or the Licensee produces an environmental impact statement assessing the risks of onsite storage of low-level waste or (b) the NRC promulgates regulations for storing low-level radioactive waste at nuclear power plant sites. By letter dated October 21, 1992, the NRC acknowledged receipt of the Petition and indicated that the Staff would take action on the requests within a reasonable time. The NRC further indicated that the portion of the Petition requesting the NRC to promulgate regulations for storing low-level radioactive wastes at nuclear power plant sites was subject to the requirements of 10 C.F.R. § 2.802 governing petitions for rulemaking. Therefore, that portion of the Petition will not be directly addressed in this Decision. However, as discussed later, the NRC has recently published in the *Federal Register* a proposed rule on this subject.

In support of the requested actions, the Petitioners assert that (1) the period for temporary storage of radioactive wastes in the proposed facility will have to be extended beyond the current 5-year limit for temporary storage, necessitating licensing approval under 10 C.F.R. Part 30, thus triggering the need for an environmental impact statement and a public hearing; (2) the risk of storing low-level radioactive waste on site was not envisioned in the original environmental impact statement for Perry; and (3) the construction of a storage facility is a fundamental change in the operating license of the plant and a more significant change than anticipated by the 10 C.F.R. § 50.59 procedures. The NRC Staff has reviewed the Petition and my formal decision in this matter follows.

II. BACKGROUND

In August 1992, the Licensee for Perry announced plans for the construction of an interim onsite low-level radioactive waste (LLW) storage and processing facility, in anticipation of possible loss of access to the three disposal sites currently in operation in the United States. In response to concerns expressed by some local citizens groups regarding the facility, the NRC held a public

meeting near the Perry site on October 1, 1992. In September 1992, the NRC Staff performed a preliminary review of the Licensee's section 50.59 evaluation for the facility and requested more detailed information. The Licensee provided a revised evaluation to the Staff in October 1992, and the Staff has completed its review of that evaluation.

NRC Generic Letter (GL) 81-38, "Storage of Low-Level Radioactive Wastes at Power Reactor Sites," provides the NRC Staff's current guidance on the design and operation of interim onsite LLW storage facilities. This guidance states:

For proposed increases in storage capacity for low-level waste generated by normal reactor operation and maintenance at power reactor sites, the safety of the proposal must be evaluated by the licensee under the provisions of 10 C.F.R. 50.59. If (1) your existing license conditions or technical specifications do not prohibit increased storage, (2) no unreviewed safety question exists, and (3) the proposed increased storage capacity does not exceed the generated waste projected for five years, the licensee may provide the added capacity, document the 50.59 evaluation and report it to the Commission annually or as specified in the license.

If a licensee determines that an unreviewed safety question exists, or if the design capacity or intended duration of storage exceeds 5 years, the generic letter specifies that a Part 30 license is required. The generic letter provides detailed radiological safety guidance and criteria used by the NRC Staff in judging the adequacy of a licensee's safety evaluation under section 50.59. A number of licensees have constructed facilities in accordance with this guidance.

On February 2, 1993, the NRC published a proposed rule in the *Federal Register* entitled "Procedures and Criteria for On-Site Storage of Low-Level Radioactive Waste" (58 Fed. Reg. 6730). The proposed rule would establish a regulatory framework, consistent with the goals of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA), for procedures and criteria applicable to onsite storage of LLW beyond January 1, 1996. The proposed rule reiterates the Commission's longstanding position that protection of the public health and safety and the environment is enhanced by disposal, rather than by long-term indefinite storage, of LLW. However, the NRC does acknowledge that state and compact efforts to establish regional LLW disposal sites are in many instances behind the schedular milestones established in the LLRWPA. The LLRWPA further states that the operators of the three existing disposal facilities could set additional restrictions on receiving LLW from outside their regional compacts, effective January 1, 1993. Therefore, the NRC recognizes the potential need for some licensees to store their LLW on site until additional access to disposal sites becomes available.

The proposed rule would preclude a licensee from storing LLW on site after January 1, 1996, unless the licensee could document that it had exhausted other

reasonable waste management options. The proposed rule would supplement, but not supersede, existing regulations and guidance. Generic Letter 81-38 will continue to provide the NRC Staff guidance and criteria regarding interim onsite storage of LLW before January 1, 1996, and also beyond that date for licensees who have adequately demonstrated and documented that all other reasonable waste management options have been exhausted.

III. DISCUSSION

The Petitioners' first and primary assertion in support of the requested actions is that the Licensee's proposed interim onsite LLW storage facility "will definitely have to be extended beyond the five (5) year limit for temporary storage." This assertion is supported only by the Petitioners' assumption that, because of the departure of Michigan from the Midwest Compact and the subsequent designation of Ohio as the host state for a disposal site, delays have resulted, making it "inconceivable" that a permanent LLW disposal facility could be operating in the State of Ohio in less than 7 years.

While it is possible that the State of Ohio will not have an operational LLW disposal site in 7 years, no further information is presented to support the certainty of the Petitioners' assertion. The Petitioners fail to address other possibilities for disposal of LLW generated by the Licensee; in fact, they acknowledge that the Barnwell, South Carolina site has agreed to accept LLW generated at Perry through June 1994. If the Licensee does not begin to store LLW on site until that time, 5 years of temporary storage would last until June 1999, more than 6 years from now. Within that time frame, it is entirely possible that an existing disposal facility will continue to accept LLW from Perry, or that new disposal facilities outside the Midwest Compact will become operational and accept waste from Perry under the "contract" provisions of the LLRWPA (section 5(e)(1)(F)). It is also possible that Ohio will have an operating disposal facility by that time. Thus, there is reason to believe that disposal options will be available to the Licensee. The NRC Staff has reviewed the Licensee's section 50.59 evaluation concerning the onsite interim storage and processing of LLW and has confirmed that the Licensee has committed to follow the guidance of GL 81-38 regarding a 5-year limit on temporary storage. Further, the Licensee will continue to ship LLW to the Barnwell facility under existing contracts through mid-1994. Therefore, I find that the Petitioners have not provided a sufficient basis for the NRC to conclude that a Part 30 license is required at this time, based on their contention that the proposed facility will be operated for longer than 5 years. If the Licensee subsequently chooses to request a Part 30 license, the NRC Staff will evaluate the request at that time.

The Petitioners also contend that the risk of low-level radioactive waste storage on site was not envisioned in the original environmental impact statement for Perry. During the operating license review, the Staff did consider in the Final Environmental Statement related to the operation of Perry Nuclear Power Plant, Units 1 and 2 (NUREG-0884, August 1982), the possible radiological impact of LLW temporarily stored on site. Although the specific details of the proposed interim storage facility were not known at that time, the Staff anticipated the existence of outdoor low-level radioactivity storage containers, which were estimated to make a dose contribution at the site boundary of less than 0.1% of that due to direct radiation from plant operation (section 5.9.3.1.2). Similarly, in its Safety Evaluation Report related to the operation of Perry Nuclear Power Plant, Units 1 and 2 (NUREG-0887, May 1982), the NRC Staff concluded that the Licensee's program for the processing, packaging, and storage of radioactive wastes before shipment off site was acceptable (section 11.4.1). Therefore, the temporary onsite storage of LLW was an activity considered by the Staff as part of its review leading to the issuance of an operating license. Should the Licensee be required to seek a Part 30 license because of a longer-than-expected need for onsite LLW storage, both the safety and environmental aspects will be evaluated in accordance with applicable requirements.

The Licensee's operation of the proposed interim storage facility could result in changes in the quantity of LLW stored on site and in the physical location and duration of storage. The Licensee has evaluated these changes in accordance with section 50.59. Generic Letter 81-38 establishes specific guidelines to ensure that the radiological impact from temporary onsite storage of LLW will not result in a significant increase in the overall radiological impact due to plant operation. The generic letter specifies that the design and operation of a temporary onsite storage facility for LLW should ensure that radiological consequences of accidents do not exceed 10% of the 10 C.F.R. Part 100 dose criteria used in reactor siting and that the projected contribution to offsite doses from onsite storage under nonaccident conditions is less than 1 millirem/year. The NRC Staff has reviewed the Licensee's section 50.59 evaluation and has found that the proposed design and operation of the facility will conform with the GL 81-38 guidance. The Licensee has appropriately evaluated the radiological risks to account for changes in the way LLW will be stored on site.

The National Environmental Policy Act of 1969 (NEPA), as amended, requires the preparation of an environmental impact statement for a major federal action significantly affecting the quality of the human environment. The Commission's regulations in 10 C.F.R. § 51.20 also specify criteria for and identification of licensing and regulatory actions requiring environmental impact statements. The Commission actions identified in section 51.20 represent those actions that the Commission believes could significantly affect the quality of the human environment. The construction and operation of the LLW storage

facility on the Perry site are not activities of the type identified in section 51.20 requiring preparation by the NRC of an environmental impact statement. Further, as a result of its review of the Licensee's section 50.59 evaluation, the Staff has determined that the construction and operation of the proposed facility does not represent a major federal action significantly affecting the quality of the human environment.

Therefore, I conclude that the Petitioners have not provided a sufficient basis for the NRC to require the preparation of an environmental impact statement for the proposed facility.

The Petitioners further contend that the construction of the proposed facility is a fundamental change in the operating license of the plant and a more significant change than anticipated by the section 50.59 procedures. As a result, they question how the Licensee is able to determine that the operation of the proposed facility does not involve an unreviewed safety question, a requisite finding for section 50.59 to apply. To support these assertions, the Petitioners state that the proposed facility will expand the storage of the waste, in addition to expanding the physical location and site of the waste; however, they fail to address the significance of these changes.

Although the Licensee's intended use of the proposed facility will likely result in more LLW temporarily stored on site for longer periods and in a different location than current practice, the significance of these changes must be assessed in determining whether an unreviewed safety question exists. The standards in 10 C.F.R. § 50.59(a)(2) specify that a proposed change, test, or experiment shall be deemed to involve an unreviewed safety question (i) if the probability of occurrence or the consequences of an accident or malfunction of equipment important to safety previously evaluated in the safety analysis report may be increased; or (ii) if a possibility for an accident or malfunction of a different type than any evaluated previously in the safety analysis report may be created; or (iii) if the margin of safety as defined in the basis for any technical specification is reduced. The NRC Staff has reviewed the Licensee's section 50.59 evaluation, including the bases on which the Licensee has determined that construction and operation of the proposed facility does not involve an unreviewed safety question, and has found that determination to be sound. The construction and operation of the proposed facility will not affect safety-related systems or equipment or the capability to safely shut down the plant; therefore, the probability of occurrence or the consequences of accidents or malfunctions of equipment important to safety will not be increased. The processing of LLW will not change significantly from that described in the safety analysis report. Facility design and controls will ensure that the radiological impact of potential accidents and normal operation will be kept within the guidelines specified in GL 81-38; these guidelines are bounded by the potential impacts due to plant operation previously evaluated by the Staff. Therefore, the possibility for an

accident or malfunction of a different type than any previously evaluated in the safety analysis has not been created. Also, as the construction and operation of the proposed facility will not affect safety-related systems or equipment or the capability to safely shut down the plant, the margin of safety as defined in the basis for any technical specification is not reduced. I therefore conclude that the Petitioners have not provided a sufficient basis for the NRC Staff to find that an unreviewed safety question is involved in the construction and operation of the proposed facility and, consequently, I find in accordance with the provisions of GL 81-38 that a Part 30 license is not needed.

The Petitioners further assert that the GL 81-38 guidance is not mandatory and that an evaluation pursuant to 10 C.F.R. § 61.50 should be conducted. It is true that the GL 81-38 guidance is not mandatory; however, the Licensee has committed to follow that guidance in its section 50.59 evaluation, which the Staff has found acceptable. If the Licensee subsequently revises that commitment, the supporting section 50.59 evaluation must also be revised and will be subject to further NRC review. The Staff will take appropriate action at that time. With respect to section 61.50, that regulation applies to permanent near-surface disposal of wastes generated by other persons and is not applicable to the Licensee's proposed facility.

IV. CONCLUSION

On the basis of the foregoing discussion, I have determined that the Petitioners' requests concerning the proposed temporary onsite low-level radiological waste storage and processing facility at the Perry Nuclear Power Plant are not supported and do not present any substantial health and safety issues. Thus, the Petition provides no basis for the NRC to require a public hearing for the construction and operation of the facility, or for the NRC to produce (or require the Licensee to produce) an environmental impact statement related to the use of the facility. The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 924 (1984). This is the standard that I have applied to the concerns raised by the Petitioners in this decision to determine whether any action in response to the Petition is warranted. For the reasons discussed above, no basis exists for taking the specific actions requested in the Petition with respect to the Perry facility, as no substantial health and safety issues have been raised by the Petitioners. Therefore, no action pursuant to 10 C.F.R. § 2.206 is being taken in this matter. The recent publication, however, of a proposed rule on "Procedures and Criteria for

On-Site Storage of Low-Level Radioactive Waste” addresses, in part, one of the concerns expressed in the Petition.

In accordance with 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission’s review.

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation**

**Dated at Rockville, Maryland,
this 28th day of March 1993.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-341

DETROIT EDISON COMPANY, *et al.*
(Enrico Fermi Atomic Power
Plant, Unit 2)

March 31, 1993

The Director, Office of Nuclear Reactor Regulation, denies a Petition filed pursuant to 10 C.F.R. § 2.206 by Robert Karalewitz requesting that action be taken with regard to the Detroit Edison Company's (DECo's) Fermi-2 nuclear plant. The Petitioner requested that the Fermi-2 operating license be suspended until certain security supervisors at Fermi-2 had been replaced. As bases for that request, the Petitioner asserted that certain Fermi-2 Security Department supervisors lied and submitted falsified documents to the NRC, and that they engaged in a conspiracy to revoke the Petitioner's access to the protected area at Fermi. The reasons for the denial are fully set forth in the Decision.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised.

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

By Petition dated June 22, 1992, Robert Karalewitz (Petitioner), pursuant to 10 C.F.R. § 2.206, asked the U.S. Nuclear Regulatory Commission (NRC) to take action with regard to the Detroit Edison Company's (DECo's) Fermi-2 nuclear

plant. The Petition requested that the Fermi-2 operating license be suspended until certain security supervisors at Fermi-2 had been replaced. As bases for that request, Petitioner asserted that certain Fermi-2 Security Department supervisors lied and submitted falsified documents to the NRC. Petitioner also asserted that these supervisors engaged in a conspiracy to revoke the Petitioner's access to the protected area at Fermi-2, and to have him fired. The Petition was referred to the Office of Nuclear Reactor Regulation for preparation of a response.

By letter dated August 3, 1992, I acknowledged receipt of the Petition and informed the Petitioner that the NRC would take appropriate action on his request within a reasonable period of time.

II. DISCUSSION

The allegations raised by the Petitioner in support of his request were forwarded to the Office of Investigations (OI) Field Office in Region III for investigation. In general, the Petitioner asserts that certain security personnel were involved in a conspiracy with an individual who instigated a search of him in order to have him fired, and that DECo's Fermi-2 security management personnel deliberately provided false and misleading information to the NRC.

By way of background, on April 29, 1991, security personnel initiated a search of the Petitioner. During the search, security personnel determined that the Petitioner was attempting to remove DECo property. As a result, his site access was revoked. On December 20, 1991, the Petitioner contacted the NRC Resident Inspector, claiming that his access authorization was inappropriately removed. By letter dated January 10, 1992, the NRC requested that DECo review and follow up this matter and submit to Region III the results of its review. Subsequently, a DECo Quality Assurance (QA) specialist conducted an investigation of the search of the Petitioner, which included a review of the Security Incident Report and Investigation Report prepared by security personnel. The results of that investigation were documented in a Report of Investigation dated January 27, 1992 (Report), which was submitted by DECo with a response letter dated February 10, 1992, to the NRC's request for information about the incident.

The specific issues as investigated by OI are summarized as follows:

- (1) Whether material false statements were made by DECo to the NRC in its Report and response letter which concluded that security personnel were *not friends of the individual who instigated the search*.
- (2) Whether a material false statement was made by DECo to the NRC in its response letter. Specifically, DECo asserted that DECo's investigator who investigated the matter determined that no further action

was necessary, when, according to the Petitioner, the investigation was limited at the direction of a senior security manager.

- (3) Whether a material false statement was made by DECo to the NRC in the Report wherein DECo stated that the individual who instigated the search did not contact security prior to the search. The Petitioner asserted that the individual did contact security prior to the search.

The Office of Investigations Field Office in Region III conducted a thorough investigation of the allegations made by the Petitioner. The findings of the investigation are documented in a Report of Investigation dated January 30, 1993, and are summarized below.

With respect to the first allegation, OI concluded that DECo did not make material false statements to the NRC regarding this matter. Specifically, contrary to the allegation, the DECo security staff members were not friends of the witness against the allegor either before or after the incident.

With respect to the second allegation, OI concluded that DECo made no material false statement to the NRC regarding DECo's investigation of the incident. Specifically, it was concluded that the initial followup investigation by a DECo investigator was not limited by any DECo Fermi-2 senior security manager(s).

With respect to the third allegation, OI concluded that DECo did not deliberately make a material false statement to the NRC in reporting of the incident. Rather, it was concluded that the individual who instigated the search of the Petitioner, by his own admission, provided false information to the DECo investigator investigating the search (this individual had been relieved of his duties prior to the search of the Petitioner, at his own request).

On the basis of the investigation of allegations conducted by OI, there is no evidence to support the allegations made by the Petitioner against DECo that certain security department supervisors lied and submitted falsified documents to the NRC or that DECo supervisors conspired to revoke the Petitioner's access to the protected area and to have him fired. Although it was determined that the witness against the allegor, by his own admission, gave false information to the DECo investigator, it was not substantiated that DECo made any deliberate attempt to give false information to the NRC.

III. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. § 2.206 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3) CLI-75-8, 2 NRC 173, 175-76 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that

I have applied to determine whether the action requested by the Petitioner is warranted.

As explained above, the NRC OI investigation of the Petitioner's allegations did not identify any wrongdoing on the part of DECo's Security Department supervisors, and there is no basis for taking the action requested by the Petitioner.

Petitioner's request for action pursuant to 10 C.F.R. § 2.206 is denied. As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary for the Commission's review.

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation**

**Dated at Rockville, Maryland,
this 31st day of March 1993.**



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-446

TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*
(Comanche Peak Steam Electric
Station, Unit 2)

April 6, 1993

The Commission denies the motion of Petitioners B. Irene Orr and D.I. Orr for a stay in further construction of, and issuance of a full-power license for, Comanche Peak Unit 2. The Commission finds that the Petitioners are not parties to — and have not sought intervention in — the Unit 2 operating license proceeding and notes that the construction permit amendment proceeding has been terminated and that requests relating to a stay of construction are therefore moot.

Furthermore, the Commission summarily rejects the motion for intervention filed by R. Micky Dow and Sandra Long Dow because it fails to address either the five factors for a late-filed intervention petition or the standing requirements.

Finally, the Commission considers and denies, as a "Motion for Reconsideration" and/or a "Motion to Hold in Abeyance," Petitioners' request to stay CLI-93-10, 37 NRC 192 (1993), and to stay issuance of the full-power license pending judicial review of that order and the instant decision.

RULES OF PRACTICE: STAY OF AGENCY ACTION

A request for a stay of an action is moot if the action has already been lawfully completed.

RULES OF PRACTICE: STAY OF AGENCY ACTION

Persons who are not parties to an operating license proceeding must petition for and be granted late intervention and reopening before they can move for a stay of issuance of the operating license.

RULES OF PRACTICE: INTERVENTION PETITIONS (PLEADING REQUIREMENT)

A petition for late intervention that does not address the five factors in 10 C.F.R. §2.714(a)(1)(i)-(v) or the standing requirements in 10 C.F.R. §2.714(d)(1) can be summarily rejected by the Commission.

NUCLEAR REGULATORY COMMISSION: HEALTH AND SAFETY RESPONSIBILITIES

The Commission itself may delay or deny the issuance of a license because of relevant safety problems — even if no formal proceedings under section 189 of the Atomic Energy Act, 42 U.S.C. § 2239, are pending.

RULES OF PRACTICE: STAY OF AGENCY ACTION

The provisions of 10 C.F.R. §2.788 apply only to requests for stays of decisions of the licensing board, not decisions of the Commission itself. A request for a stay of a previous Commission decision and a stay of the issuance of a full-power license pending judicial review is more properly entitled a “Motion for Reconsideration” and/or a “Motion to Hold in Abeyance.”

NUCLEAR REGULATORY COMMISSION: HEALTH AND SAFETY RESPONSIBILITIES

The Commission can find that construction of a nuclear power plant has been properly completed without resolving allegations of irregularity relating to its construction where a review of the pleadings indicates that Petitioners have not in fact alleged that construction deficiencies actually exist.

RULES OF PRACTICE: STAY OF AGENCY ACTION

The proper method of raising a challenge to the issuance of an operating license is to file a petition for intervention in the operating license proceeding.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a motion by B. Irene Orr and D.I. Orr ("Petitioners") for a stay of the issuance of the full-power license for Comanche Peak Unit 2. In addition, R. Micky Dow and Sandra Long Dow representing the Disposable Workers of the Comanche Peak Steam Electric Station ("the Dows") have filed a petition to intervene on behalf of themselves and two other individuals. For the reasons stated below, we deny both the Petitioners' stay motion and the Dows' petition to intervene. We also deny a Motion for Stay Pending Appeal by the Petitioners.

II. BACKGROUND

Both Petitioners and the Dows seek a stay of the full-power license pending, *inter alia*, our resolution of their separate appeals from a decision of the Atomic Safety and Licensing Board ("Licensing Board") denying their petitions to intervene in the Unit 2 construction permit amendment ("CPA") proceeding. See LBP-92-37, 36 NRC 370 (1992) ("LBP-92-37"). We recently issued an order dismissing both appeals as moot and further finding that the Dows had failed to perfect their appeal. CLI-93-10, 37 NRC 192 (1993) ("CLI-93-10").

This filing is Petitioners' second attempt to block issuance of a Unit 2-related license. Earlier, Petitioners requested a stay of the low-power license pending resolution of their appeal. See CLI-93-2, 37 NRC 55 (1993) ("CLI-93-2"). We denied that request for two reasons. First, we noted that Petitioners could not seek action in the operating license ("OL") proceeding because they were not parties to that proceeding and had not sought late intervention in that proceeding. CLI-93-2, 37 NRC at 57-58. Second, we found that 10 C.F.R. § 2.788, upon which Petitioners had based their stay request, "provide[d] only for stays of decisions or actions in the proceeding under review — in this case, the CPA proceeding[.]" and that Petitioners had not related their request to the CPA proceeding. CLI-93-2, 37 NRC at 58.

In the instant motion, Petitioners again have not sought late intervention in the Unit 2 OL proceeding. Instead, Petitioners ask only for "a stay in further

construction, testing and the issuance of a full power license for [Comanche Peak] Unit 2” Stay Motion at 1. Petitioners argue that issuance of the full-power license (1) will, in effect, moot their appeal of LBP-92-37 (Stay Motion at 2), and (2) may result in the licensing of an unsafe plant. *Id.* at 3-8. Briefly, Petitioners argue that TU Electric does not have the “character and competence” to operate the plant, because it has “secreted” safety-related information from the NRC through the practice of forcing other organizations or entities to agree to “restrictive” settlement agreements and that this “secreting” of information may have led to the construction of an unsafe plant.

The Staff and TU Electric have both filed timely responses to Petitioners’ stay motion. In addition, the Citizens Association for Sound Energy (“CASE”), which was a party to the original OL and CPA proceedings which were settled in 1988, has filed a motion for leave to file a response with a responsive pleading attached. Finally, the Dows have filed a “Petition for Leave to Intervene” to which TU Electric and the Staff have filed responses. The Dows have also filed a motion for leave to file an untimely response to the CASE pleading and supporting the Petitioners’ stay motion. We have granted both the CASE motion and the motion by the Dows for leave to file their respective pleadings.¹ We have also granted requests by the Staff and TU Electric to relax the 10-page limit for responses to stay motions established in 10 C.F.R. § 2.788. Finally, we have also accepted pleadings by the Staff and TU Electric and an untimely filing by the Dows in response to our Order of March 26, 1993, which requested responses regarding the minority co-owners’ settlement agreements.

III. ANALYSIS

A. Petitioners’ Stay Motion

First, any request to “stay” construction of Comanche Peak Unit 2 is moot because construction has already been “substantially completed.” As we noted in CLI-93-10, TU Electric lawfully completed construction at Unit 2 pursuant to 10 C.F.R. § 2.109(a) and 5 U.S.C. § 558 while the appeals were pending. *See* CLI-93-10, 37 NRC at 200-202. Thus, because construction is already complete, there is no ongoing construction to “stay.”

Second, to the extent that Petitioners seek “to stay . . . testing and the issuance of a full power license” for Comanche Peak, they are not parties to the OL proceeding which determines whether the OL should be issued. Furthermore, they have not sought late intervention under 10 C.F.R. § 2.714(a)(1)(i)-(v) and

¹The Dows’ independent Petition for Leave to Intervene requires no motion for leave to file. However, the Dows’ pleading in support of Petitioners’ stay motion and in response to the CASE pleading was untimely and a motion for leave was required. We have accepted all the submitted pleadings.

the reopening of the record — closed since 1988 — under 10 C.F.R. § 2.734. Moreover, as we pointed out above, Petitioners' appeal in the CPA proceeding has been mooted by the lawful completion of construction at Unit 2, not by the issuance of low-power license on February 2, 1993, or by the proposed issuance of the full-power license in the near future. CLI-93-10, 37 NRC at 200-04. Clearly, issuance of the full-power license will have no impact on an appeal that is already moot.

B. The Dows' Petition to Intervene

The Dow's Petition to Intervene is also clearly deficient. Initially, the Petition to Intervene does not specify whether the Dows seek to intervene in the Unit 2 CPA proceeding or the Unit 2 OL proceeding — or both. Moreover, the petition fails to address either the five factors for a late-filed petition, *see* 10 C.F.R. § 2.714(a)(1)(i)-(v), or the standing requirements, *see* 10 C.F.R. § 2.714(d)(1); thus, it can be summarily rejected as a Petition to Intervene in either proceeding. Furthermore, the Dows have not provided any factual support for the contentions they advance. *See* 10 C.F.R. § 2.714(b)(2)(i)-(iii). Finally, as we pointed out above, there is no CPA proceeding in which to seek intervention because the CPA proceeding was terminated when construction was completed. CLI-93-10, 37 NRC at 200-04.² Thus, the Dows' Petition to Intervene is denied.

IV. ALLEGATIONS REGARDING COMANCHE PEAK UNIT 2

Both the Orrs and the Dows raise allegations regarding the "character and competence" of TU Electric to operate Comanche Peak and the safety of the plant. Because we have found that there is no longer a CPA proceeding in which either the Orrs or the Dows may participate and that neither the Orrs nor the Dows are parties to the OL proceeding, the pleadings before us do not establish the rights of either the Dows or the Orrs to seek a stay of the issuance of the full-power license nor do they meet our standards for a stay under 10 C.F.R. § 2.788. However, we believe that these allegations should be addressed to remove any possible cloud on the full-power license prior to issuance. The Commission itself may delay or deny the issuance of a license because of relevant safety problems — even if no formal proceedings under section 189 of the Atomic Energy Act, 42 U.S.C. § 2239, are pending.

²In addition, we note that the Dows' appeal of the Licensing Board's decision denying their intervention petition in the Unit 2 CPA proceeding was also dismissed for their failure to perfect their appeal by filing a brief. CLI-93-10, 37 NRC at 198. The Commission granted the Dows one extension of time in which to file their brief; however, the Dows did not request an additional extension of time.

A. Petitioners' Allegations

Petitioners allege that "new factual evidence demonstrates that TUEC's past cover-up of safety related information imperils the health and safety of the public." Stay Motion at 3. These allegations fall into two general classes: (1) allegations regarding the effect of agreements imposed by TU Electric during its purchase of the ownership interests in Comanche Peak owned by three small independent utilities, and (2) allegations submitted by Mr. Ron Jones, a former worker at Comanche Peak, and loosely associated with the 1988 settlement agreement that resolved the Unit 1 CPA proceeding and the OL proceedings for both Unit 1 and Unit 2. As we show below, we find nothing in these allegations that would justify a stay of the issuance of the full-power license.

1. The Minority Co-Owners' Agreements

In 1988 and 1989, TU Electric purchased three relatively small ownership interests in Comanche Peak held by three independent utilities ("the minority co-owners"). Petitioners now allege that TU Electric entered into restrictive agreements with these minority co-owners in the process of buying out their interests. Stay Motion at 3-4. Specifically, Petitioners allege that specific clauses in these agreements have prevented the former co-owners from reporting safety concerns to the NRC and that the NRC Staff has failed "to require [TU Electric] to release this information." *Id.* at 4.

On February 12, 1988, TU Electric purchased 6.2% of the ownership interest in Comanche Peak from the Texas Municipal Power Agency ("TMPA"). On July 5, 1988, TU Electric purchased 3.8% of the ownership interest of Comanche Peak from the Brazos Electric Power Cooperative ("Brazos"). Finally, on March 23, 1989, TU Electric purchased the remaining 2 1/6% of Comanche Peak from the Tex-La Electric Cooperative ("Tex-La"). The Tex-La agreement was further amended on December 21, 1989, and on January 30, 1990. These agreements were promptly filed with the NRC when TU Electric applied for amendments to both the Unit 1 and Unit 2 construction permits to reflect those changes and placed in the NRC's Public Document Room. These amendment requests were unopposed and were granted by the NRC Staff.

On June 11, 1992, the National Whistleblower Center (represented by Petitioners' counsel) filed a petition under 10 C.F.R. § 2.206 alleging, *inter alia*, that clauses in these three agreements prevented the former co-owners, their employees, or their contractors from providing safety information to the NRC.³ The

³The clauses in question provided, *inter alia*, that the co-owner would "encourage and solicit its attorneys . . . not to oppose, or assist any third party in opposing." TU Electric's attempts to license Comanche Peak. Moreover, the agreement provided that the co-owner would "take all such action as may be necessary or appropriate in

(Continued)

Petitioners subsequently raised similar allegations before the Licensing Board in the recently dismissed Unit 2 CPA proceeding. *See* Supplement to Petition to Intervene (Oct. 5, 1992) at 5-8.

In response to the section 2.206 petition and the Petitioners' allegations, the NRC Staff began another review of all three transfer agreements. On January 12, 1993, the Staff advised TU Electric that while it concluded that the agreements did not violate 10 C.F.R. § 50.7(f), the agreements did contain provisions that were "potentially restrictive." Letter from Thomas E. Murley, NRC, to William J. Cahill, Jr., TU Electric (Jan. 12, 1993) ("Murley Letter") at 2. Specifically, the NRC Staff found that

[t]he agreements contain broad and sweeping language that not only restricts the former minority co-owners and anyone speaking on behalf of them from bringing safety information to the NRC, but also could lead one to conclude that they prohibit individuals from bringing safety information to the NRC. Such restrictive provisions are unacceptable to the NRC. Such provisions could have caused a chilling effect in the past, and may cause such a chilling effect in the future, with the result that the NRC has been, or may be, deprived of safety information.

Murley Letter at 2 (footnote omitted). Accordingly, the NRC Staff directed TU Electric to respond to the Murley Letter within 30 days describing the "actions you have taken or are taking to ensure that individuals and organizations do not believe that they are precluded from coming to the NRC with safety information." *Id.* at 3.

In response, TU Electric submitted identical letters that it sent to all three former co-owners, advising them that the provisions of the agreements "were not intended to prohibit the minority owners, their employees, or representatives from communicating safety concerns to the NRC" *E.g.*, Letter from Wes Taylor, TU Electric, to Richard E. McCaskill, Brazos Electric Power Company (Feb. 3, 1993).

Moreover, all three former co-owners have responded directly to the Murley Letter. For example, Brazos has stated that it "has never read any of the provisions of its July 5, 1988 agreement . . . as prohibiting the communication of safety information to the NRC" Letter from Richard E. McCaskill, Brazos Electric Power Company, to Thomas E. Murley (Feb. 10, 1993). Likewise, TMPA stated that it "does not now take, nor has it ever taken the position that the [ownership transfer] agreement . . . prohibits either TMPA, someone speaking on behalf of TMPA, or individuals from bringing or assisting others from bringing safety concerns to the NRC" Letter from Ed L. Wagoner, TMPA, to Thomas E. Murley, NRC (Feb. 9, 1993). Finally, Tex-La has informed the NRC

order to prevent the consultants and attorneys . . . from participating or assisting in any manner adverse to [the co-owner's] duty of cooperation." *See, e.g.*, Tex-La Agreement, § 9.2(d).

Staff that it has notified its former consultants that "the settlement agreement was not intended to restrict [them] from taking safety concerns to the NRC." Declaration of John M. Butts, attached to Letter from John M. Butts (Tex-La) to Thomas E. Murley, NRC (Feb. 10, 1993). Mr. Butts also submitted a sample of the letter transmitted to all Tex-La consultants.

On March 26, 1993, we issued an Order (unpublished) asking the Staff to advise us if the responses to the Murley Letter "provide reasonable assurance that the employees and contractors of the former co-owners have been aware that they may bring safety information to the NRC." Order of March 26, 1993, at 1. In response, the Staff has advised the Commission that the responses "provide reasonable assurance that [TU Electric] and the former minority co-owners did not intend the settlement agreements to restrict employees and contractors from bringing safety concerns to the NRC." NRC Staff Response (March 30, 1993) at 2. See generally Affidavit of James G. Partlow (attached to Staff Response), ¶ 4.

Furthermore, while the Staff concedes that "[t]he responses do not affirmatively state that all employees and contractors [of the minority co-owners] have been aware that the agreements did not restrict them from bringing safety concerns to the NRC[,]" *id.*, the Staff notes that there is "no information . . . that any specific safety concerns have been withheld from the NRC as a result of these settlement agreements." *Id.* In addition, the Staff correctly points out that assuming *arguendo* that employees or contractors of the former co-owners did consider the agreements to restrict access to the NRC,

it is unlikely that a significant number of personnel with direct knowledge of the site would have been impacted inasmuch as the minority owners were not directly involved in the management and construction of the project.

NRC Staff Response at 2. See also Partlow Affidavit, ¶¶ 5-6. Moreover, the Staff points out that there are and have been ongoing programs during this time to ensure that employees have an easy avenue to bring safety concerns to both the NRC (the NRC allegation management program) and/or to the licensee (the SAFETEAM program). NRC Staff Response at 3; Partlow Affidavit, ¶¶ 7, 9.

Finally, the Staff notes that it does not rely on these programs to ensure adequate protection of public health and safety because there is no guarantee that alлегers will find problems and bring them to the NRC. Staff Response at 3; Partlow Affidavit, ¶ 7. Instead, the Staff "relies on inspections of the Licensee's programs, policies, and facilities to ensure that adequate protection of public health and safety exists." Staff Response at 3; Partlow Affidavit, ¶¶ 7, 9. The Staff then notes the extensive inspection program that has been undertaken at Comanche Peak. Staff Response at 3; Partlow Affidavit, ¶ 8.

We have reviewed the material submitted in response to the Murley Letter and the Staff's response to our March 26 Order. Based upon the responses of the former minority co-owners and the Staff, we are satisfied that the steps taken by TU Electric to ensure that the former co-owners and their employees and contractors are aware that they can bring safety concerns to the NRC are sufficient for us to reject this allegation. Quite simply, it is clear that the former co-owners themselves have never interpreted these agreements as preventing them from raising safety concerns to the NRC and that TU Electric has never asserted to the former co-owners that the agreement prevents them from raising safety concerns.

To the extent that any individual employee or contractor of a former co-owner may have interpreted these clauses as preventing them from raising safety concerns, our concerns are alleviated by several factors. First, we agree that these employees were much less likely to have been involved in the actual construction activities at the site and thus less likely to actually have concerns. Second, we agree that the Staff's inspection program, supported by its Allegation Management Program and TU Electric's SAFETEAM program, provide sufficient assurance that outstanding safety concerns will be discovered and resolved. Accordingly, we find that a stay of the full-power license based upon this allegation is unnecessary.⁴

2. *The Jones Allegations*

Petitioners also allege that there are unreported deficiencies at Comanche Peak Unit 2 that have remained hidden because of "hush money" agreements between TU Electric or its contractors and former Comanche Peak workers who had filed employment discrimination or "whistleblower" claims with the U.S. Department of Labor ("DOL"). Stay Motion at 5-8. This allegation is based upon the supporting affidavit of Mr. Ron Jones, a former QA inspector employed at Comanche Peak Unit 1 during the years 1983-1984. However, this allegation is deficient upon its face.

First, Petitioners credibly cannot claim that Mr. Jones' allegations could not have been previously presented to the NRC (Stay Motion at 8), because Mr. Jones is no stranger to NRC proceedings. He has presented allegations to both the Commission and the NRC Staff in coordination with previous filings by the Dows. *See* Petition for Leave to Intervene (Feb. 20, 1992); Motion to Reopen the Record (Feb. 21, 1992). The NRC Staff has reviewed these allegations when Mr. Jones would provide specific information regarding them. *See, e.g.,* Letter from Russell Wise (NRC Region IV) to R. Micky Dow (Sept. 10, 1992),

⁴ We expressly commend the actions of Tex-La in acting affirmatively to notify its former contractors that they were not restricted from bringing safety concerns to the NRC. *See* Butts Declaration, *supra*.

Exhibit 1 to NRC Staff Response, Mar. 22, 1993; Letter from Russell Wise to R. Micky Dow (Undated, Exhibit 2 to NRC Staff Response, Mar. 22, 1993). Thus, not only has Mr. Jones had an adequate opportunity to present allegations to the NRC, but those allegations have been a matter of public record for some time. See, e.g., CLI-92-12, 36 NRC 62, 70-71 (1992).

Second, Mr. Jones — by his own admission — was employed only at Comanche Peak Unit 1. His affidavit makes absolutely no allegations regarding construction activities at Comanche Peak Unit 2 — the license that is at issue.⁵ And, in fact, the stay motion itself contains no allegations of any deficiencies at Unit 2. Third, Mr. Jones has not worked at the Comanche Peak construction site since 1984 — over 8 full years ago. Since that time, TU Electric undertook several massive corrective action programs to eliminate deficiencies existing at that time. We have previously noted that persons raising allegations or attempting to intervene based upon information obtained during that period must address how their information has been affected by the completion of those programs. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988). Petitioners have made absolutely no attempt to address the question of how the subsequent corrective action programs would have impacted these alleged deficiencies.

Turning to Petitioners' specific technical allegations, they imply that an incident that occurred at Comanche Peak in May of 1992 was a direct result of the failure to correct a nonconforming condition Mr. Jones had discovered. Stay Motion at 6-7. Specifically, Petitioners allege that Mr. Jones had identified

an electrical wiring defect associated with the coolant control valve to Unit 1, and that as a result of this defect, the valve would not control the cooling of the reactor rods.

Stay Motion at 6. Petitioners then allege that this defect "was never corrected[,]” *id.*, and "gave rise to conditions which could have resulted in a devastating accident at [Comanche Peak] . . .” because

⁵In fact, Petitioners appear to have either misunderstood or misrepresented Mr. Jones' affidavit in their stay motion. For example, Petitioners allege that

Mr Jones identified over 300 non-conforming conditions, *id.*, at 2, that were never corrected by [TU Electric] and, to this day, present a significant risk to the public's health and safety.”

Stay Motion at 6. On its face, this statement leads a reader to believe that Mr. Jones has stated that he reported 300 nonconformances, none of which were corrected. A close reading of Mr. Jones' affidavit discloses that he said no such thing. Mr. Jones does allege that he reported "over 300 non-conforming conditions in Unit 1.” Affidavit, ¶2. However, he makes no assertion regarding how many of those nonconformances remain uncorrected. His only allegation regarding any particular nonconformance remaining uncorrected is in ¶3 where he discusses a nonconformance "addressing faulty wiring to water coolant valve that controls the amount of water let into reactor to control nuclear heating rods. I believe that *this* was never corrected” Jones Affidavit, ¶3 (emphasis added). Mr. Jones then discusses his belief that *this* condition led to a 1992 incident at Comanche Peak Unit 1. Nowhere does Mr. Jones say that he believes that TU Electric failed to resolve his other nonconformances or that they have any relationship to Unit 2.

Unit 1 would have experienced a significant accident due to the failure of the coolant control valve to operate and that [TU Electric] was only able to avoid a catastrophe by pumping water from a source within CPSES Unit 2 (at the time an unlicensed and uninspected facility).

Stay Motion at 7.

Petitioners apparently refer to an incident at Comanche Peak Unit 1 in May of 1992. However, Petitioners have not described the incident correctly. In that incident, which, contrary to Petitioners' allegation, involved the spent fuel pool instead of the reactor, the NRC determined that the Comanche Peak spent fuel pool went without cooling for approximately 17 hours due to a component cooling water system misalignment, not due to a problem caused by a wiring deficiency. The spent fuel pool was never in danger of overheating and there was no risk to public health and safety. See Inspection Report 50-445/92-20; 50-446/92-20 (June 9, 1992) ("Inspection Report 92-20").

The Unit 1 operators corrected the problem by aligning the Unit 2 cooling water to the spent fuel pool. The use of the Unit 2 cooling water was in violation of the Unit 1 license. Therefore, the NRC issued a civil penalty of \$125,000 to TU Electric because the Unit 1 managers did not exercise proper control of licensed activities. See Enforcement Action 92-107 (July 23, 1992) ("EA-92-107") (attached as Exhibit 3 to the Staff's Response of March 22, 1993).

The NRC Staff has also issued a Director's Decision that addresses this incident in response to a petition under 10 C.F.R. § 2.206 filed by the Dows. See DD-92-6, 36 NRC 325 (1992) ("DD-92-6"). The Staff did not identify any failures of mechanical or electrical equipment. EA-92-107, *supra*, at 2; DD-92-6, 36 NRC at 333-35. Thus, we find no connection between Mr. Jones' allegation of defective wiring in 1983-1984 and the incident on May 22, 1992.

Petitioners next allege that Mr. Jones provided information regarding the nonconformance reports he prepared to his former attorney (apparently before the 1988 settlement agreement) and they further allege that his attorney failed to provide that information to the NRC because of a restriction in the 1988 settlement agreement. Stay Motion at 7-8.⁶ However, the 1988 Settlement Agreement did *not* prevent Mr. Jones' attorney from presenting that information to the NRC. See *generally Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103 (1988). Moreover, we are not aware of anything that prevented Mr. Jones from retrieving his information (regarding Unit 1, we note again) from his attorney and providing that information to the NRC himself. For example, as we noted above, Mr. Jones has presented numerous allegations directly to the NRC. Assuming *arguendo*

⁶We do not find any allegation in Petitioners' stay motion that TU Electric entered into a restrictive agreement with Mr. Jones himself.

that he has not raised the particular allegations before, he has certainly not been prevented from raising them by the 1988 agreement.

Furthermore, Petitioners have not addressed actions taken by the NRC in response to similar allegations after the 1988 Comanche Peak agreement. For example, the NRC issued a generic letter to all licensees, applicants, and their principal contractors on April 27, 1989, directing them to identify any settlement agreements that contained restrictive agreements. TU Electric did not identify any agreements that were executed at the time of the 1988 Comanche Peak agreement. See Letter from James E. Lyons, NRC, to Betty Brink, Citizens for Fair Utility Regulation (Jan. 30, 1990), Attach. at 11. Moreover, the NRC Staff reviewed the two groups of agreements signed at the time of the 1988 settlement and found that the releases in the one group did not contain restrictive agreements and that the releases in the other group "contained explicit language which informed the former employee that he/she was free to take any safety concerns to the NRC." *Id.* at 12.

Furthermore, the Secretary of Labor has voided the restrictive clauses in several agreements with former employees that were signed before the 1988 Comanche Peak agreement as being against public policy. See, e.g., *Macktal v. Brown & Root*, Docket No. 86-2332 (Nov. 14, 1989). Finally, the NRC has issued a regulation that prohibits such agreements. See 10 C.F.R. § 50.7(f); 55 Fed. Reg. 10,404 (Mar. 21, 1990).

In summary, given this background, we cannot find any basis for staying the issuance of the full-power license based upon these allegations regarding TU Electric's "character and competence."

B. The Dows' Allegations

The Dows raise two generalized allegations that we believe need to be addressed.⁷ First, they too allege that Mr. Jones' allegations "were never placed on the record before the [Licensing Board] . . . have never been addressed, investigated, and most important of all, corrected." Dow Response at 4. However, as we noted above, Mr. Jones has been in frequent contact with the NRC Staff and he has raised several allegations that the NRC Staff has reviewed and resolved.

Second, the Dows allege that they are in possession of the "Atchison papers" which the Dows allege contain "over 1,000 violation reports . . . none of which

⁷The Dows raise several other allegations not discussed in detail here. However, we have reviewed them and reject them as a basis for staying issuance of the full-power license, in no small part because they are unsupported. These allegations include TU Electric's alleged (1) lack of security for Comanche Peak, (2) harassment of whistleblowers, and (3) improper labeling of pressure valves and limit switches. The Dows also allege that TU Electric "conspired" with local law enforcement authorities to have Mr. Dow arrested. However, we find no evidence of any illegal activity by TU Electric.

has ever been introduced into the record, investigated or corrected” Dow Response at 4. However, Mr. Atchison was a witness before the Licensing Board during the 1983 period. At that time, the Licensing Board extensively reviewed many allegations raised by Mr. Atchison. *See, e.g.*, LBP-83-43, 18 NRC 122, 145-48 (1983); LBP-83-60, 18 NRC 672, 693-94 (1983). The Dows have failed to demonstrate that the allegations they would present are different from those raised in 1983 and resolved since that time. Moreover, the Dows do not make any concrete or specific allegations about any particular defect at Comanche Peak recorded in the “Atchison papers” or by the nameless “other seven whistleblowers.” Dow Response at 4. Given the vagueness of the Dows’ allegations and the thoroughness with which the Licensing Board reviewed Mr. Atchison’s allegations in 1983, we find nothing in this allegation to warrant a stay of the full-power license.⁸

V. PETITIONERS’ MOTION FOR A STAY PENDING JUDICIAL REVIEW

On April 1, 1993, Petitioners filed another pleading asking again for a stay of issuance of the full-power license and, in addition, for a stay of the effectiveness of CLI-93-10 pending judicial review. TU Electric has responded in opposition; the NRC Staff has informed us that it will not file a response.

Initially, Petitioners’ request is not properly a “stay motion” under our regulations. The provisions of 10 C.F.R. § 2.788 apply only to requests for stays of decisions of the Licensing Board, not decisions of the Commission itself. Instead, as we have noted before, a pleading like the one before us here is correctly styled a Motion for Reconsideration of our previous decision and/or a Motion to Hold in Abeyance the issuance of the disputed license pending appeal. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991).

Petitioners’ preliminary argument is that TU Electric improperly continued construction activities at Comanche Peak Unit 2 after August 1, 1992. However, Petitioners have never attempted to explain why the automatic extension provisions of 10 C.F.R. § 2.109 and 5 U.S.C. § 558 should not apply to this case. Moreover, Petitioners fail to explain why they never sought a stay of these actions when they sought intervention in the CPA proceeding last year. *See, e.g.*, CLI-93-10, 37 NRC at 201 n.37.

⁸We note that Mr. Atchison left Comanche Peak before 1983. *See* LBP-83-34, 18 NRC 36 (1983). Thus, any allegations based upon his employment there must overcome the same hurdles that we have noted face Mr. Jones’ allegations. For example, the Dows have not addressed how Mr. Atchison’s allegations would have been impacted by the extensive corrective action programs instituted by TU Electric — based in no small part on issues raised by Mr. Atchison himself.

Petitioners' main argument is that NRC cannot declare the CPA proceeding moot or issue the Unit 2 operating license in the face of their allegation that TU Electric has constructed Unit 2 "in violation of NRC requirements[.]" because, they assert, the NRC cannot find that construction has been properly completed until that allegation is resolved. Stay Motion (April 1, 1993) at 3 n.1. However, a review of their pleadings indicates that Petitioners have not in fact alleged that construction deficiencies actually exist at Unit 2. See, e.g., Petitioners' Response to the Commission's Order of March 5, 1993 (March 12, 1993); Petitioners' Stay Motion (March 15, 1993); Petitioners' Stay Motion (April 1, 1993). Instead, as we have noted earlier, their allegations fall into two general categories that do not involve construction at Unit 2.

First, Petitioners allege that TU Electric imposed restrictive settlement agreements on the former minority co-owners during the 1988 and 1989 buyouts. However, this allegation, even if true, is several steps removed from alleging that construction deficiencies actually exist at Unit 2. Petitioners have presented no evidence that any person was actually dissuaded from bringing safety concerns not previously identified and considered to the NRC because of these co-owner agreements. Moreover, as we have noted above, not only have the former co-owners stated that they do not now interpret — nor have they ever in the past interpreted — the agreements as being restrictive, but also they have stated that TU Electric has never attempted to force them not to report matters to the NRC. Quite simply, this allegation does not address any alleged construction deficiencies at Comanche Peak Unit 2.

Second, Petitioners allege that there were construction deficiencies in Comanche Peak Unit 1 during the 1982-1983 time frame. However, as we have noted above, there is no reason to infer from these earlier alleged deficiencies at Unit 1 that similar deficiencies exist now at Unit 2. As we have noted on several occasions, TU Electric engaged in a massive reinspection and corrective action program during the 1984-1988 period. Petitioners have never presented any allegations regarding improper construction at either Unit 1 or Unit 2 that postdate this period. Thus, we find no reason to accept Petitioners' implied charge that Unit 2 is improperly constructed based upon 10-year-old allegations regarding Unit 1.

As we noted in CLI-93-10, the proper method of raising a challenge to the issuance of the operating license is by a petition for intervention in the OL proceeding. See CLI-93-10, 37 NRC at 204-05. As we stated there, Petitioners "cannot . . . transform their challenge to [the CPA] . . . into an attack on the legitimacy of issuing an operating license." *Id.* at 204. Because none of the Petitioners' filings state any substantive claims that call into question the finding that construction of Unit 2 has been completed in accordance with the terms of the construction permit, we reaffirm our previous determination that the CPA proceeding is moot. Therefore, we deny Petitioners' Motion for Reconsideration.

As for Petitioners' Motion to Hold in Abeyance the full-power license pending their attempt to seek judicial review, we note once again that they attempt to raise in the forum of a CPA proceeding issues that are properly raised in an OL proceeding. Moreover, for the reasons stated elsewhere in this Order, Petitioners have not raised any substantial issue that would warrant withholding a full-power license. Therefore, we also deny Petitioners' Motion to Hold in Abeyance.

VI. CONCLUSION

In sum, the CPA proceeding has been terminated and Petitioners' request for a stay insofar as it relates to the CPA proceeding is moot. In addition, Petitioners are not parties to — and have not sought intervention in — the Unit 2 OL proceeding. Therefore, the Petitioners' stay motion is denied. Furthermore, the Dows' motion to intervene is denied for failure to address, *inter alia*, the five factors in 10 C.F.R. § 2.714(a)(1)(i)-(v). Finally, we have denied Petitioners' Motion for Reconsideration of CLI-93-10 and their Motion to Hold in Abeyance the full-power license pending their appeal of CLI-93-10 and this decision. In sum, we have concluded that neither the Petitioners nor the Dows have demonstrated that TU Electric lacks the "character and competence" necessary to operate Comanche Peak Unit 2 or that any safety problems exist that would prevent safe operation of the plant.

It is so ORDERED.

For the Commission⁹

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of April 1993.

⁹ 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 Judge:

James P. Gleason, Presiding Officer

In the Matter of

Docket No. 40-08681-MLA
(ASLBP No. 92-666-01-MLA)
(Source Material License
No. SUA-1358)

UMETCO MINERALS CORPORATION

April 12, 1993

REGULATORY GUIDES: APPLICATION

It is settled procedure, however, that guidelines, let alone proposed guidelines as involved here, are not protected from confrontation. Unlike regulations, they merely present acceptable methods of meeting regulatory requirements and are subject to questioning in adjudicatory hearings. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982).

ADJUDICATORY BOARDS: DELEGATED AUTHORITY

Subjects for future license amendment consideration are not matters that can be considered for adjudication. *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

INITIAL DECISION

This proceeding concerns itself with objections by the State of Utah (State) to the Nuclear Regulatory Commission (NRC) issuance of a license amendment to

UMETCO Minerals Corporation (UMETCO or Licensee).¹ Under UMETCO's license, uranium milling and waste disposal processes are conducted at the Company's White Mesa Mill facilities in Blanding, Utah. An informal hearing on the license amendment under NRC's Subpart L procedures was granted to the State and a Presiding Officer designated to adjudicate the controversy.²

I. BACKGROUND

On January 18, 1989, UMETCO submitted a license amendment application to perform plant processing tests on approximately 600 wet tons of feed material at the mill. The stated purpose of the testing was to determine if UMETCO could economically process the material for its uranium content with tailings resulting from the process to be disposed in the mill's impoundment. The feed material, obtained from the Teledyne Wah Chang Albany Company (TWCA), originated from the processing of ore to recover zirconium at TWCA's facilities in Albany, Oregon.³

Prior to the filing of UMETCO's application, the State of Utah, an Agreement State, had been consulting with NRC officials concerning the disposal of contaminated wastes in uranium mill tailings ponds at active mills, and had notified UMETCO of its apprehension.⁴ The State's major concern involves the possibility that UMETCO, instead of pursuing its avowed purpose of reprocessing for uranium, is actually engaging in the disposal of low-level radioactive waste. Under its agreement, the State has regulatory jurisdiction over all low-level radioactive waste materials or other wastes going into such facilities.⁵

From January 1989 to April 1992, NRC Staff personnel at Region IV and Headquarters wrestled with UMETCO's license application and the policy questions raised by a State of Utah claim of possible jurisdiction over the material. The critical issue in the Staff's view was whether tailings resulting from UMETCO's processed material could qualify as byproduct material under section 11e(2) of the Atomic Energy Act of 1954, as amended (AEA). See Hearing File, Attach. 8, at 2. In the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), the AEA was amended, adding a new category to the definition of byproduct material, to cover the tailings or wastes produced from

¹ State of Utah, Request for Hearing and Request for Action (July 2, 1992).

² B. Paul Cotter, Chief Administrative Judge, ASLBP, Designation of Presiding Officer (July 20, 1992); see also Memorandum and Order, LBP-92-20, 36 NRC 112 (1992).

³ UMETCO's application noted the 600 tons as being less than 10% of the source material still available from TWCA for processing. Hearing File, Attach. 1.

⁴ Hearing File, Attachs. 3 and 4.

⁵ *Id.*, Attach. 2.

ore processed primarily for its source material content.⁶ If the tailings from the material in question here are byproduct material, NRC's jurisdiction is clear under the Atomic Energy Act and it could authorize the materials tailings to be placed in the mill's impoundment. To resolve any uncertainties, the Staff brought the matter before the Commission and issued new proposed licensing guidance for public comment.⁷

The Commission notified the Staff that it had no objection to the UMETCO license amendment provided the amendment met the proposed guidance criteria. The Staff, determining that the criteria had been met, issued the license amendment and authorized UMETCO's plant testing of the material.⁸ The State then filed its hearing request.

Pursuant to 10 C.F.R. § 2.1231, a hearing file has been made available by the Staff, a prehearing conference and site visit to view the White Mesa Mill facility and material was conducted by the Presiding Officer, and presentations by the parties have been timely filed.⁹

II. DISCUSSION

1. The State of Utah argues that a proper analysis of the feed material is fundamental to determine which governmental entity has regulatory jurisdiction. Asserting the State's regulatory control over solid or mixed waste as well as low-level radioactive waste and naturally occurring radioactive material (NARM), Utah claims that NRC only retains jurisdiction over the processing of source material ore. The Resource Conservation and Recovery Act (RCRA) places regulatory authority over solid waste (to include hazardous waste) in the Environmental Protection Agency (EPA).¹⁰ Hazardous waste is solid waste as

⁶ Certain terms have important special meanings in the context of UMTRCA considerations:

"11c. The term byproduct material means . . . (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content."

The term "source material" has two definitions under NRC regulations. Care must be taken not to confuse them. As defined in 10 C.F.R. § 40.4, "source material" means:

(1) Uranium or thorium, or any combination thereof, in any physical or chemical form or (2) ores which contain by weight one-twentieth of one percent (0.05%) or more of: (i) Uranium, (ii) thorium or (iii) any combination thereof. Source material does not include special nuclear material.

Thus, in this case, "source material" could mean both the ore (containing at least 0.05% uranium) from which UMETCO plans to extract uranium and the uranium itself. To avoid confusion, in this decision, the term "source material ore" means the former.

⁷ Hearing File, Attach. 8, Taylor to Commission (April 16, 1992); 57 Fed. Reg. 20,525, 20,530 (May 13, 1992).

⁸ *Id.*, Attach. 9, Chilk to Taylor (May 13, 1992); Attach. 10, Hall to UMETCO (June 2, 1992).

⁹ Presiding Officer, unpublished Memorandum and Order (Nov. 6, 1992). As the Staff notes (Staff Brief at 3), the Presiding Officer provided the State an opportunity of rebuttal to the other party presentations. This is an informal proceeding and the offer was intended to expedite the development of the record. The burden of proof was not changed thereby and neither the Staff nor Licensee requested an opportunity for surrebuttal.

¹⁰ The administration and enforcement of the RCRA program in Utah has been delegated by the EPA to the Utah Department of Environmental Quality. State Brief at 7.

defined by EPA in 40 C.F.R. Part 261, Subpart A, § 261.3. If hazardous waste, regulated by EPA, is mixed with radioactive waste regulated by the NRC, the combination would have to be disposed in a mixed-waste facility. *See* 57 Fed. Reg. at 20,532. However, specifically excluded from the definition of solid waste in RCRA is byproduct material as defined in section 11e(2) of the Atomic Energy Act of 1954, as amended.¹¹

The State argues that since it has jurisdiction over the processing of RCRA waste and the disposal of solid waste within its borders, NRC regulations should contain specific procedures and requirements to ensure that any material received by NRC licensees is not hazardous.

The State also contends that the relevant parts of an alternative optional testing procedure in the new guidance, a co-disposal test, should be included in NRC's license amendment decision.¹²

The State claims that by following its new guidance in granting the UMETCO license amendment, the NRC committed multiple errors in *first*, utilizing a new and unreasonably expansive definition of ore; *second*, by placing undue reliance on UMETCO's certification that the TWCA material contains no hazardous waste; and *third*, by accepting, without an independent review, UMETCO's certification that its primary purpose for receiving and processing the material was the recovery of uranium.¹³

In setting forth its new guidance, the NRC expanded the meaning of the term ore, as used in section 11e(2) of the Atomic Energy Act of 1954, as amended. This was to permit, like the present case, feed material other than natural ore to be used by licensed mills to extract source material.

The State contends that, with the new definition, the NRC has broadened the class of materials considered as ore to such an unreasonable length that it does not conform to UMTRCA's mandate and policy. In support of its position, the State submitted a list of various definitions of "ore" compiled by the U.S. Bureau of Mines, none of which are compatible with NRC's definition.¹⁴

In order to qualify material as section 11e(2) byproduct material under the new guidance, a certification is required that the primary purpose for receiving the ore is the extraction of uranium.¹⁵ The NRC received such a certification from UMETCO. The State contends that there is an obligation on the part of the Staff to look behind the required certification, where, as in circumstances such as here, UMETCO was being paid to receive the material and where the possibly unprofitable economics of processing for uranium raises questions concerning

¹¹ 42 U.S.C.A. § 6903(27).

¹² State Brief at 16.

¹³ *Id.* at 11.

¹⁴ *Id.* at 19-21 & n.46.

¹⁵ 57 Fed. Reg. at 20,531.

the factual objective of the transaction. The State submitted evidence to indicate that UMETCO faced difficulties in realizing any profit from extracting uranium from the TWCA material; also that it may have benefitted TWCA financially to compensate UMETCO to receive the material rather than having to pay higher disposal costs for it as mixed or low-level radioactive waste.¹⁶

Finally, it is the State's position that this transaction, based on NRC's new definition of ore, may jeopardize the ultimate transfer of the material to the Department of Energy (DOE). For the long-term protection of the public's health, the Atomic Energy Act requires that, prior to license termination, land and byproduct material on it must be transferred to either the Department of Energy or the State where it is located.¹⁷

The State contends that a successful court challenge to the Staff's new definition of byproduct material could result in DOE being relieved of the obligation to assume future long-term custody and title to the land and material involved here. In support of this concern, the State references commentary in the new guidance that portends some reluctance on the part of DOE to handle commingled materials.¹⁸ The State concludes by requesting license amendment changes to (1) require submittal of information on the transaction arrangements between UMETCO and TWCA and also economic processing information on uranium recovery from UMETCO so the NRC Staff can independently determine whether UMETCO's purpose was for uranium processing or waste disposal; (2) require UMETCO to develop protocols in its current processing to determine whether future materials it processes contain RCRA hazardous waste; and (3) require the Staff to follow its own procedures on consultation with the DOE that are set forth in its new guidance on the transfer of non-11e(2) byproduct material.¹⁹

2. In UMETCO's Brief, the Licensee informs that the process treatment sludge from TWCA has a grade of 0.18% uranium, a proportion comparing favorably with concentrations in other material processed at the White Mesa Mill. The Licensee further responds that its testing demonstrates that the material is not a hazardous waste.²⁰ Accordingly, in its view, the material does not come under EPA or the State of Utah's regulatory framework. Pursuant to NRC's Staff request, as previously indicated, the Licensee filed a certification that the material was not RCRA hazardous waste and that the primary purpose for processing the material was the recovery of uranium.²¹ The Licensee also responded to an inquiry, from the Utah Solid and Hazardous Waste Control

¹⁶ State Brief at 21-26.

¹⁷ 42 U.S.C.A. §§ 2113(a)(2), (b)(2).

¹⁸ 57 Fed. Reg. at 20,528.

¹⁹ State Brief at 29-31.

²⁰ UMETCO Brief at 4.

²¹ *Id.* at 5.

Board, that its nonhazardous waste determinations had been confirmed using a new EPA Toxicity Characteristic Leaching Procedure (TCLP) test method.²² The Licensee contends that it has performed all required testing under appropriate EPA and RCRA protocols to prove that the materials are not hazardous wastes.²³

UMETCO terms the State's argument misdirected in the latter's assertions that the NRC has to review the economic particulars of the TWCA-UMETCO transaction to determine whether the transfer is, in reality, a sham disposal. Without a regulatory requirement, in Licensee's view, this is a challenge to NRC's licensing guidelines. *Citing Union of Concerned Scientists v. AEC*, 499 F.2d 1069 (D.C. Cir. 1974), the Licensee contends that the NRC hearing here is an inappropriate forum to challenge policies prescribed by Commission regulation.²⁴ UMETCO argues further that if serious evaluation were to be provided to the State's "economic" argument, EPA's regulatory considerations for determining sham recycling or disposal have more relevant criteria.²⁵ According to UMETCO, financial consideration is only one of six factors considered by EPA and then only where the potential for sham disposal is high. In the Licensee's view, the UMETCO-TWCA transaction would have no difficulty passing muster using EPA's testing procedure.²⁶

In referring to the State's allegation that the new NRC definition of ore is too broad, the Licensee argues that this contention also basically challenges the regulatory guidance, and is improperly raised in the present forum. UMETCO also cites case authority in support of NRC's new definition of ore.²⁷

To the State's argument that UMETCO should be required to meet the co-disposal test contained in the new guidance requirements for disposal of non-11e(2) byproduct materials, the Licensee alleges that the TWCA material meets the "key substantive elements" of that test.²⁸

In responding to the State's call that the Staff require UMETCO to develop additional protocols for testing further shipments of TWCA waste, the Licensee states that it has no basic objections in future amendments to the development of appropriate hazardous waste determination protocols.²⁹

Finally, the Licensee indicates that the State also calls for different licensing guidance than is applicable here, in claiming that there should be a license requirement to ensure that DOE will either take title to the material at issue, or as a minimum, follow the procedures outlined in NRC guidance for non-11e(2)

²² *Id.* at 6.

²³ *Id.* at 17.

²⁴ *Id.* at 7-10.

²⁵ 50 Fed. Reg. 614, 637-38 (Jan. 4, 1985).

²⁶ UMETCO Brief at 10-15.

²⁷ *Id.* at 15-16.

²⁸ *Id.*

²⁹ *Id.* at 16-18.

byproduct material. UMETCO contends that the NRC has regulatory license control over the mill tailings and wastes in controversy and there is no evidence that the DOE would refuse to exercise its responsibilities under the law.³⁰

3. The Staff's Brief alleges that Utah's arguments fail to address four of the five issues admitted for adjudication in this proceeding and raise five new issues instead. In the Staff's view, "it appears that Utah no longer challenges the contents of the material on site, or the (license) amendment before the Presiding Officer." Although the Staff response addresses all the issues raised by the State, it submits that the Utah brief should be rejected without further consideration. The Staff further points to Utah's neglect in not detailing deficiencies or omissions in the license application as required by 10 C.F.R. § 2.1233(c).³¹

In support of its licensing action, the Staff alleges that the material received by UMETCO, after testing and evaluation, was determined to be uranium ore and not hazardous or mixed waste. The Staff references evaluations or testing performed by the Oak Ridge National Laboratory, UMETCO, TWCA, and the Oregon Department of Environmental Quality. Referring to Utah's request for safeguards in license amendments for TWCA materials in future shipments, the Staff indicates that consideration of those activities would have to meet the same standards, but such issues are outside the jurisdiction of the present proceeding.³²

The Staff's brief provides a lengthy commentary on the Commission's proposed new guidance.³³ It states that the guidance was developed to meet a clarification of the statutory definition of byproduct material, as enunciated in a Federal Court of Appeals decision. The clarification was necessitated by previous NRC definitions which categorized such materials according to their initial use rather than their mineral and chemical characteristics. The decision (*Kerr-McGee v. NRC*, 903 F.2d 1 (D.C. Cir. 1990)) held that in applying the definition of byproduct material in UMTRCA, the NRC provided too narrow an interpretation of ore processed primarily for its source material content. The Court held that NRC's action frustrated the purposes for which UMTRCA was enacted — "to bring previously unregulated radioactive end products of . . . source material extraction . . . within the scope of NRC regulation. . . ."³⁴ The Staff cites the holding of the Court as asserting that UMTRCA's intent was designed to have NRC's regulatory authority cover all wastes resulting from the extraction or concentration of source materials in the course of the nuclear fuel cycle.³⁵ To Utah's argument that the new definition of ore is overexpansive,

³⁰ *Id.* at 18-20.

³¹ Staff Brief at 4-7.

³² *Id.* at 7-9.

³³ 57 Fed. Reg. 20,525, *et seq.*

³⁴ 903 F.2d at 8.

³⁵ Staff Brief at 9-10.

the Staff responds that it is based on UMTRCA and is consistent with *Kerr-McGee*.³⁶

After submitting its papers to the Commission containing the guidance to process feed materials other than natural ores,³⁷ the Staff determined that the UMETCO proposal met the criteria of the new guidance by:

- a determination the feed material to be tested was ore now defined as natural or native matter that may be mined and treated for the extraction of any of its constituents or any other matter from which source material is extracted in a licensed uranium or thorium mill;
- a determination the feed material was not mixed or hazardous waste;
- a determination the ore was being processed primarily for its source material content.³⁸

In connection with the jurisdictional issue raised by the State, the Staff asserts that even though delegation of regulatory control over some materials was made to Utah as an Agreement State, the NRC retained jurisdiction over the processing of source materials and section 11e(2) byproduct material.³⁹ On Utah's claim that the NRC has an obligation to determine whether TWCA's purpose in shipping the material to UMETCO is waste disposal, the Staff responds that TWCA's motive is irrelevant and neither UMTRCA nor the Court in *Kerr-McGee* refers in any way to the intent of the supplier of ore material.⁴⁰

In responding to the State's argument concerning the potentially uncertain role of the DOE in this transaction, the Staff states that there is no requirement in the law that DOE certify its willingness to take ultimate jurisdiction over the materials involved in this controversy. Since the material is section 11e(2) byproduct material, unless the State retains custody, the DOE is obligated under UMTRCA to assume control of it.⁴¹ On the State's claim that the Staff should be required to use the Commission's guidance on disposal of non-section 11e(2) waste material at NRC-licensed tailing sites, the Staff replies that the claim raises a new issue, and no reasoning being supplied, the matter must be dismissed.⁴²

The Staff also argues that it has no authority to review the economics of the TWCA-UMETCO transaction. The area is outside the zone of interests protected by the Atomic Energy Act according to the Staff, and economic concerns are

³⁶ *Id.* at 16.

³⁷ SECY-91-347 and Hearing File Attach. 8. Both papers referenced UMETCO's license amendment request.

³⁸ Staff Brief at 12, 13; *see also* Hearing File, Attach. 11, at 2, 3.

³⁹ Staff Brief at 16.

⁴⁰ *Id.* at 16-17.

⁴¹ *Id.* at 17-18.

⁴² *Id.* at 18-19.

not reviewed in license amendment applications. Consequently, this claim also requires dismissal.⁴³

4. In a response brief, the State claims that (1) it has the right in this proceeding to challenge NRC's new guidance; (2) it had not raised issues outside the scope of the proceeding; and (3) the NRC's reliance on the guidance led to deficiencies and material omissions in the UMETCO license amendment.⁴⁴

The State contends that the license amendment disputed herein was issued at a time when the new guidance was open procedurally for public comments. Accordingly, the guidance has not reached the status of a substantive rule and the Staff's actions based on it and the guidance itself are within the scope of the present proceeding.⁴⁵

The State alleges that the overriding issue raised in its request for hearings is whether UMETCO is engaged in waste disposal or reprocessing. If engaged in waste disposal, the State, not the NRC, has jurisdiction. As a consequence, characterization of the materials and the jurisdiction issue are basic matters within the scope of the proceeding, and the State's arguments are directed at either or both of those questions; these issues are also involved in ascertaining DOE's obligation to take title to the materials.⁴⁶

The State contends that the new definition of "ore" in the guidance is too broad and therefore the NRC must analyze independently whether the material is waste material. Not having done so, the license amendment is deficient.⁴⁷

The State proclaims that it is NRC's basic responsibility to determine whether UMETCO is engaging in reprocessing or waste disposal. And to rely on the Licensee's certification alone is an abdication of NRC's obligation to ascertain objectively whether the material is being received to avoid low-level radioactive waste disposal requirements. The State contends that the substance of the transaction can only be determined by reviewing related processing and economic information. And finally, the State reiterates that a mischaracterization of the materials by the NRC will place in jeopardy DOE's legal responsibility for their long-term custody.⁴⁸

⁴³ *Id.* at 19.

⁴⁴ State Brief at 1-11.

⁴⁵ *Id.* at 1-4.

⁴⁶ *Id.* at 4-5.

⁴⁷ *Id.* at 6-7.

⁴⁸ *Id.* at 7-11.

III. ANALYSIS

A. Legal Issues

A number of issues have been joined in this proceeding raising basic questions on the applicability of NRC's proposed guidance.⁴⁹ The major issues are *first*, whether the criteria that hazardous or mixed waste is not to be included in NRC's licensed 11e(2) byproduct material facilities are satisfied in this case; *second*, whether the Licensee's certification that feed material is to be processed primarily to recover source material is adequate to ensure that waste disposal is not intended; and *third*, whether the proposed definition of ore, as used by the Staff in this case, is within the regulatory authority of the NRC. Prior to treatment of these issues, other controverted matters can be briefly resolved.

1. Minor Issues

UMETCO argues that much of the State's contentions are inappropriate in the present proceeding as they constitute a challenge to NRC's licensing guidelines. It is settled procedure, however, that guidelines, let alone proposed guidelines as involved here, are not protected from confrontation. Unlike regulations, they merely present acceptable methods of meeting regulatory requirements and are subject to questioning in adjudicatory hearings.⁵⁰

The Staff contends that no consideration should be provided the State's Brief since it fails to address most of the issues admitted for adjudication, raises new issues in its place, and neglects to detail deficiencies or omissions in the license application as required by 10 C.F.R. §2.1233(c). Although propounded in an extended manner, the State basically raises questions in this proceeding on jurisdictional authority, claims of errors in NRC reliance on the new guidance with its expanded definition of ore, concerns about the responsibility of the Department of Energy to assume long-term custody of tailing ponds and byproduct materials, and proposals that the NRC obtain and evaluate Licensee's processing and economic information.⁵¹ The discussion of these matters does in fact trace to the issues admitted in this proceeding.⁵² With respect to failure to detail deficiencies or omissions in the license application, as required by 10 C.F.R. §2.1233(c), the Staff's concern is not well founded. The

⁴⁹The Staff has noted at several points that the Commission itself approved the issuance of this license amendment, provided it met the guidance. See NRC Staff Brief at 20-21 and NRC Staff Response to Questions at 2. At the time of its approval (in the form of a "no objection"), the Commission did not have before it the particular arguments raised by the State of Utah in this proceeding.

⁵⁰*Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982).

⁵¹State Brief at 6-26.

⁵²Presiding Officer, Memorandum and Order at 2 (Nov. 6, 1992).

State's case is directed at alleged deficiencies in NRC's processing and approval of the Licensee's application and not the application itself.⁵³

Both the Licensee and Staff argue a lack of merit in the State's claim that the license approval should contain some assurance that the Department of Energy (DOE) will take long-term custody and control of the UMETCO property. No statutory or regulatory requirement demands that Agency's prior concurrence, agreement, or approval of impoundments of byproduct materials. The statutory responsibility of the DOE is clear once waste material or mill tailings come within the NRC's license purview as byproduct material. A different view would be tantamount to an absurdity that agencies of the federal government should certify to the performance of their duties and intent to carry out the law. The Staff analysis in the proposed guidance, which discloses the uncertainty of DOE regarding its responsibilities for long-term custody, only refers to the disposal of *non-11e(2)* byproduct material.⁵⁴ No basis has been provided leading to a conclusion that DOE will not live up to its responsibilities concerning the disposition of byproduct material.

The Licensee and Staff each comment adversely on the State's claim that the Licensee should be required to develop protocols for future shipments of TWCA material.⁵⁵ Although UMETCO indicates that it has no objection to future appropriately imposed requirements concerning hazardous waste determinations, the Staff's argument that the question has no place in the instant proceeding has merit. The issue here is the propriety of UMETCO's license amendment granted by the NRC.⁵⁶ Additional shipments of the TWCA material to UMETCO are not matters that can be considered for adjudication in this proceeding. If pursued, these only become subjects for future license amendment consideration.⁵⁷ Due to the substantive nature of this contention, however, a recommendation on it is included hereafter.

The Staff indicates that the State raises a new issue in suggesting that, for the TWCA material, the NRC use the co-disposal test in the proposed guidance procedures for disposal of non-section 11e(2) wastes.⁵⁸ Although the State does not provide explanations for the "relevant portions" of the test that should be used, its proposal appears to relate again to the State's concern that DOE will ultimately refuse to accept custody of these materials.⁵⁹ The conclusions provided heretofore concerning DOE's acceptance of its statutory responsibility

⁵³ State Brief at 30.

⁵⁴ 57 Fed. Reg. at 20,528.

⁵⁵ Staff Brief at 8-9; UMETCO Brief at 16-17.

⁵⁶ Hearing File, Attach. 10.

⁵⁷ Presiding Officer, Memorandum and Order at 2 (Nov. 6, 1992); see also Prehearing Conference Transcript (Tr.) at 37 (Oct. 29, 1992); see also *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

⁵⁸ Staff Brief at 18-19.

⁵⁹ State Brief at 16 and 31.

for byproduct material suffices to reject this issue as well. The State does not, except for the DOE issue, provide explanations to justify the application of other provisions of the co-disposal test.

2. Major Issues

a. The first major issue (which involves the jurisdiction question) is whether the evaluation of the TWCA materials demonstrates that hazardous or mixed waste is not included.

All parties in the case agree that uranium mill feed materials should not be mixed waste, i.e., a mixture of hazardous chemical waste and radioactive material.⁶⁰ If the feed material is found to be mixed waste, the *tailings* resulting from the processing of that material for its source material content may be hazardous and subject the tailings to a complicated dual regulation by NRC and EPA.⁶¹ And if the *feed material* is found to be a mixed waste, jurisdiction for regulating it falls with EPA. Thus, if the material received by UMETCO is determined to be hazardous waste, EPA has jurisdiction.

As previously indicated, the EPA has delegated administration and enforcement of the federal RCRA program to Utah.⁶² Accordingly, the State of Utah, under its authority from EPA for the handling of RCRA materials or under its agreement authority from the NRC for the disposal of low-level radioactive waste, regulates mixed waste within the State.⁶³

⁶⁰ Hazardous waste means those wastes designated as hazardous by EPA regulations in 40 C.F.R. Part 261.

⁶¹ Uranium Mill Facilities, Request for Public Comments on Revised Guidance on Disposal of Non-Atomic Energy Act of 1954, Section 11e.(2) Byproduct Material in Tailings Impoundments and Position Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores, 57 Fed. Reg. 20,525 (May 13, 1992) (Guidance).

The Staff's guidance for the use of feed materials other than natural ores has instructive background.

The Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) amended the Atomic Energy Act (AEA) to specifically include uranium and thorium mill tailings and other wastes from the process as radioactive material to be licensed by NRC. Specifically, the definition of byproduct material was revised in Section 11e.(2) of the AEA to include

"the tailings or waste produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content."

The definition of byproduct material in Section 11e.(2) of the AEA includes all the wastes resulting from the milling process, not just the radioactive components. In addition, Title II of UMTRCA amended the AEA to explicitly exclude the requirements for the Environmental Protection Agency (EPA) to permit 11e.(2) byproduct material under the Resource Conservation and Recovery Act (RCRA). The designation of 11e.(2) byproduct material contrasts significantly with the situation for source material and other radioactive materials controlled under the authority of the AEA. This possibility for dual regulation by both the NRC and EPA can become an issue when dealing with mixed hazardous wastes. As a result of UMTRCA, NRC amended 10 C.F.R. Part 40 to regulate the uranium and thorium tailings and wastes from the milling process. Thus, under normal operation, all the tailings and wastes in an NRC or Agreement State licensed mill producing uranium or thorium are classified as "11e.(2) byproduct material" and are disposed of in tailings piles regulated under Part 40. They are not subject to EPA regulation under RCRA. 57 Fed. Reg. at 20,531.

⁶² *Supra* note 10.

⁶³ *Supra* note 5.

In its request for a hearing, the State expressed a belief that UMETCO had not independently characterized the materials and was relying instead on an outdated RCRA test, conducted by TWCA in 1987, to verify that the feed materials did not contain RCRA constituents.⁶⁴ The State complains that the NRC relied on Licensee certification under NRC's new guidance to determine that the TWCA material is not a RCRA mixed or hazardous waste.⁶⁵ The State does not offer evidence in its brief that it considers the 600 tons of TWCA material currently at UMETCO's White Mesa Mill to be a mixed waste. In contrast, UMETCO and the Staff offer convincing evidence that the TWCA material does not contain characteristic or listed hazardous waste subject to regulation under RCRA or the State. UMETCO submitted, in response to Staff requests during the license amendment review, an analysis by TWCA of the material existing in the V-2 pond located at the TWCA site. This analysis, performed in June 1987, established that on the basis of the then-existing EP Toxicity Test, the material did not fail any of the tests. At that time, TWCA anticipated the now-existing EPA protocol, the Toxicity Characteristic Leaching Procedure (TCLP), and tested six compounds found to be present in the TWCA material which were part of the TCLP. When these six compounds were tested, they were not found in the extract, thus confirming that they would not be considered hazardous by the existing EPA TCLP rule. The 1987 tests performed by TWCA confirmed that the material is not ignitable, not corrosive, not reactive, does not exhibit characteristics of EP toxicity, and does not contain 40 C.F.R. Part 261 listed hazardous waste.⁶⁶

In September 1989, the Oregon Department of Environmental Quality reviewed and concurred with the TWCA determination that the V-2 materials were not hazardous waste as defined by 40 C.F.R. Part 261 or the Oregon regulations.⁶⁷ Finally, in June 1992, UMETCO had the TWCA material currently on site at the White Mesa Mill retested using the current EPA TCLP. The results of this test confirmed that RCRA materials are not present in concentrations close to regulatory limits and that the feed material is not considered a RCRA hazardous material.⁶⁸

In January 1989, the NRC conducted an unannounced radiation safety inspection at UMETCO White Mesa Mill. The NRC collected samples of the TWCA material on site and forwarded the samples for analysis to Oak Ridge National Laboratory. ORNL identified several hazardous constituents in the material, but did not classify the material as hazardous waste as defined by 40 C.F.R. Part

⁶⁴ *Supra* note 1.

⁶⁵ State Brief at 6, 7.

⁶⁶ UMETCO Brief, Appendix at 4-23 (Dec. 18, 1992).

⁶⁷ *Id.*, Appendix at 3.

⁶⁸ Letter, R.A. Van Horn, UMETCO, to Ramon E. Hall, Director, URPO, NRC (July 21, 1992).

261.⁶⁹ On the basis of this inspection, the Staff requested the Licensee to verify that the identified hazardous constituents did not result in classifying the material as a hazardous waste as defined by EPA under 40 C.F.R. Part 261.⁷⁰ The Licensee submitted information to the Staff and the Staff found that the feed material met the criteria of the new draft guidance.⁷¹ A finding that the TWCA material was not hazardous, was later reconfirmed by the Oregon Department of Environmental Quality.⁷² On the basis of UMETCO's and the Staff's filings, it must be concluded that the feed material received from TWCA is not a mixed waste.

The NRC Staff reviewing the license (amendment) request has been given the new guidance, as previously mentioned, to determine if the feed material is mixed waste.⁷³ Under the guidance, proposed feed material would not be approved for processing at a licensed mill if the material were hazardous or mixed waste. The guidance requires the Licensee to show that materials proposed for processing are not hazardous or mixed waste.⁷⁴ The guidance also provides the option for the Licensee to certify under oath or affirmation that the feed material does not contain hazardous waste.⁷⁵

The State does not argue in this case that the material is hazardous.⁷⁶ The State claims that the license certification that the material does not contain RCRA hazardous waste is inadequate and that the new guidance should contain relevant portions of the co-disposal test.⁷⁷ UMETCO believes, as indicated, that it has performed all the required testing under appropriate EPA RCRA protocols, and has demonstrated that the material is not a RCRA hazardous waste. Any testing requirements would be for future license amendments and are not appropriate for discussion in this proceeding.⁷⁸ Utah's concern with the NRC's basis for accepting the material seeks a requirement for the Staff to follow a different procedure in its review of amendment applications, thus challenging the Staff's review activities and future amendments.⁷⁹

It must be stated that the Staff's new guidance for determining whether feed material is a mixed waste appears confusing. Part B, ¶ 2 of the guidance entitled "Determination of whether the feed material is Mixed Waste" states in part:

⁶⁹ Hearing File, Attach. 6, NRC Inspection Report 40-8681/89-01 (May 8, 1989).

⁷⁰ *Id.*, Attach. 5 (April 10, 1989).

⁷¹ *Id.*, Attach. 11, Memo to Docket File No. 40-8681, Pete J. Garcia (June 2, 1992).

⁷² Letter from William H. Dana, ODEQ, to Ramon E. Hall, URFO, NRC (July 1, 1992).

⁷³ 57 Fed. Reg. at 20,530.

⁷⁴ *Id.*

⁷⁵ *Id.* at 20,531.

⁷⁶ Utah Brief at 7-10.

⁷⁷ *Id.* at 15-17.

⁷⁸ UMETCO Answer Brief at 16-17.

⁷⁹ Staff Brief at 6.

If the licensee *can show* that the proposed feed material would not be a hazardous or mixed waste, if not proposed for processing at the mill, this issue is resolved.⁸⁰ [Emphasis added.]

It then goes on to enumerate certain specifics defining hazardous waste. However, ¶ 3 of the guidance entitled “Determination of whether the ore is being processed primarily for its source-material content,” contains the following:

- b. Licensee Certification test. If the licensee certifies under oath or affirmation that the feed material: (1) is being reclaimed or recycled in accordance with RCRA, or does not contain RCRA hazardous waste. . . .

The guidance, accordingly, appears to provide two approaches to ensuring that the feed material does not contain hazardous constituents. Had the Staff not used its traditional approach to ensuring compliance with its requirements, the use of only a certification without knowing the underlying basis to ensure that the feed material was not a mixed waste may not have been adequate. As found above, however, in this case the NRC and the Licensee went beyond mere license certification to determine that the feed material was not a mixed waste.

Based on the information in the Hearing File reviewed above, it has to be concluded that the TWCA material on site at the UMETCO White Mesa Mill does not possess the appropriate characteristics to be considered hazardous waste. Although the finding here must be that the feed material at the White Mesa Mill is not a “mixed waste,” it is suggested that specific protocols in future UMETCO license amendments to determine if alternative feed materials contain hazardous components might be reassuring.

b. The second basic consideration is whether certification, under oath or affirmation by the Licensee, that the feed material is to be processed primarily for the recovery of uranium and for no other primary purpose, is determinative on the issue that the process is not for the disposal of waste.

A fundamental argument of the State centers on a requirement in NRC’s new guidance that a licensee certify its primary purpose in processing the feed materials to be the recovery of uranium. The State’s argument focuses on the circumstances in this case wherein the Licensee mill processor or “buyer” is being paid to receive the material. It is the State’s view, in the light of this circumstance, that where, as may be the case here, the market for uranium is depressed, costs of waste disposal are high, and the close proximity of competitive natural ore for processing uranium substantially would reduce transportation costs, an obligation rests on the NRC to do something other than merely accept Licensee’s certification. And here, that other, the State contends, is to search the financial considerations and processing costs to determine the

⁸⁰57 Fed. Reg. at 20,532.

transaction's authentic purpose. In the State's view, a mere certification doesn't do it.⁸¹

The Staff's response, buttressed by case precedent, is that the financial reviews suggested by the State are outside the health and safety zone of interests protected by the Atomic Energy Act. No requirement exists in NRC regulations on uranium mill licenses for obtaining information on costs of purchase or processing of feed materials.⁸²

It is the Staff's position that profit arrangements in materials transactions are irrelevant to the licensing process as long as there is an affirmation that the primary purpose is to recover uranium.⁸³ The determination of whether ore is being processed primarily for its source material content, according to the Staff, is to be based solely on

the licensee's certification under oath or affirmation that the feed material . . . (2) is to be processed primarily for the recovery of uranium and for no other primary purpose.⁸⁴

No question has been raised that the Licensee in the instant case has not complied with these guidance prerequisites. The challenge is to an alleged inadequacy in those requirements to meet the circumstances of the present case.

The basis for the Staff's contention that economic and processing considerations involved in the UMETCO materials acquisition are outside its purview is not relevant here. In the cases cited in the Staff's Brief, economic issues were rejected as matters for litigation since they are generally considered outside the health and safety domains that constitute the normal regulatory arena for the NRC. Here, however, the matter is one of casting light on the *raison d'etre* of the transaction itself. Without more substantive reasoning, the State's claim for having the transaction walls pierced cannot be easily dismissed. Reviewing some of the particulars of economic matters involved in license transactions is simply one means by which a licensee's intention for obtaining material can be determined. Arguably, this can become a valid area for questioning where a licensee is being paid to receive TWCA's processed waste tailings.

Although not required for a resolution in this case, the reasonableness of the State's proposed criteria against the standard used for this license amendment requires some consideration to determine whether a review of economic factors should be made part of NRC's guidance in a proper case. In the Staff's view, the certification provision "eliminates the need" for any other resort to the Licensee's motives or intention concerning the proposed processing. Citing the Court's edict in *Kerr-McGee*, the Staff asserts that "tailings from ore *substantially*

⁸¹ State Brief at 22-26.

⁸² Staff Brief at 19.

⁸³ Staff Response to Questions from Presiding Officer at 4-5 (March 2, 1993).

⁸⁴ *Id.* at 6.

processed for source material are Section 11e.(2) byproduct material” (emphasis added).⁸⁵ However, this assertion appears to have an “after the fact” or retroactive aspect somewhat dissimilar to the prospective outlook contemplated by a certification. Apparently, the only means by which the genuineness of a licensee’s intention can be tested is provided by the regulations concerning false statements which, in the Staff’s view, would “be evident if uranium were not extracted or if the material were disposed without processing.”⁸⁶ NRC regulations require that licensees maintain records of byproduct material, provide opportunities for inspections, and make records of such materials available to the NRC.⁸⁷ An opportunity, therefore, to retroactively police compliance with the certification requirement may be seemingly provided. However, neither the regulations nor guidance speak to reviewing any specific amount or quantities of uranium to be extracted. It appears credible under existing procedures, for mill operators, *intent on disposing of waste material* in mill tailings ponds, to merely process minimum extractions of uranium. Consequently, the question arises whether a certification, without more, would adequately protect against ulterior motives to dispose of waste.

Having raised that possibility, however, it is unnecessary for a resolution of this case, that we need be concerned by such other considerations. UMETCO has requested and been granted an amendment to perform plant tests of the 600 wet tons of TWCA material on its premises in order to determine whether it can process the recovery of uranium economically. It is authorized to do that and nothing more. As the Staff testimony reflects, future shipments of material from TWCA in Oregon will be subject to the licensing amendment process.⁸⁸

It is not evident from the filings that the State’s principal concern is focused on the specific license amendment involved in this proceeding — that authorizing UMETCO to test the alternative feed materials. In early correspondence, the State cautioned UMETCO that, unless authorized by the NRC or the State, the Licensee was not to “*continue to receive* (TWCA) material in Utah” (emphasis supplied).⁸⁹ The State’s principal interest appeared (and appears) to be the future shipments of TWCA materials from the State of Oregon. Its requests for relief can reasonably be construed as only directed at such future shipments:

— the test amendment should be used not only by UMETCO to plant test the TWCA material but also by the NRC to require submittal of data so that it can make an adequate

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 10 C.F.R. §§ 40.61(a), 40.62(a)(b).

⁸⁸ Tr. 37 (Oct. 29, 1992).

⁸⁹ Hearing File, Attach. 3.

determination about the TWCA material. The NRC will then be in a position to judge the merits of any *future* amendment requests by UMETCO to receive TWCA materials.^[90]

- condition the license amendment to UMETCO to include a requirement that UMETCO report arrangements it has with TWCA and that UMETCO supply processing information to the NRC so that the NRC *may make* a complete independent analysis of the facts surrounding the TWCA material instead of relying on an unrealistic definition of ore and license certification.^[91]
- NRC must use this process test amendment *to have UMETCO develop protocols* to determine whether any material it processes contain(s) RCRA hazardous waste.^[92] [Emphasis added.]

None of the foregoing nor any other statement addresses the testing of the TWCA material located at UMETCO's mill. In requesting responses from the State suggesting specific wording for an acceptable license amendment in this case, the Presiding Officer was advised the following would be adequate:

A.

- B. Before the licensee may receive industrial process streams for secondary recovery of source material, the licensee shall: (1) Develop and receive approval from the NRC of a materials testing program; and (2) On a case-by-case basis, receive approval from the NRC for receipt of such material where the NRC has concluded that the primary purpose of processing is not waste disposal.

Here again, the State's concern appears to be the future shipments of TWCA material for processing instead of the testing operations approved by the NRC.⁹³

In evaluating UMETCO's request for the license amendment, the Staff complied with the Commission directive in determining that the license amendment met the guidance.⁹⁴ As of the issuance of this Decision, the new guidance has not been approved or revised by the Commission, and the circumstances herein may have some impact on its future formulation. In order to ensure, prior to processing rather than after, that disposal of waste is not involved in the handling of previously processed ore, the Staff may want to consider some of the State's suggested criteria to assist in resolving uncertain or ambiguous cases.⁹⁵

In summary, although the circumstances of this particular transfer of materials raises legitimate questions for the NRC to consider in its review processes, it cannot be concluded that the issuance of the license amendment here was erroneously granted on the basis of a sham transaction. However, since there is

⁹⁰ State Brief at 2.

⁹¹ *Id.* at 30.

⁹² *Id.*

⁹³ State of Utah's Answer to Questions at 1-2 (March 2, 1993).

⁹⁴ Staff Requirements Memorandum (May 13, 1992); Letter, Hall to UMETCO (June 2, 1992).

⁹⁵ See UMETCO Brief at 11-15.

no indication that the Staff intends to inspect the testing operations of UMETCO, during or after its commencement and to ensure that UMETCO's testing operations are implemented to carry out their stated purpose, Staff inspections of UMETCO's testing procedures and operations should be implemented.

The conclusion to uphold the licensing amendment has been reached to this point on the merits of the testing that was carried out during NRC Staff review, and other tests not required by the agency's guidance. As indicated, the Licensee offered tests conducted by TWCA, the Oregon Department of Environmental Quality, and UMETCO itself as proof that the feedstock material did not contain hazardous waste. With this consideration eliminated, there is no further uneasiness that the issuance of the license amendment would impose dual regulation on the source material ore, or the tailings from the processing of that source material. This was a concern of Congress and the NRC during the passage of UMTRCA, and was one of the principal reasons for the issuance of the agency's guidance statement with regard to alternative feedstock.⁹⁶

c. The third fundamental issue is whether the new definition of ore in the proposed guidance, and as applied in this case, is beyond the regulatory authority of the NRC.

This issue raises the question of whether the Staff acted reasonably in issuing a license amendment to test process alternative feedstock that does not include RCRA-regulated wastes. Nothing is found in UMTRCA or the AEA expressly authorizing the NRC to do such, but again, the merits of the testing conducted on this material in this case find no reason for excluding the issuance of a license amendment limited to the testing of the material and nothing more. The Staff went beyond the Licensee's certification that the TWCA material did not include hazardous or mixed waste before it issued the license amendment. The Staff not only conducted its own test through Oak Ridge National Laboratory on samples collected by NRC inspectors but required proof of a comparison of the concentrations of hazardous constituents in the source material with the normal tailings which are disposed at the site; required an assessment of the potential impact from disposal of the material on the site's ability to meet the requirements of Criterion 5 of Appendix A to 10 C.F.R. Part 40; and required an assessment of the health and industrial hygiene hazards associated with the possession and processing of the source material.⁹⁷ These tests, although not challenged or examined in this hearing, are evidence that the Staff has analyzed the TWCA material in such a manner to demonstrate that the processing and introduction of the byproduct materials into the waste impoundment will do

⁹⁶"To avoid the complexities of NRC/EPA dual regulation, such feed material [containing RCRA wastes] will not be approved for processing at a licensed mill." 57 Fed. Reg. at 20,530.

⁹⁷Hearing File, Attach. 5.

nothing to threaten the health and safety of the general public beyond that which is already allowable at the site under NRC licensing practices.

The NRC's "Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores" was issued in May of 1992.⁹⁸ It was issued because the NRC had been receiving requests from licensed uranium mills to process feedstock that could not be considered natural ore. According to the guidance statement, "[u]ranium mills were designed and operated to process natural uranium bearing rock (ore). . . . There usually was no question of other feed material or what constituted ore."⁹⁹ However, with the advent of requests to process what is now called "alternative feedstock," and the Commission's decision to allow such material to be processed in licensed uranium mills, the Staff was faced with a new problem involving the NRC's interpretation of the term "byproduct material."

The wastes and tailings produced in a uranium mill processing uranium-bearing rock from nearby mines would meet the definition of 11e.(2) byproduct material. However, it is not obvious, from the definition alone, whether wastes produced from processing feed material that is something other than rock mine [*sic*] from the earth meets the definition of 11e.(2) material.^[100]

For the purposes of regulation under the AEA, section 11e(2) byproduct material is defined as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content."¹⁰¹ Since current NRC regulations only recognize ore as being naturally occurring,¹⁰² the Staff chose to create a new definition of "ore" in order to facilitate the inclusion of the wastes and tailings from the processing of alternative feedstocks within the definition of 11e(2) byproduct material. The operative phrase that effectively includes the wastes and tailings from the processing of alternative feedstock within the definition of 11e(2) byproduct material is highlighted herein:

Ore is a natural or native matter that may be mined and treated for the extraction of any of its constituents or any other matter from which source material is extracted in a licensed uranium or thorium mill.

The new definition of ore was made part of the agency's guidance statement, and the Staff is directed to make a determination "of whether the feed material

⁹⁸ 57 Fed. Reg. 20,525 (May 13, 1992).

⁹⁹ *Id.* at 20,532.

¹⁰⁰ *Id.*

¹⁰¹ 42 U.S.C. § 2014(e)(2).

¹⁰² 10 C.F.R. § 40.4 (1992).

is ore” using the new definition.¹⁰³ It is with this definition that the State of Utah has taken exception.

In the process of making its case against the UMETCO license amendment, the State argues, correctly, that until the issuance of the guidance statement, ore was understood to be naturally occurring matter. When the Staff changed the definition of ore to include “any matter from which source material is extracted,” the new definition apparently has no limits. According to the State, since the definition of ore underlies the scope of the *statutory* definition of 11e(2) byproduct material, “reliance on the draft guidance definition of ore has created a different and broader definition of 11e(2) byproduct material than [that found in the Atomic Energy Act].”¹⁰⁴

To treat 11(e)(2) byproduct material expansively for the purpose of determining whether certain radioactive wastes should be subject to UMTRA’s [sic] remedial requirements is an entirely different inquiry to that involving the TWCA material. The issue the State is challenging is the breadth of the materials that may be used for processing to create 11(e)(2) byproduct material. . . .

. . . .

. . . The question here is whether the NRC should develop an expanded definition of 11(e)(2) byproduct material so as to expand the nuclear fuels cycle to include materials like the TWCA material¹⁰⁵

A major thrust of the Staff’s legal justification for its definition of ore comes from the *Kerr-McGee* decision interpreting those portions of the legislative history of UMTRCA that dealt with the change in the definition of byproduct material.¹⁰⁶ According to the Staff’s analysis of this case, “[a]s explained by the Court in *Kerr-McGee*, . . . (UMTRCA) is to be construed to define ‘ore’ as any material used for the production of source material regardless of prior processing of the material.”¹⁰⁷ If this was the conclusion actually reached by the Court, it would appear that the Staff’s position is supported in law. And indeed, some of the language from that case appears to fit perfectly.

However, a review of the legislative history of the UMTRCA and the *Kerr-McGee* decision raises doubts that the *Kerr-McGee* decision provides as strong an endorsement of the Staff’s position. This conclusion is based on several

¹⁰³ 57 Fed. Reg. at 20,530.

¹⁰⁴ State Brief at 12.

¹⁰⁵ *Id.* at 13-15.

¹⁰⁶ It is important to note the factual similarities between the *Kerr-McGee* case and the case at bar. Both the *Kerr-McGee* and TWCA feedstocks contain[ed] at least 0.05% uranium or thorium and both are “source material” as that term is defined by NRC regulation. Also, both feedstocks had been milled previously for the extraction of elements other than source material. Indeed, the “orphaned” feedstock in the *Kerr-McGee* case fits the Staff’s description of alternative feedstock, or ore as that term is defined in the agency’s guidance statement.

¹⁰⁷ Staff Response to Questions from the Presiding Officer at 2 (March 2, 1993), citing NRC Staff’s Brief and Evidence on Issues Raised by the State of Utah at 9-12 (Jan. 6, 1993).

factors: First, at the time of the passage of the UMTRCA, Congress was addressing the regulation of the end products of uranium processing and it never faced the issue of alternative feedstocks entering the nuclear fuel cycle. As the Staff indicates, uranium processing had been traditionally concerned with natural ores until recent requests were made to process alternative feedstocks.¹⁰⁸ The statements made in the legislative history of the passage of the UMTRCA were not made with this narrow issue in mind and they cannot be said to demonstrate congressional intent.¹⁰⁹ It is therefore difficult to rationalize that the *Kerr-McGee* Court construed the UMTRCA to define ore as any material used for the production of source material *regardless of prior processing of the material*.¹¹⁰

Second, the *Kerr-McGee* Court's statements concerning ore are arguably dicta.¹¹¹ Moreover, the Court's example from section 101 of UMTRCA that "implicitly" finds the *Kerr-McGee* processed ore to be ore as that term is defined in byproduct material is difficult to understand and does not provide strong guidance when section 101 is read in its full context. That provision makes reference to subparagraph (A)(ii) which does not seem to provide support for the Staff's justification. Nor does the Court do any analysis to demonstrate that the provisions it cites even apply to the *Kerr-McGee* feedstock in question.

Finally, the factual surroundings of the *Kerr-McGee* case obscure the extent of the reach of the opinion. All of the *Kerr-McGee* material had been processed for its source material by the time the case reached the Court. The Court was addressing NRC's refusal to take regulatory control over a portion of the material even though it was the clear intent of the UMTRCA for NRC to have regulatory control over all wastes and mill tailings from the processing of source material ore. This raises the specter of a different conclusion if some of the material, like the TWCA material in this case, had not already been processed for its source material content.

Regardless of the Staff's reliance on the *Kerr-McGee* decision, however, we do not have to reach the question of whether or not its definition of ore will survive critical legal analysis.

¹⁰⁸ 57 Fed. Reg. at 20,532.

¹⁰⁹ *Chevron v. NRDC*, 467 U.S. 837, 862 (1984), citing *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 168-69 (1945).

¹¹⁰ At the time of UMTRCA's passage, Congress never faced the issue of feedstocks containing hazardous waste. Congress did not want dual regulation of wastes and mill tailings, and it seems unlikely that it wanted dual regulation of feedstock ores. See colloquy between Congressman Dingell and NRC Chairman Hendrie as set forth in *Kerr-McGee*, 903 F.2d at 6. The Staff indicates that its definition of ore can include hazardous waste. See Staff Response to Questions from the Presiding Officer at 3. It is reasonable to expect Congress to be precise in defining critical jurisdictional terms going to the very power of an agency to regulate, such as it did when it removed byproduct material from RCRA regulation. See, e.g., *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987).

¹¹¹ 903 F.2d at 7.

In reviewing this case, a less-complicated process under the Atomic Energy Act can be utilized to support the issuance of a license to test (or even process) alternative feedstock containing source material. As the Courts have said, "The Commission's licensing decisions are generally entitled to the highest judicial deference because of the unusually broad authority that Congress delegated to the agency under the Atomic Energy Act."¹¹²

The Atomic Energy Act of 1954 is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends. The Act's regulatory scheme "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 objective."^[113]

There are broad statutory objectives enumerated in the Atomic Energy Act and they include references to processing of source material ore, the regulation of atomic energy and facilities used in connection therewith in the national interest, and programs to institute these congressional goals.¹¹⁴

It does not appear necessary, therefore, for the Staff to rely on a new definition of "ore" so that the tailings from the extraction of source material from alternative feedstock can fit within the meaning of "byproduct material." The NRC can instead press on with its obligation to regulate source material ore as it has for nearly 40 years.¹¹⁵ As long as the Staff, on a case-by-case basis, has addressed Congress's aversion to dual regulation by denying the processing of RCRA-regulated materials and has made a finding of reasonable assurance that the material will not threaten the health and safety of the public, there appears no reason not to regulate alternative feedstocks any more than naturally occurring ores.¹¹⁶

IV. CONCLUSIONS OF LAW

Although substantial questions have been raised herein in those provisions of the proposed guidance relating to the certification of waste, the certification of

¹¹² *Commonwealth of Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), citing *Carstens v. NRC*, 742 F.2d 1546, 1551 (D.C. Cir. 1984), cert. denied, 471 U.S. 1136, 105 S. Ct. 2675, 86 L. Ed. 2d 694 (1985).

¹¹³ *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978), quoting *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968), cert. denied, 439 U.S. 1046, 99 S. Ct. 721, 58 L. Ed. 2d 705 (1978).

¹¹⁴ 42 U.S.C. §§ 2012, 2013. See also 42 U.S.C. § 2201(b), setting forth the Commission's general authority.

¹¹⁵ Moreover, "source material" is defined as "ores which contain by weight one-twentieth of one percent (0.05%) or more of: (i) Uranium, (ii) thorium, or (iii) any combination thereof." See 10 C.F.R. § 40.4. Since the TWCA material has been found to contain at least 0.05% uranium by weight, it would appear that it is already defined as "ore" under this definition.

¹¹⁶ As noted before, the AEA does not define ore. However, this has not hampered NRC regulation of feedstock ores used in the processing of source material. There appears to be no legal requirement for creating a new definition of ore for alternative feedstocks or a new category of ores just because they are previously processed.

a primary purpose, and the definition of ore, no fundamental impediment has been found to negate the Staff's action. On the basis of the Staff findings that the material is not hazardous and the NRC's inherent authority to regulate the processing of source material under the Atomic Energy Act, the issuance of the license amendment can be supported herein.

It is the Presiding Officer's opinion that this controversy was capable of being settled, but efforts of the parties to this end were unavailing.¹¹⁷ There is nothing revealed in the record of this proceeding to indicate that the Licensee intends to dispose of the material sitting at its White Mesa Mill as waste material, that such material is hazardous, or that the material does not contain uranium that will be tested to see if it can be processed for economic recovery.

Here, the Staff went beyond the guidance requirements, conducted its own test of the materials, and obtained from the Licensee comparisons of the concentrations of hazardous constituents in the source material with the normal tailings disposed at the site. It also required assessments of the impacts from the proposed activity to meet Criterion 5 of Appendix A to 10 C.F.R. Part 40 and the health and industrial hygiene hazards associated with the source material. These tests demonstrate that the proposed testing and impoundment will not threaten the public health and safety beyond what was already allowable at the site under NRC licensing practices. The testing of the existing material is permitted and any additional processing requires subsequent NRC authority.

V. ORDER

On the basis of the presentations and evidence submitted, and in consideration of the opinions and conclusions set forth herein, it is ORDERED that,

1. The issuance of Amendment No. 30 to UMETCO License SUA-1358 is sustained.
2. Staff inspections of UMETCO's testing procedures and operations authorized by the amendment should be implemented.
3. In accordance with 10 C.F.R. § 2.1251, this Initial Decision will constitute the final action of the Commission within thirty (30) days after the date of issuance, unless any party petitions for Commission review in accordance with 10 C.F.R. § 2.786, or the Commission takes review *sua sponte*. Any other party

¹¹⁷ Staff Response to Questions from Presiding Officer at 7-8.

to the proceeding may file within ten (10) days after service of a petition for review, an answer supporting or opposing Commission review.

James P. Gleason, Presiding
Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland
April 12, 1993

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)

April 21, 1993

The Board denied Applicant's request for a stay of discovery, finding that all four factors in 10 C.F.R. § 2.788(e) were adverse to the request. Applicant's ground for irreparable injury, that it was also facing an enforcement investigation and that the discovery obligations would disadvantage it, was found wanting.

The Board established a schedule for discovery that provided a brief delay while the Commission considered Applicant's appeal. It also determined that Applicant's officials, whose conversations had been surreptitiously taped by Intervenor prior to this litigation, should not be deposed until after they had reviewed the taped conversations. Intervenor was asked to request the return to him of a copy of the tapes that he had given to a congressional committee. The purpose of the request was to permit Applicant to discover the tapes, which otherwise are only in the hands of the Office of Investigation and the Congress and may be subject to objections to discovery.

RULES OF PRACTICE: STAY PENDING APPEAL; CIVIL ENFORCEMENT

Discovery in a license amendment case does not cause irreparable injury to Applicant because it is subject to a continuing civil investigation. The Board said that there would not even be irreparable injury if there were a Grand Jury inquiry.

RULES OF PRACTICE: STAY PENDING APPEAL

The Board applied the principles of 10 C.F.R. §2.788(e) and denied the request for a stay.

RULES OF PRACTICE: CASE MANAGEMENT AUTHORITY OF LICENSING BOARD; ORDER OF DISCOVERY

Pursuant to authority granted by 10 C.F.R. §2.718, the Board deferred depositions of Applicant's officers until after they could review extensive audio tapes that had been surreptitiously made of their conversations prior to this litigation. The Board thought that, since Intervenor already had this extensive evidence that it had assembled informally, fairness requires that Licensee have a chance to review this potentially adverse evidence before its officers undergo formal depositions.

MEMORANDUM AND ORDER
(Ruling on Stay Request and on Scheduling)

We have decided, after weighing the relevant factors, to deny the request for a stay originally filed by Georgia Power Company, *et al.* (Applicant), before the Nuclear Regulatory Commission (Commission). On the other hand, utilizing our powers as Presiding Officer, we have decided to establish a schedule that will not require any answers to discovery requests prior to May 1, 1993, and that will defer depositions of Applicant's officials until after audio tapes that were made of their conversations are transcribed and made available to them.

We continue to urge the parties to negotiate stipulations that will minimize the cost of discovery. We urge the Staff and Mr. Mosbaugh (Intervenor) to negotiate mutually acceptable ways of conducting discovery with respect to their overlapping interests,¹ so that they may avoid unnecessary duplication of

¹ These parties can consider the possibility that the unconventional step of including Georgia Power in these negotiations might assist them in arriving at a single, mutually agreeable solution.

discovery that would be unduly costly to Applicant. Similarly, the Staff and Applicant should negotiate mutually acceptable ways of conducting discovery with respect to their overlapping interests, so that they may avoid unnecessary duplication of discovery that would be unduly costly to Intervenor.

I. PROCEDURAL HISTORY

On February 19, 1993, this Board issued LBP-93-5, 37 NRC 96, admitting Allen L. Mosbaugh as a party to this case and commencing discovery (Order Admitting Party). On March 4, 1993, Applicant responded to this Order by filing before the Commission both an Appeal² and an Application for a Stay (Applicant Appeal; Applicant Stay). On March 16, 1993, the Staff of the Nuclear Regulatory Commission (Staff) filed its response to the Appeal and the Request for a Stay (Staff Appeal Response; Staff Stay Response).³ Then, on March 18, 1993, the Commission issued CLI-93-6, referring the consideration of the Request for a Stay to this Licensing Board (Commission Referral). Following that referral, on March 22, 1993, Intervenor filed its response to the Application for a Stay (Intervenor Stay Response).

The Licensing Board scheduled a telephonic prehearing conference for April 1, 1993, for oral argument that would assist it in determining the stay motion and making scheduling decisions; but, one day prior to that date, Applicant informed us by facsimile transmission that the Department of Justice had closed the investigation of Georgia Power that had been part of Applicant's basis for seeking the stay.⁴ The Board immediately requested the parties to confer about the continuing usefulness of the scheduled conference, which was then postponed by agreement of the parties until April 15, 1993. Just prior to that conference, on April 13, the Staff filed pursuant to Board authorization, "NRC Staff Response to the Licensing Board Questions Regarding Scheduling and Discovery."

The Board held a telephonic scheduling conference on April 15, 1993. Tr. 117-51. During that conference, Applicant asserted that it continued to request the grant of a stay. Tr. 125-27. Staff, on the other hand, abandoned its support of the stay and requested that discovery requests be handled on an item-by-item basis. Tr. 141, lines 13-20; see also Tr. 143, lines 3-7; Tr. 144.

² It simultaneously filed both a Notice of Appeal and a Brief in Support of its Appeal.

³ The Staff also filed before us its Response to Licensing Board Memorandum and Order (Admitting Party), on March 8, 1993; and Intervenor filed a Scheduling Statement ("Petitioner's Scheduling Statement") on that same date.

⁴ On April 1, Intervenor transmitted a March 30, 1993 letter to Applicant's Counsel from the Department of Justice. The letter indicates that the case against Georgia Power is closed but that the Department reserves the opportunity to reopen the investigation in the future "should sufficient facts develop."

II. STAY REQUEST

A. Legal Requirements

Applicant correctly states the criteria for granting a stay pending an appeal, derived from 10 C.F.R. § 2.788(e) and from *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 257 & n.59 (1990):

- (1) whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) whether the party will be irreparably injured unless a stay is granted;
- (3) whether the granting of a stay would harm other parties; and
- (4) where the public interest lies.

Applicant also correctly states that the most crucial of the four factors is the existence of irreparable injury.⁵ In addition, the Staff has pointed out that a stay can be granted by the Commission through its inherent discretionary supervisory authority. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986).⁶ It also states that the movant has the burden of proof in establishing that a stay should be granted. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

We note that the stay arguments addressed a situation in which a criminal investigation was ongoing. That investigation is closed, and the only ongoing investigation is a civil investigation by the NRC Office of Investigation.

One of Applicant's principal arguments for the stay was that permitting discovery to go forward during the ongoing criminal investigation could unfairly prejudice both its defenses and its employees' defenses to any criminal prosecution. It cited *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1378-79 (D.C. Cir. 1980) (*Dresser*) and *United States v. Kordel*, 397 U.S. 1, 90 S. Ct. 763 (1970) (*Kordel*). In response, Intervenor questioned whether Applicant can appropriately assert a privilege that is analogous to the Fifth Amendment on behalf of one or more employees that may or may not wish to seek such protection. Intervenor's Stay Opposition at 4-5. Intervenor also argues that Applicant has an affirmative obligation to disclose criminal or felonious acts. *Id.* at 5; 10 C.F.R. § 73.71, and Part 73, Appendix G (as amplified in NUREG-1304 . . .); Regulatory Guide 5.62, "Reporting of Safeguards Events," § 2.2, Example 2.⁷

⁵ Applicant Stay at 3.

⁶ Staff Stay Response at 3.

⁷ The Board also notes that the quality assurance regulations require Licensee to seek the root cause of alleged deficiencies that come to its attention. 10 C.F.R. Part 50, Appendix B, §§ I ("assuring that an appropriate quality assurance program is established and effectively executed" and verifying correct performance), II, XVI-XVII.

After studying the cited legal precedents, we have concluded that *even* the pendency of a criminal investigation would not require the granting of a stay of all discovery. In *Kordel*, the Supreme Court upheld a criminal conviction that occurred after the government had simultaneously pursued civil and criminal remedies against the same company and had used evidence from the civil case in the criminal case. Initially, the defendant corporation had sought a stay of the civil proceeding, and the stay was denied. Then the corporate officers provided testimony, knowingly waiving their Fifth Amendment rights despite the pendency of a criminal proceeding. Because of the waiver, it was held to be entirely permissible to use their testimony in the subsequent criminal case. The only apparent restriction on simultaneous proceedings was the Court's recognition that the government's interrogatories were found to have been filed in good faith in the civil proceeding; this implies that "bad faith," however determined, could block simultaneously proceeding in civil and criminal contexts. In this case, however, there is no reason to doubt the good faith of the government, particularly since this proceeding is brought by an outside intervenor and not by the government itself, and the government is merely pursuing its authorized rights as a party.

In *Dresser*, the D.C. Circuit held that the Securities and Exchange Commission was entitled to the enforcement of a subpoena issued in a civil investigation of the corporate use of funds to make "questionable foreign payments" to obtain foreign business. The court was presented with the argument that this subpoena would unfairly broaden the government's rights of investigation under the rules of criminal procedure in a simultaneous Grand Jury inquiry. The court held, however, that simultaneous enforcement of the subpoena was appropriate.

We find that these cases are determinative. Applicant's claim for a stay is weaker than it once was, since it was based on the alleged effects of a criminal investigation against it. Even in that posture, the courts have refused stays. Now that the pending criminal investigation has been closed, Applicant's claim for a stay is still weaker. Nor has Applicant suggested even colorable authority that a civil case should be stayed because of a pending civil investigation.

B. Criteria for a Stay

Although we have addressed the legal underpinning for Applicant's case in the previous section, there are four criteria for a stay, and the purpose of this section of our opinion is to weigh all four factors before determining whether or not to grant the pending request for a stay.

1. Likelihood of Prevailing on the Merits

We have studied the grounds for error asserted by Applicant in its stay motion and have concluded that none of the grounds is likely to prevail on appeal.

The first asserted ground is that Mr. Mosbaugh's residence 35 miles from Vogtle for a week a month does not constitute sufficient contacts to be the basis for standing.⁸ The principal case cited in support of this proposition is *Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989)*, which denied standing to an intervenor in an amendment case. The intervenor in that case lived 40 miles from the facility, and the Commission denied standing because it found that the risks of the particular amendment at issue were limited risks that were not risks to the general public. In Applicant's view, the risks in this case likewise involve a paperwork transfer of authority that does not affect operations or the general public; consequently, it considers the pending amendment not to involve risks to the general public.

We were well aware of Applicant's view when we admitted Mr. Mosbaugh as a party. We stated that view in LBP-93-5, 37 NRC at 98, 99. We rejected that view only after extended consideration of the legal requirements for an amendment (*id.* at 100-01) and after recognizing that we had to choose between Applicant's view that there was no increase in risk and Intervenor's view that it is enough to allege that the transfer could not be effected because the recipient of operating authority is lacking in character and competence to operate a nuclear power plant safely. We concluded, *id.* at 98, that:

We would not deprive [intervenor] . . . of his right to intervene because the material safety deficiencies he has alleged may already be occurring.

We also concluded, *id.* at 108, that Intervenor had alleged a safety risk to himself, because "[t]he risk of non-safety-conscious management is as great as many other risks that could be adjudicated in an operating license case."⁹

We note that the Staff, which initially opposed admission of Mr. Mosbaugh, has changed its opinion and agrees with the Board's position. Thus, it appears

⁸ We did not discuss allegedly false statements made by Mr. Mosbaugh concerning his residence in this proceeding because we did not consider that controversy relevant to our acceptance of the undisputed facts concerning Mr. Mosbaugh's contacts with the plant at the present time. Applicant's Stay Request at 7 n.8. We note that Applicant's appeal has not challenged our findings concerning those facts.

⁹ With respect to risks to the public from the operation of a nuclear power plant, the Commission has said that residence—presumably "full-time" residence—50 miles from a plant is enough to establish standing. In this case, Intervenor resides 35 miles from the plant for one week per month; consequently, there is no direct guidance as to whether to admit Mr. Mosbaugh. However, in search of a rationale with which to act, we asked the parties how to compare these conditions to full-time residence at 50 miles, and no one was able to suggest a reasonable way to compare these risks. Tr. 52-59. We concluded, in our discretion, that Mr. Mosbaugh had enough exposure to Vogtle to be admitted as a party. (Because we admitted Mr. Mosbaugh of right, we have not considered whether he could have been admitted under our discretionary authority to permit intervention.)

to have been persuaded by our opinion to support our position on the merits. Staff Appeal Response at 6-9.

We conclude that Applicant is unlikely to succeed on the merits of its appeal.

2. Irreparable Injury

Initially, Georgia Power alleged that it was irreparably injured because discovery in this case would prejudice its defense of a criminal investigation ongoing against it and some of its employees. Above, beginning on page 295, we discussed the legal precedent concerning the validity of this argument, and we concluded that Applicant was not entitled to a stay even if the criminal investigation were ongoing. We also concluded that there was less claim for a stay in the present posture, where only a civil investigation is ongoing. Therefore, we conclude that Applicant has not carried its burden of proof concerning irreparable injury.

We conclude that there is no irreparable injury to Georgia Power from proceeding with discovery. We note that the decision to proceed does not deprive Georgia Power or other parties of the right to assert applicable privileges, although matters already adjudicated may affect future rulings.

3. Effect on Other Parties

Both Intervenor and the Staff seek to proceed with discovery. Because there is an interest in fair and efficient adjudication, their interest in timely adjudication is an important one. In this case, there is the added interest that our adjudication could affect other pending matters that could have an immediate impact on the plant's operation.¹⁰ Although it is not our job in this license amendment case to decide directly whether Vogtle should continue to operate, it is appropriate to recognize Intervenor's interest in a timely adjudication that could affect other cases in which continued operation is an issue.

4. The Public Interest

The public's interest is broad. In addition to desiring an adequate assurance of safety in the operation of nuclear power plants, it encompasses timely adjudication and also the avoidance of placing unnecessary burdens on potential defendants in an enforcement action. On balance we consider the public interest to favor moving forward with this case and denying the stay request.

¹⁰ Intervenor is part of a pending 10 C.F.R. § 2.206 petition, and we also note that the Commission requested relevant information from the Staff in February 1992. CLI-92-3, 35 NRC 63, 65 (1992).

5. Conclusion

We conclude, after balancing all the factors, that it is not appropriate to grant a stay of discovery pending determination of the appeal. We therefore shall deny Applicant's request.

III. CONSIDERATION OF A SCHEDULE

Apart from consideration of Applicant's motion for a stay, we have broad authority to regulate the course of the proceeding before us, in the twin interests of fairness and efficiency. 10 C.F.R. §2.718.

Because of our concern that the expensive process of discovery not be commenced unnecessarily, we consider it to be appropriate to defer the parties' obligations to respond to all discovery requests before May 1, 1993. This will not provide any real succor for the parties, but it will recognize the appropriateness of the delay in discovery that has occurred during the consideration of the pending stay motion. It will also provide a few more days in which the Commission could act, thereby clarifying the status of the case.

We also have wrestled with the question placed before us by the parties about whether or not to defer depositions of Applicant's officials until after audio tapes and transcripts become available. These tapes appear to be essential evidence. They were made by Mr. Mosbaugh, generally without informing people with whom he was conferring that the tapes were being made. There are about 76 such tapes, with some of them being as long as 2 hours. Counsel for Applicant, Tr. 134.

An argument we seriously weighed about these tapes is that we might expect greater candor from Georgia Power's officials if they had to be deposed prior to seeing the tapes or transcripts of them. Their candor would result from their fear of direct contradiction in their own words in the transcript of the tapes.

However, we have decided that fairness and efficiency both dictate that depositions not be conducted until after the tapes become available. These extensive tapes, portions of which may be admissible in evidence, represent an extensive informal discovery process already undertaken by Intervenor. In the course of the taped discussions, the "deponents" had no knowledge that their words were being preserved, so they had no right to object to questions based on relevance or the form of the questions and they were not on notice that their communication could be used in a formal legal setting. Given Mr. Mosbaugh's beliefs about Georgia Power's actions, we understand his motives for this way of proceeding, and without seeing the evidence, we have no opinion at this time about the usefulness of these tapes. However, it is clear to us, after extensive reflection, that Intervenor already has extensive evidentiary information accumulated through this technique and that it is not in need of a

further procedural advantage. To the contrary, we have concluded that it would be unfair to Georgia Power officials to have them testify *again* before they have access to the tapes and transcripts of their prior conversations. We also are impressed that this way of proceeding would be most efficient for this proceeding and would avoid the necessity for repeated depositions of the Georgia Power officials, once before the tapes are available and again after. Hopefully, this also will reduce the volume of the deposition transcripts and simplify the job of the Board in sifting evidence.

Because of this determination, we have an increased interest in expediting the availability of the tapes and transcripts. One copy is known to be in the possession of the Office of Investigation of the Nuclear Regulatory Commission.¹¹ They will object to releasing that evidence during their continued investigation. Tr. 141. On the other hand, Mr. Mosbaugh retained a copy of the tapes, and his copies would be available for discovery had he not turned them over to a congressional committee, as his counsel represents that he has done. Tr. 142-43. We therefore shall require that counsel for Mr. Mosbaugh request the return of his copies of the tapes from the congressional committee and that he report to us on his efforts and the response he has received, in a document that is received by us and the parties by May 14, 1993.

With the exceptions just noted, discovery (including document discovery) may proceed at its normal pace. We will reach further determinations concerning discovery deadlines only after we have ruled on the first round or rounds of claims of privilege and are more fully informed about the dates on which documents will become available.

We note that there is an apparent discrepancy in the representations of Staff Counsel, at Tr. 129-30, and ¶ 5 of an affidavit filed with us by Mr. Ben Hayes, appended to the NRC Staff's Response to Licensing Board Memorandum and Order (Admitting Party). We shall ask the Staff to explain this apparent discrepancy.

IV. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 21st day of April, 1993, ORDERED that:

1. The Application for a Stay filed by Georgia Power, *et al.*, before the Commission on March 4, 1993, is *denied*.
2. Parties shall not be required to file answers to discovery requests or to provide witnesses for depositions prior to May 1, 1993. In all other respects, discovery may proceed.

¹¹ Transcripts have been made either of some of the tapes or all of the tapes. Tr. 141-42.

3. Counsel for Mr. Allen Mosbaugh shall make a good-faith, earnest request for the return of Mr. Mosbaugh's copies of the tapes he has made from the congressional committee to which he has given those tapes. He shall report to us on his efforts and the response he has received, in a document that is received by us and the parties by May 14, 1993.

4. Staff of the Commission shall file an explanation of the apparent discrepancy concerning the affidavit of Mr. Ben Hayes in a document that is received by us and the parties by May 14, 1993.

**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 MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket No. 40-8027

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Facility)

April 14, 1993

The Director of the Office of Nuclear Material Safety and Safeguards denies a petition filed by Diane Curran, Esq., on behalf of Native Americans for a Clean Environment (NACE), with the Nuclear Regulatory Commission Staff (Staff) requesting the NRC to immediately order Sequoyah Fuels Corporation (SFC) to stop transporting liquid raffinate fertilizer off SFC's Gore, Oklahoma site. The Petitioner's request for immediate action was based on its contentions that the raffinate fertilizer had been handled in a way that posed an unacceptable and immediate risk to the public health and safety. The Petitioner sought relief based on allegations that (1) the raffinate contains potentially toxic radionuclides and heavy metals and is also very caustic; (2) on May 4, 1992, when an individual was driving on a public highway past one of SFC's properties known as the "Old Monsanto Ranch" where raffinate was being sprayed from a truck onto a pasture, the individual's face and arms were sprayed with raffinate that was carried by the wind through the open window of his truck, and, as a result, the individual suffered second- and third- degree burns; (3) at the request of Mr. Lance Hughes, NACE's Executive Director, on May 10, 1991, at the SFC site, Linda Kassner, an NRC Senior Radiation Specialist in NRC Region IV, interviewed the individual and observed his burns; (4) the incident described by the individual has been referred to the "allegations" office in Region IV, but the NRC has, to date, taken no further action; and (5) in at least three other instances, persons, animals, or vegetation have been injured by exposure to the raffinate.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING (REQUEST FOR IMMEDIATE RELIEF)

Where Petitioner has not asserted any violation of NRC requirements and has submitted insufficient evidence to conclude that the injuries of an individual were caused by the Licensee's activities or that there is a substantial public health and safety hazard, immediate relief will be denied.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

Where Petitioner has not provided the factual basis for its request with the specificity required by 10 C.F.R. § 2.206, action need not be taken on its request.

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: Hazards of radioactive and chemical materials in raffinate fertilizer; Release of radioactive materials in effluents to unrestricted areas (application of raffinate fertilizer); Release of heavy metals in effluents to unrestricted areas (application of raffinate fertilizer); Effect of application of raffinate fertilizer.

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

I. INTRODUCTION

Native Americans for a Clean Environment (NACE, the Petitioner) filed a "Request for Emergency Enforcement Action" (Petition) dated May 11, 1992, with the U.S. Nuclear Regulatory Commission Staff for consideration as a petition under 10 C.F.R. § 2.206. The Petition requested that the NRC immediately order Sequoyah Fuels Corporation (SFC) to stop transporting liquid raffinate fertilizer off the SFC site. The Petitioner's request for immediate action was based on its contention that the raffinate fertilizer has been handled in a way that poses an unacceptable and immediate risk to the public health and safety.

The Petitioner alleges the following bases for its request:

- (1) The raffinate fertilizer contains potentially toxic radionuclides and heavy metals and is also very caustic;
- (2) on May 4, 1992, when a member of the public (hereafter Person A) was driving his truck on a public highway past one of SFC's properties known as the "Old Monsanto Ranch" where fertilizer was being sprayed from a truck onto a pasture, Person A's face and arms

were sprayed with fertilizer that was carried by the wind through the open window of his truck, and as a result, Person A suffered first- and second-degree burns; and

- (3) in other instances, a former SFC employee, a nearby family, and other persons, animals, or vegetation have been injured by exposure to the fertilizer.

By letter dated July 7, 1992, the NRC Staff acknowledged receipt of the Petition and informed the Petitioner that the Petition would be treated under 10 C.F.R. § 2.206 of the Commission's regulations and that a decision would be issued within a reasonable time. The Staff denied the emergency relief requested, on the basis that there was no allegation that SFC violated any NRC requirements, insufficient evidence to conclude that the injuries of Person A were caused by any SFC activity, or that there is a substantial public health and safety hazard from SFC's use of raffiniate fertilizer. The Staff also requested the Petitioner to provide specific factual details of (1) the lawsuits mentioned in the Petition, including docket numbers and case status; and (2) the alleged injuries to a nearby family and the two unidentified children to whom the Petition refers and why the Petitioner believes these injuries were caused by the activities of the Licensee. The Petitioner responded to the request by letter dated August 18, 1992, and provided additional information regarding a former SFC worker's (hereafter Person B) compensation claim and the lawsuits and the alleged injuries to a nearby family (hereafter Family C). The Petitioner was unable to locate the family of the two unidentified children and did not provide any information on their alleged injuries.

On May 20, 1992, SFC submitted a response to the Petition. SFC stated that it maintained a buffer zone between the spray trucks applying the fertilizer and the road on which Person A was travelling, that there would have been a minimum distance of over 100 feet between the spray trucks and Person A's vehicle, and that it is unlikely that Person A was exposed to the fertilizer. SFC also stated that even if Person A was accidentally sprayed, it was unlikely that the fertilizer could have caused his injuries. SFC also noted that it was reviewing and investigating the circumstances associated with the alleged incident. By letter dated July 1, 1992, SFC stated that it had completed its investigation, confirmed its position that it is unlikely that the fertilizer could have caused injuries to any person, and considered the matter closed. By letter dated September 11, 1992, SFC responded to NACE's August 18 letter, acknowledged a pending worker's compensation claim from Person B and Family C's lawsuits, and reaffirmed its position that it is unlikely that the fertilizer would have caused the alleged injuries.

I have completed my evaluation of the matters raised by the Petitioner and have determined that, for the reasons stated below, the Petition should be denied.

II. DISCUSSION

SFC is licensed by the NRC to produce uranium hexafluoride (UF_6) at its facilities in Gore, Oklahoma. However, by letter dated November 23, 1992, SFC advised the NRC of its decision to place the UF_6 plant in standby mode and to cease uranium conversion operations. By letter dated February 16, 1993, SFC notified the NRC of its decision to decommission its UF_6 facility. The license authorizes SFC to produce and apply raffinate fertilizer containing very low levels of uranium contaminants. Petitioner requests that the NRC order SFC to stop transporting liquid raffinate fertilizer off the SFC site. The concerns that form the bases for the Petitioner's request and the evaluations of the Staff are provided below.

A. The Raffinate Fertilizer Contains Toxic Radionuclides and Heavy Metals and Is Very Caustic

Petitioner alleges that the raffinate fertilizer contains potentially toxic radionuclides and heavy metals and is very caustic. The Petitioner is correct that the raffinate is a byproduct of the uranium hexafluoride conversion process and contains some trace quantities of radionuclides and heavy metals. However, as set forth below, the heavy metals and radioactive constituents are present in the raffinate fertilizer in very low concentrations, and do not represent an undue threat to public health and safety.

Before the raffinate is used as a fertilizer, it is neutralized with anhydrous ammonia to reduce the heavy metal content (including uranium) by precipitation of heavy-metal salts and is further treated with barium chloride to reduce the concentration of radium-226 by precipitation of barium-radium sulfate. The resulting solution is neutralized, sampled, and analyzed prior to its transfer from the clarifiers to ponds for storage as fertilizer.

The present fertilizer program conducted by SFC was approved by the NRC on June 30, 1982. The NRC approval includes restrictions on the radionuclide level of the fertilizer and the nitrogen quantity applied to any land. NRC granted its approval after completion of a comprehensive environmental assessment. The assessment was prepared by Oak Ridge National Laboratory and was reviewed with no adverse comments by the Department of Agriculture, Food and Drug Administration, Environmental Protection Agency, and Eastern Oklahoma Development District. Additionally, on August 27, 1986, the State of Oklahoma registered the ammonium nitrate raffinate fertilizer as a commercial fertilizer subject to State and NRC license conditions. Furthermore, SFC has arranged for the Oklahoma State Extension Agronomists to provide program oversight and recommendations for enhancement of the overall program.

Under NRC license conditions, the treated raffinate is released for use as a fertilizer only if the average uranium concentration does not exceed 0.1 milligrams per liter (mg/L) of solution, which is equivalent to 67.7 picocuries per liter (pCi/L) of solution, and the radium-226 content does not exceed 2 pCi/L of solution or 0.1 picocuries per gram of nitrogen. The uranium concentration in commercial phosphate fertilizer is often in the 90-mg/L range because of the natural occurrence of uranium. The uranium concentration in SFC's ammonium nitrate solution is far below the NRC limit for release to unrestricted areas, which is 30,000 pCi/L for liquid effluent (the new 10 C.F.R. Part 20 limit, which becomes effective in 1994, is 300 pCi/L). The concentration of radium, the radioisotope of principal concern, in SFC's fertilizer is less than the EPA drinking water standard of 5 pCi/L in community water systems. The NRC standards and license conditions are established to protect public health and safety. Since the fertilizer contains a uranium concentration below the NRC limit for release to unrestricted areas and a radium concentration below that considered safe for drinking water, the radionuclides in the fertilizer do not pose an undue radiological hazard.

With respect to potential chemical hazards, the Licensee describes the treated raffinate fertilizer solution as a mild ammonium nitrate solution with a concentration of nitrogen of approximately 12-13 grams per liter. Ammonium nitrate is a major component in some commercial fertilizers which can be purchased from local retail stores without any restrictions or special precautions for use. The value of pH for a neutral solution (i.e., pure water) is 7.0. The lower the value, the more acidic the solution; the higher the value, the more alkaline the solution. The pH value of SFC's ammonium nitrate solution is typically in the range of 7.5-8.0 (it is slightly alkaline) upon transfer to the ponds and becomes somewhat more acidic over time due, in part, to evaporation and concentration. The pH value of the solution is typically in the range of 6.0-7.0 as applied to the land as fertilizer. According to SFC's chemical analysis from late April and early May 1992, the pH value of the fertilizer ranged from 6.0 to 6.2. The pH value of the raffinate was close to neutral, and the slight acidity of such a solution is not considered harmful to human beings. For illustration, the *CRC Handbook of Tables for Applied Engineering Science* gives a table of pH values of various foods, which have pH values ranging from 2.0 to 8.5. For example, carbonated soft drinks have pH values in the range of 2.0-4.0.

The fertilizer contains trace amounts of heavy metals, but the concentrations are so low that they do not pose an undue public health hazard. The license restricts the use of the treated raffinate for fertilizer to crops that are not used directly as human food, such as animal forage or seed production. Accordingly, the license requires SFC to maintain the concentrations of heavy metals in both groundwater and surface water in compliance with the standards set forth in the National Academy of Sciences (NAS) report entitled *Water Quality Standards*

(1972), applicable to such uses, as follows. If nitrate concentration in surface water or groundwater (which SFC is required to sample) exceeds 20 mg/L, then SFC is required to analyze the water further for levels of heavy metals to ensure compliance with the NAS standards. SFC also samples the crops fertilized by the treated raffinate for certain heavy metals for comparison with the NAS standards for forage in *Mineral Tolerance of Domestic Animals* (1980). The forage generally complies with the NAS standards for heavy metals; there have been occasional exceedances of molybdenum. When the forage exceeded the molybdenum standard, the forage was not released. Furthermore, a study, done by SFC in 1988 and confirmed by Oak Ridge National Laboratory's independent analysis, showed that the heavy metal contents of SFC's fertilizer are less than those of commercial fertilizers, except for copper, molybdenum, and nickel. There is no basis for the NRC Staff to conclude that the heavy metals in the fertilizer pose an unreasonable hazard to public health and safety.

Many commercial fertilizers have chemical properties similar to SFC's fertilizer, and contain ammonium nitrate and trace amounts of heavy metals and radionuclides. There are no special restrictions on the sale or application of these commercial fertilizers. The Petition does not give any basis for imposing restrictions on application of the raffinate fertilizer, given that such restrictions are not imposed on the application of commercial fertilizers of similar composition.

In summary, SFC's fertilizer is subject to NRC license conditions which ensure that it does not pose an undue hazard to public health and safety. There is no evidence that SFC's fertilizer program has violated NRC regulations and license conditions. The Petitioner has not provided any specific evidence that the fertilizer is capable of causing public health hazards. Therefore, the chemical and radiological nature of the raffinate fertilizer provides no basis to grant the Petitioner's requested action.

B. A Member of the Public Was Injured by Raffinate While Traveling on a Public Highway

Petitioner alleges that the ammonium nitrate solution produced by SFC is being handled in a way that poses an unacceptable and immediate risk to the public health and safety, and has injured a member of the public, Person A, while he was travelling on a public highway on May 4, 1992.

The NRC Staff first learned of the incident involving Person A on Sunday, May 10, 1992, at which time the Staff observed his injuries and was informed that he had already received medical treatment. On May 11, 1992, the NRC Region IV Staff made followup contacts with SFC and Person A. SFC agreed to investigate the matter, and also agreed to provide medical evaluation to Person A to assess the nature and cause of his injuries. Person A initially agreed to

medical followup to be arranged by SFC, but apparently changed his mind on May 12, 1992, declined SFC's offer, and declined to make medical records related to his injuries available to the NRC. SFC confirmed its offer of medical assistance in writing to Person A on May 19, 1992.

Person A did not respond to SFC's May 19, 1992, offer of medical evaluation, but he later provided the NRC Staff with copies of medical records related to his injuries. Person A's medical records documented symptoms of his injuries that are consistent with chemical burns, and there is no indication of any injuries that could be attributed to radiation exposures. Some individuals are sensitive to chemicals and could have reactions to certain chemical compounds, even if present in concentrations as low as those of the raffinose fertilizer. The diagnoses from the medical records did not indicate the specific chemical or other sources that caused the injuries or whether the cause was in any way related to SFC.

On May 20, 1992, SFC submitted a response to the Petition. SFC maintained that it is unlikely that the fertilizer being sprayed that day could have reached the highway where Person A alleged he was injured. SFC stated that the buffer zone for fertilizer application was approximately 60-70 feet between the road and the fence on the SFC property, and the spray truck generally maintained an additional buffer zone of about 45-50 feet from the fence when spraying was taking place, which gives a minimum of over 100 feet between the spray trucks and Person A's vehicle. SFC also noted that the wind was relatively calm on May 4, 1992, at the time of fertilizer application, and the buffer zone appeared to be sufficient to contain the fertilizer well within the boundaries of SFC's property. The SFC personnel and truck drivers involved in applying the fertilizer were not aware of the alleged incident, and none of them noticed any unusual event or circumstance that would have caused the fertilizer to blow over to the roadway.

SFC maintained that, even if the fertilizer reached the roadway, the chemical nature of the fertilizer was unlikely to have caused the alleged injuries. SFC indicated that on May 4, 1992, two SFC personnel were driving a pickup truck approximately 25 to 30 feet behind the spray trucks in order to help establish the proper spray width, and that they were sprayed with some of the fertilizer through the truck's open window. Neither reported any adverse effects from his contact with the fertilizer.

In view of the above, Person A's injuries appear to have resulted from a nonradiological hazard. As stated above, Petitioner alleges that this hazard resulted from SFC's spraying of the raffinose and caused Person A's injuries. In that regard, Petitioner has requested the NRC to make a determination on its authority to take enforcement action. Specifically, by letter dated August 18, 1992, Petitioner requested clarification of and an explanation of the basis for the NRC Staff position regarding its authority to take enforcement action with respect to nonradioactive hazards posed by SFC's raffinose spraying. This

request was prompted by two letters: in a letter dated October 10, 1991, the NRC Region IV Allegations Coordinator stated that SFC's disposal of chemical fertilizer is not within the jurisdiction of the NRC as long as the Licensee meets the radiological limits for disposal; and in a letter dated July 7, 1992, which acknowledged receipt of the Petition, it was noted that the Petition does not allege that SFC violated any NRC requirements. As set forth below, the NRC has considered the Petitioner's request for clarification as needed to make a determination on the Petitioner's request for enforcement action.

The NRC may impose license conditions related to nonradiological environmental hazards pursuant to the National Environmental Policy Act (NEPA). *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77 (1st Cir. 1978). The NRC's enforcement authority, however, is limited by statute to violations of the Atomic Energy Act of 1954, as amended (the Act), certain provisions of the Energy Reorganization Act of 1974 (the ERA), regulations and orders adopted pursuant to the Act or the ERA, and license conditions. See, e.g., Atomic Energy Act of 1954, as amended, §§ 161c, 161i, 161o, 186, 232, 234, 42 U.S.C. §§ 2201(c), 2201(i), 2201(o), 2236, 2280, 2282; Energy Reorganization Act of 1974, §§ 206, 211, 42 U.S.C. §§ 5846, 5851. The ERA provisions cited above do not relate to the regulation by the NRC of the use of the raffinate fertilizer (they relate to defects or substantial safety hazards in basic components supplied to NRC-licensed facilities, and to discrimination against nuclear workers for engaging in protected activity).

The NRC-approved Amendment No. 17 to SFC's license on June 30, 1982. Pursuant to section 102 of NEPA, 42 U.S.C. § 4332, and in order to minimize adverse environmental impacts associated with the treatment and use of raffinate fertilizer, the NRC imposed license conditions designed to protect human and animal health and safety, water quality, and soil and plant health. The license conditions limit the use of treated raffinate fertilizer to crops not directly used as human food, such as animal forage or seed production. The Licensee is required to ensure that neutralization and barium processes reduce radioactive and heavy metal content of the treated raffinate to specified levels. The quantity of nitrogen from treated raffinate applied per acre of land is limited. The Licensee is required to analyze groundwater for nitrates, radium-226 and uranium, and surface water for molybdenum, copper, nickel, radium-226 and uranium. Limits for radium-226, thorium-230 and uranium in forage are specified. The Licensee is required to obtain the approval of a qualified independent agronomist prior to the use or sale of the raffinate-fertilizer-treated crops. The Licensee is required to obtain input and recommendations for use of the treated raffinate from the Oklahoma State Extension Agronomists. Finally, the Licensee must submit an annual report regarding the raffinate fertilizer program to the NRC.

The license conditions imposed by the NRC upon SFC in 1982 address both radiological and nonradiological hazards. Those license conditions do not,

however, address hazards related to the activity of spraying or applying treated raffinate fertilizer. As discussed above, the limits on concentration of radioactive elements in the raffinate are so low that raffinate meeting these limits poses no undue hazard to public health and safety, without regard to the manner of fertilizer application. While many kinds of fertilizer are chemically hazardous if not properly handled, the NRC Staff did not conclude in 1982, and does not now conclude, that the fertilizer poses a public health hazard when applied with normal care. Accordingly, since Petitioner has not alleged and it is not apparent that the Licensee violated any NRC requirements in connection with the use of treated raffinate as a fertilizer and has not provided information that indicates that the use of the treated raffinate as a fertilizer under the conditions imposed by the NRC poses an undue risk to public health and safety, there is no basis for NRC enforcement action, as requested in the Petition.

C. Other Incidents Involving Persons, Animals, or Vegetation Allegedly Injured by Exposure to the Raffinate Fertilizer

Petitioner alleges that there are at least three other incidents in which persons, animals, or vegetation have been injured by exposure to the raffinate fertilizer. By letter dated July 7, 1992, the NRC Staff requested the Petitioner to provide additional information on these incidents. The Petitioner provided a videotape and general information in two cases, the alleged injuries to Person B and to Family C. Petitioner was unable to provide additional information regarding two unidentified children who were allegedly injured by the fertilizer.

The videotape provided by the Petitioner showed several dead cows in a pit allegedly on SFC's property. The Petitioner, while acknowledging that the cause of death of the cattle was unknown, suggested that the cattle were poisoned, perhaps from the use of the raffinate fertilizer. The NRC Staff investigated this matter and provided its response in a letter dated January 9, 1992, from James M. Taylor, Executive Director for Operations, NRC, to the Honorable David L. Boren, United States Senator from Oklahoma. In the letter, the Staff noted SFC's explanation that the cattle probably died from illness unrelated to the fertilizer. As stated in the letter, these deaths were not attributed to consumption of crops fertilized with the raffinate. The videotape also contains a news report that showed areas of vegetation burned or discolored and suggested that SFC's raffinate fertilizer had caused this condition. SFC responded in its September 11, 1992 letter that normal application of ammonia nitrate fertilizer results in initial burn or discoloration of pasture grass, and the results after a few weeks are lush enhanced-growth grass. SFC also noted that what is shown on the videotape is typical of SFC's program for a short period of time after fertilizer application, that the area shown on the videotape was identified and examined, and that the area was green with tall grass and the brown had disappeared. In

view of the information provided by SFC, the videotape submitted by Petitioner does not demonstrate an undue hazard to public health and safety. As described above, the NRC continues to monitor the raffinate fertilizer program, and the Petitioner has not identified any violation of NRC requirements, nor any other basis for the requested enforcement action.

In the case of Person B, who was occupationally exposed to the fertilizer, the Petitioner has not presented any specific information to demonstrate that the fertilizer caused his injuries. The fact that the alleged injuries occurred after exposure to the fertilizer is not a sufficient basis to conclude that the fertilizer caused the injuries. Likewise, Petitioner has not presented any specific information to demonstrate that the fertilizer injured any member of Family C or other unidentified persons, nor has Petitioner described how Family C was exposed to the raffinate. Rather, in its response to the NRC's July 7, 1992 request for more information, the Petitioner stated that such information was available from Family C's attorney. The NRC's requests to Family C's attorney for additional information were unsuccessful. As discussed above in Section A, the NRC has placed restrictions on the content of the fertilizer. Because the Petition does not allege any violation of these requirements, and does not provide any specific information to demonstrate that the fertilizer caused particular injuries to Person B or Family C, it does not provide any basis to show that the fertilizer poses an undue hazard to public health and safety. In addition, as discussed in Section B, above, there is no basis for the NRC to impose requirements on SFC based on the manner in which SFC applies the fertilizer. Accordingly, Petitioner has not provided a basis for the NRC to take enforcement action against SFC.

In summary, with respect to the alleged injuries to persons, animals, and vegetation, the Petitioner has not presented a basis to conclude that the injuries were caused by the fertilizer or that the fertilizer presents an undue hazard to public health and safety. Therefore, there is no basis for the relief requested by the Petitioner.

III. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. §2.202 is appropriate only where substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that I have applied to determine whether the action requested by the Petitioner, or additional enforcement action, is warranted.

For the reasons discussed above, I conclude that no substantial health and safety issues have been raised by the Petitioner. Accordingly, the Petitioner's request for action pursuant to 10 C.F.R. §2.206 is denied. 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 the 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 14th day of April 1993.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Frank J. Miraglia, Acting Director

In the Matter of

Docket Nos. 50-321
50-366
50-424
50-425GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2; Hatch Nuclear
Plant, Units 1 and 2)

April 23, 1993

The Acting Director of the Office of Nuclear Reactor Regulation concludes that the petition filed by Messrs. Marvin B. Hobby and Allen L. Mossbaugh (Petitioners) raised no substantial health or safety concern to call into question the continued safe operation of the Vogtle and Hatch nuclear facilities operated by Georgia Power Company (GPC) and the Southern Nuclear Operating Company (SONOPCO). In addition, the Acting Director concluded that no unauthorized transfer of the Vogtle operating licenses occurred, and that, based on the NRC Staff's review of information available to date, none of the issues decided call into question GPC's character, competence, fundamental trustworthiness, and commitment and safety with respect to the operation of its nuclear facilities.

Certain concerns raised by Petitioners were partially substantiated. Violations of regulatory requirements have occurred in the operations of the Vogtle and Hatch facilities. Notices of Violation and a civil penalty have been issued to GPC for certain of these violations.

Certain other issues have not yet been addressed by the Acting Director and will be the subject of a Final Director's Decision.

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

I. INTRODUCTION

On September 11, 1990, Michael D. Kohn, Esquire, filed with the U.S. Nuclear Regulatory Commission (NRC) a "Request for Proceedings and Imposition of Civil Penalties for Improperly Transferring Control of Georgia Power Company's Licenses to the SONOPCO project and for the Unsafe and Improper Operation of Georgia Power Company Licensed Facilities" (Petition) on behalf of Messrs. Marvin B. Hobby and Allen L. Mosbaugh (Petitioners). The Petitioners are former employees of the Georgia Power Company (GPC or Licensee), which operates and is part owner of the Vogtle Electric Generating Plant and the Hatch Nuclear Plant. The Petition was referred to the Office of Nuclear Reactor Regulation (NRR) for the Director of NRR to prepare a Director's Decision in accordance with section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206). The NRC received exhibits to support the Petition on September 21, 1990, and a supplement to the Petition on October 1, 1990.

The Petitioners made a number of allegations about the management of the GPC nuclear facilities. Specifically, the Petitioners alleged that (1) GPC illegally transferred its operating licenses to Southern Nuclear Operating Company (SONOPCO)¹; (2) GPC knowingly included misrepresentations in its response to concerns of a Commissioner about the chain of command for the Vogtle facility; (3) GPC made intentional false statements to the NRC about the reliability of a diesel generator whose failure had resulted in a Site Area Emergency at Vogtle; (4) a GPC executive submitted perjured testimony during a U.S. Department of Labor (DOL) proceeding under section 210 of the Energy Reorganization Act; (5) GPC repeatedly abused Technical Specification (TS) 3.0.3 at the Vogtle facility; (6) GPC repeatedly and willfully violated Technical Specifications (TSs) at the Vogtle facility; (7) GPC repeatedly concealed safeguards problems from the NRC; (8) GPC operated radioactive waste systems and facilities at Vogtle in gross violation of NRC requirements; (9) GPC routinely used nonconservative and questionable management practices at its nuclear facilities; and (10) GPC retaliated against managers who made their regulatory concerns known to GPC or SONOPCO management. The Petitioners requested the NRC to institute proceedings and take swift and immediate action based on these allegations.

On October 23, 1990, I acknowledged receiving the Petition and concluded that no immediate action was necessary regarding these matters. I made

¹ Southern Nuclear Operating Company is more commonly known today as "Southern Nuclear." However, to be consistent with the Petition, "SONOPCO" will be used throughout this Partial Director's Decision.

that determination based on completed and continuing NRC inspections and investigations of the Licensee and particularly of the operation of the Vogtle facility. I further informed the Petitioners that I would issue a Director's Decision on these matters within a reasonable time.

On February 28, 1991, the NRC requested the Licensee to respond to the Petition. The Licensee responded on April 1, 1991 (Response).

On July 8, 1991, the Petitioners submitted "Amendments to Petitioners Marvin Hobby's and Allen Mosbaugh's September 11, 1990, Petition; and Response to Georgia Power Company's April 1, 1991, Submission by Its Executive Vice President, Mr. R.P. McDonald" (Supplement). In the Supplement, the Petitioners alleged that GPC's Executive Vice President made material false statements in GPC's April 1, 1991 submittal to the NRC. The Petitioners also alleged that this same individual made false statements to the NRC at a transcribed meeting held on January 11, 1991, to discuss the formation and operation of SONOPCO. The Petitioners provided additional information about certain allegations made in the earlier Petition. The Petitioners requested a variety of relief in the Supplement, including a request that the NRC take immediate steps to determine if GPC's current management has the requisite character and competence to continue operating a nuclear facility. On August 26, 1991, I acknowledged receiving the Supplement and informed the Petitioners that no immediate action was required and that the specific issues raised in the Supplement would be addressed in my Director's Decision. On August 22, 1991, the NRC requested the Licensee to respond to the Supplement. The Licensee submitted its response on October 3, 1991 (Supplemental Response).

The Petitioners raise a large number of issues in their submittals. Some of the issues will require additional consideration by either the DOL or the NRC Staff before a final decision is made. I do not, at this time, address the allegations of discrimination raised by the Petitioners that are before the DOL.²

Nor am I prepared at this time to make a final determination about the Petitioners' claim that GPC made intentional false statements to the NRC about the reliability of a diesel generator. This issue will require further evaluation before I can determine what action, if any, is appropriate. I do address in this Partial Director's Decision the Petitioners' other issues of alleged wrongdoing because the facts are now sufficiently developed as a result of NRC inspections and other reviews.

Because the NRC Staff has completed its review of a number of the issues and final conclusions have been reached, I am issuing a Partial Director's Decision

²The NRC Staff is aware of the decision by a DOL Administrative Law Judge recommending to the Secretary of Labor that the complaint of Mr. Hobby be dismissed with prejudice (*Marvin B. Hobby v. Georgia Power Co.*, Case No. 90-ERA-30) and the decision by a DOL Administrative Law Judge recommending to the Secretary of Labor that the complaints of Mr. Mosbaugh be dismissed (*Allen Mosbaugh v. Georgia Power Co.*, Case Nos. 91-ERA-1 and 91-ERA-11). Both recommended decisions are still pending before the Secretary of Labor.

with regard to those issues that are capable of final resolution now. For all issues not addressed herein, I intend to issue a supplement to this Decision when the considerations by the NRC Staff and DOL are complete. My discussion and decision regarding issues for which final conclusions have been reached follow.

II. DISCUSSION

A. Alleged Illegal Transfer of Licenses (Petition § III.1 with Supplemental Filing of October 1, 1990; July 8, 1991 Supplement § IV)

The Petitioners allege an illegal transfer to SONOPCO of the NRC licenses currently held by GPC that authorize operation of GPC nuclear facilities. Specifically, the Petitioners allege that GPC improperly transferred control of its nuclear licenses to SONOPCO. The Petitioners contend that Mr. Joseph M. Farley — who was an officer of GPC's parent company, The Southern Company, and its subsidiary, Southern Company Services — was really the Chief Executive Officer (CEO) of SONOPCO and was, in fact, responsible for operating the GPC nuclear facilities, beginning with the first of three phases in the planned transition to SONOPCO.

A review of the history and background of the formation of SONOPCO is necessary to understand this issue.

The Southern Company is the parent firm of five electric utilities: Alabama Power Company (APC), GPC, Gulf Power, Mississippi Power, and Savannah Electric. Two of these utilities are associated with nuclear facilities at three different sites. GPC is the principal owner and the holder of licenses from the NRC to operate the Vogtle nuclear facility near Augusta, Georgia, and the Hatch nuclear facility near Baxley, Georgia. APC owns the Farley nuclear facility near Dothan, Alabama. The Southern Company also includes Southern Company Services, Incorporated, a wholly owned service organization.

In 1988, The Southern Company established the SONOPCO project for the long-term purpose of establishing an operating company to eventually operate the nuclear power generating plants that were then operated by GPC and APC. The establishment of a single operating company was to be accomplished in three phases. During Phase 1, SONOPCO — which had not yet received the approval of the Securities and Exchange Commission (SEC) — was formed by The Southern Company as a "project" to provide support services to the operating companies (GPC and APC). In Phase 2, which is now in effect for the Vogtle and Hatch facilities, SONOPCO continues to provide support services to the operating companies, but has become a legal entity, having obtained the approval of the SEC, and thereafter being incorporated by The Southern Company. Phase 3 will begin for the Vogtle and Hatch facilities (and is currently

in effect for the Farley facility), once SONOPCO acquires NRC licenses to operate the nuclear facilities.

Because of delays, the transition occurred more slowly than first anticipated, and Phase 1 of the project lasted for approximately 2 years (1989 and 1990). During this phase, Mr. Joseph M. Farley was responsible for the administrative aspects of forming the new operating company. On February 24, 1989, Mr. Farley was elected Executive Vice President–Nuclear, of The Southern Company and Executive Vice President of Southern Company Services, Incorporated. Before this appointment, he had been President and Chief Executive Officer (CEO) of APC for almost 20 years.

Until SONOPCO acquired the NRC licenses, the GPC nuclear facilities were to remain under the direction of GPC President, Mr. A.W. Dahlberg, with a reporting chain downward of Executive Vice President–Nuclear Operations (Mr. R.P. McDonald), Senior Vice President–Nuclear Operations (Mr. W.G. Hairston, III), and the vice presidents for the Vogtle and Hatch facilities (Messrs. C.K. McCoy and T.J. Beckham, respectively). The APC plants were to remain under the direction of the APC President, with a similar chain downward of Mr. McDonald, Mr. Hairston, and the vice president for the Farley facility. Mr. McDonald and Mr. Hairston were officers of both APC and GPC.

During Phase 1, which began on or about November 1, 1988, technical support was provided to all three nuclear facilities by a common Technical Services group under a Vice President of Southern Company Services, Incorporated, who reported to the Executive Vice President, Mr. McDonald. Administrative support to all three facilities was provided by a common Administrative Services Group under another Vice President of Southern Company Services, Incorporated, who also reported to Mr. McDonald. This phase was to be effective until the SEC approved the creation of SONOPCO. Mr. Farley was not identified as having any responsibility for operating the GPC nuclear facilities during this phase. He was responsible for providing administrative services through Southern Company Services, Incorporated, and was also responsible for the formation of SONOPCO. Although not effective during Phase 1, Mr. Farley had been designated to become the President and CEO of SONOPCO when it was established.

Phase 2 began near the end of 1990 with the approval of SONOPCO as a legal entity by the SEC. Specifically, on December 14, 1990, the SEC approved The Southern Company's request of June 22, 1988, to form SONOPCO. SONOPCO was incorporated on December 17, 1990, and its officers were elected December 18, 1990. As part of Phase 2, GPC's Executive Vice President and Senior Vice President, Nuclear Operations (Messrs. McDonald and Hairston) became officers of SONOPCO and reported administratively to the President and CEO of SONOPCO, Mr. Farley. The Vice Presidents of each nuclear facility also became officers of SONOPCO. The Vice President of Technical Services and the

Vice President of Administrative Services, respectively, for Southern Company Services, Incorporated, became officers of SONOPCO, rather than officers of Southern Company Services, Incorporated. During this phase, GPC and APC retained their NRC licenses and the responsibility for operating their respective nuclear facilities.

Phase 3, during which SONOPCO was to have operating responsibility, was planned to begin for GPC nuclear facilities when the NRC licenses had been transferred to SONOPCO. The NRC-approved license amendments on November 22, 1991, that authorized the transfer of licenses for the Farley facility from APC to SONOPCO. The amendment for the Farley facility was implemented within 90 days thereafter. GPC filed applications for similar amendments to transfer the licenses for operation of the Vogtle and Hatch facilities on September 18, 1992, and the NRC is currently reviewing these applications.

The Petitioners contend that during Phase 1 of the transition to SONOPCO, GPC, in effect, transferred control of its NRC licenses to the SONOPCO project. They base their claim, in part, on their having witnessed the daily operation of GPC's nuclear facilities at the site and at GPC's corporate offices. The Petitioners state that

the actual chain of command was General Plant Manager George Bockhold (Vogtle) to SONOPCO Vice President McCoy; McCoy to SONOPCO's Senior Vice President, George Hairston, Hairston to SONOPCO's Executive Vice President and Chief Operations Officer, R. Patrick McDonald; McDonald to SONOPCO's Chief Executive officer, Mr. Farley.

In the supplementary filing of October 1, 1990, the Petitioners further contend that Mr. Farley "chose the GPC Corporate Officers which would be staffing the SONOPCO project even though he is not an officer or employee of GPC." In the July 8, 1991, Supplement (at 20), the Petitioners assert that Mr. McDonald has reported to Mr. Farley on administrative matters since the formation of the SONOPCO project.

In March 1988, GPC and APC met with NRC to discuss their plans to form a separate operating company, SONOPCO. On July 25, 1988, NRC met with GPC to discuss the corporate organization of SONOPCO and GPC, including the generic activities and initiatives involving the Vogtle and Hatch facilities. Enclosure 3 to the meeting summary prepared by NRC Region II, August 11, 1988, a Nuclear Operations-Transition Organization chart, shows the Vice President-Nuclear (Hatch), and the Vice President-Nuclear (Vogtle) reporting to Mr. W.G. Hairston, the Senior Vice President-Nuclear Operations and Mr. W.G. Hairston reporting to Mr. R.P. McDonald, the Executive Vice President-Nuclear Operations. On March 1, 1988, Mr. McDonald was elected a senior officer of GPC and named Executive Vice President-Nuclear, effective April 25, 1988.

On May 4, 1988, Mr. W.G. Hairston was elected Senior Vice President–Nuclear Operations of GPC and Mr. C.K. McCoy was elected Vice President–Nuclear of GPC (GPC Submittal, April 1, 1991, Attach. 1, Exh. 4).

During December 19 through 21, 1988, with Phase 1 of the SONOPCO transition in effect, the NRC conducted an inspection of the corporate organization, responsibilities, and functions of SONOPCO at Birmingham, Alabama (Inspection Report Nos. 50-321/88-41, 50-366/88-41, 50-424/88-60, 50-425/88-77, 50-348/88-33, and 50-364/88-33). Part 3 of this report states:

In preparation for combining the management of Vogtle, Hatch, and Farley into one organization, GPC has reorganized and moved the corporate nuclear operations to Birmingham. . . . Currently, the Executive Vice President and Senior Vice President for Nuclear Operations are officers of both GPC and APC. . . . The Vice Presidents for each of the three projects (Vogtle, Hatch, and Farley) report to the Senior Vice President of Nuclear Operations.

The transcript of the DOL proceeding³ on the discrimination complaints of Mr. Hobby indicates that GPC President, Mr. Dahlberg, stated that the operation of GPC's nuclear facilities is his direct responsibility; that Mr. McDonald takes his management direction from Mr. Dahlberg regarding the operation of GPC's nuclear plants; and that Mr. McDonald reports to Mr. Dahlberg for management operations dealing with GPC plants (Proceeding Transcript at 305, 307, and 309). Mr. Farley stated that he does not have any responsibility for operating GPC's nuclear facilities and that Mr. McDonald does not report to him with respect to the operation of Hatch and Vogtle (*id.* 567 and 568). Mr. McDonald stated that he reports to Mr. Dahlberg regarding the operation of GPC's nuclear facilities (*id.* at 613 and 614).

In a deposition of May 5, 1990, taken in the same Hobby DOL proceeding, at pages 13 and 14, Mr. McDonald stated that he has no reporting responsibilities to Mr. Farley. In a Memorandum, to Mr. H.B. Hobby of May 15, 1989, Mr. Fred D. Williams, the GPC Vice President for Bulk Power Markets, stated:

Mr. R.P. McDonald reports to A.W. Dahlberg for operation and support activities of Plants Vogtle and Hatch. I have attached a copy of the most recent published organization chart showing the reporting. Mr. George Hairston reports to Mr. McDonald.

The Petition (at 5 and 6) states that Mr. Hobby's claims regarding control of operating the nuclear facilities are based upon his having witnessed the day-to-day operation at GPC's corporate offices. Other than Mr. Hobby's observations of day-to-day operation, no direct evidence was offered to support the claim that Mr. McDonald reported to Mr. Farley regarding the operation of the Hatch or Vogtle nuclear facilities. Mr. Hobby acknowledged that he had no personal

³ *Marvin B. Hobby v. Georgia Power Co.*, Case No. 90-ERA-30.

knowledge that Mr. McDonald received his direction from Mr. Farley (Hobby DOL Proceeding Transcript at 239). He does, however, relate observations or assertions that he believes strongly suggest that SONOPCO was in control:

- (1) In his Memorandum of April 27, 1989 (Exh. A of the September 21, 1990 Supplement to the Petition), Mr. Hobby refers to a specific concern with regard to control that was expressed by one of the joint owners of the Vogtle facility, the Oglethorpe Power Corporation.
- (2) Page 4 of Mr. Hobby's letter of June 8, 1989, to Mr. D. Wilkinson (Attach. 4 to the July 8, 1991 Supplement to the Petition) refers to coaching of the GPC corporate staff regarding the organizational reporting and control issue.
- (3) Mr. Hobby states that on October 25, 1989, GPC's counsel advised him that statements in certain contractual documents should be reworded to avoid any accusation that SONOPCO was in control (October 1, 1990 Supplement to Petition at 3).
- (4) In the October 1, 1990 Supplement (at 1 and 2), the Petitioners state that Mr. Farley was responsible for selecting GPC vice presidents associated with the SONOPCO project and also decided whether to transfer GPC employees from the SONOPCO project located in Birmingham, Alabama, to GPC Headquarters, in Atlanta, Georgia, even though he was not a GPC employee.
- (5) Mr. Hobby was advised that "[i]t was Mr. Farley who would be making the call about the staffing of all GPC nuclear positions. . . ." (October 1, 1990 Supplement to Petition at 4).
- (6) The Petitioners state that Vogtle project management assumed that Mr. Farley, and not Mr. Dahlberg, controlled Vogtle's operation, citing two reasons for this assertion: a statement by Mr. McCoy during a meeting on Vogtle Unit 1's Cycle 4 refueling outage that the outage philosophy was created by Mr. Farley and others; and a taped comment by a former SONOPCO manager stating his belief that, in case of a significant event at a GPC facility, the corporate duty manager would call Mr. Farley rather than Mr. Dahlberg (October 1, 1990 Supplement to Petition at 4 and 5).
- (7) The Petitioners assert that Mr. McDonald has reported to Mr. Farley on administrative matters since the SONOPCO project was formed (July 8, 1991 Supplement to the Petition at 20).

The NRC Staff has reviewed the materials submitted by the Petitioners to support their claims. With regard to Items (1), (2), and (3) previously described, the Petition contains expressions of concern that, both within and outside of GPC, SONOPCO might be perceived as being in control of GPC nuclear operations. Such concerns would not necessarily be unusual during a transitional phase when, by necessity, the responsibilities of GPC and SONOPCO could

closely coincide. As is discussed in the following paragraphs, the NRC Staff has concluded that GPC retained control of its nuclear facilities during this transitional phase.

With regard to Items (4) and (5) above, the DOL depositions and testimony do provide some support for the contention that Mr. Farley participated to some degree in personnel decisions affecting both SONOPCO and GPC employees, including some who were elected as GPC corporate officers. Mr. Farley was Executive Vice President-Nuclear of The Southern Company (parent company of APC, GPC, and Southern Company Services) and was expected to become President and CEO of the SONOPCO project upon its formation. Therefore, his involvement in personnel decisions for employees transferring into or out of the SONOPCO project is not unreasonable. Further, Mr. Farley's consultation with GPC on other GPC employees does not conflict with any NRC requirements. Both Mr. Farley and GPC have provided sworn statements and depositions that the ultimate responsibility regarding decisions on assignment of GPC employees rested with the authorized GPC management structure (i.e., Dahlberg, McDonald, *et al.*). In fact, GPC vice presidents, as officers of GPC, were approved by the GPC Board of Directors. On the basis of this information, the NRC Staff concludes that the Petitioners' assertions about Mr. Farley's decisionmaking with respect to GPC employees constitute an insufficient basis for NRC action in this matter.

With regard to Items (6) and (7), above, the Petitioners express a specific concern that the Executive Vice President-Nuclear Operations was taking guidance and direction from the SONOPCO organization, as opposed to taking this guidance and direction from the GPC CEO.

The NRC Staff has reviewed the Vogtle Final Safety Analysis Report, the Vogtle licenses, records of an NRC Special Inspection conducted to review the SONOPCO management organization, and testimony of key officials taken under oath. The NRC Staff concludes that this information established that the responsibility for decisions affecting the operation of the GPC plants rests with the GPC's Senior Vice President-Nuclear Operations, Mr. Hairston. While Messrs. Hobby and Mosbaugh express concerns in this area, these concerns do not warrant a conclusion that SONOPCO was in control. Rather, the NRC Staff finds that throughout Phases 1 and 2 of the SONOPCO project, the chain of command was from the respective vice presidents for the Vogtle and Hatch facilities to Mr. Hairston. Mr. Hairston reported to Mr. McDonald, who reported to Mr. Dahlberg, President of GPC. Each of these individuals is an elected officer of GPC, and the reporting chain progresses up to the President of GPC. Therefore, the NRC Staff concludes that there has been no illegal transfer of responsibility from GPC to SONOPCO for the Vogtle or Hatch facilities.

B. Alleged False Statements at the January 11, 1991 Meeting (July 8, 1991 Supplement § IV)

The Petitioners also assert that Mr. McDonald made false statements during a transcribed meeting with the NRC Staff on January 11, 1991, when he discussed the formation of SONOPCO. The Petitioners contend that Mr. McDonald's statement that "[h]e [Mr. Farley] had no responsibilities for this Administrative Support" (Tr. at 42) prior to December 1990 was false. The statement was false, the Petitioners claim, because Mr. Farley had been involved in administrative matters since the SONOPCO project was formed in November 1988. The Petitioners assert that deposition testimony of Mr. Farley taken in a DOL proceeding⁴ on May 7, 1990, verifies that Mr. McDonald's statement was false. In his testimony, Mr. Farley describes his involvement in certain administrative matters which, the Petitioners assert, conflicts with Mr. McDonald's assertion that Mr. Farley had no responsibilities in the area of administrative support before December 1990.

The statement claimed by the Petitioners to be false was not categorical, i.e., that Mr. Farley had *no* administrative responsibilities during Phase 1 of the formation of SONOPCO. Mr. McDonald's statements as a whole make clear that his point was that Mr. Farley assumed *new* administrative duties beginning with the commencement of Phase 2 of the formation of SONOPCO.

The administrative responsibilities to support the GPC staff during Phase 1 were described in a letter of agreement between Mr. McDonald and Mr. H.A. Franklin, President and CEO of Southern Company Services, Incorporated, dated April 24, 1989 (Letter of Agreement). Item 1 of the Letter of Agreement provides for administrative services under the direction of Mr. C.D. McCrary, Vice President, Administrative Services-Nuclear. These administrative services were to support GPC's nuclear staff; and during this period, Mr. McCrary reported to Mr. McDonald with respect to these functions.

When Phase 2 began and Mr. Farley became CEO of SONOPCO, he acquired line responsibility for executive oversight of SONOPCO's Administrative Services group and the Technical Services group. Therefore, when Phase 2 began, Mr. Farley assumed significant new administrative responsibilities for the Administrative Services group. Thus, Mr. Farley's role did indeed change.

Also, prior to the January 11, 1991 meeting, it is clear that Mr. Farley had some administrative responsibilities associated with the formation of the SONOPCO project. Item 4 of the Letter of Agreement provides for services by Mr. Farley relating to the anticipated transfer of nuclear operating and support activities from GPC to SONOPCO. Such services would include some administrative services. Mr. McDonald also worked with Mr. Farley, who was

⁴*Id.*

the officer in charge of the SONOPCO project office, on the administrative aspects of the formation of SONOPCO (Transcript for Deposition of Joseph M. Farley, May 7, 1990, at 37 and 38). Thus, Mr. Farley assumed some administrative responsibilities during Phase 1 of the formation of SONOPCO.

It is not reasonable to interpret Mr. McDonald's statement at the January 11, 1991 meeting as a categorical statement to the effect that Mr. Farley had no previous administrative duties when Mr. Franklin had specifically authorized such duties as requested by Mr. McDonald in the Letter of Agreement. The more reasonable interpretation to be given to Mr. McDonald's statement is that, when Phase 2 began and Mr. Farley became CEO of SONOPCO, he acquired substantial additional administrative responsibilities, specifically line responsibility for executive oversight of SONOPCO's Administrative Support group and the Technical Services group. The NRC Staff concludes that because it was Mr. Farley's new duties that Mr. McDonald referred to during the January 11, 1991 meeting with the NRC Staff, Mr. McDonald's statement during the meeting cannot be considered false.

C. Alleged False Statements About Chain of Command (Petition § III.2; July 8, 1991, Supplement § III)

The Petitioners state that GPC misled the Commission about the chain of command from the Vogtle project's Plant Manager to its CEO before the NRC issued the operating license for the facility.

On March 30, 1989, the Commissioners met to discuss and possibly vote on the full-power operating license for Vogtle Unit 2. The Commissioners present were Chairman Lando W. Zech, Jr., Kenneth M. Carr, Thomas M. Roberts, Kenneth C. Rogers, and James R. Curtiss. The transcript reflects that then-Commissioner Carr expressed concern about the hierarchy between the Vogtle Plant Manager (i.e., the General Manager) and the Chief Executive Officer (CEO), noting that it "looked to me like he was a long way from the CEO." Mr. R.P. McDonald, GPC Executive Vice President-Nuclear Operations, responded that (1) he (Mr. McDonald) reported to Mr. A. William Dahlberg, the GPC CEO; (2) Mr. Ken McCoy, Vice President of Vogtle, reported to Mr. McDonald; and (3) Mr. George Bockhold, then Vogtle General Manager, reported directly to Mr. McCoy. At the conclusion of the meeting, the Commissioners voted unanimously in favor of the license, and the license was issued the following day.

On May 1, 1989, Mr. W.G. Hairston, III, Senior Vice President for Nuclear Operation, sent the NRC a letter of correction of the transcript, noting that Mr. McDonald had

inadvertently left out the Senior Vice President of Nuclear Operations. The organization is as described on figures 13.1.1-1 and 13.1.1-2 of the Vogtle Final Safety Analysis Report.

The Petitioners claim that Mr. McDonald knowingly made false statements to the NRC Commissioners in the presence of Messrs. Dahlberg, McCoy, and Bockhold during his response to then-Commissioner Carr in that he "eliminated one entire level of management between the plant manager and the CEO." Moreover, the Petition asserts that

Messrs. Dahlberg, McCoy and Bockhold should have known that Mr. McDonald's statements were false and should have brought this to the immediate attention of the Commission and otherwise corrected the record *before* the Commission acted on the Vogtle full power license request.

In its Response to the Petition of April 1, 1991, GPC noted that the Commission had been apprised of the company's organization before the meeting on March 30, 1989, including the Senior Vice President position, by an amendment to the Vogtle Final Safety Analysis Report (FSAR) that was submitted November 23, 1988. The amendment described the reporting chain as being from Mr. McCoy to Mr. Hairston to Mr. McDonald. GPC's Response also indicated that the NRC had reviewed the organizational structure in December 1988 and issued an inspection report.⁵ In the inspection report, the NRC stated that the vice presidents of the Farley, Hatch, and Vogtle facilities reported to the Senior Vice President, who reported to the Executive Vice President, and that the organization for Vogtle was consistent with the Vogtle FSAR amendment submitted in November 1988.

In its Response, GPC noted further that, during the March 30 meeting, Commissioner Rogers stated that he had reviewed the company's organizational chart during a visit he made to the plant site.

Finally, GPC also noted that it had submitted the letter of correction to the transcript approximately 2 weeks after receiving the NRC transcript.

The NRC Staff has reviewed this issue and concludes that Mr. McDonald's reply to then-Commissioner Carr was inaccurate in that the transcribed record clearly contradicted other documents of record, including the FSAR and NRC inspection reports. The inaccuracy was material in that the reply (1) was in direct response to the Commissioner's stated concern for an organizational structure in which the plant manager appeared to be "a long way from the CEO," (2) could influence the Commission's decision, and (3) could have been considered by the Commission in reaching its decision.

⁵ NRC Inspection Report Nos. 50-321/88-41, 50-366/88-41, 50-424/88-60, 50-425/88-77, 50-348/88-33, and 50-364/88-33 (Feb. 7, 1989).

The Licensee or its employees would probably not attempt to deliberately mislead the Commissioners since the Licensee had previously provided correct information, and NRC Staff members were present who presumably knew the correct information. Therefore, the NRC Staff believes that Mr. McDonald's false statement or omission was not intentional.

The NRC Staff also believes that, while the statement (and thus the omission) was material because it could have influenced the Commission, it was not significant because the NRC Staff does not believe this one issue would have caused the Commission to reach a different decision.

On November 7, 1991, the NRC Staff informed the Commission of the inaccurate information and of the Staff's intent to reply to this issue on the basis that the statement omitting Mr. Hairston in the organizational structure was insignificant. The Commission has concurred in this approach (Staff Requirements Memorandum of December 2, 1991, in response to SECY-91-358).

In summary, while inaccurate information was given to the Commissioners, the NRC Staff does not believe that it was deliberate or significant. Under the NRC's Enforcement Policy (10 C.F.R. Part 2, Appendix C), unsworn oral statements that are unintentionally inaccurate are not normally acted upon unless they involve significant information by a Licensee official. In this case, no enforcement action is warranted regarding the oral statement because the information was not significant. Although we cannot be certain whether the other GPC personnel present knowingly made a material omission when they failed to correct the false statement, further action to pursue this omission is not warranted because of its lack of significance and because no information beyond the Petitioners' opinion exists to support the position that the omission was intentionally false.

D. Alleged Routine Entering into "Motherhood" (Petition § III.5)

The Petitioners allege that GPC routinely threatens the safe operation of GPC's nuclear facilities by allowing them to enter TS 3.0.3, referred to in the Petition as "motherhood." Specifically, the Petitioners state that GPC repeatedly allowed the Vogtle facility to enter TS 3.0.3 by rendering both trains of safety-related load sequencers for the diesel generators inoperable. The Petitioners also allege that GPC did not make the required notifications to the NRC when TS 3.0.3 was entered.

Vogtle TS 3.0.3 requires that, when a limiting condition for operation (LCO) is not met, except as provided in the associated action requirements, action shall be taken within 1 hour to place the unit in a mode in which the TSs do not apply by placing it in hot standby within the next 6 hours, in hot shutdown within

the following 6 hours, and at least in cold shutdown within the subsequent 24 hours.

The NRC established TS 3.0.3 to ensure that the reactor plant is shut down in a timely and orderly manner when the LCO in the TS for the specific component or system is exceeded or when a condition exists that is not addressed by TS requirements. The Licensee has satisfied the TS if it performs the final action within the time specified in the TS. If the condition requiring entry into TS 3.0.3 is corrected before commencing or completing the shutdown, the Licensee need not initiate a shutdown, or if a shutdown is already initiated, may end the shutdown and return the plant to the previous conditions.

The Commission's regulations for notifying and reporting to the NRC do not contain an explicit requirement that an entry into TS 3.0.3, in and of itself, be reported. Licensees are required by 10 C.F.R. § 50.72 to notify the NRC within 1 hour of the initiation of any plant shutdown required by the plant's TS. Thus, the NRC is promptly notified of entries into TS 3.0.3 if the plant initiates a shutdown as a result of the problem that caused entry into the TS. However, there is no requirement to notify the NRC of entries into TS 3.0.3 if a shutdown is not initiated.

The NRC Staff has reviewed entry into TS 3.0.3 through various inspections conducted by region-based inspectors and the observations of the permanently assigned resident inspector and concludes that GPC does not routinely enter TS 3.0.3.

In Inspection Report 50-424, 50-425/90-19, January 11, 1991, the NRC Staff documented that GPC management had indicated that actions for an orderly shutdown would not be initiated until at least 3 hours after entry into TS 3.0.3. GPC management also indicated that it could perform an orderly, controlled shutdown within 1 hour, if need be. GPC has interpreted the action statement of TS 3.0.3 to allow 7 hours to be in hot standby, and to accomplish this, the shift crew could wait for at least 3 hours after entering the LCO before commencing a shutdown. It was also GPC's position that no notifications to the NRC were required under these circumstances. GPC's actions in this area did not differ significantly from those of other licensees, except that GPC did not immediately notify the load dispatcher⁶ and did not provide written guidance to the operations personnel. In the inspection report, the NRC Staff identified the lack of immediate notification as a weakness. On February 28, 1991, GPC

⁶The NRC confirmed that, while GPC did not follow the actions recommended in Generic Letter 87-09 (i.e., notification of the load dispatcher within the first hour and performance of a controlled shutdown throughout the next 6 hours), GPC has never exceeded the 7-hour time limit to be in hot standby. In NRC Inspection Report 50-424, 50-425/90-19, the NRC identified as a weakness the failure to notify the load dispatcher in any of the instances that a change in plant operation had been initiated.

responded to this finding by providing written guidance⁷ for the operators to use upon entering TS 3.0.3. The NRC Staff reviewed this guidance and, as noted in Inspection Report 50-424, 50-425/91-14 dated July 19, 1991, found it acceptable.

The specific example identified by the Petitioners regarding this issue concerned GPC's practice in the area of safety-related load sequencers for Vogtle's emergency diesel generators. The Petitioners claim that the Licensee failed to recognize that the loss of a load sequencer resulted in the entry into TS 3.0.3 and, thus, required notification to the NRC.

Each unit at Vogtle has two Engineering Safety Feature Actuation Systems (ESFASs) sequencers and both must be operable during Modes 1, 2, 3, and 4. The NRC and GPC personnel determined that removing the load sequencers from service could result in entering the LCO for TS 3.0.3 or in entering TS Table 3.3-2, depending on which portion of the sequencer system was removed. Some of the circuits were included in Table 3.3-2, but the TS did not address the remainder of the system. The Operations Department had historically linked load sequencer outages to the emergency diesel generator LCO of TS 3.8.1.1.b (78 hours to hot standby). During the NRC's special team inspection documented in Inspection Report 50-424, 50-425/90-19, GPC determined that TS Table 3.3-2 and TS 3.0.3 should have applied to sequencer outages. When this determination was made, GPC informed the NRC Staff that it had not reviewed past work orders for load sequencers.

At that time, the NRC Staff reviewed both the completed maintenance work orders that were performed on the sequencers on Units 1 and 2 and the related surveillance tests by the Instrumentation and Control Engineering and the Operations Departments. The NRC Staff found several instances in which the work performed would have required the load sequencers to be deenergized. However, the associated unit was found not to have been in Modes 1, 2, 3, or 4 at the time this work was performed and, thus, no TS LCO applied.

Similar to the maintenance work order review, the NRC Staff reviewed related Instrumentation and Control Engineering and the Operations Departments' surveillance tests. This review did not reveal any examples of the load se-

⁷The Licensee's written guidance for TS 3.0.3 entry was issued as TS Clarifications, which are additional pages that the Licensee maintains with the TS in the main control room. The guidance basically states the following: Upon entry in TS 3.0.3, the Unit Shift Supervisor should evaluate plant conditions and formulate a course of action, including actions to prepare for and complete a safe and controlled shutdown. In cases where a high degree of confidence exists that the technical issues can be resolved or repairs made promptly to restore component operability, an immediate power reduction is not advisable. However, actions are to be taken to ensure that an orderly shutdown will be completed within the allowable time while repairs or attempts to resolve operability are under way. Within the first hour, notifications to the load dispatcher and management should be made. If the condition still exists, power reduction should begin no later than 4 hours into the action (3 hours of the allowable time remaining). In those cases where it is apparent that resolution of the condition will not occur within the allowable time, an orderly shutdown will begin immediately.

quencers having been deenergized while in Modes 1 through 4 at the time the work was performed and, thus, no TS LCOs applied.

Accordingly, the NRC Staff has concluded that GPC does not routinely threaten the safe operation of the Vogtle facility by allowing entry into TS 3.0.3. The Petitioners' claim that NRC notification requirements were violated upon entry into TS 3.0.3 was not substantiated.

E. Alleged Ignoring of TS (Petition § III.6)

The Petitioners claim that GPC routinely endangers the public's safety by ignoring TS and that this is illustrated by seven cited examples:

Example (1) Opening Dilution Valves When Required to Be Locked Closed (Petition § III.6a)

The Petitioners state that the Licensee willfully and knowingly violated Vogtle Unit 1 TSs by opening dilution valves required to be locked closed by TSs. The Petitioners claim that the valves were opened while the reactor coolant system (RCS) was at mid-loop, and that this placed the plant in an unanalyzed condition and created the risk of an uncontrolled boron dilution accident and an inadvertent reactor criticality. The Petitioners allege that the valves were opened to expedite an outage so that the plant could be placed back on line according to the outage schedule. The Petitioners also assert that violating TSs to stay on schedule was due, in part, to SONOPCO's philosophy (attributed by the Petitioners to Messrs. Farley, McDonald, Hairston, and three SONOPCO Vice Presidents but not attributed to Mr. Dahlberg) that outages must be scheduled assuming that

everything goes right. Everything falls into place right. That you do not put any contingency or extra time in there . . . (quotation verbatim from Vice President McCoy) [Petition at 18].

The NRC Office of Investigations (OI) has investigated this event, which occurred in October 1988 during the first refueling outage for Vogtle Unit 1. The results of that investigation are documented in OI Report 2-90-001. The OI investigators concluded that TS 3.4.1.4.2 was knowingly and intentionally violated by Vogtle Operations shift supervisors, with the express knowledge and concurrence of the Operations Manager. In its Report, OI also concluded that a violation of the reporting requirements of 10 C.F.R. § 50.73 occurred, but that the evidence was insufficient to conclude that this was a deliberate violation of reporting requirements.

On June 3, 1991, after reviewing the OI findings, the NRC Staff issued a Notice of Enforcement Conference and Demands for Information to GPC and the Operations Manager at the time of the incident. The NRC Staff also issued

on June 3, 1991, Demands for Information to the Operations Superintendent and the Shift Supervisor at the time of the incident. After receiving and reviewing the responses to the four Demands for Information (Demands), the NRC Staff held an Enforcement Conference on September 19, 1991, with GPC and the Operations Manager.

Following the Enforcement Conference, the NRC Staff sent letters to the Operations Manager, the Operations Superintendent, and the Shift Supervisor stating that no additional actions would be taken regarding their individual NRC licenses. The NRC Staff also stated that, although the actions of these individuals did not meet NRC expectations, the evidence was insufficient to support a conclusion that their actions in 1988 constituted a deliberate attempt to disregard and intentionally circumvent the requirements of the TSs.

On December 31, 1991, after consultation with the Commission, the NRC Staff issued to GPC a Notice of Violation and Proposed Imposition Of Civil Penalty of \$100,000 (Notice). The Notice set out several violations identified during the NRC investigation conducted between February 1, 1990, and March 19, 1991, including a violation that, contrary to the requirements of TS 3.4.1.4.2, on October 12 and 13, 1988, with Unit 1 in Mode 5, loops not filled, reactor makeup water storage tank valves 1208-U4-176 and 1208-U4-177 were opened in order to add chemicals to the RCS. On January 30, 1992, the Licensee responded to the Notice, denied the violations, and protested the proposed imposition of the civil penalty. The NRC Staff reviewed the GPC response and, on June 12, 1992, issued an Order Imposing Civil Monetary Penalty of \$100,000 (Order). On July 9, 1992, GPC responded to the Order, submitted payment of the penalty, and noted that it did not plan to continue an appeal of this action.

On the basis of this investigation and subsequent followup, the NRC Staff agrees that a violation associated with the operation of these dilution valves did, in fact, occur. To this extent, the Petitioner's claim is substantiated and the NRC has taken appropriate enforcement action. However, the NRC Staff concludes, after consultation with the Commission, that the evidence does not substantiate that this action was willful. Rather, as indicated by the responses of the Operations Manager, the Operations Superintendent, the Shift Supervisor, and GPC to the NRC's Demands and during the Enforcement Conference, the action resulted from an incorrect interpretation of the TS requirement by the Operations Manager in 1988.

The Petitioners state that opening these valves while the RCS was at mid-loop placed the plant in an unanalyzed condition and resulted in risking an uncontrolled dilution accident and inadvertent reactor criticality. The NRC Staff did find that this action placed the plant in an unanalyzed condition. For this reason, in part, the NRC Staff issued the Notice to GPC dated December 31, 1991, and the Order dated June 12, 1992.

With respect to the placement of the plant in a condition that could have resulted in an uncontrolled dilution event and inadvertent reactor criticality, the NRC Staff reviewed an analysis of this event that Westinghouse later performed for GPC. GPC provided the analysis to the NRC Staff on November 21, 1989, to support proposed license amendments to change Vogtle TS 3.4.1.4.2. The change would allow the valves to be opened under administrative control to enable nonborated chemical additions to be made to the RCS during Mode 5b (cold shutdown with coolant inventory reduced to the extent that the reactor coolant loops are not filled) and Mode 6 (refueling), using a flow path via the reactor makeup water storage tank. The results of the Licensee's analysis indicated that the minimum acceptable operator action times of 15 minutes for Mode 5b and 30 minutes for Mode 6, as specified in the NRC's Standard Review Plan (NUREG-0800), would be met. On the basis of this analysis, the NRC Staff concluded that the opening of these valves under administrative controls with the RCS in a loops-not-filled condition, including the mid-loop condition, would not result in an unsafe condition. This conclusion was the basis for the NRC Staff's approval of License Amendment Number 28 for Vogtle Unit 1 and License Amendment Number 9 for Vogtle Unit 2, each dated February 20, 1990. The responses by GPC and specific individuals indicate that precautions were taken when the valves were opened in 1988 to ensure that the valves would remain open for no more than 5 minutes. While the NRC Staff is unable to conclude that these undocumented controls were in place, the NRC Staff does find that the actual amount of time the valves were open was of insufficient duration to create a criticality event. Therefore, the NRC Staff concludes that, although the TSs in effect at the time were violated, the actual opening of the valves in 1988 did not endanger the health and safety of the public.

With respect to the Petitioners' claim that the valves were opened to expedite the outage so that the plant could be placed back on line according to the outage schedule, the NRC Staff pursued this issue during the Enforcement Conference on September 19, 1991. The NRC Staff did not conclude that this evolution had been performed to meet the outage schedule. Although chemical cleaning is a desirable process that is advantageous to maintaining radiological exposures of plant personnel to levels as low as is reasonably achievable, it is performed at the option of the utility. The NRC did not require chemical cleaning before the utility restarted the reactor in 1988. If the desire to remain on schedule had been the basis for the decision, then the more logical decision for this first refueling outage would have been to omit the chemical cleaning step and defer it for a subsequent outage.

Example (2) Failure to Secure Dilution Valves as Required by TS (Petition § III.6b)

On February 26, 1990, the NRC Staff found that dilution valves, identified in previous Example 1, were required to be locked closed, but were not locked while at mid-loop in violation of TSs. The Petitioners assert that this is another example of a willful violation of TSs by Vogtle senior management.

On February 26, 1990, while Unit 1 was in Mode 5 with reactor coolant loops not filled (mid-loop), the NRC Staff found that discharge valve 1-1208-U4-176 of the refueling makeup water storage tank was closed but was not secured in position as required by Action Statement c of TS 3.4.1.4.2. Instead of installing a mechanism to mechanically secure this valve, the Licensee placed a "hold tag"⁸ on the valve, which provided only administrative control to preclude valve operation. When the NRC Staff described this condition to the Licensee, Vogtle personnel contended that the administrative controls were acceptable to fulfill the requirements of the TS that the valve be secured in position. GPC later agreed that this method was unacceptable and took action to install a mechanical locking device. On April 26, 1990, the NRC Staff issued Notice of Violation, 50-424, 50-425/90-05-01, "Failure to Mechanically Secure Valve 1-1208-U4-176 During Mode 5 as Required by TS 3.4.1.4.2.C."

During a subsequent NRC inspection (Inspection Report 50-424, 50-425/91-14), the NRC Staff reviewed the Licensee's associated actions and closed this violation. The inspectors reviewed the locked-valve procedure, 10019-C, which had been revised to eliminate using a "hold tag" on valves that are required by TSs to be secured in position. To secure the valve involved in this violation, the Licensee routed a steel cable through drilled holes in the valve handle and then mechanically secured the cable to prevent personnel from operating the valve. GPC conducted a comprehensive review of all remaining valves required by TSs to be secured to ensure that each had a locking mechanism in place. GPC committed to provide an appropriate locking mechanism for any valve secured by a hold tag and required to be secured by TSs. However, GPC found no other valves in that category.

The NRC Staff concludes that, although a violation occurred, it was an error based upon interpretation and was not an example of a willful violation of TSs by Vogtle senior management.

⁸ A "hold tag" is a 3-inch by 5-inch red tag that is attached to a piece of equipment to indicate that it is not to be operated. The intent of the "hold tag" is indicated by Vogtle's Administrative Procedure 304-C, "Equipment Clearance and Tagging Procedure," which states that "[a] hold tag, when attached to a piece of equipment, prohibits the operation of that equipment in all circumstances."

Example (3) Miscalculation of Shutdown Margin (Petition § III.6c)

In January 1989, two shifts of licensed operators miscalculated, because of procedural errors, the shutdown margin for Vogtle Unit 1, which was shut down at the time. The Petitioners allege that the RCS boron concentration thus became "dangerously low" and that the Licensee did not write a deficiency report, conduct a critique, review their actions for conformance to TSS, or submit a report to the NRC.

Vogtle TS 3.1.1.2 requires that a specified minimum shutdown margin be maintained when the reactor is in Modes 3 (Hot Standby), 4 (Hot Shutdown), or 5 (Cold Shutdown). The required minimum value is specified by graphs of shutdown margin as a function of RCS boron concentration. The minimum shutdown margin specified in TS 3.1.1.2 is sufficient to ensure, as a most restrictive condition, that if a boron dilution accident were to occur during the beginning of core life, the operator would have at least 15 minutes to take corrective action after the initiation of an alarm caused by source range high flux to avoid total loss of shutdown margin. An operator reaction time of at least 15 minutes is consistent with the associated accident analyses of the boron dilution event in the FSAR. The corresponding surveillance requirement in TS 4.1.1.2 requires that the shutdown margin be determined to be greater than or equal to the required value at least once every 24 hours by considering several factors, including RCS boron concentration, RCS average temperature, and xenon concentration.

At 5:35 p.m. on January 19, 1989, control room operators at Vogtle manually tripped the Unit 1 turbine and reactor to enter a planned outage to repair a leaking socket weld for the drain line in the loop seal downstream of the pressurizer safety relief valve. After the unit was shut down, an extra shift supervisor on shift completed Procedure 14005-1, "Shutdown Margin Calculation," which must be completed every 24 hours when the plant is in Modes 3, 4, or 5. He signed the procedure at 7:13 p.m. on January 19, 1989. However, the extra shift supervisor incorrectly completed Data Sheet 2, which applies to conditions when the average RCS temperature is equal to or greater than 557°F. This action was incorrect because he should have completed Data Sheet 4, which applies to conditions related to entering Cold Shutdown (Mode 5). That shutdown margin calculation, which was based upon the wrong data sheet, resulted in a calculated shutdown margin of 6.6% reactivity (i.e., $\Delta k/k$)⁹ a required shutdown margin of 2.58% $\Delta k/k$. These results indicated to the operators that no boron addition to the RCS was required in order to enter Cold Shutdown.

⁹ Reactivity is defined as the fractional change in neutron population from one neutron generation to the subsequent generation. Reactivity is expressed mathematically as $(K_{eff} - 1)/K_{eff}$, or as $\Delta k/k$, where K_{eff} is the multiplication factor in a nuclear system expressing the change in the fission neutron population per generation.

On January 20, 1989, at approximately 9:00 a.m., a reactor engineer questioned the apparently low RCS boron concentration of 1333 parts per million (ppm). His concern prompted the Licensee to stop the unit cooldown until the shutdown margin calculation was verified. At 10:22 a.m., the reactor engineer completed a shutdown margin calculation that assumed an RCS temperature of 68°F and 0% reactivity for xenon worth. His calculation, which did not take into account xenon worth, showed that 1800 ppm boron concentration was necessary to obtain a shutdown margin of 4.015% $\Delta k/k$ compared to a required shutdown margin of 3.47% $\Delta k/k$. This calculation failed to include credit for xenon worth, which would have added approximately 3.8% $\Delta k/k$ to the shutdown margin and provided more than an adequate margin above TS requirements without further boration. Since no TS limit was exceeded, GPC was not required to submit, and did not submit, a written report to the NRC.

On January 20, 1989, at 1:38 p.m., the on-shift operations supervisor recalculated the shutdown margin that had been incorrectly calculated at 7:13 p.m. on January 19, 1989. The new calculation relied upon plant data in effect on January 19 and was based upon Data Sheet 4. The new calculation determined that the shutdown margin was 4.185% $\Delta k/k$ while the required shutdown margin is 1.92% $\Delta k/k$.

The NRC resident inspectors reviewed Procedure 14005-1, Data Sheets 2 and 4, the calculations concerning the data sheets dated January 19 and 20, 1989, and control room logs for that period. The NRC Staff discussed the inspection findings in Inspection Report 50-424, 50-425/91-20, dated September 12, 1991. The inspector found that the shutdown margin calculation performed at 7:13 p.m. on January 19, 1989, was incorrect in that the wrong Data Sheet of Procedure 14005-1 was used. However, the inspector found no evidence that the TS limits on shutdown margin were ever exceeded or that an inadvertent criticality could have occurred because the wrong data sheet was used. The confusing instructions on Data Sheet 2 of Procedure 14005-1 contributed to this error. On March 26, 1989, the Licensee revised this procedure to simplify, consolidate, and clarify the data sheets. The inspectors also confirmed that GPC failed to write a deficiency card for this event which would have prompted the Licensee to perform a followup review of the error. The inspectors reviewed the GPC's deficiency card program and found it to be adequate; they could find no other instances of a failure to write a deficiency card.

Thus, the NRC Resident Inspectors determined that violations occurred. The extra shift supervisor failed to follow procedures in selecting the data sheet. Additionally, a Licensee individual made an error and failed to write a deficiency card.

Although not addressed in Inspection Report 50-424, 50-425/91-20, the NRC Staff has determined that these violations meet the criteria contained in sections V.A. and V.G.1 of the then-effective "General Statement of Policy and Procedure

for NRC Enforcement Actions” (10 C.F.R. Part 2, Appendix C) for violations for which a Notice of Violation need not be issued. Section V.A allows the NRC to exercise discretion in issuing a Notice of Violation for isolated Severity Level V violations, regardless of who identifies them, provided the Licensee has initiated appropriate corrective actions before the end of the inspection. Under section V.G.1, the NRC need not issue a Notice of Violation if the violation was identified by the Licensee, is normally classified at a Severity Level IV or V, was reported if required, was or will be corrected (including measures to prevent recurrence) within a reasonable time, was not a willful violation, and was not a violation that could reasonably be expected to have been prevented by the Licensee’s corrective action for a previous violation. This practice of not requiring the issuance of a Notice of Violation when the violations meet the aforementioned criteria was adopted by the NRC as a means of encouraging licensees to identify and correct violations and to avoid expenditure of limited resources for both the NRC and the licensee — resources that could be better used in improving safety.

In summary, the Licensee identified and corrected the shutdown margin calculation error, which did not result in the violation of a TS limit and did not require a written report to the NRC. Moreover, the corrected calculations of the shutdown margin do not support the allegation that the error resulted in “dangerously low” boron concentrations in the RCS or that it endangered the health and safety of the public. The NRC inspectors determined that, even though a deficiency card was not written, the Licensee’s followup review of the error was prompt and had been completed before the end of the inspection.

Example (4) “Taking” LERs (Petition § III.6d)

The Petitioners claim that GPC employees were told, on March 22, 1990, to keep planned shutdowns on schedule by “taking” LERs. The Petitioners also contend that pressure to remain on schedule would necessarily result in an intentional violation of TS and “taking” LERs in order to remain on schedule.

“Taking” LERs implies that personnel intentionally do not perform actions required by a TS at the specified time required by the TS action. At a later time, they subsequently acknowledge this action was not performed and then write a written report (LER) to address this TS violation. This action would require a written report to the NRC as specified in 10 C.F.R. § 50.73. The Petitioners allege that this would be done in order to forgo performing the activity required by a TS at a time that would cause a schedule delay.

This issue was reviewed as part of OI’s investigation of an alleged intentional TS violation with regard to a mode change with an inoperable neutron source range monitor (see Example 6 hereinafter). OI’s review and findings in this area are documented in OI Report 2-90-012. The OI investigation did not substantiate

the alleged "taking" of LERs. The personnel interviewed stated that they had never been instructed to do whatever it takes to stay on schedule.

On the basis of this investigation, the NRC Staff cannot conclude that Vogtle personnel either had a deliberate practice to, or were instructed to, "take" LERs to stay on schedule. Similarly, the statements made by the Petitioners that SONOPCO's philosophy would necessarily result in managers intentionally violating TS and "taking" LERs to remain on schedule were not substantiated by the NRC Staff's review.

***Example (5) Surveillance Testing of Containment Isolation Valves
(Petition § III.6.e.i)***

The Petitioners claim that the Licensee knowingly concealed a technical violation which, if uncovered, would have resulted in a safety-related shutdown of Vogtle Unit 1. This technical violation allegedly concerned the failure to properly test approximately thirty-nine containment isolation valves in violation of TS surveillance requirement 4.6.1.1.a.

In February 1990, after operations personnel performed a monthly TS surveillance on containment isolation valves and turned in their paperwork, the Shift Supervisor recognized an error in that only 2 of 39 valves had been checked. The Shift Supervisor directed that all necessary surveillances be performed immediately. The Shift Supervisor then examined previous records and found that the same error had also been made the previous month. Accordingly, a violation of TS 4.6.1.1.a had occurred. The Shift Supervisor then informed the Work Planning Group of the error and this group prepared and delivered a Deficiency Card to the control room. Since the missed surveillances had already been completed by this time, no action was initiated under the TS's LCO (shutdown within 1 hour). The Petitioners state that the Deficiency Card should have been initiated earlier by the individual discovering the deficiency and that the event was mishandled to conceal the discovery time and to avoid the shutdown requirement of the LCO.

GPC reported this issue in a timely LER 50-425/90-01 dated March 27, 1990, and NRC resident inspectors reviewed it as discussed in Inspection Report 50-424, 50-425/90-10. The inspection report notes that the task sheet contained in the procedure for performing this task was inadequate. The format of the task sheet resulted in cognitive personnel errors because the task sheet was unclear as to the number of valves required to be tested. The NRC Staff did not issue a Notice of Violation for this event because the aforementioned criteria specified in section V.G.1 of the then-effective "General Statement of Policy and Procedure for NRC Enforcement Actions" (10 C.F.R. Part 2, Appendix C) were met.

OI investigated the willfulness aspect of this issue and found that willfulness was not substantiated. OI reported the results of this investigation in OI Report 2-90-012. In this report, OI concluded that the missed surveillance had been reported in an LER and resulted from an inadequate Surveillance Task Sheet that had listed equipment identification numbers of only two valves for the monthly containment integrity check. OI noted that the NRC resident inspectors had reviewed the LER and documented the event without issuing a Notice of Violation. OI also noted that the circumstances of this event were reviewed during the NRC's special team inspection at Vogtle in August 1990, which found that the Shift Supervisor did not conceal the true discovery time of the missed surveillance in order to avoid a unit shutdown and that the Shift Supervisor's actions to initiate an investigation into the adequacy of the previous monthly surveillance and to concurrently perform the missed surveillances were appropriate. The special team inspection determined that the supervisor who identified this potential problem took action to determine if a previous surveillance test had been conducted and, at the same time, initiated action to perform the missed surveillance tests. Since the surveillance test is of short duration, it was completed before the determination was made that the previous test had not been completed correctly. Since the surveillance test had already been repeated once the inadequacy of the previous test became known, a shutdown of the unit at that point was not required.

On the basis of the NRC Staff's inspections and investigation, the Petitioners' claim that the Licensee knowingly concealed a technical violation is not substantiated.

***Example (6) Changing Modes with Required Equipment Inoperable
(Petition § III.6.e.ii)***

The Petitioners claim that the Licensee knowingly concealed another technical violation on March 1, 1990, when a change from Mode 5 to Mode 6 occurred even though required equipment was not operable. The failure to comply with the TS, the Petitioners claim, translated into a 12-hour schedule enhancement at a critical juncture. The Petitioners allege that this is an example of a willful violation.

The NRC resident inspectors, an NRC special inspection team, and OI investigators reviewed this issue. Results of these efforts are documented in NRC Inspection Report 50-424/90-10 dated June 14, 1990, and OI Report 2-90-012. GPC also documented this event in LER 424/90-004 dated May 11, 1990. This LER described the violation of TS 3.0.4 on March 1, 1990, when Unit 1 entered Mode 6 from Mode 5 with an LCO in effect for a neutron source range channel. The LER attributed the root cause to cognitive personnel error by the Shift Superintendent who failed to review the back side of the relevant

LCO Status Sheet which noted that the mode change was prohibited while the source range monitor was inoperable. Moreover, the Shift Superintendent had not otherwise recognized the prohibition before authorizing the mode entry.

The NRC Staff interviewed various personnel involved in the review of plant conditions and involved with documentation necessary to change modes. The interviews indicated that the Shift Superintendent and the Unit Shift Supervisor were aware of an active LCO at the time of the mode change, but neither had connected the LCO to a mode restriction. Both of these individuals indicated that there had been no unreasonable emphasis on the critical-path schedule. Both denied that they had ever been given any indication or instruction to do whatever it takes to stay on schedule. They also indicated that they did not feel undue pressure to stay on schedule, particularly not if it meant compromising plant safety. The mode change did result in a reduction of the critical-path outage time.

The NRC Staff did express a concern associated with the format of the LCO status sheet that contributed to this problem. The status sheet is a two-sided form with the remarks section on the back side of the form. A cursory review of these forms would result in a possible omission of the review of any remarks that may be entered on the form. On the basis of the NRC resident inspectors' review, the NRC determined that a violation occurred as discussed in Inspection Report 50-424/90-10. A Notice of Violation was not issued however, because the aforementioned criteria specified in section V.G.1 of the then-effective General Statement of Policy and Procedure for NRC Enforcement Actions (10 C.F.R. Part 2, Appendix C) were satisfied.

On the basis of evidence developed during the NRC inspections and OI investigation, the allegation of an intentional violation was not substantiated.

***Example (7) Failure to Declare RHR Pump Inoperable and Enter LCO
(Petition § III.6.e.iii)***

The Petitioners allege that GPC knowingly concealed a TS violation when the "B" residual heat removal (RHR) pump was not declared inoperable after cracking of the nuclear service cooling water (NSCW) line. The "A" RHR pump was inoperable at the time because of outage work.

The Petitioners allege that, during the second refueling outage at Unit 1, (1R2), with RHR train "A" out of service for maintenance, the RHR train "B" pump experienced excessive vibration and the NSCW motor cooler experienced a leak at its outlet. TS 3.9.8.1, "RHR and Coolant Circulation," was allegedly violated because the Operations Department chose not to declare RHR pump "1B" inoperable in an effort to mitigate the effect on the critical work path.

The NRC Staff included this item in the Special Team Inspection discussed in Supplement 1 to NRC Inspection Report 50-424, 50-425/90-19, dated November

1, 1991. In section 2.2 of the Inspection Report, the NRC Staff concluded that the Vogtle Operations Department had an adequate engineering basis for accepting the operability of the RHR pump even with the pump's high vibration and the NSCW leak.

The inspection team also concluded that declaring the pump inoperable would not have affected the critical work path; the LCO actions would not have been restricted because the containment, except for ventilation, had been isolated as required by TS 3.9.4. The LCO actions would not have prevented the Licensee from continuing refueling activities because the actions to close all containment penetrations providing direct access from the containment atmosphere to the outside atmosphere would have required only closing the containment ventilation purge valve, which has an automatic closure signal. Thus, schedule considerations could not have motivated the Licensee in this matter.

F. Alleged Concealment of Safeguards Problems (Petition §§ III.7a and III.7b)

The Petitioners allege that GPC personnel, including a Vice President and General Manager, and a Southern Company Services Manager, knowingly and repeatedly hid safeguards problems from the NRC and willfully refused to comply with mandatory reporting requirements. The Petitioners further allege that the GPC Vice President made false statements to the NRC during an Enforcement Conference about the status of safeguards materials in Birmingham, Alabama, and that the alleged false statements probably influenced a subsequent civil penalty action taken by the NRC. The Petitioners claim that the false and misleading information presented at the Enforcement Conference and other information withheld from the NRC were highly significant. The Petitioners believe that, if the NRC had had the benefit of complete, factual information, the NRC would likely have increased the Notice of Violation and Proposed Imposition of Civil Penalty in the amount of \$50,000 issued to the Licensee on June 27, 1990, into the hundreds of thousands of dollars.

The Petitioners also allege that on July 23, 1990, plant and SONOPCO senior management prevented the Site Security Manager from making a Red Phone¹⁰ notification within 1 hour as required by 10 C.F.R. § 73.71. The Petitioners allege that the manager was prevented from making the call in order to delay or defuse the NRC's knowledge of programmatic problems on the part of the Licensee regarding the handling of safeguards documents.

OI has investigated the allegation that GPC knowingly and repeatedly hid safeguards problems from the NRC and willfully refused to comply with manda-

¹⁰A Red Phone refers to a Licensee's Emergency Notification System and is used for immediate telephone notifications to the NRC's Operation Center in accordance with 10 C.F.R. §§ 50.72 and 73.71.

tory reporting requirements. OI also investigated the allegation that the GPC Vice President made false statements to the NRC in an Enforcement Conference concerning the status of safeguards material in Birmingham, Alabama. The results of these investigations are documented in OI Report 2-91-003. The OI investigations did not substantiate that GPC withheld pertinent information from the NRC at the time of the Enforcement Conference on May 22, 1990, or that GPC management impeded the reporting of safeguards events. On the basis of the OI investigations, the NRC Staff concludes that the Notice of Violation and Proposed Imposition of Civil Penalty of \$50,000 were appropriate.

OI also investigated the allegation that on July 23, 1990, plant and SONOPCO senior management prevented the Site Security Manager from making a Red Phone notification within 1 hour as required by 10 C.F.R. § 73.71. The results of the investigation are also documented in OI Report 2-91-003. Specifically, the concern was that the Site Security Manager was allegedly prevented from making a Red Phone notification for two events. The first event was that a safeguards container had been found open and uncontrolled for half an hour in Birmingham, Alabama, in November 1989. The second event was that fourteen safeguards documents had been found uncontrolled in the SONOPCO offices on June 15, 1990.

For the first event, a violation of the reporting requirements of 10 C.F.R. § 73.71 occurred in 1989 when the uncontrolled container was discovered and not reported to the NRC within 1 hour. In 1990, as part of its corrective actions in response to an NRC enforcement action, GPC identified the fact that a required report for this event might not have been made in 1989.

GPC's corrective actions in response to the NRC enforcement action also identified the second event. GPC's consideration of the reporting requirements for the first event was subsequently combined with a similar consideration of the need to report the second event. The second event was also not reported within 1 hour as required by 10 C.F.R. § 73.71.

After reviewing OI's investigation results, the NRC Staff concluded that the failure to make a timely report on the second event, and the delay in informing the NRC Staff of the discovery of the failure to report the first event, were due to the GPC's cumbersome system for evaluating corporate security findings through the site security organization, rather than being due to any willful attempt to impede the reporting process.

The NRC Staff decided to take no additional enforcement action for these two issues. The decision to issue no Notice of Violation for the delay in reporting the first event was based upon section V.G.5 of the then-effective "General Statement of Policy and Procedure for NRC Enforcement Actions" (10 C.F.R. Part 2, Appendix C). This provision of the policy allows the NRC Staff to forego a Notice of Violation when a violation is discovered as the result of corrective action for a previous enforcement action. Similarly, the NRC Staff considered

the violation for the delay in reporting the second event to be an additional example of a violation for which the Licensee had identified and was, at the time, taking corrective actions. Therefore, as provided by the aforementioned section V.G.5, the NRC Staff issued no Notice of Violation.

G. Alleged Operation of Radioactive Waste Systems and Intimidation of Plant Review Board Members (Petition § III.8)

The Petitioners assert that GPC has endangered the public's health and safety by operating radioactive waste systems and facilities known to be in gross violation of NRC requirements. The Petitioners also state that Vogtle's General Manager intimidated members of the Plant Review Board (PRB) when they attempted to consider if the use of the waste system should be resumed.

The NRC's Special Inspection Team reviewed this item and discussed its findings in Supplement 1 to Inspection Report 50-424, 50-425/90-19, dated November 1, 1991. The first assertion regarding improper installation and operation of the radioactive waste system is discussed in section 2.1 of the Inspection Report. The second part regarding intimidation of PRB members is discussed in section 2.7 of the Inspection Report.

The Petitioners allege that GPC installed and operated a radioactive waste microfiltration system without performing an adequate engineering and safety evaluation in accordance with 10 C.F.R. § 50.59.¹¹ This specific system is known as the FAVA system because it is supplied by FAVA Control Systems (FAVA).

The Petitioners further allege that the material configuration, fabrication, and quality of the system did not meet the guidance of Regulatory Guide (RG) 1.143, "Control of Stainless Steel Weld Cladding of Low-Alloy Steel Components," and the requirements of the American Society of Mechanical Engineers (ASME) Code.

In late 1987, GPC had temporarily installed and operated a system at Vogtle for removing niobium-95. GPC planned to replace this temporary modification with a permanent, high-quality system in the future.

In February 1988, GPC experienced difficulty with the temporary system in removing colloidal niobium-95 following a reactor shutdown for maintenance work. GPC contracted FAVA to help rectify this problem. The Licensee corrected the situation by installing a 0.35-micron filter system downstream of the existing prefilters. However, a large volume of radioactive waste was generated because the 0.35-micron filters rapidly exhibited high differential

¹¹ Title 10 of the *Code of Federal Regulations*, §50.59, allows licensees to make changes in the facility and procedures, or conduct tests or experiments as described in the safety analysis report, without prior Commission approval, unless the proposed changes involve a change in the Technical Specifications or an unreviewed safety question.

pressure and had to be changed frequently. The need to change filters frequently also resulted in radwaste department personnel receiving additional radiation exposure.

Upon evaluating the performance of the 0.35-micron filter system, the Radwaste Department determined that the best approach to the problem was to install a back-flush, pre-coat filter system. However, no operational data were available for a system of this type in this specific application. FAVA supplied a proprietary Ultra Filtration System (Model No. 5FD/E) for testing to evaluate whether this was a practical and effective solution to the problem. GPC installed the temporary FAVA system before the Unit 1 refueling outage and operated it under Test Procedure T-OPER-8801. The test system kept liquid effluent releases well below the TS limits. The Radwaste, Chemistry, and Engineering Departments evaluated the test results, and GPC issued a general work order to purchase a permanent system.

In the early part of 1989, the Quality Assurance (QA) Department performed an audit and identified a significant audit finding involving a programmatic breakdown in the procurement of the temporary FAVA system and a failure to meet commitments of the FSAR. That finding prompted the Licensee to remove the temporary FAVA system from service.

In late 1989, the Licensee sought to reinstall the FAVA system under a temporary modification because colloidal Cobalt-59 and Cobalt-60 had to be removed. The PRB reviewed this temporary modification and several members expressed strong objections to it based on the previous QA audit finding.

These objections prompted the Licensee to submit a Request for Engineering Assistance (REA) and perform a safety evaluation in accordance with 10 C.F.R. § 50.59 in November 1989. The Licensee's engineering staff subsequently reviewed the November 1989 safety evaluation and found it to be adequate, except that it did not properly address the guidance of Regulatory Guide (RG) 1.143 regarding the use of polyvinyl chloride (PVC) piping. GPC performed another safety evaluation in February 1990 to address this issue and the vulnerability of the PVC pipes to radiation degradation. In the February 1990 safety evaluation, the Licensee specifically stated that the FAVA system did not conform to the criteria of RG 1.143. However, this deviation was found to be technically acceptable for several reasons: (1) The design of the FAVA system had been previously evaluated and found to be adequate in the REA response of November 1989, except for the PVC pipes; (2) the location of the FAVA system was inside a shielded watertight vault, which provided adequate assurance that any system failures would be contained and would not create the potential for offsite releases; and (3) the presence of PVC pipe in the FAVA system, although prohibited by RG 1.143, was acceptable based on subsequent design reviews because the radiation exposure of the plastic was found to be within acceptable limits.

Although the testimony of one of the PRB members indicated that the temperature effects on the use of PVC in the FAVA system were not adequately evaluated before the system was installed, the testimony of the corporate system engineer indicated that GPC had considered this before installing the system although not specifically documented in the safety evaluation.

Vogtle management subsequently consulted the NRC resident inspector to seek an NRC position on placing the FAVA system back in service. This was supplemented with additional information provided by other Vogtle management personnel documenting reasons that it should not be placed in service. The Licensee forwarded this package to Region II and NRR for review. In March 1990, following Region II and NRR concurrence during a telephone conference, the Licensee placed the FAVA system in service with the following NRC stipulations:

- (1) That procedures for operating the FAVA system require that an operator be present any time the system is in operation;
- (2) That all hoses to and from the FAVA system be verified to conform to RG 1.143;
- (3) That the cover over the FAVA system be securely fastened when the system is in operation to ensure that, if a spraying leak developed, it would be contained in the concrete vault; and
- (4) That the design of the walls of the auxiliary radwaste building be evaluated to determine if a design change was needed to reduce the possibility of wall leakage if a hose develops a leak and sprays its contents on the walls.

The Licensee complied with these stipulations upon returning the system to operation.

The review by the NRC indicated that the FAVA system was originally installed and operated by the Licensee without an adequate safety evaluation and did not meet the guidance in RG 1.143 in that PVC piping was used in this system. However, this deficiency was of limited duration and the Licensee, upon performing subsequent safety evaluations that were forwarded to and accepted by the NRC Staff, concluded that the system was acceptable for use. Given the NRC's extensive review, the facts of this matter do not support a conclusion that the Licensee willfully violated NRC requirements or willfully operated the facility in a manner to endanger public health or safety.

The Petitioners also contend that Vogtle's General Manager intimidated and pressured PRB members during a PRB meeting. The meeting occurred in February 1990 to determine the acceptability of the safety analysis for installing the FAVA microfiltration system.

As previously discussed, the Licensee performed several safety evaluations for the temporary modification to install the FAVA microfiltration system. The NRC Special Inspection Team found through its discussions with PRB

members that, while reviewing these safety evaluations, various PRB members had expressed reservations on several occasions concerning the acceptability of the FAVA system.

Although various PRB members may have expressed reservations, the inspection team, in reviewing the PRB meeting minutes regarding this temporary modification, identified few instances of the PRB members documenting their dissenting opinions. Specifically, the minutes of PRB meeting 90-15, on February 8, 1990, documented one PRB member's negative vote and dissenting opinions regarding the acceptability of exempting the temporary modification from regulatory requirements and the adequacy of the system's safety evaluation. The only other example of a dissenting opinion was in the minutes for PRB Meeting 90-32, on March 6, 1990. This dissenting opinion related to the acceptability of voting on the FAVA system installation when the PRB member who raised the initial questions and concerns on the operation of the FAVA system was not present.

During discussions with NRC inspectors, PRB members indicated that, during the various PRB meetings concerning installing the FAVA system, they did feel intimidated and pressured by the presence of the General Manager at the PRB meeting. On one occasion, an alternate voting member felt intimidated and feared retribution or retaliation because the General Manager was present at the meeting and the PRB member knew the General Manager wanted to have the temporary modification approved. However, the PRB member stated that he did not alter his vote and felt comfortable with how he had voted. This PRB member also stated that he was not aware of any occasions on which he or any other PRB member had succumbed to intimidation or any other occasions where he or they feared retribution.

The PRB members informed the General Manager following the meeting (PRB 90-15) that several of them viewed his presence as intimidating. On March 1, 1990, the General Manager addressed this concern by meeting with all PRB members to reiterate each member's duties and responsibilities. He specifically told the members that his presence at PRB meetings must not influence them and that alternates should be selected who would feel comfortable with this responsibility. He also addressed the difference between professional differences of opinion and safety or quality concerns, and methods for resolving each.

Thus, the NRC Staff has found that, in one case, a PRB voting member felt intimidated and feared retribution because the General Manager was present at the PRB meeting. However, this member stated that he did not change his vote in response to the General Manager's presence. He stated that the General Manager was informed of this issue and met with the PRB to allay fears. The information obtained by the NRC Staff indicated that retribution did not occur. The instance involving a member fearing retribution was confirmed, and the absence of dissenting opinions in the PRB meeting minutes calls into question

the openness of discussions at PRB meetings. However, further discussions with PRB members indicated the reason for the lack of dissenting opinions was that items are discussed and reviewed until all members were comfortable with their decisions.

NRC resident inspectors at Vogtle frequently attend PRB meetings and have found that the subjects are candidly discussed and the issues resolved without intimidation or fear of retribution. Consequently, the allegation that Vogtle's General Manager intimidated members of the PRB when they attempted to determine whether the use of the waste system should be resumed, could not be substantiated.

III. CONCLUSION

As discussed above, certain concerns raised by the Petitioners were partially substantiated. Violations of regulatory requirements have occurred in the operations of the Vogtle and Hatch facilities. Notices of Violation and a civil penalty have been issued to the Licensee for certain of these violations. To this extent, the Petitioners' request for action pursuant to 10 C.F.R. §2.206 is granted.

However, on the basis of the NRC Staff's review, I conclude that no unauthorized transfer of the Vogtle operating licenses occurred, and that the GPC nuclear facilities are now being operated in accordance with NRC regulations and do not endanger the health and safety of the public. Additionally, based on the NRC Staff's review of information available to date, I conclude that none of the issues decided in this Partial Director's Decision call into question the Licensee's character, competence, fundamental trustworthiness, and commitment to safety with respect to the operation of its nuclear facilities.

The institution of proceedings in accordance with section 2.206, as requested by the Petitioners, is appropriate only where substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point Units 1, 2 and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). As previously discussed, there is reasonable assurance that the Vogtle and Hatch facilities now operate with adequate protection of the public health and safety. Therefore, I decline to take any further action with respect to the issues decided in this Partial Director's Decision. To this extent, the Petitioners' request for action pursuant to 10 C.F.R. §2.206 is denied. As provided in 10

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

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**Frank J. Miraglia, Acting Director
Office of Nuclear Reactor
Regulation**

**Dated at Rockville, Maryland,
this 23d day of April 1993.**

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 50-56

RICHARD P. GRILL

January 8, 1993

The Nuclear Regulatory Commission (NRC) is denying a petition for rule-making (PRM 50-56) submitted by Richard P. Grill on August 16, 1991. The Petitioner requested that the NRC amend 10 C.F.R. Part 50, "Domestic Licensing of Production and Utilization Facilities," and issue new regulations, as necessary, to add lightning-induced and other electrical transients to the required list of phenomena that licensed nuclear power plants and other nuclear facilities must be designed to safely withstand. The petition is being denied because the design and construction of existing nuclear power plants adequately protect plant electrical systems from the effect of electrical transients, and there is no evidence at this time that electrical systems and components have not been designed to withstand the effects of electrical transients in such a manner as to require additional generic regulatory action.

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: General Design Criteria 2 & 4, Appendix A, 10 C.F.R. Part 50; Electrical transients; Lightning protection; Nuclear electromagnetic pulse (EMP).

DENIAL OF PETITION FOR RULEMAKING

I. THE PETITION

In a letter dated August 16, 1991, Mr. Richard Grill filed a petition for rulemaking with the NRC. The petition requested that the NRC take the following actions:

- (1) Amend the regulations or issue new regulations as necessary to add lightning-induced and other electrical transients to the required list of phenomena that licensed nuclear power plants and other nuclear facilities must be designed to safely withstand;
- (2) Perform a comprehensive study to determine the current state of knowledge of electrical transients;
- (3) Perform a study to identify and quantify potential consequences on licensed nuclear facilities from electrical transients;
- (4) Require each licensed facility to be analyzed and modified as necessary to prevent the compromise of safety-related electrical systems by electrical transients;
- (5) Develop regulatory guidance for the protection of safety-related control systems from electrical transients; and
- (6) Determine why this issue was not addressed and resolved in the past.

II. BASIS FOR REQUEST

The Petitioner asserts that (1) because of the complexity of the electrical systems in nuclear facilities, there is a need for explicit requirements for protection of electrical systems from electrical transients in the provisions of Appendix A, "General Design Criteria for Nuclear Power Plants," to 10 C.F.R. Part 50; (2) inadequacies exist in the analysis of the electrical system of each licensed facility regarding the effects of electrical transients; and (3) a large number of alternative paths for the entry of electrical transients into the safety-related electrical systems exist that can only be discovered by performing a thorough and rigorous analysis of the entire electrical system. In support of his position, the Petitioner states that the Defense Nuclear Agency (DNA) and the Defense Communications Agency (DCA) have developed computer programs that can be used to analyze the effects of nuclear electromagnetic pulse (EMP) on electrical systems. The petition states that these programs can be used to determine the effect of electrical transients on safety-related electrical systems in NRC-licensed facilities.

The petition also refers to a draft regulatory guide that was issued for public comment in 1979. This draft guide concerned the protection of nuclear power

plants from lightning. The petition requests information on the reasons the regulatory guide was never issued, even though a draft of it had been issued for public comment.

The petition also refers to potential improprieties in the manner that the Petitioner was treated by the NRC and its predecessor, the Atomic Energy Commission, in the 1970s. These references are separable from the safety questions raised by the petition.

III. PUBLIC COMMENTS ON THE PETITION

A notice of receipt of the petition for rulemaking was published in the *Federal Register* on December 23, 1991 (56 Fed. Reg. 66,377). Interested persons were invited to submit written comments or suggestions concerning the petition by February 21, 1992. The NRC received four comments in response to the notice: two from private citizens, one from a citizens group, and one from a public utility. Three of the commenters supported the petition. The main reasons cited by the commenters who supported the petition were:

One commenter feels that the changes in world conditions increase the likelihood of a nuclear device detonation and that nuclear power plants must be hardened against EMP from nuclear explosions.

One commenter believes that efforts by the national defense agencies to harden equipment from the effects of nuclear EMP indicate that similar efforts are required of civilian nuclear power plants.

One commenter, a citizen group, believes that electrical transients in nuclear power plants present a safety hazard, based upon NRC generic communications regarding operational events cause by radio-frequency interference (RFI), lightning, geomagnetically induced currents (GIC), and battery failure. In addition, they believe that the Individual Plant Examination of External Events (IPEEE) for Severe Accident Vulnerabilities program should have included a review of the potential effects of lightning for all licensees, not just those licensees who have experienced adverse plant effects from lightning besides loss of offsite power.

Two of the above three commenters support the petition because of the perceived delicate nature of solid-state electronic devices, and the belief that these devices will not be adequately protected in the absence of regulation by the NRC.

One commenter, a public utility, was opposed to the petition because research has not yet proven the need for any rulemaking, or the extent of rulemaking if a need is shown. If the order of proposed actions in the petition were accepted, licensees would be required to take actions prior to the issuance of any guidance.

IV. REASONS FOR DENIAL

The NRC has considered the petition, the public comments received, and other information and has concluded that the issues raised in the petition, though valid concerns, do not warrant new Staff regulatory positions for existing plants. The following discussions address the issues raised in the petition.

Upon receipt of the petition from Richard Grill, the NRC Staff reviewed all the General Design Criteria of Appendix A to 10 C.F.R. Part 50 to determine whether any of them, not just those cited in the petition (Criteria 2, 13, 14, 17, 18, 19, 21, 22, 23, 24, 29, 63, and 64), should be modified as requested. Design Criterion 2 states that "[s]tructures, systems, and components important to safety shall be designed to withstand the effects of natural phenomena such as earthquakes, tornados, hurricanes, . . . without loss of capability to perform their safety functions." Although lightning is not specifically identified, it is implicitly included in the natural phenomena for which protection must be provided. Criterion 4 states that "[s]tructures, systems, and components important to safety shall be designed to accommodate the effects of and to be compatible with the environmental conditions associated with normal operation, maintenance, testing These structures, systems, and components shall be appropriately protected against dynamic effects . . . and from events and conditions outside the nuclear power unit." The environmental conditions cited implicitly include electrical transients and their sources. Also, qualification of safety-related systems and components for the applicable environmental conditions is required for conformance with this criterion. Design Criteria 2 and 4 apply to all safety-related instrumentation, control, and power systems. Therefore, the Staff finds that there is no need to modify any of the General Design Criteria in order to ensure that the effects of electrical transients are considered in the design of these systems.

The NRC licensing review of operating plants for conformance to General Design Criteria 2 and 4 in regard to protection against lightning, switching surges, and other electrical transient phenomena was based on the knowledge that: (1) established industry design standards and practices were being applied in the design of the electrical control and instrumentation systems; (2) the great majority of electrical systems and components in nuclear power plants were qualified for operability in the electromagnetic environment of these plants on the basis of prior operational experience in similar industry applications; and (3) the equipment and systems deemed to be particularly vulnerable, such as those utilizing solid-state components and circuitry, were required to be qualified for operability in the electromagnetic environment by appropriate type testing before being approved for nuclear power plants.

The NRC next thoroughly reviewed the technical literature regarding sources of electrical transients. This review and other bases for the Staff's conclusions

are documented in an internal NRC report entitled "Report on the Sources and Effects of Electrical Transients on the Electrical Systems of Commercial Nuclear Power Plant," which is available for public inspection or copying in the NRC Public Document Room. It was determined that potentially dangerous electrical transients are not generally transmitted to electrical systems or components in the power generation plant from the power transmission system. There are only four physical mechanisms by which an electrical transient can be transmitted to an electrical system or component, all of which are well documented in the technical literature and are generally considered in the design of nuclear safety-related electrical systems. First, the transient may enter via a transmission line that carries power or data to or from the system or component. Second, the transient can enter via capacitive (electric field) coupling of the system or component to the source of the transient. Third, the transient can enter via inductive (magnetic field) coupling of the system or component to the source of the transient. Finally, the transient can be caused by ionized particles impinging on the system or component. The NRC finds that the present consideration of these effects is sufficient to ensure safe operation of nuclear power plants with analyses conducted on a system- or component-specific basis. There is no need to perform a comprehensive analysis of the entire electrical system of a nuclear power plant.

Based on a review of the technical literature, it appears that analyses of components and systems have been conducted and have effectively prevented electrical transients from significantly affecting the operation of nuclear power plants for the electromechanical-controls-based systems typically employed at licensed U.S. nuclear power plants. In addition, the NRC has required licensees to perform additional testing of solid-state control components and systems that specifically targeted the potential for problems to be caused by electrical transients. These considerations provide a sufficient basis for the NRC to conclude that electrical transients have been adequately considered in the licensing of existing nuclear power plants.

The NRC then reviewed 177 operating events that were attributed to lightning from 1980 to 1991, a period representing approximately 967 operating years, to determine whether any of these events might indicate that nuclear safety-related electrical systems and components have not been adequately protected from power-line transients, capacitively coupled transients, and magnetically coupled transients. This review is also contained in the previously referenced internal report. Ten of these events were also analyzed in NUREG/CR-3591, "Precursors to Potential Severe Core Damage Accidents," vol. 1 (July 1984), and NUREG/CR-4674, "Precursors to Potential Severe Core Damage Accidents," vol. 2 (December 1986); vol. 6 (May 1988); vol. 8 (July 1989); vol. 12 (August 1990). None of these incidents resulted in a significant risk of core damage. Based on this review, it was determined that the existing level of protection

against electrical transients is sufficient to protect against failure of nuclear safety-related electrical systems. It should be noted that the electrical transients created by lightning can be more severe than any other source of electrical transient except nuclear EMP.

The effect of nuclear EMP on nuclear safety-related electrical systems has been studied by the NRC. This investigation is documented in NUREG/CR-3069, "Interaction of Electromagnetic Pulse with Commercial Nuclear Power Plant Systems" (February 1983). It was determined that a high-altitude nuclear explosion would not prevent the safe shutdown of a nuclear power plant. Therefore, it is not necessary to analyze nuclear safety-related electrical systems with the programs developed by the DNA and DCA. In addition, these programs were written to determine the effects of ionizing radiation on electrical systems and components, an effect known as system-generated EMP (SGEMP). A civilian nuclear power plant would only be exposed to SGEMP in the event of a near or direct strike with a nuclear weapon. Nuclear power plants are not required to be designed to survive the effects of a near or direct nuclear weapon strike.

Some of the Petitioner's concerns will be further addressed in the individual plant IPEEE reviews. Because the NRC has previously determined that additional regulation of lightning protection is not cost-justified, lightning is not required to be specifically considered in the IPEEE program unless there have been plant-specific effects. For those licensees where, based on operating experience, lightning strikes are likely to cause more than just loss of offsite power, further examination of lightning effects is expected, including a determination of whether any plant modifications are required. Licensees have been notified of this position by Supplement 4 to Generic Letter 88-20, which includes NUREG-1407, "Procedural and Submittal Guidance for the Individual Plant Examination of External Events (IPEEE) for Severe Accident Vulnerabilities" (June 1991), as guidance. However, operating events that have been studied to date have not revealed any significant concerns. Therefore, there is no need to extend the IPEEE review to consider other potential effects besides loss of offsite power to plants that have had no operating experience with such effects, as requested by one commenter.

The on-going Staff reviews of advanced light-water designs are more focused in regard to the application of General Design Criteria 2 and 4 in the review of these designs for protection against electrical transient phenomena. The NRC Staff is reviewing the advanced designs against the Electric Power Research Institute's (EPRI) requirements that address lightning protection, grounding, surge withstand capability, electromagnetic interference (EMI), and electrostatic discharge. EPRI's requirements are based upon good engineering practices and established industry standards. The NRC Staff is also evaluating the above criteria for inclusion in the "Inspection, Tests, Analyses, and Acceptance

Criteria/Design Acceptance Criteria (ITAAC/DAC)" verification programs that will be implemented on advanced designs. More information on this subject is provided in SECY-92-53, "Use of the Design Acceptance Criteria during 10 C.F.R. Part 52 Design Acceptance Reviews," which is also available in the NRC Public Document Room.

Copies of NUREG-1407, NUREG/CR-3591, NUREG/CR-4674, and NUREG/CR-3069 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. 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 copying for a fee in the NRC Public Document Room, 2120 L Street, NW (lower level), Washington, D.C.

The Petitioner also requested the reason that the Draft Regulatory Guide RS 705-4, "Lightning Protection for Nuclear Power Plants," was never issued in final form. The Advisory Committee for Reactor Safeguards (ACRS) requested on February 3, 1981, that a risk assessment be performed to determine whether the draft regulatory guide would be cost-effective. This risk analysis indicated that implementation of the guide would not be cost-effective. In addition, measurements of surge arrester current magnitude that are reported in the technical literature indicate that there is no apparent basis for the position adopted in the guide that a 120,000-ampere surge arrester is required to protect nuclear safety-related electrical systems and components from power-line transients. For example, one study (Gaibrois, G. L., "Lightning Current Magnitude Through Distribution Arresters," IEEE Transactions on Power Apparatus and Systems, Vol. PAS-100, No. 3 March 1981) indicates that 0.07% of measured surge arrester currents exceeded 100,000 amperes for a sample size of 2488 distribution surge arresters. These currents would be higher than transmission-line surge arrester currents because distribution lines do not typically have shield wires. Implementation of the draft regulatory guide would have imposed an economic burden on licensees, and the Staff did not find sufficient safety benefit to justify such a burden on them or their ratepayers.

On the matter of the potential improprieties in the treatment of the Petitioner or his concerns by the NRC or its predecessor, the questions raised have been

referred to the Office of the Inspector General for appropriate consideration and disposition.

For the reasons cited above, the NRC denies the petition.

FOR THE NUCLEAR
REGULATORY COMMISSION

James M. Taylor
Executive Director for Operations

Dated at Rockville, Maryland,
this 8th day of January 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

**Ivan Selln, Chairman
Kenneth C. Rogers
James R. Curtiss
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)**

May 26, 1993

The Commission denies Sacramento Municipal Utility District's motion for reconsideration of CLI-93-3, in which the Commission granted the Environmental and Resources Conservation Organization discretionary intervention, admitted one contention, and permitted amendment of another in a proceeding to consider a proposed order approving a decommissioning plan for, and authorizing decommissioning of, the Rancho Seco Nuclear Generating Station.

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission has the authority to grant intervention, as a matter of discretion, pursuant to the Commission's authority to hold hearings and to permit participation in its proceedings.

**RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION
(RAISING MATTERS FOR THE FIRST TIME)**

The Commission rejects an argument raised for the first time in a motion for reconsideration as a basis for reconsideration of its admission of a contention.

**RULES OF PRACTICE: CONTENTIONS (LATE-FILING
REQUIREMENTS)**

The provisions of 10 C.F.R. § 2.714(b)(2)(iii) with respect to the filing of contentions based on differences between data and conclusions in the Staff's environmental review documents and the licensee's or applicant's environmental report are not intended to add or remove from consideration any factor to be balanced in the determination of the admissibility of a late-filed contention under 10 C.F.R. § 2.714(a).

**RULES OF PRACTICE: CONTENTIONS (LATE-FILING
REQUIREMENTS)**

Late-filed contentions, including those filed on subsequently issued NRC environmental review documents, are subject to the late-filed criteria set out in 10 C.F.R. § 2.714(a)(1)(i)-(v).

**RULES OF PRACTICE: CONTENTIONS (LATE-FILING
REQUIREMENTS)**

Even without a showing that the Staff's environmental review documents significantly differ from the applicant's environmental report, a petitioner may be able to meet late-filed contention requirements, e.g., by presenting significant new evidence not previously available.

**RULES OF PRACTICE: CONTENTIONS (LATE-FILING
REQUIREMENTS)**

A showing that the Staff's environmental review documents significantly differ from the applicant's environmental report, although ordinarily sufficient to show good cause for lateness, is not in itself sufficient to make an environmental contention admissible, because the petitioner must still meet the other criteria in 10 C.F.R. § 2.714(a).

RULES OF PRACTICE: CONTENTIONS

A generic environmental impact statement on decommissioning cannot be categorized as an "applicant's document" for purposes of 10 C.F.R. § 2.714(b)(2)(iii).

MEMORANDUM AND ORDER

Sacramento Municipal Utility District (SMUD or Licensee) has filed a motion for reconsideration of the Commission's Memorandum and Order, CLI-93-3, which granted Environmental and Resources Conservation Organization (ECO) discretionary intervention, admitted one contention, and permitted an amendment of another. 37 NRC 135 (1993). This proceeding involves ECO's challenge to the Nuclear Regulatory Commission (NRC) Staff's proposed order approving a decommissioning plan for, and authorizing decommissioning of, the Rancho Seco Nuclear Generating Station (Rancho Seco). For the reasons set forth below, we deny SMUD's motion for reconsideration.

The Licensee premises its motion for reconsideration on essentially four bases.¹ First, the Licensee argues that the Commission should reconsider its determination to grant discretionary intervention because ECO has not met the standards required for discretionary intervention set out in Commission jurisprudence. Second, the Licensee argues that the Commission improperly admitted the contention regarding loss of offsite power (LOOP) because the LOOP issue does not raise a material issue of law or fact and is unrelated to any ECO interest, and because ECO has not demonstrated a significant ability to contribute to the record on this issue. Third, the Licensee maintains that to allow ECO the opportunity to file an amended contention regarding SMUD's decommissioning funding plan is patently unfair and prejudicial to the Licensee. Fourth, the Licensee argues that allowing the adjudication to remain open for the specific purpose of allowing contentions to be filed on the Staff's environmental review documents is inconsistent with Commission regulations.

The Staff supports the Licensee's motion with respect to the first three noted objections for essentially the same reasons presented by the Licensee.² The Staff does not seek reconsideration of the fourth matter because the Staff believes that the relief provided by the Commission is consistent with Commission regulations. ECO opposes the Licensee's motion.³

¹ Licensee's Motion for Reconsideration, March 10, 1993.

² NRC Staff's Support of Licensee's Motion for Reconsideration, March 26, 1993.

³ ECO's Answer in Opposition to Licensee's Motion for Reconsideration, March 26, 1993.

Analysis

For the reasons set out in more detail below, SMUD has failed to identify any error or abuse of discretion by the Commission in deciding CLI-93-3. Although SMUD asserts that its interests are compelling and that our decision is highly prejudicial, SMUD has not articulated any specific harm that it is suffering as a result of our order.

1. *Discretionary Intervention*

In CLI-93-3, we granted ECO discretionary intervention because ECO presented several difficult questions which, if resolved in its favor, would support standing. We also found that ECO had submitted one viable contention. In addition, we stated that the Commission is presently reviewing the process for review and approval of decommissioning plans, including the timing and scope of public participation in the decommissioning process. CLI-93-3, 37 NRC at 141. The decision to grant ECO intervention, without resolving the question of standing as of right, rested on our discretionary authority to hold hearings and to permit participation in our proceedings. The Licensee does not challenge this authority.

Nonetheless, the Licensee asserts that we ignored our own standards and precedents in granting ECO discretionary intervention in this instance. We disagree. Cases cited by the Licensee, including *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976) (hereinafter *Pebble Springs*) are consistent with our decision to grant ECO discretionary intervention. As we stated in *Pebble Springs*, it was expected that the practice of granting discretionary intervention should develop "not through precedent, but through attention to the concrete facts of particular situations." 4 NRC at 617.

Although ECO did not establish a clear case for standing, ECO averred certain arguments that would support its standing. The standing issue posed questions of first impression in the context of a Staff decommissioning order. Resolution of those questions might have little, if any, future application in view of the Commission's current examination of the process for approving decommissioning plans. Thus, in this instance we have determined that it is in the public interest to resolve the particular matters raised by the Petitioner rather than to expend any further resources resolving the difficult questions regarding ECO's standing as of right.

In reaching our decision, we also took into account whether ECO had raised potentially litigable matters in this proceeding. The Commission admitted one aspect of ECO's environmental contention regarding the probability of a LOOP and has permitted ECO to amend its contention regarding the funding

plan. Although both the Staff and Licensee argue that ECO is not capable of making a substantial contribution on either of these matters, such a conclusion is premature.

The questions of whether a genuine issue of material fact remains regarding the LOOP contention and whether ECO has submitted an admissible amended funding plan contention are before the Licensing Board. If ECO establishes litigable matters with respect to either of these contentions, it will clearly be in the public interest to resolve these matters, which involve the adequacy of the Licensee's discussion of credible accidents in the Environmental Report, and to determine whether SMUD has provided adequate financial assurances for funding decommissioning. On the other hand, if neither contention survives further scrutiny under the applicable provisions of 10 C.F.R. § 2.714(b)(2) or § 2.749, then such matters will be dispensed with promptly.

In sum, we gave due consideration to the *Pebble Springs* criteria and the particular circumstances of this case in formulating our order. Thus, we decline to reconsider our determination to grant ECO intervention as a matter of discretion.

2. *Admissibility of the Environmental Contention*

ECO's environmental contention alleged, in part, that SMUD's Environmental Report is inadequate because SMUD's discussion of radiological impacts appears to rely merely on general NRC regulations, guidance, and reports. As an example, ECO alleged that SMUD's discussion of the probability of a LOOP is inadequate. In CLI-93-3, we admitted ECO's contention that there is no reference to a particularized study to allow independent verification of the conclusion that the probability of a LOOP is less than once in 20 years. CLI-93-3, 37 NRC at 146.

SMUD argues that this matter was not raised on appeal by ECO.⁴ SMUD is incorrect. On appeal, ECO argued that the Licensing Board erred by not considering ECO's specific examples of alleged deficiencies in SMUD's Environmental Report. Although ECO did not restate the specifics of ECO's objections to SMUD's discussion of the LOOP, ECO referred in its appellate brief to the pages of ECO's supplemental petition that, according to ECO, the Licensing Board failed to consider.⁵ The cited portions of ECO's supplemental

⁴ SMUD Motion at 8.

⁵ In support of its argument that the Licensing Board improperly denied the admissibility of ECO's environmental contention, ECO stated that "ECO spells out in great detail the various requirements for an environmental report. ECO [Amendment and] Supplement [to Petition for Leave to Intervene and Request for Hearing, June 29, 1992, at] 16-28. And ECO discussed in great detail the various ways [in which] the environmental report did not meet those requirements Having previously spelled out those duties . . . there is nothing further for ECO to have done." ECO Brief in Support of Appeal from LBP-92-23, September 8, 1992, at 30-31.

petition included ECO's allegation that there is no reference to a particularized study in SMUD's Environmental Report to allow independent verification of SMUD's conclusion regarding the probability of a LOOP.

In its motion for reconsideration, SMUD presents a new argument regarding the LOOP — that the probability of a LOOP is immaterial and, thus, ECO has not raised a valid contention.⁶ This is not the argument that SMUD provided in its answer to ECO's supplement when SMUD addressed ECO's reference to the probability of a LOOP.⁷ Had SMUD made these arguments to the Board, it might have defeated admission of this contention. Nevertheless, SMUD is free to pursue this new line of argument before the Licensing Board in resolving any remaining matter regarding this contention.⁸ We decline to reconsider our determination to admit ECO's environmental contention with respect to the probability of a LOOP.

3. Amending the Funding Plan Contention

In CLI-93-3, we permitted ECO to amend its contention challenging the adequacy of SMUD's proposed funding plan because there was sufficient confusion in the proceedings below as to whether ECO could raise the objections to the funding plan in a proceeding other than the instant one. Both Staff and Licensee insist that ECO was responsible for the confusion and that it was clear that any such objections had to be raised in this proceeding. We disagree. We found that the confusion apparently stemmed from the handling of an earlier SMUD request for, and Staff consideration of, an exemption from complying with the funding requirements in 10 C.F.R. § 50.75(e)(1)(ii). See CLI-93-3, 37 NRC at 148-49. Due to a subsequent change in Commission rules in July 1992, an exemption was no longer necessary and, thus, was no longer being considered by Staff.⁹ Nevertheless, the Licensing Board still concluded that ECO's comments regarding the funding plan would be considered when Staff determined whether to grant SMUD's exemption request, and, for this reason, the Licensing Board concluded that the "crux of ECO's concern . . . has been fulfilled." LBP-92-23, 36 NRC 120, 137 (1992).

⁶ SMUD's Motion at 8-9. The Staff's arguments supporting SMUD's motion also pose objections raised for the first time on reconsideration.

⁷ Licensee's Answer to ECO's Amendment and Supplement to Petition for Leave to Intervene and Request for Hearing, July 8, 1992, at 21-22.

⁸ Although we have already admitted the original contention as we decided in CLI-93-3, we leave for the Licensing Board to determine if the further amendment to the contention is admissible and to determine if a genuine issue of material fact remains regarding the probability of a LOOP. The Licensing Board should also determine if ECO's amended contention raises matters that were not dependent on the analysis of the probability of a LOOP. To the extent that ECO raises issues that could have been raised before because they are not dependent on the new information provided regarding the probability of a LOOP, ECO must meet the criteria for late-filed contentions.

⁹ CLI-93-3, 37 NRC at 149 (citing Prehearing Conference Transcript at 140). See Final Rule, Decommissioning Funding for Prematurely Shut Down Power Reactors, 57 Fed. Reg. 30,383 (July 9, 1992).

In its motion for reconsideration, SMUD maintains that Staff made it clear that there would not be another proceeding in which ECO could challenge the funding plan and such contentions must be raised here. In support of this argument, SMUD quotes the NRC Staff's response to ECO's contention regarding the funding plan:

Chapter 5 and Appendix C of SMUD's decommissioning plan provide SMUD's funding plan. The NRC staff is reviewing that proposal. Approval of the funding plan will be in the Order *or by separate approval*. ECO provides no basis to contest the adequacy of SMUD's funding plan in this proceeding, and its adequacy, therefore, cannot be a contention herein.¹⁰

Staff's mention of a "separate approval" does little more than raise further confusion as to whether there would be a separate proceeding in which ECO could challenge the funding plan. Moreover, ECO indicated its intent to challenge the adequacy of the funding plan.¹¹ Thus, we decline to reconsider our determination to permit ECO to amend its funding plan contention.

SMUD also argues that if ECO is permitted to amend its funding plan contention, the amendment should be limited to matters related to the exemption request. We leave to the Licensing Board to determine whether ECO has presented issues that go beyond the scope of the adequacy of the funding plan and, if new matters are raised, whether such new matters meet the late-filed criteria listed in 10 C.F.R. § 2.714(a)(1)(i)-(v).

4. *Staying Issuance of the Decommissioning Order*

In CLI-93-3, we ordered the Staff to withhold issuance of the decommissioning order until after the Licensing Board has completed both its review of the admissibility of any amended or late-filed contentions and has held a hearing or otherwise resolved any litigable matter that may be raised. 37 NRC at 152. We provided for a pre-effectiveness hearing based on the totality of the circumstances presented in this instance. Because the Staff's environmental review documents had not been issued, we recognized that contentions might be filed by ECO pursuant to 10 C.F.R. § 2.714(b)(2)(iii) after the Staff had completed its environmental review. Thus, we permitted a reasonable opportunity for consid-

¹⁰ SMUD's Motion at 11-12 (emphasis added) (quoting NRC Staff Response to ECO's Supplement to Its Petition for Leave to Intervene and Request for Hearing, July 10, 1992, at 27).

¹¹ See, e.g., Prehearing Conference Transcript at 141 (July 14, 1992) (Counsel for ECO stated that it found "that the decommissioning plan funding arrangement that the staff originally proposed to approve is full of contradictions, uncertainties, and ensuing radiological and environmental risks due to the period of time of funding; therefore, [the funding plan] should be rejected." Moreover, counsel for ECO stated at the prehearing conference that "I am not here trying to attack as everyone has recognized, the decommissioning funding plan itself. That is a separate proceeding. . . . [W]hile it is still a separate proceeding, they [Staff and SMUD] are criticizing me for not having raised [ECO's challenges to the funding plan] in the context of this proceeding also." *Id.* at 150.

eration of such contentions consistent with our grant of intervention as a matter of discretion and our determination to permit a prior hearing on litigable matters. The Licensee has not shown any specific support for its argument that our determination has caused it considerable hardship. Therefore, we decline to reconsider this portion of our order.

In the alternative, SMUD argues that (1) the Commission should direct the NRC Staff to conclude its environmental review promptly and (2) the Commission should clarify that ECO must show that the new Staff documents on which ECO submits late-filed contentions contain data and conclusions that differ significantly from the data or conclusions in SMUD's environmental report and the NRC's Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (NUREG-0586) (hereinafter GEIS). With respect to SMUD's first request, we note that CLI-93-3 was not intended to delay issuance of the Staff's environmental review documents. Thus, when the Staff completes its review, the Staff's assessment or other environmental review documents should be issued promptly.

With respect to SMUD's second request, the Commission emphasized in CLI-93-3 that 10 C.F.R. § 2.714(b)(2)(iii) of our regulations expressly provides for the filing of supplemental or amended contentions if the Staff's environmental review documents contain data or conclusions that differ significantly from the data or conclusions in the Licensee's environmental documents. See CLI-93-3, 37 NRC at 153-54. We also stated that any such contentions are subject to the late-filed criteria listed in section 2.714(a)(1)(i)-(v). Apparently, SMUD believes that the provision in section 2.714(b)(2)(iii), referring to contentions that may be filed on the Staff's environmental review documents, adds a sixth factor to the existing five factors that must be considered when determining whether a late-filed contention is admissible pursuant to section 2.714(a)(1)(i)-(v). SMUD argues that in addition to meeting the five factors listed in section 2.714(a)(1)(i)-(v), ECO must also show that the Staff's documents significantly differ from both applicant's environmental documents and the GEIS. Although information regarding the difference between the applicant's environmental report and the Staff's environmental review documents is relevant to the "good-cause" factor, section 2.714(b)(2)(iii) neither adds nor removes from consideration any factor to be balanced in the determination of the admissibility of a late-filed contention pursuant to section 2.714(a).

The Commission promulgated changes to section 2.714, effective in September 1989.¹² One significant change to this section is that the Commission now requires the petitioner to provide sufficient information with its proffered

¹² Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (Aug. 11, 1989), *aff'd sub nom. Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990).

contention "to show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2)(iii). As a general matter, in making this showing the petitioner must reference specific portions of the application that the petitioner disputes or the reasons for the petitioner's belief that required information is omitted. On environmental matters this showing must include a reference to the specific portion of the applicant's environmental report that the petitioner believes inadequate. However, the Commission expressly recognizes that if data and conclusions in Staff environmental review documents significantly differ from the data and conclusions on a material issue in the applicant's environmental report, the petitioner could raise a genuine issue by referring to those portions of the Staff's environmental documents that the petitioner disputes. *See* 10 C.F.R. § 2.714(b)(2)(iii).

In promulgating this change we did not alter the criteria to be considered when determining the admissibility of a late-filed contention, but merely emphasized that prior agency case law makes it clear that any late-filed contention, including those filed on subsequent NRC environmental review documents, are subject to the late-filed criteria set out in section 2.714(a)(1)(i)-(v).¹³ We did not mean to imply that a showing that the Staff's environmental review documents significantly differ from the applicant's environmental report is always necessary to raise a good contention. Even without such a showing, a petitioner may still be able to meet the late-filed contention requirements of section 2.714(a), e.g., by presenting significant new evidence not previously available. Likewise, a showing that the Staff's environmental review documents significantly differ from the applicant's environmental report, although ordinarily sufficient to show good cause for lateness, is not by itself sufficient to make an environmental contention admissible, because the petitioner must still meet the other criteria in section 2.714(a).

Further, we decline to require ECO to also show how the data and conclusions in Staff's environmental documents differ significantly from the data and conclusions in the GEIS for purposes of filing a contention. The GEIS cannot be categorized as an "applicant's document" under 10 C.F.R. § 2.714(b)(2)(iii).

Conclusion

For the reasons stated above, SMUD's motion for reconsideration of CLI-93-3 is *denied*.

¹³ 54 Fed. Reg. at 33,172.

It is so ORDERED.

For the Commission

**JOHN C. HOYLE
Assistant Secretary of the
Commission**

**Dated at Rockville, Maryland,
this 26th day of May 1993.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Robert M. Bernero, Director

In the Matter of

Docket No. 030-04632

INTERSTATE NUCLEAR SERVICE
CORPORATION

(Indian Orchard, Massachusetts)

May 7, 1993

The Director of the Office of Nuclear Material Safety and Safeguards grants in part and denies in part a petition filed by Gloria M. Mitchell and Linda Hammons, on behalf of the Indian Orchard Citizens Council (IOCC), which requested action with regard to the Interstate Nuclear Service Corporation (INS) at Indian Orchard, Massachusetts. Petitioners made ten requests and four demands. Petitioners asserted as bases for their requests and demands that the residents of the Indian Orchard neighborhood of Springfield, Massachusetts, live in close proximity to INS and have expressed great concern about health issues related to the operation of INS, especially since the publication of an article in the Springfield *Sunday Republican* on June 7, 1992, concerning radiation levels at the INS perimeter fence, onsite waste storage by INS, and INS discharges to the city sewer system.

The requests of Petitioners that were granted are that the NRC: (1) participate in a public meeting in Indian Orchard to respond to the concerns of the neighborhood residents; (2) hold an unannounced inspection of INS; (3) provide to the Petitioners a copy of the NRC regulations under which INS operates; (4) check adjoining Park Department land, including Dimmock Pond, for contamination and illegal dumping of waste material; (5) determine what INS has done with waste material not shipped; (6) provide to the Petitioners the docket number for INS; (7) identify a Public Document Room (PDR) for INS and its location; and (8) describe the type of monitoring done, who does it, and how frequently. Requests that were denied are that the NRC: (1) check homes in the area for radioactive contamination; and (2) check Loon Pond for contamination and for

possible illegal dumping of waste material. Petitioners' demands that were denied are that: (1) radiation readings outside the INS fence perimeters be "0" at all times; (2) "0" nuclear waste byproducts from INS be allowed to enter Springfield's water/sewer system; and (3) under no circumstances should INS be allowed to store nuclear waste on its property. Petitioners' demand that INS stop using residential streets, specifically Nagle and Nichols Streets, to go to and from its plant was mooted by the voluntary actions of INS.

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

I. INTRODUCTION

By letter dated June 29, 1992, addressed to the Chairman of the Nuclear Regulatory Commission (NRC or the Commission), Gloria M. Mitchell and Linda Hammons, on behalf of the Indian Orchard Citizens Council (IOCC), requested that NRC take action with respect to Interstate Nuclear Service Corporation (INS or the Licensee) in Indian Orchard, Massachusetts. The IOCC requested an NRC response or action on ten matters or requests and made four "demands" concerning the Licensee's activities.

Petitioners request that the NRC: (1) participate in a public hearing in Indian Orchard to respond to the concerns of neighborhood residents; (2) hold a surprise inspection of INS; (3) check homes in the area for radioactive contamination; (4) provide to the Petitioners a copy of the NRC regulations under which INS operates; (5) check adjoining Park Department land, including Dimmock Pond, for contamination and illegal dumping of waste material; (6) check Loon Pond for contamination and for possible illegal dumping of waste material; (7) determine what INS has done with waste material not shipped; (8) provide to the Petitioners the docket number for INS; (9) identify a Public Document Room (PDR) for INS and its location; and (10) describe the type of monitoring done, who does it, and how frequently.

Petitioners further "demand" on behalf of neighborhood residents that: (1) radiation readings outside the INS fence perimeters be "0" at all times; (2) "0" nuclear waste byproducts be allowed to enter Springfield's water/sewer system; (3) INS stop using residential streets, specifically Nagle and Nichols Streets, to go to and from its plant; and (4) under no circumstances should INS be allowed to store nuclear waste on its property.

Petitioners assert as bases for their requests and demands that the residents of the Indian Orchard neighborhood of Springfield, Massachusetts, live in close proximity to INS and have expressed great concern over possible health issues, especially since publication of an article in the *Springfield Sunday Republican*

on June 7, 1992. The article reported that: (1) radiation readings outside the INS perimeter fence, near a waste-filled truck, were 12 to 15 times normal background radiation levels experienced in everyday life; (2) all INS waste will be stored on site beginning January 1, 1993; (3) in 1989, INS waste stored was twice the volume shipped; (4) the corporate health physics manager of INS, Michael Bovino, stated that waste is removed twice a year, but NRC records indicate that it is removed only once a year and not at all in 1990; (5) a person standing at the INS fence for two days in early May would have received a higher radiation dose than a person standing at Vermont Yankee's fence for a year because of tighter regulations for nuclear power plants; and (6) there have been allegations that INS discharges radioactive water into the city sewer system.

The NRC Staff provided a partial response to IOCC by letter dated July 21, 1992. By letter dated August 25, 1992, the NRC Staff formally acknowledged receipt of the Petition and informed Petitioners that their Petition would be treated as a request under 10 C.F.R. §2.206 and a decision would be issued within a reasonable amount of time. By letter dated August 25, 1992, the Staff also informed INS of the Petition and invited INS to provide information for the Staff's consideration. INS responded to the Petition on August 31, 1992.

I have completed my evaluation of the matters raised by Petitioners and have determined that, for the reasons stated below, the Petition shall be granted in part and denied in part. The Petition is granted insofar as the NRC Staff: participated in a public meeting on the evening of July 23, 1992, at the American Legion Post, Number 277, in Indian Orchard and responded to the concerns of the neighborhood residents; conducted an unannounced inspection of INS on July 8 and 9, 1992; provided IOCC with copies of pertinent portions of NRC's regulations; checked adjoining Park Department land, including Dimmock Pond, for contamination; reviewed INS's waste storage program; provided IOCC a description of INS's radiation monitoring program; identified the location of the Public Document Room (PDR) for the INS license; and provided the docket number for the INS license. The Petition is denied with respect to the remaining requests to check homes in the area for radioactive contamination, and to check Loon Pond for contamination and possible illegal dumping of waste material. The Petition is also denied with respect to three of IOCC's demands. The fourth demand was mooted by the Licensee's voluntary actions.

II. BACKGROUND

INS is a subsidiary of UniFirst Corporation whose headquarters are located in Springfield, Massachusetts. INS operates thirteen facilities, each of which is separately licensed by the NRC or an Agreement State. An Agreement State

is one with which the NRC, or previously the Atomic Energy Commission, has entered into an agreement under subsection 274b of the Atomic Energy Act of 1954, as amended, for the state to assume the regulatory authority and responsibility that would otherwise be discharged by the NRC with respect to protection of public health and safety associated with the possession and use of certain categories of radioactive materials. The Commonwealth of Massachusetts is not an Agreement State and, therefore, the regulatory authority over the facility that is the subject of this Petition resides with the NRC.

One of INS's thirteen facilities is located in Indian Orchard, a community of Springfield, Massachusetts. INS at Indian Orchard holds NRC License No. 20-03529-01 and is authorized to possess various byproduct, source, and special nuclear materials in the form of contaminated material and associated decontaminated waste for the collection, laundering, and decontamination of contaminated clothing and other launderable nonapparel items. More specifically, INS is authorized to possess the following maximum amounts of NRC-licensed materials: 0.93 terabecquerels (2.5 curies) of any byproduct material with atomic numbers 1-83; 370 megabecquerels (10 millicuries) of any byproduct material with atomic numbers 84-102; 10 kilograms of any source material; and special nuclear material with a total quantity not to exceed 0.25 kilogram of uranium enriched in uranium-235 or 0.020 kilogram of plutonium. INS is also authorized to possess any byproduct material in individual sources not exceeding 37 megabecquerels (1 millicurie) per source or 185 megabecquerels (5 millicuries) total activity for use as standards to calibrate radiation detection and measuring instruments. The license also authorizes the transport of licensed materials in accordance with 10 C.F.R. Part 71 of the Commission's regulations.

Use of licensed material is limited to the INS facility at 295 Parker Street, Indian Orchard, Massachusetts. INS is not authorized to launder contaminated items at temporary jobsites or at a customer's facility, except as specifically authorized by the customer's license. INS is also not authorized to package or possess radioactive wastes, except those generated by the laundering activities conducted at its Indian Orchard facility.

License No. 20-03529-01 was originally issued on April 15, 1958, was last renewed on May 26, 1988, and is due to expire on May 31, 1993.

III. DISCUSSION

A. The NRC Staff has examined Petitioners' concerns based on the article in the June 7, 1992 issue of the Springfield *Sunday Republican*. The Staff's evaluation of each of the six concerns in the article and referenced by Petitioners is discussed below:

1. Radiation Readings Outside the INS Perimeter Fence, Near a Waste-Filled Truck, Were 12 to 15 Times Normal Background Radiation Levels Experienced in Everyday Life

Current NRC regulations require NRC licensees to demonstrate that radiation levels outside of the licensee's controlled area (e.g., INS's fenceline) shall not be greater than 20 microsieverts (2 millirems) in any 1 hour or 1 millisievert (100 millirems) in any 7 consecutive days. 10 C.F.R. § 20.105(b). Average radiation exposure to a member of the general public from external radiation is approximately 1 millisievert (100 millirems) in 1 year. A radiation level 10-15 times background at the INS fence (or approximately 2 microsieverts (0.2 millirem) per hour) from a truck temporarily parked at INS for as long as a week and used to pick up radioactive waste would meet the current NRC hourly and weekly standards.

Beginning in January 1994, section 20.105(b) will be superseded by new requirements under 10 C.F.R. § 20.1301(a). 56 Fed. Reg. 23,360 (May 21, 1991). Under the new requirements, NRC licensees must demonstrate that no individual member of the public would be exposed to more than 1 millisievert (100 millirems) of radiation above background from the licensee's activities in one year. The measurement of conformance to the new NRC requirements must take into consideration changes in the radiation levels and the *occupancy time* of the maximally exposed individual member(s) of the public for the year. For instance, in order for INS to exceed the new standard due to radiation from its waste-pickup truck, INS would have to make three radioactive waste shipments per year and the same individual members of the public would have to stand continuously at the fenceline throughout these periods. NRC inspectors have confirmed that during the period 1989-1992, INS made no more than two radioactive waste shipments per year. Accordingly, the transient radiation level of 10-15 times background, or 2 microsieverts (0.2 millirem) per hour, for as long as a week, would comply not only with current requirements, but also with the more restrictive new NRC requirements.

INS's current environmental measurements of radiation involve weekly radiation surveys, the results of which have been within NRC limits. For transient radiation levels such as created by temporary parking of INS's waste-pickup truck, it normally would be difficult to estimate precisely the yearly radiation exposure at the fenceline based on measurements made once a week, if not for the additional surveys required by the U.S. Department of Transportation (DOT). 10 C.F.R. § 173.441(b). Prior to shipping its radioactive waste off site, INS is required by the DOT to perform radiation measurements at the driver's compartment, at all sides, top, and bottom of the vehicle, and at 2 meters away from all lateral surfaces of the vehicle. The results of these surveys are all within DOT limits.

Even though not obligated by current NRC requirements to do so, the Licensee deployed thermoluminescent dosimeters (TLDs) in 1992 along the fence of its property to measure environmental radiation levels. The use of TLDs will improve the measurement of the annual radiation exposure at the fenceline because the devices will be continuously present, and should more definitively demonstrate whether INS has complied with NRC requirements. INS's TLD measurements for the last 6 months of 1992 are in compliance with NRC requirements. Based on the above, I conclude that Petitioners have not raised a substantial health or safety concern.

2. All INS Waste Will Be Stored on Site Beginning January 1, 1993

The Low Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA) requires states to develop disposal capacity for their low-level radioactive waste (LLW) by January 1, 1993. States have several options: they may develop their own disposal facility; they may join with other states in compacts that will then develop disposal capacity for the member states; or they may contract for disposal with states or compacts that have a disposal facility. Currently, Massachusetts does not have a disposal facility and is not a member of any compact. However, under an agreement between Massachusetts and the Southeast Low Level Radioactive Waste Compact Commission (SLLRWCC), Massachusetts waste generators will be able to use the Barnwell, South Carolina waste disposal site until July 1994. INS intends to ship its waste to Barnwell until July 1994, at the same frequency as in the past. *See* Section III.A.4, below.

A number of other states are in the same situation as Massachusetts, i.e., they neither have a disposal site nor belong to a compact that has access to a disposal site. Beginning in July 1994, when Barnwell is scheduled to close its doors to states that do not belong to the SLLRWCC, the NRC recognizes that waste generators in these states may have no other choice but to store their LLW. Indeed, a few states (Michigan, Maine, New Hampshire, Rhode Island, and the District of Columbia) have no disposal option at this time. Although the NRC encourages permanent disposal of LLW, and views storage as an option of last resort, the NRC understands that onsite interim storage may be necessary in certain cases. Many waste generators also store LLW for short periods to permit decay of very short-lived radionuclides, or to accumulate enough to ship efficiently. In order that both short-term and long-term storage may be accomplished safely, the NRC has developed regulations and guidance for LLW storage. Current requirements for LLW storage appear in 10 C.F.R. Parts 20, 30, 40, 50, and 70. Various guidance documents have also been published, for example, Information Notice (IN) 90-09, "Extended Interim Storage of Low-Level Radioactive Waste by Fuel Cycle and Materials Licensees" and IN 89-13, "Alternative Waste Management Procedures in Case of Denial of Access to Low-

Level Waste Disposal Sites." Finally, in addition to the storage requirements and guidance that NRC provides, NRC fuel cycle and materials licensees, including INS, are subject to regular inspections and to license reviews to assess safety and determine that licenses meet applicable requirements, including those related to waste storage.

In 1992, INS completed a new onsite storage facility for radioactive waste. It is located underground, adjacent to the health physics laboratory, and accessible only from inside the building. The new storage facility replaces the storage of waste in trailers in the parking lot next to one of the Licensee's buildings. The storage area is constructed of concrete and steel and includes a fire suppression system, a liner/collection system around the exterior walls and floors to direct any potential releases to a sump for collection and subsequent sampling, and an air sampling system. Waste that is placed in this facility is already packaged for shipment. The facility is monitored on a daily basis for airborne contamination, removable contamination, and radiation levels. The NRC Staff concludes that the use of INS's new radioactive waste storage facility will increase the protection of the public health and safety because INS will be better able to monitor radiation emissions from the waste and, if necessary, contain radioactive releases. In July 1994, INS may have to hold its radioactive waste on site when Barnwell is scheduled to cease accepting out-of-compact waste. The new radioactive waste storage facility at INS has sufficient capacity to hold approximately 5 years of waste.

At this time, the NRC Staff concludes that there is no health or safety problem related to the January 1, 1993 deadline date published in the Springfield *Sunday Republican*. Based on the above, I conclude that Petitioners have not raised a substantial health or safety concern.

3. *In 1989, INS Waste Stored Was Twice the Volume Shipped*

As requested by Petitioners, NRC inspectors conducted an unannounced inspection on July 8 and 9, 1992. A review of INS's radioactive shipping manifests showed that during the 4 years from 1989 to 1992, INS shipped a total volume of 6,455.7 cubic feet of radioactive waste for final disposal at a commercial low-level radioactive waste disposal site. This averages to approximately 1,613.9 cubic feet of waste generated per year by INS during this period. Due to the limited shipping capacity of the waste shipment truck, INS needs to make 1½ waste shipments per year in order to dispose of the yearly amount of waste it generates. To maximize the use of its waste shipment truck, INS has been making two shipments every other year, and one shipment in the alternate years. Under this shipping schedule, no radioactive waste generated at INS is held for onsite storage for more than 2 years. For the year 1989, NRC inspectors noted that INS shipped a total volume of 2,125.3 cubic feet

of radioactive waste, which is more than the amount of waste generated for that year but not twice as much. INS has not exceeded the 2-year limit for onsite radioactive waste storage in the INS license. Accordingly, I conclude that Petitioners have not raised a substantial health or safety concern.

4. *INS Stated That Waste Is Removed Twice a Year But NRC Records Indicate That It Is Removed Only Once a Year and Not at All in 1990*

As discussed above, NRC inspectors noted in their inspection report that INS made two shipments in 1989, one shipment in 1990, two shipments in 1991, and one shipment to the time of the inspection in 1992. On the average, INS needed to make approximately 1½ shipments per year, resulting in two shipments every other year. Accordingly, I conclude that Petitioners have not raised a substantial health or safety concern.

5. *A Person Standing at the INS Fence for 2 Days in Early May Would Have Received a Higher Radiation Dose Than a Person Standing at Vermont Yankee's Fence for a Year Because of Tighter Regulations for Nuclear Power Plants*

It appears that the Springfield *Sunday Republican* article concerns the direct radiation levels at the INS fence due to the presence of the INS waste-pickup truck compared to the annual air dose at Vermont Yankee's fence due to its gaseous effluents.

Petitioners are correct that NRC's exposure limits for individual members of the general public near materials facilities such as INS are different from those for individual members of the general public near nuclear power reactors. NRC materials licensees must comply, beginning on January 1, 1994, with the 1 millisievert (100 millirems) per year NRC limit to the maximally exposed member of the general public. 10 C.F.R. § 20.1301. In addition, materials licensees, such as INS, must comply with the ALARA requirement which states, "[t]he licensee shall use, to the extent practicable, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonable achievable (ALARA)." 10 C.F.R. § 20.1101(b).

Nuclear power reactors are required to comply with requirements in 10 C.F.R. Part 20 as well as with technical specification requirements to meet the criteria in 10 C.F.R. Part 50, Appendix I. Nuclear power reactors and fuel cycle facilities are also required to meet the Environmental Protection Agency's (EPA) Uranium Fuel Cycle Standard of 0.25 millisievert (25 millirems) per year. See 40 C.F.R. Part 190. The annual limit of 0.25 millisievert (25 millirems) for a maximally

exposed individual was derived by EPA based on ALARA considerations. For gaseous effluents, the NRC Part 50, Appendix I criterion mentioned in the newspaper article and recited by the Petitioners is 0.05 millisievert (5 millirems) per year to a maximally exposed member of the general public. Direct radiation exposure to a maximally exposed member of the general public at the fenceline is not specifically addressed in Appendix I. However, nuclear power reactors are required to meet the 0.25 millisievert (25 millirems) per year EPA limit that includes exposures from direct radiation exposure as well as from gaseous effluents. 10 C.F.R. § 20.105(c).

Although there are differences in the regulatory limits for nuclear power reactors and for materials facilities, the differences are based on whether ALARA has been incorporated into the limits for a certain category of licensees (i.e., nuclear power reactors and fuel cycle facilities), or must be considered in addition to the limits (i.e., materials facilities). These limits are all significantly below any observable health effects that could affect the public. NRC inspectors have found that the radiation levels at the INS fenceline are well within NRC limits. See Section III.A.1, above. Moreover, INS has moved the location of its laundry and waste-pickup trucks to reduce radiation levels at those fenceline locations described in the Springfield *Sunday Republican* article, in keeping with ALARA. Accordingly, I have concluded that Petitioners have not raised a substantial health or safety concern.

6. There Have Been Allegations That INS Discharges Radioactive Water into the City Sewer System

The Commission's regulations allow the discharge of liquids, containing very low levels of radioactive materials, into the sanitary sewer. 10 C.F.R. § 20.303. Licensees are required to monitor and control any such discharges and to make available the documentation of such discharges for NRC inspection. 10 C.F.R. § 20.401. Water used by INS for nuclear laundry purposes is first filtered to remove as much of the radioactive materials from the water as possible. This water then goes into holding tanks where the water is sampled for radioactivity levels and compared to NRC-authorized limits before release into the sanitary sewer. The July 8-9, 1992 unannounced NRC inspection of INS found no violation of NRC limits concerning releases to sanitary sewers. In addition, NRC inspectors took a water sample from INS's wastewater holding tank and, by independent measurements, found the radioactivity levels in the water to be within NRC limits. Accordingly, I conclude that Petitioners have not raised a substantial health or safety concern.

B. The NRC Staff has evaluated Petitioners' ten requests for responses or actions by the NRC. That evaluation and my disposition of each of the ten requests are discussed below. Petitioners requested that the NRC:

1. Participate in a Public Hearing in Indian Orchard to Respond to the Concerns of Neighborhood Residents

In response to this request, representatives of NRC and the Commonwealth of Massachusetts attended a public meeting on the evening of July 23, 1992, at a local American Legion post. The meeting was attended by approximately 75 people and lasted about 2½ hours. The meeting was moderated by Mrs. Linda Hammons of the IOCC. At this meeting, NRC Staff discussed with the attendees the results of the NRC inspection on July 8-9, 1992, and answered all health and safety concerns directly with members of IOCC. Therefore, this request has, in effect, been granted.

2. Hold a Surprise Inspection of INS

Although the NRC Staff had conducted an unannounced inspection at INS in December 1991, the NRC Staff conducted another unannounced inspection on July 8-9, 1992, to review recent events and to provide a current basis for the discussions scheduled at the July 23, 1992 public meeting. A representative from the Department of Public Health of the Commonwealth of Massachusetts accompanied the NRC inspectors on July 8, 1992. Copies of the NRC Inspection Report for the July 8-9, 1992 inspection were sent to IOCC before the July 23, 1992 meeting, for discussion at that meeting. In addition, extra copies of the NRC Inspection Report were made available to all attendees at the beginning of the public meeting. This request has, therefore, been granted.

3. Check Homes in the Area for Radioactive Contamination

NRC does not normally monitor private houses for radioactive contamination. Based on radiation surveys and soil sample measurements taken by NRC inspectors along the Licensee's fence line, and a review of INS survey records, the Staff does not have any technical basis to conclude that local homes could have been contaminated due to loss of radiological control at INS. This information was made available, through the inspection report, to the IOCC. However, the Commonwealth of Massachusetts' personnel have taken radiation readings in the local area with several neighbors in attendance. No radiation levels above normal background were found. Petitioners have presented no substantial health or safety concern. Accordingly, this request is denied.

4. *Provide to the Petitioners a Copy of the NRC Regulations Under Which INS Operates*

By letter dated July 21, 1992, Richard Cooper, II, Director of the Division of Radiation Safety and Safeguards, NRC Region I, provided copies of the NRC regulations under which INS operates to Gloria Mitchell, President of IOCC. This request has, therefore, been granted.

5. *Check Adjoining Park Department Land, Including Dimmock Pond, for Contamination and Illegal Dumping of Waste Material*

During the July 8-9, 1992 inspection, NRC inspectors took direct radiation readings around the Dimmock Pond area, including the unimproved road between the Pond and the Licensee's property and trails along the Parker Avenue side of the Pond. No readings above normal background were detected during these surveys. The inspectors also took two water samples from Dimmock Pond to check for radioactivity. In addition, the NRC inspectors obtained a sediment sample, consisting of a composite sample taken from Dimmock Pond near the Licensee's property. Finally, the Commonwealth of Massachusetts also took a water sample and a sediment sample from Dimmock Pond. Analyses of all these samples have identified no detectable radiation levels or radioactive materials above normal background. Based on the results of the above measurements, review of INS's radioactive waste storage and shipping records, and other inspection results, the Staff has no information that could demonstrate that there has been illegal dumping of waste material by INS. The request to conduct surveys, therefore, has been granted.

6. *Check Loon Pond for Contamination and for Possible Illegal Dumping of Waste Material*

During the July 8-9, 1992 inspection, NRC inspectors did not obtain any evidence that supported the allegation that there may have been illegal dumping of radioactive waste material in Loon Pond. Further, since no radioactive contamination was found in Dimmock Pond, which is adjacent to the INS property, the Staff concluded that sampling Loon Pond, physically separated from the INS property by Parker Street and railroad tracks, and several hundred yards away, would be neither necessary nor reasonable. I conclude that Petitioners have presented no substantial health or safety concern. Therefore, this request is denied.

7. *Determine What INS Has Done with Waste Material Not Shipped*

INS is required by its license to safely store its radioactive waste at NRC-authorized locations. Prior to May 1992, INS stored its radioactive waste inside trailers located next to one of its buildings. In May 1992, INS began using a newly constructed storage facility for radioactive waste. This onsite storage facility has been described earlier. See Section III.A.2, above. At this time, INS is using the new storage facility only for short-term storage of radioactive waste, in compliance with its license. INS's NRC license does not currently permit the storage of any radioactive waste at INS for more than 2 years. INS would have to submit an application for amendment of its license, as discussed in accordance with Information Notice 90-09, "Extended Interim Storage of Low-Level Radioactive Waste by Fuel Cycle and Materials Licensees," if INS wished to store its radioactive waste for a period longer than 2 years. The Petitioners' request, therefore, has been granted.

8. *Provide to the Petitioners the Docket Number for INS*

By letter dated August 25, 1992, Robert M. Bernero, Director, Office of Nuclear Material Safety and Safeguards, provided the docket number for the INS license to Gloria Mitchell and Linda Hammons of IOCC. This request, therefore, has been granted.

9. *Identify a Public Document Room (PDR) for INS and Its Location*

By letter dated July 21, 1992, Richard Cooper, II, Director, Division of Radiation Safety and Safeguards, NRC Region I, provided this information to Gloria Mitchell of IOCC. The location of the NRC Public Document Room for INS is at the NRC Region I office at 475 Allendale Road, King of Prussia, Pennsylvania, 19406. This request, therefore, has been granted.

10. *Describe the Monitoring Done, Who Does It, and How Frequently*

INS is required to perform radiation surveys as are necessary to comply with 10 C.F.R. Part 20 and to evaluate the extent of radiation hazards that are or may be present. 10 C.F.R. §20.201(b). The licensee must also maintain records of these surveys. 10 C.F.R. §20.401. The particular types of radiation surveys that INS performs to satisfy NRC requirements were approved by the NRC during the licensing process and are described in the July 8-9, 1992 NRC inspection report, a copy of which was sent to Gloria Mitchell of IOCC before the July 23, 1992 public meeting. In addition, extra copies of the inspection report were

made available to all attendees at the start of the public meeting. This request, therefore, has been granted.

C. I have considered Petitioners' four "demands" on behalf of neighborhood residents, and deny three demands, the fourth having been mooted by INS's voluntary actions, for the reasons stated below. Petitioners demand that:

1. Radiation Readings Outside the INS Fence Perimeters Be "0" at All Times

As noted above, the average annual background external radiation to a member of the general public is about 1 millisievert (100 millirems) per year. Therefore, it is not possible to achieve a radiation reading outside the INS fence perimeters of "0" at all times. Nonetheless, members of the general public ought not to be exposed to any more radiation above background from NRC-licensed activities than is absolutely necessary, regardless of whether the radiation level is within NRC limits. 10 C.F.R. § 20.1(c). This is the NRC's ALARA policy. In keeping with the ALARA policy, INS is reviewing the staging of transient waste and laundry shipping trucks to reduce the potential of any fence-line radiation exposure. The NRC will continue to monitor INS's ALARA program through inspection and licensing actions. Petitioners have not raised a substantial health or safety concern. Accordingly, this demand is denied.

2. "0" Nuclear Waste Byproducts Be Allowed to Enter Springfield's Water/Sewer System

NRC regulations require licensees to monitor and document their releases into the sanitary sewer. 10 C.F.R. § 20.401. Licensees are limited in terms of both the concentration and quantity of radioactive materials that can be disposed via the sanitary sewer. 10 C.F.R. § 20.303. The levels of radioactivity permitted to be put into the sanitary sewer are considered by NRC not to present any threat to the public health or safety. NRC inspectors did not find any sanitary sewer releases to date by INS in excess of NRC limits. In addition, the NRC Staff authorized INS, by license amendment dated October 8, 1992, to use a new liquid waste treatment system which should improve the Licensee's capability to filter out radioactive materials from its laundry wastewater before disposal into the sanitary sewer. Moreover, in the new 10 C.F.R. § 20.2003(a)(1), which will become effective on January 1, 1994, the type of radioactive materials that can be disposed into the sanitary sewer is clarified to further restrict the type of materials allowed in water. Current technology is not capable of filtering out all radioactive materials from wastewater before it is discharged into the sanitary

sewer. To require "0" releases would go beyond the bounds of the ALARA policy and technical feasibility. Petitioners have raised no substantial health or safety concern. Accordingly, this demand is denied.

3. *INS Stop Using Residential Streets, Specifically Nagle and Nichols Streets, to Go to and from Its Plant*

All NRC licensees who transport licensed material outside the confines of their plant or other places of use must comply with appropriate DOT requirements in 49 C.F.R. Parts 170-189. 10 C.F.R. §71.5. In the most recent inspection of INS, NRC inspectors did not find any violation of DOT requirements. Although there are no DOT restrictions on the use of residential streets, INS has voluntarily submitted a plan to IOCC to use an alternate route that does not include residential streets. IOCC has accepted INS's plan. Accordingly, this demand has been satisfied by the Licensee's voluntary actions and is moot.

4. *Under No Circumstances Should INS Be Allowed to Store Nuclear Waste on Its Property*

The NRC Staff recognizes the concerns of the local community with regard to the long-term storage of radioactive waste on a licensee's property. Should INS wish to store its radioactive waste for a longer period than what is currently allowed under its license, it must submit a license amendment application to the NRC. NRC Information Notice No. 90-09 provides guidance to fuel cycle and materials licensees on information needed in license amendment requests to authorize extended interim storage of low-level radioactive waste (LLW) at licensed operations. As stated in this information notice, NRC does not consider storage as a substitute for disposal. However, NRC will consider extended interim storage of LLW at the Licensee's site only if disposal is not a viable option and the waste can be stored safely. Information Notice No. 90-09 provides the information that the licensee must submit to the NRC in order for NRC to make a health and safety determination. For a facility such as INS to continue to operate, a certain amount of radioactive waste will necessarily be generated. Also, INS storage activities are covered by NRC's regulatory (including inspection) program for storage, as described earlier in Section III.A.2. The NRC will continue to monitor the Licensee's activities to ensure that public health and safety will not be compromised. In view of the above, and the Licensee's compliance with NRC's regulatory limits, Petitioners have raised no substantial health or safety concern. Accordingly, this demand is denied.

IV. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175-76 (1975); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that I have applied to determine whether the actions requested by Petitioners are warranted.

The Staff has carefully considered the ten "requests" and four "demands" of Petitioners. In addition, the Staff has evaluated the bases for Petitioners' requests and demands. For the reasons discussed above, there are no substantial public health and safety concerns warranting NRC action concerning the "four demands" of Petitioners. Accordingly, three of the Petitioners' demands are denied and one demand was mooted by the voluntary action of the Licensee. Eight of the Petitioners' requests were granted insofar as NRC Staff: participated in a public meeting on the evening of July 23, 1992, at a local American Legion hall and responded to the concerns of the neighborhood residents; conducted an unannounced inspection of INS on July 8 and 9, 1992; provided IOCC with copies of pertinent portions of NRC's regulations; checked adjoining Park Department land, including Dimmock Pond, for contamination; reviewed INS's waste storage program; provided IOCC a description of INS's radiation monitoring program; identified the location of the Public Document Room (PDR) for the INS license; and provided the docket number for the INS license. The Petition is denied with respect to IOCC's requests to check homes in the area for radioactive contamination and to check Loon Pond for contamination and possible illegal dumping of waste material, because Petitioners failed to raise a substantial health or safety concern. 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 the 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 7th day of May 1993.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket No. 50-220

NIAGARA MOHAWK POWER
CORPORATION
(Nine Mile Point Nuclear Station,
Unit 1)

May 9, 1993

The Director of the Office of Nuclear Reactor Regulation grants in part and denies in part a petition filed with the Nuclear Regulatory Commission (NRC) Staff by Ben L. Ridings (Petitioner) on October 27, 1992, requesting that the NRC issue an immediately effective order directing Niagara Mohawk Power Corporation (NMPC) to cease power operation of Nine Mile Point Nuclear Unit 1 (NMP-1) and place the reactor in a cold-shutdown condition. The Petitioner sought relief based on allegations that (1) NMPC is operating NMP-1 in violation of the requirements for availability of emergency core cooling system (ECCS) high-pressure coolant injection (HPCI), (2) NMPC has failed to provide the mandatory emergency backup power to the HPCI system at NMP-1, and (3) 45% of the containment isolation valves have administrative deficiencies. Petitioner also alleged that NMPC, NMPC's quality assurance group, and the NRC had reviewed these safety concerns and, contrary to any practical justification, had remained silent. Petitioner concluded that the NRC and NMPC's quality assurance organization have failed to remain independent, and therefore called for a congressional investigation into these matters.

PLANT DESIGN: GENERAL DESIGN CRITERIA

The General Design Criteria (GDC) do not apply to plants with construction permits issued prior to May 21, 1971, such as NMP-1. Such plants comply with the intent of the GDC, and do not need exemptions from the GDC; they were

evaluated on a plant-specific basis, determined to be safe, and licensed by the Commission.

PLANT DESIGN: ECCS

For a plant with an Emergency Core Cooling System comprised of redundant, safety-grade core spray and automatic depressurization systems designed to accommodate the range of loss-of-coolant accidents from the smallest up to the largest line break, a safety-grade feedwater system operating in an HPCI mode is not needed to satisfy ECCS requirements.

PRICE-ANDERSON ACT (INSURANCE)

The Price-Anderson Act requires each utility to provide \$200 million in liability insurance for public liability claims that might arise from a nuclear accident at its site. In addition, all commercial nuclear power plant licensees must participate in an industry public liability self-insurance plan which subjects each licensee to a potential liability of \$63 million for each commercial nuclear power plant that it operates for claims that might arise from a single nuclear accident at any commercial nuclear power plant licensed by the NRC. NMPC has obtained and is maintaining the appropriate amount of liability insurance.

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: Core spray system; Automatic depressurization system; Feedwater system in high-pressure coolant injection mode; Non-safety-related methods for coolant injection; Inservice testing program applied to feedwater system and containment isolation valves; Appendix J testing of containment isolation valves; Consistency and completeness of technical specifications and updated Final Safety Analysis Report regarding listing of containment isolation valves, valve stroke time requirements, and valve actuation signals; and Licensee self-assessment program — Regulatory Compliance Group, Quality First Program.

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

Introduction

On October 27, 1992, Mr. Ben L. Ridings (Petitioner) filed a Petition for consideration in accordance with 10 C.F.R. § 2.206 with the Nuclear Regulatory

Commission (NRC or Commission). The Petitioner requested that the Commission take direct review of the Petition. However, the Commission declined to take direct review and referred the Petition to the Director, Office of Nuclear Reactor Regulation (NRR), for consideration.

The Petitioner requested that the NRC issue an immediately effective order directing Niagara Mohawk Power Corporation (NMPC) to cease power operation of Nine Mile Point Nuclear Station Unit 1 (NMP-1) and place the reactor in a cold-shutdown condition. The Petition also asked the Commission to hold a public hearing before authorizing resumption of plant operation. As bases for these requests, the Petitioner asserted that (1) NMPC is operating NMP-1 in violation of the requirements for availability of an emergency core cooling system (ECCS) high-pressure coolant injection (HPCI) system including the failure to provide the mandatory emergency backup power to the HPCI system; (2) 45% of the containment isolation valves have administrative deficiencies; and (3) NMPC, NMPC's quality assurance group, and the NRC have reviewed these safety concerns and, contrary to any practical justification, have remained silent.

The Petition was placed in the Public Document Room and a copy of the Petition was sent to NMPC in a letter of November 19, 1992, for NMPC's review and comments regarding the issues raised in the Petition. In a letter of December 21, 1992, NMPC commented on the issues raised in the Petition.

In a letter of December 4, 1992, I acknowledged receipt of the Petition, informed the Petitioner that the Commission had declined to take direct review of the Petition, denied Petitioner's request for immediate action, and told the Petitioner that a final decision on the Petition would be issued within a reasonable time. My December 4, 1992 letter to the Petitioner also requested that the Petitioner give the NRC some specific information that was not fully legible or not provided in the Petition.

In response to my request for specific information, the Petitioner submitted a document titled "Information Requested by Office of Nuclear Reactor Regulation" as an attachment to a letter received by the NRC Office of the Executive Director for Operations on January 5, 1993. In his response, the Petitioner also asserted that the NMP-1 facility will not meet the leakage limits of 10 C.F.R. Part 50, Appendix J, when the leakage rates of Category A containment isolation valves are added to the leakage total for the NMP-1 containment building. (As defined by ASME Code § XI, Category A valves are those for which seat leakage is limited to a specific maximum amount in the closed position for fulfillment of their function.) In addition, the Petitioner contends that NMPC's asserted failures to comply with the requirements of 10 C.F.R. Part 50 precludes NMPC from operating NMP-1 with limited liability. A copy of the Petitioner's response was sent to NMPC in a letter of January 11, 1993, for NMPC review and comments regarding the issues raised in the response. In a letter of February

9, 1993, NMPC commented on the issues raised in the Petitioner's response. A copy of the Petitioner's response was also placed in the Public Document Room.

I have now completed my evaluation of the Petition and the Petitioner's response ("Information Requested by Office of Nuclear Reactor Regulation"). The Petitioner's request for correction of the NMP-1 Technical Specification (TS) to correctly list the NMP-1 containment isolation valves, their initiating signals, and their stroke times is granted. However, for the reasons given in the discussion below, the Petitioner's request for other actions is denied.

Discussion

The NRC Staff's evaluation of the Petitioner's assertions follows.

1. NMP-1 Does Not Meet NRC Requirements for an ECCS HPCI System

The Petitioner asserted that NMP-1 does not meet NRC requirements for an ECCS HPCI system for the following reasons:

- (a) NMP-1 fails to meet General Design Criterion (GDC) 33, "Reactor coolant makeup"; GDC 35, "Emergency core cooling"; GDC 36, "Inspection of emergency core cooling system"; and GDC 37, "Testing of emergency core cooling system," of Appendix A, "General Design Criteria for Nuclear Power Plants," to 10 C.F.R. Part 50 because NMP-1 does not have an ECCS HPCI system to provide abundant emergency core cooling in the event of a small-break loss-of-coolant accident (LOCA). Petitioner also asserted that the feedwater system operating in its HPCI mode is not an acceptable alternative system because it does not have a backup electric power supply from an onsite emergency diesel generator.
- (b) Of the forty-seven valves in the feedwater injection flow path, forty-four are not included in the NMP-1 inservice testing program for pumps and valves.

The NRC Staff's review of these issues and conclusions is based on the original design and licensing basis of NMP-1, as follows.

NMP-1 is a General Electric boiling-water reactor with a Mark I containment. After appropriate review and evaluation by the staff of the U.S. Atomic Energy Commission (AEC), predecessor regulatory agency to the NRC, the NMP-1 Construction Permit was issued to NMPC on April 21, 1965.

On March 24, 1969, the AEC staff issued a report to the Advisory Committee on Reactor Safeguards in which the AEC staff stated

We recognize that the NMP facility was not designed in accordance with the current set of the Commission's general design criteria. However, as discussed in our evaluation, the inherent features and capability provide a basis for reasonable assurance that the facility design meets the intent of the criteria.

The NMP-1 Provisional Operating License was issued to NMPC on August 22, 1969. The "Technical Supplement to Petition for Conversion from Provisional Operating License to Full-Term Operating License," dated July 1972, gave information related to the extent to which NMP-1 conforms to the GDC. The NRC did not require NMPC to design NMP-1 in accordance with the GDC because NMP-1 was evaluated on a plant-specific basis, determined to be safe, and licensed by the Commission.

The NRC Staff also notes that NMP-1 received a construction permit on April 21, 1965, a date that preceded the issuance of the GDCs in Appendix A to 10 C.F.R. Part 50. (The GDCs were issued on May 21, 1971.) In a September 18, 1992 Staff Requirements Memorandum (SRM) to the NRC Executive Director for Operations, the Commission set forth its position that the NRC Staff will not apply the GDCs to plants with construction permits issued before May 21, 1971. The SRM continued:

At the time of promulgation of Appendix A to 10 CFR Part 50, the Commission stressed that the GDC were not new requirements and were promulgated to more clearly articulate the licensing requirements and practice in effect at that time. While compliance with the intent of the GDC is important, each plant licensed before the GDC were formally adopted was evaluated on a plant specific basis, determined to be safe, and licensed by the Commission. Furthermore, current regulatory processes are sufficient to ensure that plants continue to be safe and comply with the intent of the GDC. Backfitting the GDC would provide little or no safety benefit while requiring an extensive commitment of resources. Plants with construction permits issued prior to May 21, 1971, do not need exemptions from the GDC.

Therefore, GDC 33, 35, 36, and 37 do not apply to NMP-1.

The AEC published its acceptance criteria for emergency core cooling systems for light-water power reactors on January 4, 1974 (39 Fed. Reg. 1003). This then-new regulation added Appendix K to 10 C.F.R. Part 50 which specifies analytical techniques to be employed for the evaluation of ECCS acceptability. NMP-1 was originally licensed to the Interim Acceptance Criteria of 10 C.F.R. § 50.46, which were effective while the AEC was promulgating this regulation. The AEC Safety Evaluation Report of December 27, 1974, concluded that the NMP-1 ECCS satisfies the requirements of section 50.46 and Appendix K to Part 50 as finally promulgated. That conclusion was reached without relying on or taking credit for the feedwater system operating in its HPCI mode. Moreover, NMP-1 meets the intent of the GDC by providing redundant methods for reliably cooling the reactor core (and meeting the requirements of section 50.46) under

postulated accident conditions. The provisional operating license was converted to a full-term operating license on December 26, 1974.

The following is a summary of the NRC Staff's analysis of how the NMP-1 ECCS satisfies NRC requirements. The NMP-1 ECCS includes the core spray system (CSS), consisting of two separate and independent loops, and an automatic depressurization system (ADS). The CSS and ADS are described in UFSAR §§ VII.A and V.B.5.0, respectively. Each CSS loop consists of two 100% pump combinations (i.e., two core spray pumps and two core spray topping pumps). The maximum discharge pressure of each pump combination is approximately 350 psig. The four core spray pumps and four core spray topping pumps get electric power from offsite sources or from the onsite emergency diesel generators. The logic for the ADS is powered by ac emergency power supplies, and the six electrically actuated relief valves get electric power from the dc emergency power supplies (station batteries in parallel with battery chargers).

The CSS is a safety-related system that is designed to accommodate the range of loss-of-coolant accidents from the smallest up to the largest line break. For large breaks, the CSS can maintain the peak cladding temperature within the acceptance criteria of section 50.46 without assistance from the ADS because the reactor depressurizes sufficiently fast for the CSS to achieve rated flow before the criteria of section 50.46 are exceeded. For small breaks, i.e., breaks below about 0.30 square foot, the ADS is provided and it will operate to depressurize the reactor to permit water injection by the CSS before the criteria of section 50.46 are exceeded. The criteria of section 50.46 are not exceeded, assuming a single failure that disables one of the two available CSS loops and without taking credit for operation of the feedwater system in the HPCI mode.

In addition to the CSS and ADS, NMP-1 also has and utilizes the feedwater system operating in an HPCI mode and two control rod drive pumps operating in the coolant injection mode to inject water into the reactor at reactor operating pressure in the event of a small-break LOCA. Successful operation of these systems is desirable since their proper operation may negate the need to unnecessarily actuate the ADS valves. However, the NMP-1 LOCA safety analyses do not rely on water injection by either the control rod drive pumps or the feedwater system operating in the HPCI mode to satisfy the requirements of section 50.46.

The foregoing conclusion has been reaffirmed in the General Electric Company's (GE's) LOCA analysis for each subsequent fuel cycle. Each analysis was performed to demonstrate compliance with the requirements of section 50.46 without taking credit for the feedwater system operating in the HPCI mode. The analysis for the current fuel cycle was prepared in response to the requirements of NMP-1 TS 6.9.1.f, "Reporting Requirements, Core Operating Limits Report."

Therefore, the NRC Staff concludes that the Petitioner's assertion that the NMP-1 HPCI system (feedwater system operating in the HPCI mode) must meet GDC 33, 35, 36, and 37 and that the HPCI system must be part of the ECCS and be supplied with backup electrical power from an onsite emergency diesel generator is incorrect. NMP-1 does not have and does not need an ECCS HPCI system because the existing NMP-1 ECCS satisfies the requirements of section 50.46 and Part 50, Appendix K, without reliance on the feedwater system operating in the HPCI mode.

Non-Safety-Related Methods for Coolant Injection

In addition to the CSS and ADS, NMP-1 has two control rod drive pumps which can be operated in the coolant injection mode and with a feedwater system which can be operated in an HPCI mode to inject coolant at reactor operating pressure. Each control rod drive pump is rated at 85 gpm at a head of 3760 feet. Operation of the control rod drive pumps in the coolant injection mode is described in section X.C of the UFSAR. Operability of the control rod drive pumps in the coolant injection mode is required by TS 3.1.6, "Control Rod Drive Pump Coolant Injection." Electric power for the control rod drive pumps comes from either offsite sources or from the onsite emergency diesel generators.

Operation of the feedwater system in the HPCI mode is described in section VII.I of the UFSAR. Operability of the HPCI system is required by TS 3.1.8, "High Pressure Coolant Injection." The HPCI system utilizes the two condensate storage tanks, the main condenser hotwell, two condensate pumps, condensate demineralizers, two feedwater booster pumps, feedwater heaters, two motor-driven feedwater pumps, an integrated control system, and all associated piping and valves. The HPCI system is capable of delivering 6840 gpm into the reactor vessel at reactor pressure when using two trains of feedwater pumps. The HPCI system gets electric power from normal offsite sources by either of the two 115-kV lines, but not from the onsite emergency diesel generators. NMP-1 also has the capability of automatically realigning the HPCI system to receive electric power from a dedicated generator at the Bennetts Bridge Hydro Station in the event of a loss of power to both 115-kV offsite lines. Although this hydrogenerator is not equivalent to an onsite emergency diesel generator, it is a highly reliable source of backup power.

Operation of the control rod drive pumps in the coolant injection mode and the feedwater system in the HPCI mode is described in the UFSAR. The control rod drive pumps and the HPCI system are required to be operable by the NMP-1 TS. The control rod drive pumps and the HPCI system are required to be operable by the TS to provide coolant injection without unnecessarily actuating the ADS valves. However, the NMP-1 safety analyses do not rely on operation of the control rod drive pumps in the coolant injection mode or on operation of

the feedwater system in the HPCI mode to provide emergency core cooling or to meet the acceptance criteria of section 50.46.

NMP-1 was designed and constructed, and began operation (Provisional Operating License issued on August 22, 1969), before May 21, 1971, when the GDCs were issued. The final emergency core cooling acceptance criteria of section 50.46 were satisfied by the NMP-1 ECCS (one out of two loops of the CSS operating in conjunction with the ADS) without reliance on either the control rod drive pumps operating in the coolant injection mode or the feedwater system operating in the HPCI mode. Therefore, neither the control rod drive pumps nor the feedwater system operating in the HPCI mode is required to meet section 50.46 criteria for ECCS equipment.

Applicability of IST Program to Feedwater System

With regard to the Petitioner's concern regarding the failure to include forty-four of the forty-seven valves in the feedwater injection flow path in the NMP-1 inservice testing (IST) program for pumps and valves, as discussed above, the NMP-1 safety analyses do not rely on feedwater system operation in the HPCI mode to provide emergency core cooling or to satisfy the criteria of section 50.46. Furthermore, the feedwater system is not otherwise required to be a safety-related system. For nuclear power facilities whose construction permits were issued before January 1, 1971 (as was the case for NMP-1), paragraph (f) of 10 C.F.R. § 50.55a requires the IST programs for those facilities to include, to the extent practical, IST requirements for pumps and valves classified as ASME Code Class 1, 2, and 3. However, the NMP-1 feedwater system is not a safety-related system and is not classified as an ASME Code Class 1, 2, or 3 system. Therefore, the Commission's regulations do not require these valves to be part of the NMP-1 IST program. However, the feedwater isolation valves (31-01R, 31-02R, 31-07, and 31-08) function as part of the reactor coolant system pressure boundary and are, therefore, included in the NMP-1 IST program for pumps and valves. These valves are also containment isolation valves and, as such, are included in TS Table 3.2.7.

HPCI System — Conclusion

In summary, the HPCI system is not required to meet GDC 33, 35, 36, and 37, it is not required to be part of the ECCS with backup electric power from an onsite emergency diesel generator, nor is its operation required to satisfy the emergency core cooling requirements of section 50.46. The existing ECCS satisfies the emergency core cooling requirements of section 50.46 without reliance on the non-safety-related feedwater system operating in the HPCI mode.

The Petitioner does not raise any new issues regarding the design or operation of the feedwater system operating in the HPCI mode. Accordingly, I find that the Petition contains no basis to order a shutdown of NMP-1 or to institute such a proceeding as requested by the Petitioner; therefore, this portion of the Petition is denied.

2. *Forty-Five Percent of the Containment Isolation Valves Have Administrative Deficiencies; the NMP-1 Facility Will Not Meet the Leakage Limits of 10 C.F.R. Part 50, Appendix J, When the Leakage Rates of Category A Containment Isolation Valves Are Added to the Leakage Total for the NMP-1 Containment Building*

The Petitioner asserted that 45% of the NMP-1 containment isolation valves have administrative deficiencies. Attachment 5 to the Petition listed eighteen notes in which the Petitioner identified specific deficiencies associated with the containment isolation valves. The asserted deficiencies included:

- (1) failure to list certain containment isolation valves in the TS or UFSAR tables that list the containment isolation valves;
- (2) failure to test the containment isolation valves in accordance with the requirements of 10 C.F.R. Part 50, Appendix J;
- (3) failure to test the containment isolation valves in accordance with the requirements of the NMP-1 IST program;
- (4) inconsistencies in valve stroke time requirements between the TS tables and the UFSAR;
- (5) inconsistencies in valve actuation signals as specified in the TS tables, the UFSAR tables, and on plant drawings.

Primary reactor containments are required to meet the containment leakage test requirements given in Appendix J of Part 50. The purpose of containment leakage tests performed in accordance with the requirements of Appendix J are to ensure that (1) leakage through the primary reactor containment and systems and components penetrating primary containment do not exceed allowable leakage rate values as specified in the plant's technical specifications or associated bases; and (2) periodic surveillance of reactor containment penetrations and isolation valves is performed so that proper maintenance and repairs are made during the service life of the containment, and systems and components penetrating primary containment. The maximum allowable leakage rate (L_a) for the NMP-1 primary containment is 1.5 weight percent of the contained air per 24 hours at a test pressure of 35 psig. Section III.C.3 of Appendix J further limits the combined leakage for all penetrations and valves subject to Types B and C Tests (as defined in sections II.G and II.H of Appendix J) to less than 0.60 L_a . Type C Tests are intended to measure containment isolation valve leakage rates.

Containment isolation valves are provided on lines penetrating the drywell and pressure suppression chamber to ensure integrity of the containment when required during emergency and postaccident periods. Containment isolation valves, which must be closed to ensure containment integrity immediately after an accident, are automatically controlled by the reactor protection system.

The NRC Staff has reviewed the deficiencies identified in Attachment 5 to the Petition. Each of the notes listed in Attachment 5 to the Petition and the NRC Staff's corresponding specific findings are discussed in Attachment 1 to this Director's Decision (not published). Several of the Petitioner's notes included comments regarding compliance with GDC 55, "Reactor coolant pressure boundary penetrating containment"; GDC 56, "Primary containment isolation"; and GDC 57, "Closed system isolation valves," of Appendix A to 10 C.F.R. Part 50. These comments are not individually addressed in the NRC Staff findings since, as previously noted, the NRC Staff has concluded that the GDCs of Appendix A to 10 C.F.R. Part 50 are not applicable to NMP-1.

The NMP-1 containment isolation valves are listed in two tables in the NMP-1 operating license TS and in three tables in the NMP-1 UFSAR. NMP-1 TS Table 3.2.7 and NMP-1 UFSAR Table VI-3a listing containment isolation valves are titled "Reactor Coolant System Isolation Valves." NMP-1 TS Table 3.3.4 listing containment isolation valves is titled "Primary Containment Isolation Valves Lines Entering Free Space of the Containment." NMP-1 UFSAR Table VI-3b listing containment isolation valves is titled "Primary Containment Isolation and Blocking Valves Lines Entering Free Space of the Containment." NMP-1 UFSAR Table VI-3c listing containment isolation valves is titled "Primary Containment Isolation and Blocking Valves Lines with a Closed Loop Inside Containment Vessels."

The NRC Staff had previously identified, through its inspection program, administrative deficiencies in the TS and UFSAR listings of the containment isolation valves similar to those identified in the Petition. An evaluation of NMP-1 compliance with the requirements of Appendix J to Part 50 was sent to NMPC in a letter and attached safety evaluation of May 6, 1988. The NRC Staff letter and the attached safety evaluation stated that several changes were required to the NMP-1 TS and requested that NMPC submit a license amendment to revise the NMP-1 TS.

In a letter of November 20, 1990, NMPC submitted a proposed license amendment to update the containment isolation valve tables and to bring the TS into conformance with the requirements of Part 50, Appendix J, and the NRC Staff's safety evaluation of May 6, 1988. NRC Staff and NMPC representatives discussed the contents of the November 20, 1990 submittal in a meeting held on March 5, 1991. Following this meeting, NMPC representatives requested that the NRC Staff suspend review of the November 20, 1990 submittal, since

NMPC would be revising and resubmitting the proposed TS based on comments from the March 5, 1991 meeting.

In a letter of February 7, 1992, NMPC submitted a proposed license amendment that superseded the November 20, 1990 submittal and incorporated the comments from the March 5, 1991 meeting between NMPC and NRC Staff. The NRC Staff reviewed the February 7, 1992 submittal and issued a request for additional information (RAI) to NMPC on November 30, 1992. NMPC responded to this RAI in a letter of January 29, 1993. The NRC Staff conducted an onsite inspection of the containment isolation valve issue during the period February 1-5, 1993. The purpose of the onsite inspection was to obtain more information about the containment isolation valve issue. The findings of the onsite inspection are summarized below. The detailed results of that inspection are reported in combined Inspection Report No. 50-220/93-01 and 50-410/93-01, dated March 23, 1993.

Completeness of TS and UFSAR Tables of Containment Isolation Valves

During the February 1-5, 1993 onsite inspection, the NRC Staff independently developed a list of containment isolation valves using plant drawings. In order to compare this list with TS Tables 3.2.7 and 3.3.4 of the February 7, 1992 license amendment request, the NRC Staff needed to understand the criteria used by NMPC in the development of the tables. NMPC stated that the TS tables were developed to list any containment isolation valves that received an automatic isolation signal from the reactor protection system (RPS). On the basis of a comparison using this criterion, the NRC Staff concluded that the two lists were consistent, with two exceptions. Specifically, the proposed TS tables did not include valves 63-04 and 63-05 (postaccident sampling system return isolation valves) identified on Drawing F-45089-C, Sheet 8, Revision 3, as containment isolation valves.

Following discussions with the NRC Staff, NMPC changed the criterion for listing valves as containment isolation valves in the TS tables. The revised criterion included only those isolation valves closest to the containment. On the basis of this change, the following revisions were made in a February 18, 1993 supplement to the February 7, 1992 submittal:

- Valves 63-04 and 63-05 were not included in the TS table because they do not serve as containment isolation valves.

The NRC Staff verified that, while these valves receive automatic isolation signals from the reactor protection system, they are located in a branch line outside of containment isolation valves 63.1-01 and 63.1-02 that also receive automatic isolation signals from the RPS. Valves 63.1-01 and 63.1-02 are included in TS Table 3.3.4.

- Valves 05-02 and 05-03R (emergency cooling high point vent to main steam); 39-11R, 39-12R, 39-13R, and 39-14R (emergency cooling steam line drain to main steam); and 05-01R, 05-04R, 05-11, and 05-12 (emergency cooling high point vent line), were deleted from TS Table 3.2.7.

The NRC Staff verified that containment isolation valves 39-03, 39-04, 39-05, 39-06, 39-07R, 39-08R, 39-09R, and 39-10R are located between the subject valves and the reactor coolant system and are included in TS Table 3.2.7.

- Valves 80-114 and 80-115 (containment spray discharge to waste disposal system) were deleted from TS Table 3.3.4.

The NRC Staff verified that isolation valve 80-118 provides the containment isolation function for the subject penetration. NMPC updated TS Table 3.3.4 to include valve 80-118 in a February 18, 1993 supplement to the February 7, 1992 submittal.

On the basis of this review, the NRC Staff agreed that the proposed change was appropriate, since the revision states that the valves located closest to the containment are to be considered the containment isolation valves rather than valves in branch lines that are outboard of valves closer to the containment. This revised criterion serves to minimize extensions of the containment and is, thereby, consistent with the intent of GDC 55, 56, and 57, even though the GDCs are not applicable to NMP-1.

The NRC Staff also determined that the proposed TS tables did not include six normally closed manual isolation valves. NMPC stated that these valves had not originally been included because they were normally closed, manually operated valves that do not receive an automatic isolation signal from the RPS. However, NMPC committed to include four of these manual valves (72-479, 72-480, 114-114, and 114-116) in TS Table 3.3.4 so that all containment isolation valves will be listed in the TS tables. NMPC included these valves in TS Table 3.3.4 in the February 18, 1993 supplement to the February 7, 1992 submittal. The other two valves (110-165 and 110-166) were not included in the TS tables since this line has been capped and the penetration will be tested as part of Type B penetration testing. Therefore, these two valves are no longer classified as containment isolation valves.

In addition, the NRC Staff independently reviewed the technical data in the TS tables. With the exception of three items described below, all entries were independently verified to be correct.

- (1) On proposed TS page 148, the bracket indicating that the listed initiating signal was indicated as being applicable to all four penetrations (drywell supply, suppression chamber supply, drywell return, and suppression chamber return) of the H₂/O₂ #12 sampling system was incorrectly drawn. The bracket erroneously indicated that the ini-

tiating signal was applicable to the self-actuating check valves when, in fact, the initiating signal was applicable only to the dc solenoid valves in the drywell supply and suppression chamber supply lines.

- (2) On proposed TS page 148, note (1) was incorrectly applied to four places on the #11 H₂/O₂ sampling entries (drywell supply, suppression chamber supply, drywell return, and suppression chamber return). Note (1) states: "These valves do not have to be vented during the Type 'A' test. However, Type C leakage from these valves is added to the Type A test results." Since these lines are required to be vented during Type A tests, this note should not apply to these valves.
- (3) On proposed TS page 148a, note (1) was also incorrectly applied to the containment atmosphere monitoring supply line entry since this line is required to be vented during Type A tests.

These administrative deficiencies were discussed with NMPC and were corrected in the February 18, 1993 supplement to the February 7, 1992 submittal. The NRC Staff concluded that all other technical data entries in the TS tables were correct.

The NRC Staff verified consistency between the pertinent elementary RPS wiring drawings and the valve isolation actuation signals listed in the February 7, 1992 license amendment request. The NRC Staff reviewed a sample of recent test data to determine if these valves responded properly to their actuation signals. Specifically, test results from the most recent performance of Procedure N1-ST-R2, "Loss of Coolant Accident and Emergency Diesel Generator Simulated Automatic Initiation Test" (July 9-11, 1992), were reviewed. This test inserted low-low reactor water level and high drywell pressure signals (the most common actuation signals for containment isolation valves) and verified that the specified isolation valves closed. Review of the test results revealed that all valves listed in the procedure responded properly.

The NRC Staff also verified that NMPC had similar test procedures in place for all containment isolation valves and that these procedures were being used to verify proper isolation valve response to other actuation signals.

Containment Leakage Rate Testing

Appendix J of Part 50 establishes the NRC requirements for containment leakage testing. Appendix J requires performance of three types of containment leakage tests (Type A Tests, Type B Tests, and Type C Tests). These three types of tests are explained in sections II.F, II.G, and II.H of Appendix J.

Type A Tests are tests intended to measure the primary reactor containment overall integrated leakage rate (1) after the containment has been completed and is ready for operation and (2) at periodic intervals thereafter.

Type B Tests are tests intended to detect local leaks and to measure leakage across each pressure-containing or leakage-limiting boundary for the following primary reactor containment penetrations:

- (1) containment penetrations whose design incorporates resilient seals, gaskets, or sealant compounds, piping penetrations fitted with expansion bellows, and electrical penetrations fitted with flexible metal seal assemblies;
- (2) airlock door seals, including door operating mechanism penetrations which are part of the containment pressure boundary;
- (3) doors with resilient seals or gaskets, except for seal-welded doors; and
- (4) components other than those listed in 1, 2, or 3 (above) that must meet the acceptance criteria in section III.B.3 of Appendix J (combined leakage rate for all penetrations and valves subject to Type B and C Tests shall be less than 0.60 La).

Type C Tests are tests intended to measure containment isolation valve leakage rates.

Leakage Rate Testing of Containment Isolation Valves

The NRC Staff reviewed the most recent local leakage rate test (LLRT) results associated with Procedure N1-TSP-201-550, "Local Leak Rate Test — Summary (Type B and C Tests)." This procedure is used to track the combined leakage rate for all penetrations subject to Type B and C Tests following a Type A Test to verify that the measured combined leakage rate is less than the Appendix J allowable leakage rate of 0.60 La and that the leakage rate limits of TS 4.3.3.f(1)(b)(i) and (ii) and 4.3.3.f(1)(c) are not exceeded. The NRC Staff determined that the leakage rate totals were consistent with the requirements of Appendix J and the TS as of January 29, 1993. The NRC Staff verified that the leakage rates from all primary containment isolation valves requiring Type C testing were included. Independent calculations of the total Type C leakage rates, based on the test data in the procedure, confirmed the accuracy of the value determined by NMPC.

Step 9.8 of the procedure indicated that the leakage rate limit of TS 4.3.3.f(1)(b)(i) applies to the sum of the leakage rates from testable penetrations and the isolation valves listed in the TS tables. Six normally closed manual isolation valves (72-479, 72-480, 114-114, 114-116, 110-165, and 110-166) were not included in the TS tables in the February 7, 1992 license amendment request. However, leakage rate values for these valves were properly included in the calculation for combined Type C leakage rates. This inconsistency was corrected by adding four of these manual isolation valves to TS Table 3.3.4 in the February 18, 1993 supplement to the February 7, 1992 submittal. The other

two valves were not included in the TS tables and will be deleted from Type C testing since they are no longer classified as containment isolation valves; this penetration has been capped and will be tested as part of Type B testing.

The NRC Staff reviewed Drawing F-45089-C, Sheets 8 through 10, and verified that test procedures have been identified for all of the containment isolation valves requiring Type C testing per Appendix J of Part 50.

Leakage Rate Testing of Water-Sealed Containment Isolation Valves

Section III.C.3 of Appendix J to Part 50 states that leakage from containment isolation valves that are sealed with fluid (water, for NMP-1) from a seal system may be excluded when determining the combined leakage rate for all penetrations and valves subject to Types B and C Tests, provided that

- Such valves have been demonstrated to have fluid leakage rates that do not exceed those specified in the TS or associated bases, and
- The installed isolation valve seal-water system fluid inventory is sufficient to ensure the sealing function for at least 30 days at a pressure of 1.10 Pa.

The February 7, 1992 license amendment request, which was supplemented by the February 18, 1993 submittal and approved by License Amendment No. 140 issued on April 12, 1993, specifies in the TS that the maximum allowable water leakage rate from water-sealed valves shall be limited to 0.5 gpm per nominal inch of valve diameter up to a maximum of 5 gpm. These water leakage rate limits are consistent with the requirements of paragraph 4.2.2.3(e) of the ASME Operations and Maintenance Standards Part 10 (OM-10) of the 1989 Edition of section XI of the ASME Code, which was incorporated by reference in paragraph (b) of 10 C.F.R. § 50.55a, effective September 8, 1992 (57 Fed. Reg. 34,666).

The NRC Staff reviewed the most recent leakage rate test results of valves designated in the TS as being subject to water-seal testing and determined that all such valves met their applicable leak test requirements. The NRC Staff concluded that, based on the provisions of section III.C.3 of Appendix J, the leakage rates from these water-sealed valves may be properly excluded when determining the combined leakage rate for all penetrations and valves subject to Types B and C Tests.

The NRC Staff reviewed note (6) of TS Table 3.3.4 in the February 7, 1992 proposed license amendment. Note (6) states that the following valves have a water-seal capability and that no Appendix J or IST leakage rate testing is required:

- Valves 63.1-01, 63.1-02, 05-05, and 05-07 are properly excluded from Appendix J and IST leakage rate testing since these valves have no atmospheric leak path.

- Valves 80-15, 80-16, 80-17, 80-18, 80-19, 80-35, 80-36, 80-37, 80-38, 80-39, 80-65, 80-66, 80-67, and 80-68 have adequate water seals that did not require water leak rate tests according to the NRC Staff's safety evaluation of May 6, 1988.

Therefore, the NRC Staff concluded that these water-sealed valves are properly excluded from Appendix J and IST leakage rate testing.

Inservice Testing of Containment Isolation Valves

The NRC Staff reviewed Revision 3 of the Second 10-Year Inservice Testing Program Plan for NMP-1 and verified that the plan included the independently developed list of containment isolation valves and appropriate exercising and stroke-time test requirements (for power-operated valves). The NRC Staff reviewed the following two surveillance tests which implement the IST requirements:

- N1-ST-04, "Reactor Coolant System Isolation Valves Operability Test," performed November 16-18, 1992;
- N1-ST-05, "Primary Containment Isolation Valves Operability Test," performed on November 7, 1992.

This review revealed that all the isolation valves listed in the procedures had been exercised and, if required, stroke-time tested. The procedures specified stroke time limits and the measured results were consistent with the IST program and, if specified, with the TS limits. On the basis of these reviews of IST data, the NRC Staff concluded that all containment isolation valves listed in the procedures have been properly exercised and stroke-time tested as part of the Licensee's ongoing IST program.

The NRC Staff also verified that test procedures are in place for all required IST testing of containment isolation valves.

UFSAR Update

In its January 29, 1993 letter, NMPC committed to update the UFSAR and correct deficiencies therein by June 30, 1993. The NRC Staff will verify, as part of its routine reviews of UFSAR updates, that UFSAR Tables VI-3a, VI-3b, and VI-3c have been corrected.

Containment Isolation Valves — Conclusion

In summary, the NRC Staff concluded that (1) the containment isolation valve deficiencies identified by the Petitioner were administrative in nature; (2) notwithstanding the administrative deficiencies, the operability of the contain-

ment isolation valves was being maintained in accordance with the requirements of the TS and IST program and the valves were being properly tested in accordance with all applicable regulatory requirements; (3) the leakage rates of water-sealed valves were properly excluded when determining the combined leakage rate for all penetrations and valves subject to Types B and C Tests; (4) the Licensee has committed to update the UFSAR by June 30, 1993, to correct the identified deficiencies; and (5) License Amendment No. 140, issued on April 12, 1993, to the Nine Mile Point Nuclear Station Unit 1 Facility Operating License DPR-63 corrected the administrative deficiencies related to the containment isolation valve listings in the TS. Therefore, to the extent that the Petitioner sought correction of the TS tables to correctly list the NMP-1 containment isolation valves, their initiating signals, and their stroke times, this relief has been granted. As stated above, NMPC has committed to correct the UFSAR tables by June 30, 1993. Action to require earlier change to the UFSAR tables is not needed in light of the NRC Staff's confirmation of valve operability during an onsite inspection conducted February 1-5, 1993. Petitioner's request for other actions based on containment isolation valve deficiencies is denied.

3. *NMPC, NMPC's Quality Assurance Group, and the NRC Have Reviewed These Safety Concerns and, Contrary to Any Practical Justification, Have Remained Silent*

The Petitioner was employed at NMP-1 as a contractor from November 13, 1989, to January 18, 1990. During that employment, the Petitioner expressed several concerns to NMPC regarding the design and operation of the NMP-1 feedwater system in its HPCI mode and what he believed were various inconsistencies in the listings of the containment isolation valves in the TS, in the UFSAR, and on the plant drawings.

The NRC Staff has reviewed NMPC records regarding the processing of the Petitioner's concerns by the NMPC Regulatory Compliance Group and by the NMPC Quality First Program. A summary of NMPC's consideration of the Petitioner's concerns follows.

Review of Concerns by NMPC Regulatory Compliance Group

The Petitioner initially submitted his concerns regarding the design and operation of the feedwater system in its HPCI mode and what he believed were various inconsistencies in the listings of the containment isolation valves in the TS, in the UFSAR, and on the plant drawings to the NMPC Regulatory Compliance Group during January 1990. In a letter dated July 31, 1990, to NMPC, the Petitioner subsequently also submitted these concerns to the NMPC

Quality First Program (Q1P). The NRC Staff review of NMPC records disclosed that the concerns the Petitioner submitted to the NMPC Regulatory Compliance Group and to the NMPC Q1P covered the same topics he submitted to the NRC in his 10 C.F.R. § 2.206 Petition dated October 27, 1992, and evaluated herein by the NRC Staff.

NMPC evaluated the Petitioner's concerns regarding the feedwater system operating in the HPCI mode during February 1990 and determined that the NMP-1 accident analyses do not rely on the HPCI system for mitigation of any accidents. NMPC's conclusion regarding operation of the feedwater system in the HPCI mode was documented in an internal memorandum of February 28, 1990, and was consistent with the conclusion reached by the NRC Staff in this Director's Decision. After reviewing NMPC records, the NRC Staff concluded that NMPC had properly reviewed the Petitioner's concerns regarding the HPCI system.

The NRC Staff reviewed NMPC records which showed that, in January 1990, the Petitioner communicated to the NMPC Regulatory Compliance Group what he believed were various inconsistencies in the listings of containment isolation valves in the TS, in the UFSAR, and on the plant drawings. The Petitioner also expressed concerns about the performance of IST and leak tests according to the requirements of Appendix J. NMPC reviewed the Petitioner's concerns between January and July 1990. NMPC determined that some of the Petitioner's concerns had been previously reviewed and found acceptable in NRC Staff-approved safety evaluations and that some of his concerns had been resolved by issuance of NRC Staff-approved scheduler exemptions. NMPC also referred the Petitioner's list of concerns to the NMPC Licensing Group to ensure that applicable concerns would be addressed by including them in the license amendment then in preparation with the purpose of resolving deficiencies identified in the NRC Staff safety evaluation of May 6, 1988. After reviewing NMPC records, the NRC Staff concluded that the NMPC Regulatory Compliance Group had processed the Petitioner's concerns in an appropriate manner.

Review of Concerns by NMPC Quality First Program

The Petition stated that following a perceived period of inaction by NMPC, the Petitioner notified the NMPC Q1P of his concerns regarding (1) operation of the feedwater system in the HPCI mode and (2) the containment isolation valves.

The Q1P is an NMPC program designed to give its employees a confidential forum for reporting potential problems that affect quality or safety on the job. Q1P is directed by the NMPC Quality Assurance Department and applies to the receipt, control, investigation, resolution, feedback to the originator, and reports

to NMPC management of any concerns identified. Q1P is not governed by NRC regulatory requirements, except as related to protected activities by employees. Although NMPC employees are encouraged to report potential problems to the NMPC Q1P during their employment and upon termination of employment, NMPC representatives stated that NMPC personnel had searched the Q1P files and found no record of the Petitioner contacting the Q1P prior to receipt of a letter from the Petitioner, dated July 31, 1990. NMPC informed the NRC Staff that Q1P records were not considered plant records unless a valid quality concern was determined to exist. Therefore, it is possible that no records exist because previous contacts may have been made but had been treated as having no basis.

The NRC Staff reviewed a copy of the letter NMPC received from the Petitioner, dated July 31, 1990, in which concerns regarding operation of the feedwater system in the HPCI mode and the containment isolation valves were outlined. These concerns repeated the ones made previously by the Petitioner to the NMPC Regulatory Compliance Group.

The NRC NMP-1 resident inspectors were informed by a Q1P representative on August 6, 1990, that the July 31, 1990 letter had been received. According to records reviewed by the NRC Staff, NMPC had reviewed the Petitioner's concerns between August and November 1990. These records showed that NMPC closed out these concerns on November 28, 1990, after contacting the Petitioner and obtaining his agreement for closure. NMPC again determined that the concerns regarding operation of the feedwater system in the HPCI mode had no basis since the NMP-1 safety analyses do not rely on operation of the feedwater system in the HPCI mode to satisfy the emergency core cooling requirements of section 50.46. The NMPC Licensing Group received the concerns regarding the containment isolation valves for consideration in the proposed license amendment development. The NRC Staff concluded that the NMPC Q1P organization processed the Petitioner's concerns appropriately.

As noted in the discussion of operation of the feedwater system in the HPCI mode, information regarding the design features of the NMP-1 feedwater system, including operation in the HPCI mode, has been readily available in the public records, and the NRC Staff was well aware of this information over the life of the NMP-1 plant. The NRC Staff concerns about NMP-1 compliance with the requirements of Part 50, Appendix J, have been a matter of public record since May 6, 1988, when the NRC Staff issued its letter with its attached safety evaluation. As noted above, the NRC Staff concluded that NMPC's Regulatory Compliance Group and Q1P representatives handled the Petitioner's concerns in an appropriate manner. Therefore, I have concluded that the Petitioner's assertion that NMPC, NMPC's quality assurance group, and the NRC have known of these safety concerns and have remained silent has

no basis. Accordingly, the Petitioner's request for enforcement action against NMP-1 on this part of the Petition is denied.

Although I have denied this portion of the Petition, a copy of the Petition has been referred to the NRC Office of the Inspector General for whatever review and action the Inspector General deems appropriate.

Insurance

The Petition asserts that NMPC is not insured to operate NMP-1 in the manner described in the Petition. In order to operate a commercial nuclear power plant within the United States with "limited liability," an NRC licensee must have and maintain financial protection (e.g., liability insurance). The Price-Anderson Act requires NMPC to provide \$200 million in liability insurance for public liability claims that might arise from a nuclear accident at the NMP-1 site. In addition, NMPC (along with all other commercial nuclear power plant licensees) must participate in an industry self-insurance plan which subjects it to a potential liability of \$63 million for each commercial nuclear power plant that it operates, for public liability claims that might arise from a single nuclear accident at NMP-1 *or any other commercial nuclear power plant licensed by the NRC*. This liability insurance cannot be purchased from the nuclear liability insurance pools unless the pools are satisfied that a licensee is operating its commercial nuclear power plant in accordance with NRC regulations. Contrary to the assertions in the Petition, NMPC has obtained and is maintaining the appropriate amount of liability insurance.

Conclusion

The Petitioner requested that the NRC issue an immediately effective order directing NMPC to cease power operation of NMP-1 and to place the reactor in a cold-shutdown condition pending full compliance with NRC regulations. The Petition also asked the Commission to hold a public hearing before authorizing resumption of plant operation.

On April 12, 1993, the NRC Staff issued License Amendment No. 140 to the NMP-1 Facility Operating License DRP-63. This license amendment corrects the NMP-1 TS tables that list the containment isolation valves, their initiating signals, and their stroke times. To the extent the Petitioner sought such corrections, this relief has been granted. Further, NMPC has committed to update the UFSAR, by June 30, 1993, to list the containment isolation valves correctly. The NRC Staff will verify this commitment as part of its routine reviews of UFSAR updates. The NRC Staff views these changes as administrative corrections since the NRC Staff has concluded that all relevant

valves were appropriately tested. With regard to the other requests made by the Petitioner, an immediate shutdown of NMP-1 and the institution of a public hearing before authorizing resumption of plant operation, as requested by the Petitioner, is appropriate only where substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). For the reasons discussed above, I find no basis for taking such actions. Rather, on the basis of the review efforts by the NRC Staff, I conclude that no substantial health and safety issues have been raised by the Petitioner. Accordingly, the Petitioner's remaining requests for action pursuant to section 2.206 are denied.

A copy of this Decision will be placed in the Commission's Public Document Room, Gelman Building, 2120 L Street, NW, Washington, DC 20555, and at the Local Public Document Room, Reference and Documents Department, Penfield Library, State University of New York, Oswego, NY 13126.

A copy of this Decision will also be filed with the Secretary for the Commission's review as stated in 10 C.F.R. § 2.206(c) of the Commission's regulations.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 9th day of May 1993.

[The attachments have been omitted from this publication but can be found in the NRC Public Document Room, 2120 L Street, NW, Washington, DC.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Dr. Thomas E. Murley, Director

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY, <i>et al.</i> (Comanche Peak Steam Electric Station, Units 1 and 2)	Docket Nos. 50-445 50-446
CAROLINA POWER AND LIGHT COMPANY (Brunswick Steam Electric Plant, Units 1 and 2)	Docket Nos. 50-324 50-325
CAROLINA POWER AND LIGHT COMPANY, <i>et al.</i> (Shearon Harris Nuclear Power Plant)	Docket No. 50-400
DETROIT EDISON COMPANY, <i>et al.</i> (Enrico Fermi Atomic Power Plant, Unit 2)	Docket No. 50-341
WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS Nuclear Project No. 2)	Docket No. 50-397
GULF STATES UTILITIES COMPANY (River Bend Station, Unit 1)	Docket No. 50-458

ARKANSAS POWER AND LIGHT COMPANY (Arkansas Nuclear Two)	Docket No. 50-368
DUQUESNE LIGHT COMPANY, <i>et al.</i> (Beaver Valley Power Station, Units 1 and 2)	Docket Nos. 50-334 50-412
COMMONWEALTH EDISON COMPANY (Braldwood Nuclear Power Station, Units 1 and 2)	Docket Nos. 50-456 50-457
TENNESSEE VALLEY AUTHORITY (Browns Ferry Nuclear Plant, Units 1, 2, and 3)	Docket Nos. 50-259 50-260 50-296
COMMONWEALTH EDISON COMPANY (Byron Nuclear Power Station, Units 1 and 2)	Docket Nos. 50-454 50-455
UNION ELECTRIC COMPANY (Callaway Plant, Unit 1)	Docket No. 50-483
ILLINOIS POWER COMPANY, <i>et al.</i> (Clinton Power Station, Unit 1)	Docket No. 50-461
INDIANA AND MICHIGAN POWER COMPANY (Donald C. Cook Nuclear Plant, Units 1 and 2)	Docket Nos. 50-315 50-316
NEBRASKA PUBLIC POWER DISTRICT (Cooper Station, Unit 1)	Docket No. 50-298
FLORIDA POWER CORPORATION (Crystal River Unit No. 3 Nuclear Generating Plant)	Docket No. 50-302
TOLEDO EDISON COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	Docket No. 50-346

PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2)	Docket Nos. 50-275 50-323
IOWA ELECTRIC LIGHT AND POWER COMPANY (Duane Arnold Energy Center)	Docket No. 50-331
ENTERGY OPERATIONS, INC. (Grand Gulf Nuclear Station, Unit 1)	Docket No. 50-416
CONNECTICUT YANKEE ATOMIC POWER COMPANY (Haddam Neck Plant)	Docket No. 50-213
GEORGIA POWER COMPANY (Edwin I. Hatch Nuclear Power Plant, Units 1 and 2)	Docket Nos. 50-321 50-366
CONSOLIDATED EDISON COMPANY OF NEW YORK (Indian Point, Unit 2)	Docket No. 50-247
COMMONWEALTH EDISON COMPANY (La Salle County Station, Units 1 and 2)	Docket Nos. 50-373 50-374
PHILADELPHIA ELECTRIC COMPANY (Llmerick Generating Station, Units 1 and 2)	Docket Nos. 50-352 50-353
MAINE YANKEE ATOMIC POWER COMPANY (Maine Yankee Atomic Power Station)	Docket No. 50-309
DUKE POWER COMPANY, et al. (William B. McGuire Nuclear Station, Units 1 and 2)	Docket Nos. 50-369 50-370

NORTHEAST NUCLEAR ENERGY COMPANY (Millstone, Units 1, 2, and 3)	Docket Nos. 50-245 50-336 50-423
NORTHERN STATES POWER COMPANY (Monticello Nuclear Generating Plant, Unit 1)	Docket No. 50-263
NIAGARA MOHAWK POWER CORPORATION (Nine Mile Point Nuclear Station, Units 1 and 2)	Docket Nos. 50-220 50-410
VIRGINIA ELECTRIC AND POWER COMPANY (North Anna Power Station, Units 1 and 2)	Docket Nos. 50-338 50-339
GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Oyster Creek Nuclear Generating Station)	Docket No. 50-219
CONSUMERS POWER COMPANY (Pallsades Nuclear Power Facility)	Docket No. 50-255
ARIZONA PUBLIC SERVICE COMPANY, <i>et al.</i> (Palo Verde Nuclear Generating Station, Units 1, 2, and 3)	Docket Nos. 50-528 50-529 50-530
PHILADELPHIA ELECTRIC COMPANY, <i>et al.</i> (Peach Bottom Atomic Power Station, Units 2 and 3)	Docket Nos. 50-277 50-278
CLEVELAND ELECTRIC ILLUMINATING COMPANY, <i>et al.</i> (Perry Nuclear Power Plant, Unit 1)	Docket No. 50-440

NORTHERN STATES POWER COMPANY (Prairie Island Nuclear Generating Plant, Units 1 and 2)	Docket Nos. 50-282 50-306
SOUTHERN CALIFORNIA EDISON COMPANY, et al. (San Onofre Nuclear Generating Station, Units 2 and 3)	Docket Nos. 50-361 50-362
TENNESSEE VALLEY AUTHORITY (Sequoyah Nuclear Plant, Units 1 and 2)	Docket Nos. 50-327 50-328
HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2)	Docket Nos. 50-498 50-499
FLORIDA POWER AND LIGHT COMPANY (St. Lucie Nuclear Power Plant, Units 1 and 2)	Docket Nos. 50-335 50-389
SOUTH CAROLINA ELECTRIC AND GAS COMPANY, et al. (Virgil C. Summer Nuclear Station, Unit 1)	Docket No. 50-395
VIRGINIA ELECTRIC AND POWER COMPANY (Surry Nuclear Power Station, Units 1 and 2)	Docket Nos. 50-280 50-281
PENNSYLVANIA POWER AND LIGHT COMPANY (Susquehanna Steam Electric Station, Units 1 and 2)	Docket Nos. 50-387 50-388

GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 1)	Docket No. 50-289
PORTLAND GENERAL ELECTRIC COMPANY, et al. (Trojan Nuclear Plant, Unit 1)	Docket No. 50-344
FLORIDA POWER AND LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4)	Docket Nos. 50-250 50-251
VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station)	Docket No. 50-271
GEORGIA POWER COMPANY, et al. (Vogtle Electric Generating Station, Units 1 and 2)	Docket Nos. 50-424 50-425
ENTERGY OPERATIONS, INC. (Waterford Steam Electric Station, Unit 3)	Docket No. 50-382
TENNESSEE VALLEY AUTHORITY (Watts Bar, Units 1 and 2)	Docket Nos. 50-390 50-391
WOLF CREEK NUCLEAR OPERATING CORPORATION (Wolf Creek Generating Station, Unit 1)	Docket No. 50-482
COMMONWEALTH EDISON COMPANY (Zion Station, Units 1 and 2)	Docket Nos. 50-295 50-304 May 23, 1993

On February 1, 1993, the Director of the Office of Nuclear Reactor Regulation issued a Partial Director's Decision Under 10 C.F.R. §2.206 (DD-93-3, 37

NRC 113 (1993)) responding to a petition dated July 21, 1992, submitted by the Nuclear Information and Resource Service and others (Petitioners) which requested that the U.S. Nuclear Regulatory Commission (NRC) take enforcement actions in light of Thermo-Lag fire barrier test failures. Fire barriers are generally required at operating commercial nuclear power plants by the NRC's regulations or facility license conditions. Petitioners submitted additional filings on August 12, 1992, September 3, 1992, and December 15, 1992. All issues raised by Petitioners except those raised in the December 15, 1992 supplement were addressed in DD-93-3. The remaining issues were to be addressed in a Final Director's Decision.

New concerns regarding Thermo-Lag material raised in the December 15, 1992 filing can be summarized as the existence and creation of voids in Thermo-Lag material, staples in the material, and possible erroneous information given to utilities concerning the weight of the material. Petitioners also restated assertions made in their earlier filings regarding alleged inconsistencies in tests conducted to determine the toxicity of Thermo-lag material when it is burned.

Petitioners requested that the NRC immediately suspend the operating licenses and construction permits of nuclear facilities that use Thermo-Lag or, alternatively, that the NRC order each licensee to remove and replace its Thermo-Lag during its next refueling outage or before beginning operation.

On May 23, 1993, the Director issued a Final Director's Decision Under 10 C.F.R. § 2.206 which addressed Petitioners' remaining issues and denied the relief sought by the Petitioners. The Director concluded that no substantial health and safety issues had been raised by the Petitioners.

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

I. INTRODUCTION

By a petition dated July 21, 1992, the Nuclear Information and Resource Service (NIRS), Alliance for Affordable Energy, and Citizens Organized to Protect Our Parish (the Petitioners), requested that the U.S. Nuclear Regulatory Commission (NRC) take enforcement action regarding the Gulf States Utilities' (sometimes referred to as GSU) River Bend Station, demanding that its operating license be suspended until GSU can demonstrate, through independent testing, that it meets the NRC's fire protection regulations (Appendix R to Part 50 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. Part 50)). In addition, the Petitioners demanded that the NRC Staff immediately issue Generic Letter (GL) 92-XX, the draft of which was circulated for public comment on February 11, 1992, and close any nuclear power plant for which the Licensee cannot

prove, through independent testing, that it meets the NRC's fire protection regulations until it does meet them. By an addendum to the petition dated August 12, 1992, the Petitioners requested immediate action related to the Comanche Peak, Shearon Harris, Fermi-2, Ginna, WNP-2, and Robinson nuclear facilities. Joining in filing the addendum were a number of other organizations: Citizens for Fair Utility Regulation, Don't Waste New York, Citizens Against Radioactive Dumping, Coalition for Alternatives to Shearon Harris, Conservation Council of North Carolina, Safe Energy Coalition of Michigan, Steve Langdon, Essex County Citizens Against Fermi-2, Natural Guard, and Northwest Environmental Advocates.¹ The petition and addendum were submitted under the provisions of 10 C.F.R. § 2.206 of the NRC's regulations. Notice of receipt of these filings was published in the *Federal Register* on August 26, 1992 (57 Fed. Reg. 38,702).

In their filings the Petitioners alleged a number of deficiencies concerning Thermo-Lag 330-1 material (Thermo-Lag), manufactured by Thermal Science, Inc. (TSI), including failure of Thermo-Lag fire barriers during 1-hour and 3-hour fire endurance tests, deficiencies in procedures for installation, nonconformance with NRC regulations for quality assurance and qualification tests, the combustibility of the material, ampacity miscalculations, lack of seismic tests, the failure to pass hose stream tests, the high toxicity of substances emitted from the burning material, and the declaration by at least one utility, GSU, that the fire barrier was inoperable at its River Bend Station. The Petitioners also alleged that a fire watch cannot substitute for an effective fire barrier indefinitely and that the NRC Staff had not adequately analyzed the use of fire watches.

On the basis of these allegations, the Petitioners requested emergency enforcement action to immediately suspend the operating licenses for River Bend Station, Comanche Peak Unit 1, Shearon Harris, Fermi-2, Ginna, WNP-2, and Robinson, pending a demonstration that these facilities meet NRC fire protection requirements. The Petitioners also requested that the NRC issue (1) a stop-work order regarding the installation of Thermo-Lag at Comanche Peak Unit 2 and (2) a generic letter by September 5, 1992, that would require licensees to submit information to the NRC demonstrating compliance with fire protection requirements. Where facilities could not demonstrate compliance, the Petitioners requested immediate suspension of the operating licenses for such facilities until such time as compliance with NRC fire protection requirements could be shown. The Petitioners' submittals were referred to the Office of Nuclear Reactor Regulation for preparation of a response.

In a letter of August 19, 1992, the Director, Office of Nuclear Reactor Regulation, denied the Petitioners' request for emergency relief. The NRC Staff concluded that the immediate suspension of the operating licenses for River

¹ Reference to Petitioners hereinafter shall also include these organizations.

Bend Station, Comanche Peak Unit 1, Shearon Harris, Fermi-2, WNP-2, Ginna, and Robinson was not warranted. The NRC Staff also determined that a stop-work order or the suspension of the construction permit for Comanche Peak Unit 2 was not warranted and concluded that the generic letter would be issued in accordance with the NRC Staff's action plan regarding Thermo-Lag issues and that it was not necessary to accelerate the issuance of the generic letter.

On September 3, 1992, the Petitioners filed an "appeal" with the Commission in response to the NRC Staff's denial of August 19, 1992, of the request for emergency enforcement action. In the "appeal," the Petitioners removed the Ginna and Robinson plants from their request and added Brunswick Units 1 and 2. The Petitioners again alleged that Thermo-Lag is an inadequate fire barrier, that compensatory measures do not substitute for regulatory compliance, and that fire watches are inadequate substitutes for fire barriers.

In a letter of November 9, 1992, the Secretary of the Commission informed the Petitioners that their "appeal" request had been referred to the NRC Staff for appropriate consideration in conjunction with its review of the Petitioners' earlier filings.

The NRC Staff evaluated the issues raised in the above-referenced Petitioners' submittals and issued a Partial Director's Decision on February 1, 1993 (58 Fed. Reg. 7595). The Partial Director's Decision concluded that the Petitioners had not presented information sufficient to constitute a basis to

- issue a stop-work order suspending installation of Thermo-Lag in, or to suspend the construction permit for, Comanche Peak Unit 2;
- immediately suspend the operating licenses for Comanche Peak Unit 1, Shearon Harris, Fermi-2, WNP-2, Brunswick Units 1 and 2, and River Bend Station;
- have issued GL 92-XX before September 5, 1992.

In a letter of December 15, 1992,² NIRS filed another petition pursuant to section 2.206 raising additional issues regarding Thermo-Lag. This filing alleges that it contains new information regarding deficiencies with Thermo-Lag material, restates the concerns raised by NIRS and others in earlier submittals, and requests that the NRC immediately suspend the operating licenses and construction permits of nuclear facilities that use Thermo-Lag as a fire barrier material or, alternatively, that the NRC order each licensee to remove and replace its Thermo-Lag during its next refueling outage or before beginning operation. Notice of receipt of the December 15, 1992 petition was published in the *Federal Register* on February 16, 1993 (58 Fed. Reg. 8637).

The NRC Staff reviewed the December 15, 1992 petition for any new issues and information that were not addressed in the Partial Director's Decision of

² It is presumed that NIRS is still acting on behalf of all the Petitioners.

February 1, 1993. New concerns regarding Thermo-Lag material that have been raised and were not previously addressed can be summarized as the existence of and creation of voids, staples in the material, and possible erroneous information given to utilities concerning the weight of the material.

In a letter of February 4, 1993, I denied the December 15, 1992 request for emergency relief. The NRC Staff concluded that immediately suspending the operating licenses or construction permits of all nuclear power plants that use Thermo-Lag fire barrier material until the Thermo-Lag is removed or replaced was not warranted. I also stated that the NRC would treat the December 15, 1992 submittal as a supplement to the earlier filings by the Petitioners and would address the new concerns in a Final Director's Decision to be issued within a reasonable time.

Upon consideration of the new concerns and information given in the December 15, 1992 petition, I have determined that the Petitioners have not presented sufficient information that would constitute a basis to immediately suspend the operating licenses or construction permits of all nuclear power plants that use Thermo-Lag fire barrier material, until the Thermo-Lag is removed or replaced, or alternatively, to order each licensee to remove and replace its Thermo-Lag during its next refueling outage, or before beginning operation.

II. DISCUSSION

The specific issues raised by the Petitioners in the petition of December 15, 1992, are summarized below, together with the NRC Staff's evaluation.³

A. Voids and Staples

The Petitioners state that they recently learned that Thermo-Lag contains voids, which the Petitioners characterize as "in layman's terms, areas where there is essentially a front and back to the material but no or little middle." According to the Petitioners, where voids exist, the material could burn through very rapidly, negating the material's effectiveness as a fire barrier. The Petitioners also state that they believe some voids may be created by "bending" Thermo-Lag material around electrical conduits, and that it is common practice to bend the material, causing it to crack, and then to staple the material together and cover it with another layer of Thermo-Lag. The Petitioners contend not only that this practice creates voids, but also that the staples may serve as a "heat sink" causing combustion and "speedy failure" of the material.

³A general historical summary of concerns and issues relating to Thermo-Lag is contained in the Partial Director's Decision of February 1, 1993, and will not be repeated here.

1. Analysis of Concerns

The concerns raised by the Petitioners appear to be based at least in part on reports of observations made during cutting operations at Comanche Peak Steam Electric Station (CPSES). The existence of delaminations was discovered at Comanche Peak Unit 2. A "delamination" refers to the separation of the component layers of a Thermo-Lag panel with a resulting air gap between the component layers. This phenomenon was the subject of communications between the NRC and TSI⁴ referred to by the Petitioners in their December 15, 1992 petition. Although the Petitioners do not specifically question delaminations, the NRC Staff nonetheless has analyzed the condition and believes that there is reasonable assurance that the existence of a delamination not detected during fabrication or installation would not have a significant effect on the performance of properly installed Thermo-Lag material. The Staff bases its judgment on the fact that the process through which Thermo-Lag material performs its function (partial intumescence and char layer formation) and which has been observed by the NRC Staff on many occasions, results in a significant expansion of the material as the char layer forms and any air gap between layers would be essentially eliminated. More importantly, the total amount of material specified to be installed is still present.

With respect to "voids" as characterized by the Petitioners, i.e., an area of a Thermo-Lag panel "where there is essentially a front and back" to the panel but "no or little middle," the NRC Staff has inspected Thermo-Lag materials purchased for its own tests and Thermo-Lag used in other tests and has found that small air pockets entrapped inside Thermo-Lag material are inherent in all prefabricated panels and preshaped conduit sections, not simply those found at Comanche Peak. The "voids" observed by the NRC Staff ranged in size from less than 1/8-inch diameter to about the size and shape of a lima bean. They are formed during the course of manufacturing; they do not result from bending the material to form conduit sections.⁵ On the basis of the successful fire tests

⁴ In communications between the NRC and TSI, the air gap between delaminated component layers of Thermo-Lag was referred to at one point as a "void." However, contrary to the Petitioners' use of the term "void," an air gap associated with a delamination does not indicate that the existing total amount of material is less than what was intended.

⁵ While the process of forming conduit sections at the factory from bending Thermo-Lag panels does not produce voids of this nature, bending can produce longitudinal cracks or fissures along the outer layer of the sections. The manufacturer's procedures require that cracks in conduit sections be repaired by force filling the cracks with Thermo-Lag 330-1 Trowel Grade material until the repair are complete. The crack formation and repair are part of the normal manufacturing process for preformed Thermo-Lag conduit sections and is an inherent condition for conduit sections. To the extent the Petitioners suggest that installation of Thermo-Lag includes "bending" of material around electrical conduits, resulting in cracks, this is not a recommended installation practice. Rather, preformed Thermo-Lag conduit sections are used to enclose conduits at the site. Also, to the extent that the Petitioners suggest that an overlay of Thermo-Lag material may create a void in the nature of an air gap associated with a delamination, such an air gap, as discussed above, is not unacceptable. In addition, overlay configurations have been the subject of successful fire acceptance tests.

performed for Comanche Peak 2, where test specimens consisted of hundreds of square feet of prefabricated Thermo-Lag materials that were not known to be any different from other Thermo-Lag materials with respect to inherent void characteristics, the NRC Staff believes that these voids will not cause premature failure of properly designed and installed fire barriers.⁶

The assertion that the use of staples may serve as a "heat sink" causing combustion and "speedy failure" of the material is not supported by the Petitioners. It is true that the discretionary use of staples to repair cracks and enhance the structural integrity of conduit sections has been an ongoing practice in the manufacture of 1-hour and 3-hour Thermo-Lag prefabricated items. Furthermore, Texas Utilities Electric (TU) installation procedure QCP-CV-107, "Application of Fire Barrier and Fire Proofing Material," at CPSES, specifies the use of 1/2-inch, Arrow or Bostich T-50 staples to secure stress skin to prefabricated panels. Contrary to the Petitioners' assertion, however, there is no evidence from TU tests of Thermo-Lag material containing staples that would suggest that the existence of staples could cause Thermo-Lag to fail to perform properly. In addition, before being tested at TU, test specimen panel seams were through-stitched with stainless steel wire. The amount of metal available as a "heat sink" in such stitching is greater than in the staples used in practice; however, test results did not indicate any adverse effects from the stitching.

Therefore, on the basis of the information provided above, the NRC Staff concludes that the Petitioners' assertions that voids will negate Thermo-Lag material's effectiveness as a fire barrier and that staples may serve as a "heat sink" causing combustion and "speedy failure" are without foundation.

2. Compensatory Measures

The information required by Generic Letter 92-08, "Thermo-Lag 330-1 Fire Barriers," issued December 17, 1992, will show whether Thermo-Lag fire barriers have been properly qualified and installed, and are representative of tested configurations.⁷ Without such confirmation, Thermo-Lag fire barriers

⁶It should be noted that the existence of voids in fire barrier materials is not unique to Thermo-Lag. Other materials used to build fire barriers, such as concrete blocks, bricks, and ceiling tiles may also contain voids.

⁷Generic Letter 92-08 required licensees using Thermo-Lag 330-1 barriers to state whether or not (1) the licensee has qualified the Thermo-Lag 330-1 fire barriers by conducting fire endurance tests in accordance with the NRC's requirements and guidance or licensing commitments; (2) the fire barrier configurations installed in the plant represent the materials, workmanship, and methods of assembly, dimensions, and configurations of the qualification test assembly configurations; and (3) the licensee has evaluated any deviations from the tested configurations. These informational requirements apply to all 1-hour and 3-hour Thermo-Lag 330-1 materials and barrier systems assembled by any method, such as by assembling preformed panels and conduit shapes, as well as spray, trowel, and brush-on application assembly. Should a licensee answer any of the three items (above) in the negative, the licensee is to describe all corrective actions needed and include a schedule for completing such actions and shall describe all compensatory measures taken in accordance with their technical specifications or administrative controls.

are to be considered inoperable, a status that requires licensees to implement compensatory measures until operability of the barrier can be demonstrated. In their responses to NRC Bulletin 92-01, Supplement 1, "Failure of Thermo-Lag 330-1 Fire Barrier System to Perform Its Specified Fire Endurance Function," all licensees of operating plants named in the petition of December 15, 1992, have affirmed that compensatory measures are in place consistent with their technical specifications or license conditions for an inoperable fire barrier. The NRC Staff has evaluated compensatory measures, such as fire watches, and has found that they continue to adequately protect the public health and safety when barriers are inoperable. Therefore, the NRC Staff has concluded that there is no immediate threat to the public health and safety, given that compensatory measures have, in fact, been instituted. Accordingly, the suspension of the operating licenses for those reactors listed in the December 15, 1992 petition is not warranted. Licensees will be permitted to cease compensatory measures when they have affirmed that fire barriers have been properly qualified and installed and there is reasonable assurance that such barriers will perform their intended function.

B. Installed Weight of Thermo-Lag

The Petitioners state that TSI, the manufacturer of Thermo-Lag, may have given utilities erroneous information about the weight of Thermo-Lag. Specifically, the Petitioners state that the "as installed actual weight" of Thermo-Lag may vary from 92.5 pounds per cubic foot (lb/ft^3) to as much as 140 lb/ft^3 , rather than the 78.5 lb/ft^3 dry density figure given by TSI. The Petitioners contend that this difference is important because there often is very little room for error in calculating the weight loads for cable trays and conduits supported by hangars and other supports.

The Petitioners give no explanation of how they derived their density figures; the Petitioners' figures appear to be based, however, on the use of nominal thicknesses⁸ of preformed Thermo-Lag sections to calculate the volume of a section or panel. The use of nominal-thickness dimensions instead of the actual-thickness dimensions, which may in fact be larger, may result in a calculated density that is greater than the actual density. This would occur, for example, when a panel is manufactured and finished slightly thicker than the nominal thickness, and is then weighed. If such weight is divided by the assumed volume derived from nominal dimensions, the resulting calculated density will be greater than the density determined if the weight was divided by the actual greater volume.

⁸"Nominal thickness" as used here means the minimum finished thickness listed by the manufacturer for a standard panel or section.

In any event, the Staff reviewed the adequacy of the weight and density values that TSI provides in its product literature. In discussions with the manufacturer, the NRC Staff learned that all Thermo-Lag products, which are manufactured in standard sizes, are weighed before shipment to ensure that the weight of the product falls within the allowed limits of TSI's quality control procedures.⁹ Products that fall outside specified weight tolerances are rejected.

The NRC Staff was also informed by TSI that the density of Thermo-Lag products is approximately 78 lb/ft³ with some normal manufacturing tolerance and that there has not been any change in the density of Thermo-Lag during the time the products have been manufactured. Upon curing, there is no difference in density among Thermo-Lag products. Based on a review of TSI quality control procedures, the Staff does not consider the manufacturing density variations to be significant.

As detailed later in this discussion, the NRC Staff conducted an inspection of TSI's quality assurance program in December 1991, by reviewing selected criteria from 10 C.F.R. Part 50, Appendix B, including handling, control, identification, storage and shipping of materials, control of measuring and test equipment, and control of purchased materials, and concluded that the program was adequate. Thus there is assurance that the TSI weight and density specifications are being met.

In summary, the NRC Staff has determined that the actual weights of Thermo-Lag panels and sections are controlled, and has verified that an adequate quality assurance program exists. Accordingly, there is reasonable assurance that accurate weight and density specifications are being provided by the manufacturer to licensees. Therefore, in view of the foregoing, the NRC Staff has determined that the suspension of the operating licenses or construction permits for those reactors listed in the December 15, 1992 petition is not warranted based on the Petitioners' allegation of TSI providing erroneous information about the weight or density of Thermo-Lag.

C. Inconsistencies in Toxicity Test Results

In the December 15, 1992 petition, the Petitioners restate assertions made in prior filings that tests conducted by Southwest Research Institute (SwRI) indicate that burning Thermo-Lag can release highly toxic gases, specifically, hydrogen cyanide and carbon monoxide. The Petitioners assert that if a fire were to occur, fire watch personnel could be overcome by these toxic gases and

⁹ The Staff verified the existence of a weight control specification by reviewing TSI quality control procedures. In addition, an NRC inspection of TSI in December 1991 examined records that indicated that TSI had a longstanding practice of weighing Thermo-Lag products. Furthermore, Texas Utilities Electric has verified that Thermo-Lag products it has received were within specified weight tolerances, by actually weighing such products at receipt inspections.

be unable to perform their functions; further, their health and safety could be subject to "inappropriate risk." The Petitioners argue that "[i]f the staff's tests have shown that the burning of Thermo-Lag does not produce toxic fumes," there are limited possible scenarios to explain the differences in the results of the SwRI and Staff's tests that raise concerns sufficiently troublesome to immediately shut plants down. In particular, the Petitioners are concerned that inconsistent test results may reflect poor quality assurance, or may reflect a change in Thermo-Lag's composition that has not been tested.

Prior to conducting its own tests, the NRC Staff reviewed the SwRI test report referenced by the Petitioners. The Staff review resulted in a number of unanswered questions regarding the development of the SwRI test results, specifically, questions regarding the protocol, test procedures, and quality controls used in the conduct of the test. Rather than expending resources to resolve these unanswered questions, and to independently address issues concerning the toxicity of Thermo-Lag, in part raised by the SwRI test report, the NRC Staff decided to conduct an independent toxicological evaluation of the combustion products of Thermo-Lag fire barrier material. The NRC, in conjunction with the National Institute of Standards and Technology (NIST), determined that the products of combustion of Thermo-Lag do include hydrogen cyanide and carbon monoxide; however, Thermo-Lag combustion products also were determined to be comparable in toxicity to the burning of Douglas fir lumber or flexible polyurethane foam, and no more toxic than the products of combustion of other materials, such as cable insulation, installed in the plant.¹⁰ Thus, when circumstances require taking into account toxic releases during a plant fire, the presence of Thermo-Lag would introduce no unique considerations.

Because the NRC Staff's tests clearly showed the release of some toxic substances, to the extent that the Petitioners are assuming the SwRI and NRC Staff's test results are inconsistent because they erroneously believe "the staff's tests have shown that the burning of Thermo-Lag does not produce toxic fumes," their assumption is incorrect. Moreover, a comparison of the SwRI test results to the NRC Staff's test results is inappropriate where it has not been established that the two tests were conducted in an identical fashion, and thus such a comparison provides little or no basis to conclude that there is a quality assurance problem or that there have been changes in the composition of Thermo-Lag.¹¹ Indeed, other information suggests that the Petitioners' two hypotheses are incorrect.

¹⁰ The results of the NIST tests were provided in NIST Report of Test FR 3987, "Toxicological Evaluation of the Combustion Products from a Thermal Barrier Material Decomposed Under Flaming and Nonflaming Conditions," dated April 29, 1992.

¹¹ In fact, the NRC Staff's comparison of the SwRI test report accompanying NIRS's September 3, 1992 filing, with the NIST test report indicates that there were at least several test parameters or conditions that differed between the two tests.

First, regarding the possibility of changes in composition, six Thermo-Lag samples of different form and vintage were submitted to NIST and, at the request of the NRC Staff, the samples were subjected to a detailed chemical analysis by NIST to characterize the chemical composition of the materials. The results of the analysis revealed the same elemental profile and similar composition and behavior for all six samples, which provides some indication that there have been no changes in the formulation of Thermo-Lag over the years. Second, questions related to TSI's quality assurance (QA) program have been addressed in an NRC Staff inspection of TSI's QA program on December 16-20, 1991. The results are provided in NRC Inspection Report 99901226/91-01. The NRC inspectors verified the implementation of the QA program by reviewing selected criteria from 10 C.F.R. Part 50, Appendix B, including nonconforming materials; identification and control of materials; handling, storage, and shipping of materials; control of measuring and test equipment; and control of purchased materials. On the basis of the observations, the NRC inspectors concluded that TSI's QA program was adequate with the exception of two nonconformances (which were subsequently corrected) that would have had no bearing on the uniformity of the composition of Thermo-Lag. Thus, in the NRC Staff's view, there are no bases for the Petitioners' concerns that there may be poor quality assurance or there may have been a change in Thermo-Lag's composition that has not been tested.

On the basis of the NIST test results, the NRC Staff concluded in the Partial Director's Decision that the thermal decomposition of Thermo-Lag under actual fire conditions would not introduce concerns regarding either the composition or quantity of toxic materials produced, above and beyond the usual concerns regarding the toxicity of a fire that burns typical in-plant combustibles. Accordingly, the NRC Staff noted that the toxicity levels evaluated did not suggest that precautions above and beyond those that would normally be taken during an in-plant fire should be considered. Thus, the NRC Staff concluded that fire-watch personnel can perform their functions of finding incipient fires and notifying appropriate response personnel without sacrificing personal safety. Because the National Institute of Standards and Technology is the recognized authority in establishing the standards by which to conduct and in conducting toxicological tests, the NRC Staff has the highest confidence in the results of the NIST tests. Thus, the NRC Staff continues to believe that fire-watch personnel can perform their functions safely.

III. CONCLUSION

The Petitioners request that the NRC order the immediate suspension of the operating licenses or construction permits of all nuclear power plants that

use Thermo-Lag material as a fire barrier, until the Thermo-Lag is removed and replaced. Alternatively, the Petitioners request that the NRC order each reactor licensee to remove and replace its Thermo-Lag during its next refueling outage, or before beginning operation. These requests presumably are based on the allegations discussed above, in addition to those addressed in the Partial Director's Decision, where I found that no substantial health and safety issues had been raised.

With regard to the requests made by the Petitioners, the institution of proceedings pursuant to 10 C.F.R. § 2.206 to shut down certain facilities using Thermo-Lag fire barrier material is appropriate only where substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). With respect to the issues discussed in this Final Director's Decision, I find no basis for taking such actions. Rather, on the basis of the review efforts by the NRC Staff, I conclude that no substantial health and safety issues have been raised by the Petitioners. Accordingly, the Petitioners' requests for action pursuant to section 2.206 are denied.

A copy of this Decision will be placed in the Commission's Public Document Room, Gelman Building, 2120 L Street, NW, Washington, DC 20555, and in the Local Public Document Room for the named facilities.

A copy of this Decision will also be filed with the Secretary of the Commission for the Commission's review as provided in 10 C.F.R. § 2.206(c) of the Commission's regulations.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 23d day of May 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

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

**ONCOLOGY SERVICES
CORPORATION**

June 4, 1993

The Commission grants Oncology Services Corporation's petition for review of LBP-93-6, 37 NRC 172 (1993), which granted in part the Nuclear Regulatory Commission Staff's motion for delay of this enforcement proceeding. However, because it was likely that the stay would expire before the Commission could provide any relief, if warranted, to the Licensee on the petition, the Commission took the unusual step of directing the Licensing Board to refer to the Commission any ruling granting an additional stay of the proceeding.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Review of an interlocutory order will be granted if one of the criteria in 10 C.F.R. §2.786(g) is satisfied.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Satisfaction of one of the criteria in section 2.786(b)(4) is not mandatory in order to obtain interlocutory review. The Commission may consider the criteria

listed in section 2.786(b)(4) when reviewing interlocutory matters on the merits, but when determining whether to undertake such review, the standards in section 2.786(g) control the Commission's determination.

MEMORANDUM AND ORDER

The Commission has before it a petition for interlocutory review filed by Oncology Services Corporation (OSC or Licensee) pursuant to 10 C.F.R. § 2.786. The Commission has also received OSC's supplement to the petition for review, which was filed on June 3, 1993. In its petition, OSC requests that the Commission review the Atomic Safety and Licensing Board's Memorandum and Order, LBP-93-6, which granted in part the Nuclear Regulatory Commission (NRC) Staff's motion for delay of this enforcement proceeding through June 23, 1993. 37 NRC 172 (1993). The proceeding stems from OSC's request for a hearing on the NRC Staff's January 20, 1993 order that suspended, on an immediately effective basis, OSC's license to use sealed sources containing iridium-192 for human brachytherapy treatments at specified OSC facilities in Pennsylvania. Order Suspending License (Effective Immediately), 58 Fed. Reg. 6825 (Feb. 2, 1993). For the reasons stated below, the Commission grants interlocutory review, but postpones further consideration of this matter until after the Licensing Board resolves the Staff's "Motion for Additional Delay of Proceeding" that was filed on June 3, 1993.

In its petition for interlocutory review, OSC claims that the Commission should review LBP-93-6 because the Licensing Board (1) erroneously considered the effect of this proceeding on the Commonwealth of Pennsylvania's criminal investigation as a factor in determining good cause for the stay and (2) incorrectly applied due process standards in determining whether to grant the stay of 120 days. OSC avers that the order threatens it with immediate and serious irreparable impact that cannot be alleviated through a petition for review of a final decision and that the order affects the proceeding in a pervasive and unusual manner. Therefore, OSC argues, the Commission should take interlocutory review to vacate or reverse the portions of the Licensing Board's order that are contrary to law and policy. The Staff opposes OSC's petition for review. In its supplement, OSC argues that in view of the United States Supreme Court's recent decision in *United States Department of Justice v. Landano*, 61 U.S.L.W. 4485 (U.S. May 25, 1993), no basis exists for continuing the stay.

Questions certified or rulings referred to the Commission by a presiding officer will be reviewed if they meet either of the standards in 10 C.F.R. § 2.786(g). Even in the absence of the presiding officer's referral or certification, the Commission will consider an aggrieved party's petition for review of an

interlocutory order if one of the standards in section 2.786(g) is met. See *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992). Although language in our decision in *Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992), can be read to the contrary,¹ satisfaction of one of the criteria in section 2.786(b)(4) is not mandatory in order to obtain interlocutory review. The Commission may consider the criteria listed in section 2.786(b)(4) when reviewing interlocutory matters on the merits, but when determining whether to undertake such review the standards in section 2.786(g) control our determination.

Under the circumstances here, we grant review pursuant to the first standard in section 2.786(g). For purposes of determining whether interlocutory review is appropriate, when a licensee is subject to an immediately effective suspension order, a licensee's due process interest in a prompt hearing is threatened by a 120-day stay of the proceeding. As a practical matter, review of the final Licensing Board order in this instance would provide no relief from the type of harm that conceivably could be suffered as a result of a 120-day stay imposed by an allegedly erroneous Licensing Board order.

We have taken a hard look at the matters raised by OSC's petition and supplement. Summary reversal of the Licensing Board's order is not warranted. The Licensing Board appears to have used the appropriate legal standards and has provided a reasoned analysis to support its order. Typically our next step would be to set a schedule for filing of briefs by the parties. See 10 C.F.R. §2.786(d). However, because the stay expires by its own terms on June 23, 1993, it is unlikely that after receiving briefs we could render a decision and provide any relief, if warranted, to the Licensee on its petition. Nevertheless, we recognize that some of these issues may be raised again in the context of Staff's motion for an additional delay, filed June 3, 1993. Therefore, we take the unusual step of directing the Licensing Board, if it grants Staff's motion for an additional delay, to refer that ruling to the Commission. The Commission will

¹ The holding in CLI-92-9 is limited to a determination that the NRC Staff did not meet the standards in section 2.786(g) in seeking review of a Licensing Board's interlocutory order.

then set a schedule for the filing of briefs. We will consider whether to vacate LBP-93-6 on grounds of mootness at that time.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of June 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

**Docket No. 30-31758-EA
(Byproduct Materials License
No. 34-26201-01)**

RANDALL C. OREM, D.O.

June 4, 1993

The Commission reviews a settlement agreement between the Licensee and the NRC Staff, which was approved by the Licensing Board in LBP-92-18, 36 NRC 93 (1992). Although the Commission expresses reservations with respect to aspects of the agreement, the Commission determines to permit the agreement to take effect. The Commission also re-emphasizes the importance of applicants' and licensees' obligation to submit complete and accurate information and reiterates the Commission's longstanding interpretation of material information under the Atomic Energy Act. Chairman Selin and Commissioner Curtiss disapprove the order in part.

ATOMIC ENERGY ACT: DUTIES OF LICENSEES/APPLICANTS

The Commission is dependent on licensees and applicants for accurate information to assist the Commission in carrying out its regulatory responsibilities and expects nothing less than full candor from licensees and applicants.

ATOMIC ENERGY ACT: MATERIAL FALSE STATEMENT

Under section 186a of the Atomic Energy Act and the Commission's implementing regulations, the materiality of information "depends upon whether information has a natural tendency or capability to influence a reasonable agency expert." *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), *aff'd*, 571 F.2d 1289 (4th Cir. 1978).

ATOMIC ENERGY ACT: MATERIAL FALSE STATEMENT

The Commission need not rely on a false statement in order for it to be material, nor must the statement in fact induce the agency to grant an application.

ATOMIC ENERGY ACT: MATERIAL FALSE STATEMENT

The nature (e.g., physical attributes and capabilities) and the status of an applicant's proposed facility are material matters in a decision whether to grant a radioactive byproduct materials license.

ATOMIC ENERGY ACT: DUTIES OF LICENSEES/APPLICANTS

Even if an applicant turns to a consultant to help prepare a license application, the applicant remains responsible for the contents of the application.

RULES OF PRACTICE: SETTLEMENT OF CONTESTED PROCEEDINGS

Despite its reservations about aspects of a settlement agreement, the Commission does not find the agreement to be, on balance, against the public interest.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Commission has under consideration the Atomic Safety and Licensing Board's approval of a settlement agreement between the Nuclear Regulatory Commission (NRC) Staff and Dr. Randall C. Orem. *See* LBP-92-18, 36 NRC 93 (1992). The Commission previously issued an order in which we asked the NRC Staff to provide additional information regarding its reasons for entering into a particular term of the agreement. CLI-92-15, 36 NRC 251, 252 (1992).

The Staff has responded to our order with an affidavit explaining the Staff's position. The Commission has also received a "Board Notification" from the Staff, docketed on March 29, 1993, that transmits the publicly available portions of a report of the NRC's Office of Investigations on Dr. Orem and other individuals.¹ Upon consideration of these filings and the remaining record of the proceeding, the Commission has determined that it will not overturn the settlement agreement. The Commission is providing, however, guidance on certain matters of regulatory policy.

II. BACKGROUND

The proceeding was initiated upon Dr. Orem's request for a hearing on an order to revoke Dr. Orem's byproduct materials license. *See* 56 Fed. Reg. 63,986 (Dec. 6, 1991). The order was signed by Hugh L. Thompson, Jr., the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support, on behalf of the NRC Staff. The Staff issued the order after discovering about a year after granting the license that the facility described in Dr. Orem's license application as the place of possession and use of radioactive material had not been constructed and that the facility's address was that of his private residence. 56 Fed. Reg. 63,986 (Dec. 6, 1991). Dr. Orem had indicated in the facility drawing attached to his license application that the facility was "being finished at this time." The Staff revoked the license on the basis that, had the NRC known that the proposed place of use of the byproduct material was a private residence without adequate provisions for the safe receipt, handling, and use of licensed material, a license would not have been issued. *Id.* at 63,987.

Dr. Orem requested a hearing on the order, but he and the Staff ultimately submitted a joint motion for approval of a settlement agreement, which the Licensing Board granted in LBP-92-18. Under the agreement, Dr. Orem admitted no wrongdoing or violation of federal statutes and regulations. 36 NRC at 96. Dr. Orem has not contested the basic facts that the listed facility location was his personal residence and that the facility described in his application did not exist.

According to the settlement agreement, the NRC Staff has decided not to take any further action against Dr. Orem. In addition, paragraph 4 of the agreement contains the following stipulation:

¹ Board Notification 93-05, Memorandum from R.M. Bernero, Director, Office of Nuclear Material Safety and Safeguards (NMSS), dated March 17, 1993. Pursuant to the Commission's Statement of Policy, Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984), we directed the Staff on April 20, 1993, to provide the nonpublic portions of the report for our *in camera* review. Although we have examined this material, we have not relied on it nor would it materially change our decision.

The NRC staff agrees that none of the facts associated with this proceeding will be held against him in the event Dr. Orem submits another application for a specific license on his own behalf or a license amendment application is submitted to name Dr. Orem as an authorized user. If such application is in compliance with the Atomic Energy Act and the Commission's regulations, such application shall be granted.

LBP-92-18, 36 NRC at 96. In order to understand the Staff's bases for entering the settlement, particularly in view of Staff's position and supporting documentation in the record that Dr. Orem had submitted false statements in his application, we asked the Staff in CLI-92-15 to explain the "Staff's reasons for agreeing not to pursue any further action against Dr. Orem, including its agreement not to hold the facts associated with this proceeding against Dr. Orem in the event that he submits another application for a license." 36 NRC at 252.

III. STAFF'S BASES FOR SETTLEMENT

The Staff replied to the Commission's inquiry with an affidavit from Robert M. Bernero, the Director of NMSS. Mr. Bernero's affidavit affirms that the Staff initially sought revocation of the license because Dr. Orem's application contained false information concerning the status of his facility. The affidavit emphasizes that the "key point on which the Order was based was that the proposed facility did not exist."² Mr. Bernero states that at some unidentified time after the order was issued, the materiality of the erroneous information was questioned. Although NMSS had originally concurred in the order, NMSS later concluded that a license could have been issued to Dr. Orem without the facility being complete. Affidavit at 3-4.

NMSS interprets 10 C.F.R. § 30.33(a)(2), which provides that a license will be issued if the applicant's "proposed equipment and facilities are adequate to protect health and minimize danger to life or property," as not requiring a completed facility before a license is granted as long as the licensee does not receive material prior to having "everything in place as specified in the application." Affidavit at 4. An NMSS policy directive attached to the affidavit states that the Staff encourages applicants to delay completion of facilities and acquisition of equipment until after the Staff's review is completed. See NMSS Policy and Guidance Directive FC 92-04; Issuance of New Licenses for Material

² Affidavit at 3. Mr. Bernero quotes a letter dated December 19, 1991, from James Lieberman, Director of the Office of Enforcement, to Dr. Orem that states --

The Order that was issued to revoke your license was not issued on the question of whether you would be using material at a later time or at a residence. The Order was issued because you indicated in the application that the facility described in the application was "being finished at this time" when in fact it was learned through further investigation that the facility was never started and, further, the location that you indicated in the application was a location at which there is no capability to receive and use licensed material.

Use Programs (Sept. 14, 1992) (Exhibit 2 to the Bernero Affidavit). The purpose of this interpretation is to prevent premature expenditure of resources by license applicants before NRC's safety review of an application is completed.

Mr. Bernero acknowledges that a residual question regarding Dr. Orem's integrity remained because of his indication that the facility was "being finished at this time," but NMSS could not conclude that "Dr. Orem deliberately made inaccurate statements in the application to deceive the staff in order to obtain a license he would not otherwise obtain." Affidavit at 4-5. Staff saw no undue risk in allowing Dr. Orem to return to licensed activities, because any future application would be subject to the general guidance memorandum attached to the affidavit. The guidance memorandum provides general instructions to NMSS reviewers in handling applications for which facilities are not complete and prescribes limiting license conditions to prohibit acquisition of material prior to completion of facilities.

IV. MATERIAL INFORMATION UNDER THE ATOMIC ENERGY ACT

Although we have chosen not to disturb the settlement agreement reached between Dr. Orem and the Staff, the Commission is taking this opportunity to underscore the importance that we place on the completeness and accuracy of information submitted by applicants and licensees and to reiterate our longstanding interpretation of the concept of "material" information under the Atomic Energy Act. We cannot overstate the importance of a licensee's or an applicant's duty to provide the Commission with accurate information. As we noted in commenting on the obligation of reactor licensees,

In order to fulfill its regulatory obligations, NRC is dependent upon all of its licensees for accurate and timely information. Since licensees are directly in control of plant design, construction, operation, and maintenance, they are the first line of defense to ensure the safety of the public. NRC's role is one primarily of review and audit of licensee activities, recognizing that limited resources preclude 100 percent inspection.

Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 418 (1978). These same principles are applicable to the regulation of radioactive materials licensees, perhaps even more so given the thousands of materials licenses for which the NRC is responsible. We expect no lesser standard of honesty from materials users: "Nothing less than candor is sufficient." *Hamlin Testing Laboratories, Inc., 2 AEC 423, 428 (1964), aff'd, 357 F.2d 632 (6th Cir. 1966).*

The Commission addressed the concept of materiality of statements and omissions of information in our decision in *Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976)*

("VEPCO"), *aff'd*, 571 F.2d 1289 (4th Cir. 1978). In *VEPCO*, the Commission interpreted the term "material false statement" as used in section 186a of the Atomic Energy Act, 42 U.S.C. § 2236(a). Although the Commission has since promulgated regulations as a primary means of enforcing the Commission's expectations regarding the accuracy of information submitted by applicants and licensees, these regulations do not diminish the basic concept of materiality established in *VEPCO*.³ Under *VEPCO*, a statement is material if "a reasonable staff member should consider the information in question in doing his job"; i.e., "[m]ateriality depends upon whether information has a natural tendency or capability to influence a reasonable agency expert." 4 NRC at 486, 491. This test is a common one for materiality and is comparable to the standard applied under the federal statute, 18 U.S.C. § 1001, that provides criminal sanctions for false statements made to agencies of the United States. See *United States v. Lueben*, 838 F.2d 751, 754 (5th Cir. 1988); *Weinstock v. United States*, 231 F.2d 699, 701-02 & n.6 (D.C. Cir. 1956); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-324, 3 NRC 347, 358, *aff'd*, CLI-76-22, 4 NRC 480, 486 (1976). Moreover, the NRC need not rely on a false statement in order for it to be material. Whether a statement would have, in fact, induced the agency to grant an application has no bearing on materiality.⁴

Applying the standard to the circumstances before us, we conclude that the nature and status of the applicant's proposed facility are certainly material matters in a decision whether to grant a radioactive byproduct materials license. The physical attributes and capabilities of the facility have an obvious relationship to the NRC's licensing decision. Commission regulations governing issuance of licenses for possession and use of radioactive byproduct material require a determination that the applicant's proposed facility is "adequate to protect health and minimize danger to life or property" before a license may be issued. 10 C.F.R. § 30.33(a)(2).

The status of the facility is also material. An applicant's statements about the status of a proposed facility may reveal or lead to questions concerning the technical qualifications of the applicant. Such statements may also affect the treatment given to a license application, because neither the Atomic Energy Act nor the Commission's regulations indicate that the NRC must issue a materials

³ See, e.g., 10 C.F.R. § 30.9 (1992); Completeness and Accuracy of Information, Final Rule and Statement of Policy, 52 Fed. Reg. 49,362, 49,366 (Dec. 31, 1987).

⁴ See, e.g., *Lueben*, 838 F.2d at 754-55 (whether false statements on loan application and related documents actually affected approval of government loan is not an issue under 18 U.S.C. § 1001); *United States v. Lopez*, 728 F.2d 1359, 1362 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984) (although false priority dates on immigration applications would not have led to erroneous granting of applications, submission of falsehoods influenced agency's treatment of applications and was thereby material); *United States v. McIntosh*, 655 F.2d 80, 82-83 (5th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (reliance on false statements in documents related to federally guaranteed loan unnecessary for statements to be material).

license to a person who is unlikely to be able to construct the required facilities or to undertake licensed activities for an extended period of time.

The NMSS guidance attached to Mr. Bernero's affidavit supports this analysis. According to the guidance, the Staff reviewer should ascertain the status of the proposed facility and, if the applicant does not intend to complete the facility and begin using material within a year, the reviewer should request that the applicant explain why a license is being sought at that time. NMSS Directive FC 92-04, Enclosure 2, at 1. Even though license issuance is not precluded by the fact that facility construction has not begun, information about the status of the facility certainly has a capability of influencing the agency's review.

V. COMMISSION DECISION ON THE SETTLEMENT AGREEMENT

The Commission has determined not to overturn the settlement agreement reached between the Staff and Dr. Orem and approved by the Licensing Board. However, we had concerns about some aspects of the agreement. Although the Staff had represented to the Licensing Board that a determination of willful misconduct or wrongdoing by Dr. Orem was beyond the scope of the instant proceeding,⁵ the Staff stated in the agreement, for reasons not readily apparent, that it would forgo any further action against Dr. Orem and stipulated that the facts associated with the proceeding would not be held against him in any future licensing action. The agreement contains no acknowledgment by Dr. Orem of his obligation to ensure that information he provides to the NRC is accurate and complete.

Despite our reservations, we do not find the agreement on balance to be contrary to the public interest. Inasmuch as the original order sought termination of a license granted to a person who did not have appropriate facilities for the possession and use of radioactive material, this result is achieved under the agreement without further litigation. We note that the false statement appears to have been added gratuitously to the application by Dr. Orem's consultant. Although Dr. Orem's reliance on a consultant does not excuse him from responsibility for the contents of the application, the circumstances surrounding the submission of the false statement do not appear so severe as to warrant Dr. Orem's disqualification from future licensing and, hence, disapproval of the settlement agreement. Once the license was issued, Dr. Orem apparently conducted himself consistently with the terms of the license and our regulations. He seems to have recognized that he could not procure licensed material without having completed the facility described in his application. Considering all these

⁵ See generally Telephone Conference Transcript at 8-11 (Jan. 29, 1992) (remarks of Staff counsel).

circumstances, we have decided to accede to the settlement agreement between the NRC Staff and Dr. Orem.⁶

We caution Dr. Orem, however, that we expect him, as well as all applicants and licensees, to adhere to the standards of accuracy and completeness of information under our regulations in any future dealings with the Commission. Even if the applicant turns to a consultant to help prepare the license application, as was the case here, the applicant remains responsible for the contents of the application.

In conclusion, we are permitting the settlement agreement approved by the Licensing Board in LBP-92-18, 36 NRC 93 (1992), to take effect. The proceeding is hereby terminated.

The Chairman and Commissioner Curtiss approve this order in part and disapprove it in part. The Chairman's and Commissioner Curtiss's dissenting views are attached.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of June 1993.

DISSENTING VIEWS OF CHAIRMAN SELIN

I would have disapproved the stipulation in the settlement agreement by which none of the facts associated with the proceeding would be held against Dr. Orem in future licensing actions. Although I do not suggest that further enforcement action should be taken against Dr. Orem or that he should be disqualified from future licensing, I believe the stipulation is an unnecessary and inappropriate concession for the proper resolution of this matter.

⁶Inasmuch as the agreement is between Dr. Orem and the NRC regulatory staff reporting through the NRC's Executive Director for Operations, the agreement has no effect on actions that may be brought as a result of investigations by the NRC's Independent Inspector General under the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 *et seq.* See generally 10 C.F.R. Part 13 (1993).

DISSENTING VIEWS OF COMMISSIONER CURTISS

Based upon the facts of this case, it is clear, in my view, that Dr. Orem willfully submitted material false information in his application for a byproduct materials license. While I agree that Dr. Orem's actions in this regard do not justify disqualifying him from all future licensing, I do not agree that those actions should be wholly ignored if and when he again seeks authorization to engage in some NRC-licensed activity. Material false statements are extremely serious matters; they warrant strong action and a clear message that applicants who make them, whether on their own or on the advice of some consultant, should expect to have that false statement taken into account by the agency with regard to any future licensed activity concerning that individual. Accordingly, I would reject paragraph 4 of the settlement agreement (*see* LBP-92-18, 36 NRC 93 at 96) — where the Staff agrees to ignore the facts of this case in any future licensing action involving Dr. Orem — and remand the agreement to the Licensing Board. While I realize that this would reopen the settlement question and possibly result in further litigation, I believe that the NRC must be free to take Dr. Orem's conduct in this case into account in any future licensing action that he may request.



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)

June 17, 1993

In a proceeding concerning the proposed extension of operating licenses to recover or recapture into those licenses the period of construction of the reactors, the Licensing Board denies three late-filed contentions (although permitting certain aspects of those contentions to be litigated under a previously accepted contention), rules on various discovery motions, and sets schedules for the proceeding.

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTIONS**

In ruling on late-filed contentions, a licensing board is required to determine whether the contention meets applicable contention requirements, as set forth

in 10 C.F.R. § 2.714(b) and (d), and, in addition, whether the proponent of the contention has satisfied the late-filed criteria set forth in 10 C.F.R. § 2.714(a)(1). A licensing board need not address these considerations in any particular order, although both are required for admissibility of a late-filed contention.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

The late-filed factors are not equally weighted, nor do all have to be evaluated favorably to the proponent of a late-filed contention for the contention to be admitted. Good cause for late filing has been described as the most significant, but all five must be considered. Absent a showing of good cause for late filing, a stronger showing must be made on the other factors.

NEPA: ENVIRONMENTAL ASSESSMENT

Prior to the Staff's issuance of an Environmental Assessment determining whether an Environmental Impact Statement need be prepared, it is premature to entertain a contention calling for issuance of an EIS.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING (EXCLUSIVITY)

A decision under 10 C.F.R. § 2.206 on a request for a show-cause order is no more than a decision of an NRC Division Director. It is not subject to appellate review at the behest of a party, either before the Commission or a Court of Appeals. It thus does not constitute an adjudicatory decision under section 189b of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(b), and would not even bar the petitioner from seeking relief before NRC in an adjudicatory forum, were one available.

RULES OF PRACTICE: CONTENTIONS

The bare pendency of an investigation does not reflect that there is a substantive problem, that there has been any violation, or that there even exists an outstanding significant safety issue and, accordingly, cannot serve as valid bases for a contention.

RULES OF PRACTICE: DISCOVERY (PRIVILEGED MATTER)

Reports prepared by the Institute for Nuclear Power Operations (INPO) are not privileged in the traditional sense but, rather, are subject to nondisclosure under the Freedom of Information Act. Whether those reports may be released to a party in litigation (possibly subject to a protective order) depends on meeting criteria spelled out in 10 C.F.R. § 2.790(b)(4)-(6).

RULES OF PRACTICE: DISCOVERY (AGAINST NRC STAFF)

Discovery against the NRC Staff is subject to different standards than would be applicable between other parties. 10 C.F.R. § 2.720(h). Availability of information in the NRC Public Document Room will bar discovery of the information.

TECHNICAL ISSUES DISCUSSED

Maintenance and surveillance programs,
Thermo-Lag insulation.

PREHEARING CONFERENCE ORDER (Late-Filed Contentions and Discovery)

Pending before us are three late-filed contentions submitted by the San Luis Obispo Mothers for Peace (MFP), an Intervenor in this proceeding.¹ Pacific Gas and Electric Company (Applicant or PG&E) and the NRC Staff each oppose admission of all of these contentions.² On May 11-12, 1993, we held a prehearing conference at the Commission's office at Walnut Creek, California, to discuss these contentions, as well as outstanding discovery questions.³

¹ San Luis Obispo Mothers for Peace Late-Filed Contention, dated March 12, 1993; San Luis Obispo Mothers for Peace Second Late-Filed Contention, dated March 16, 1993; San Luis Obispo Mothers for Peace Third Late-Filed Contention, dated April 12, 1993. The deadline for filing timely contentions was set by this Board as October 26, 1992. MFP filed 11 proposed contentions by that deadline, of which we ultimately found two to be acceptable. LBP-93-1, 37 NRC 5 (1993). The three new contentions before us were filed subsequent to that deadline and hence are "late-filed."

² PG&E's Response to San Luis Obispo Mothers for Peace First Late-Filed Contention, dated April 2, 1993; PG&E's Response to MFP Second Late-Filed Contention, dated April 6, 1993; NRC Staff's Response to MFP First Late-Filed Contention, dated April 14, 1993; NRC Staff's Response to MFP Second Late-Filed Contention, dated April 14, 1993; PG&E's Response to MFP Third Late-Filed Contention, dated April 27, 1993; NRC Staff's Response to MFP Third Late-Filed Contention, dated May 4, 1993.

³ Tr. 407-568. The conference was announced through our Notice of Prehearing Conference, dated April 23, 1993 (58 Fed. Reg. 26,177 (Apr. 30, 1993)).

For reasons set forth below, and confirming our ruling at the aforementioned prehearing conference (Tr. 485), we are denying all three of these contentions but permitting specified portions of two of them to be litigated in the context of already-admitted Contention I. (There no longer appears to be a genuine dispute over two significant portions of the other contention, by virtue of action taken by PG&E.)

A. Standards

In ruling on late-filed contentions, we are required to determine whether the contention meets the generally applicable contention requirements, set forth in 10 C.F.R. § 2.714(b) and (d). (These requirements were described in detail in earlier opinions in this proceeding.⁴) In addition, however, we also must consider whether the proponent of such a contention has satisfied the late-filed criteria, involving a balance of the following factors:⁵

- (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.

These five factors are not equally weighted — 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.⁶ Absent good cause, a petitioner must make a stronger showing on the other factors in order to have a contention accepted.⁷ But the good-cause factor is not to be given controlling weight; all of them must be considered.⁸ Indeed, in applying these factors, a licensing board has “broad discretion in the circumstances of individual cases.”⁹

In the circumstances of this case, we determined that we would first consider the validity and admissibility under 10 C.F.R. § 2.714 of the three contentions before us. Only if a contention warranted acceptance under those standards would we then consider the timeliness aspects — an inquiry that we in fact were never required to reach.

⁴ LBP-92-27, 36 NRC 196, 200-01 (1992); LBP-93-1, 37 NRC 5, 13-14 (1993).

⁵ 10 C.F.R. § 2.714(a)(1).

⁶ *Nuclear Fuel Services Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

⁷ *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982).

⁸ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

⁹ *West Valley, supra*, 1 NRC at 275.

This approach was contrary to that advocated by the Applicant and Staff. Relying on cases such as *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156 (1993); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 70 (1992); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461 (1985), and *Fermi*, 16 NRC at 1765, they would have had us first determine whether the contentions withstood the timeliness criteria and, only if so, have us consider their admissibility.

Under either approach, a late-filed contention would not be admitted if it failed to meet either the late-filed criteria or the admissibility criteria of section 2.714. In the current context, however, the Intervenor, who lack extensive funding, are not “sleeping on their rights” but, instead, are attempting to raise technically sophisticated issues with the assistance of outside technical consultants. The Board therefore considers it to be in the public interest and within its discretion to consider the seriousness of the asserted safety or environmental problem before considering the late-filed criteria, in order to avoid the possibility of overlooking a safety or environmentally significant matter for purely procedural reasons.

Cases cited in support of the opposite approach, such as *Comanche Peak*, CLI-93-4 and CLI-92-12, and *Fermi*, ALAB-707, involved attempts to intervene years (rather than days, weeks, or even months) late — indeed, following the close of the entire record in a proceeding. At that stage, a more stringent application of timeliness factors might arguably be mandated, and we are inclined to read those decisions in that light. As for ALAB-816, that decision, although not involving excessive lateness, involved a failure of the petitioner even to address the late-filed factors. Here, there was no such complete failure.

In any event, those decisions do not necessarily provide authority for the position taken by the Applicant and Staff here. For, even in the circumstances where there was extreme untimeliness, the Commission (in *Comanche Peak*) and the Appeal Board (in *Fermi*) took a close look at the safety significance of the issues sought to be raised. And, in summarily denying the *Pilgrim* petitioner’s claim for failure even to mention the late-filed factors, the Appeal Board noted both that the petitioner had participated in other NRC proceedings and, more significantly, that nothing in its petition suggested that a “possibly serious safety problem” might escape proper scrutiny.¹⁰

With these standards in mind, we turn to the specific proposed contentions before us.

¹⁰ *Pilgrim, supra*, 22 NRC at 468.

B. Contention XI

The first of the late-filed contentions reads as follows:

XI. The San Luis Obispo Mothers for Peace challenges the Environmental Assessment [EA] and Finding of No Significant Impact (TAC NOS. M84006 and M84007) issued February 3, 1993. The NRC should be required to prepare an Environmental Impact Statement [EIS].

This contention was filed on March 12, 1993. Although the EA issued on February 3, 1993, MFP advises that it did not receive its copy until February 12, 1993, 28 days prior to its filing the contention.¹¹

This contention had a timely filed predecessor — i.e., the former Contention XI. That earlier contention also sought the issuance of an EIS. We rejected it solely because we considered it premature, inasmuch as the EA, in which the Staff determines whether an EIS need be prepared, had not yet been released.¹² Thus, not wishing either to presume any particular Staff determination prior to its actually being made or to require a party to do so, we determined that there was at least a possibility that the contention would become moot by virtue of Staff action (*see* Tr. 205). Therefore, we did not rule on the bases of the contention that was submitted but rejected it *only* on the ground of its prematurity.

In fact, the EA as issued determines that, in the Staff's view, an EIS is not warranted. The current contention (as well as the earlier version) challenges that conclusion.

The EA is also the subject of two questions posed by the Board by our Memorandum and Order (Addendum to FES), dated March 19, 1993 (unpublished). In particular, we noted that the EA sanctioned the various environmental conclusions reached in the 1973 EIS but neglected to reference, in its overall conclusion, any of the changes noted in an Addendum issued by the Staff in May 1976.¹³ We asked (1) whether the existence of the Addendum invalidated in whole or in part the conclusions reached in the EA and (2) whether the omission of reference to the Addendum from the EA's conclusion supports in some degree MFP's charges concerning the adequacy of the methodology used to prepare the EA — i.e., was preparation of the existing EA merely a *pro forma* exercise by the Staff?

All parties responded to the questions with similar positions.¹⁴ Based on references to the Addendum in connection with particular environmental findings

¹¹ Staff issuance of the EA was announced in the *Federal Register* of February 10, 1993. 58 Fed. Reg. 7899-7903. The Notice set forth the entire contents of the EA.

¹² LBP-93-1, *supra*, 37 NRC at 35-36.

¹³ *See* 41 Fed. Reg. 22,895 (June 7, 1976), noting that on May 28, 1976, the Addendum had been issued.

¹⁴ NRC Staff Response to Licensing Board's Questions, dated April 1, 1993; Pacific Gas & Electric Company's Response to Memorandum and Order (Addendum to FES), dated April 2, 1993; Intervenor San Luis Obispo Mothers for Peace Response to Memorandum and Order (Addendum to FES), dated April 8, 1993.

of the EA, none of the parties faulted the EA for failing specifically to reference the Addendum in the ultimate conclusion. On that basis, we will treat the EA as including the Addendum and will judge the contention's adequacy based on the challenges to the EA proffered by MFP.¹⁵

I. MFP Position

MFP assigns six reasons or bases for showing that the proposed license extensions "pose a significant, previously unconsidered risk to the human environment" and thereby for questioning the accuracy and adequacy of the conclusions reached in the EA. We will describe them *seriatim*.

(a) The first of the bases — aging — is the most extensive. MFP claims that the environmental impacts considered as a basis for the Staff's conclusion in the EA — i.e., a continuation of the types of impacts evaluated in 1973 or 1976 by the EIS or its Addendum — are not based on fact inasmuch as, in the EA, they fail to factor in newly discovered information on the methodology of aging, lack of technology to detect certain aging effects, as well as periods of time during which the components were being stored but not operated (and hence allegedly not considered as undergoing aging.)

In other words, various plant components (several are explicitly listed) will age more rapidly than originally projected, leading to a greater likelihood or risk of adverse impacts during the period of projected operation. The EA allegedly does not consider any aging effects in its calculation of projected environmental impacts. More particularly, the "1973 FES did not consider the full term of degradation and aging effects to which the DCNPP would be subjected over the 55-year lifetime that is now being proposed."¹⁶ Further, the risk of unforeseen aging effects is said to be exacerbated by improper maintenance practices, as alleged in Contention I.

(b) The second basis — population changes — asserts that increases in population in the area of the plant have exceeded population changes predicted in the EIS (and assumed by the EA) and thus have upset some of the environmental conclusions of the FES based on population density or location (as in analyzing effects of offsite releases from postulated accidents). MFP also questions the EA's conclusion that population-center-distance standards of 10 C.F.R. Part 100 will remain satisfied throughout the extended license term (although MFP does not provide any explicit information that would undercut the EA's conclusion).

¹⁵ On April 14, 1993, PG&E moved to strike certain material from MFP's response that it regarded as extraneous material. On April 26, 1993, MFP filed a reply explaining why the material was pertinent to its reply. As announced at the prehearing conference (Tr. 521-22), because we are not relying for any purpose on the allegedly extraneous statements, and because of our ruling denying admission of the contention to which the material related, there is no need for us to act on PG&E's motion, and we decline to do so.

¹⁶ MFP Late-Filed Contention, dated March 12, 1993, at 8.

(c) The third basis challenges the EA for failing to consider cumulative and chronic impact of low-level radiation on population surrounding the plant, including unpredictable unplanned releases of radiation such as have occurred on several named occasions in the past. MFP cites high rates of lung and breast cancer in San Luis Obispo County and asserts that the correlation between low-level releases and cancer did not exist in 1973. MFP seeks an EIS to perform this analysis.

(d-f) The fourth and fifth bases take issue, respectively, with perceived deficiencies in which the EA deals with high- and low-level waste. The sixth and final basis challenges the cost-benefit balance set forth in the EA, premised mostly on differences of opinion on the dollar cost of the power to be produced and the EA's conclusion that, if the licenses are not extended beyond 2008, PG&E would have to construct new baseload capacity.

To justify the late filing of this contention, MFP cites the release of the EA on February 3, 1993, its receipt of the document on February 12, and our earlier refusal to accept its EIS contention on grounds of prematurity. MFP adds that it proceeded as rapidly as it could in preparing its contention (given requirements to prepare discovery requests during that period) and that the 28-day period was a reasonable time for it to have filed its contention.

2. *Applicant and Staff Positions*

The Applicant and Staff each claim that MFP has not demonstrated good cause for late filing. They further assert that the contention fails to accord with NRC requirements for contentions.

With respect to lateness, the Applicant and Staff each claim that the facts forming the basis for the EA's conclusion are founded on those set forth in the Applicant's Environmental Report and in no case include facts arising subsequent to the December 10, 1992 prehearing conference. They each point to the Commission's rule that requires environmental contentions to be initially submitted on the basis of the Applicant's Environmental Report, subject to modification if the Staff review document differs significantly. 10 C.F.R. § 2.714(b)(2).

With regard to the substance of the contention, the Applicant claims that we have already rejected the aging aspects of the contention based on our prior resolution of Contention IV, which we found inadmissible. Both the Applicant and Staff claim that no grounds are asserted that would deem the instant licensing proposal to be a major federal action requiring preparation of an EIS.

3. Board Analysis

In the view of MFP (*see* Tr. 413), by far the most significant allegations in this contention are those concerning aging. In rejecting the initial Contention IV, concerning aging, we pointed to the lack of a sufficient basis for admitting this contention standing alone. We also noted that, to the extent age-related degradation is subject to maintenance efficacy, the subject will be examined in conjunction with Contention I, which we were accepting.¹⁷

As we explained at the recent prehearing conference, all components are subject to aging. In order for a plant to be operable, it must utilize a maintenance and surveillance system that will accurately and timely detect such degradation, including degradation that occurs earlier than might otherwise have been expected, so that repair or replacement can be accommodated in a timely fashion. *See* Tr. 413. MFP in its new contention has listed a number of components that allegedly have prematurely aged.¹⁸

With respect to age-related degradation, we inquired through our Memorandum (Questions for Parties), dated April 16, 1993 (unpublished), what objection MFP (and other parties) would have to litigating the "aging" aspects of the first late-filed contention in conjunction with Contention I. We referred to our suggestion in LBP-93-1 that the earlier "aging" contention (Contention IV) could be litigated in that manner.

MFP offered no objection to our suggestion, although it expressed a desire also to consider the "aging" matters as a reason for requiring an EIS. MFP further commented that the "aging" contention was somewhat broader than what would fit into the Surveillance and Maintenance Program contention (Tr. 413).

The Applicant and Staff, however, both opposed the suggestion. The Applicant stressed the apparently broader scope of the aging allegations than what would reasonably fit into the Maintenance and Surveillance contention together with the asserted lateness of the claim. The Staff took essentially the same position, although it stressed what it regarded as the lateness of the filing.

Taking into account the entire record on this contention, it is apparent to us that MFP has offered no valid bases for its claim that an EIS rather than an EA should have been issued. It has not provided the "substantial and significant information" that we previously indicated would be requisite for an EIS contention.¹⁹ It has defined no impacts that were not covered in the FES that will eventuate from the proposed license amendment. It acknowledged that its aging allegations would result not in producing impacts different in kind

¹⁷ LBP-93-1, *supra*, 37 NRC at 25.

¹⁸ MFP Late-Filed Contention, dated March 12, 1993, at 4.

¹⁹ LBP-93-1, *supra*, 37 NRC at 36.

from those previously reviewed (in particular, results of accidents) but only in a potentially greater likelihood of occurrence of those impacts (Tr. 427).

Moreover, the population projections for the area cited by MFP are not sufficiently different from those projected in the EIS to provide a basis for the claim that a new EIS is warranted. Further, as we previously held, the high-level waste matters and cost-benefit matters raised by MFP are not litigable in a proceeding of this sort.²⁰ Finally, there are insufficient bases provided for the low-level waste allegations.

Beyond that, the most significant of these matters for MFP — age-related degradation — to a great extent is litigable under Contention I, although as a safety rather than an environmental matter, and we are permitting such litigation. The lateness factors are not applicable — these matters always were litigable under Contention I. We therefore are rejecting the first late-filed contention but are expressly reiterating that its aging allegations may be litigated to the extent they bear on the maintenance and surveillance programs covered by Contention I. (We are modifying the discovery schedule to accommodate this further clarification of the scope of Contention I.)

C. Contention V

The second late-filed contention reads as follows:

V. The San Luis Obispo Mothers for Peace contends that the interim fire protection measures in place at DCNPP to compensate for the faulty fire barrier material, Thermo-Lag, are inadequate because the material itself creates a fire hazard. The proposed license extension request should therefore be denied until this situation is resolved.

This contention was filed on March 16, 1993. It supplements or expands upon a previous Contention V, also challenging certain uses of Thermo-Lag at the Diablo Canyon facility. The initially filed Contention V sought to challenge both the permanent and interim use of Thermo-Lag. We rejected the contention insofar as it sought to raise a generic issue, based on lack of an adequate basis supporting such an issue.²¹ We accepted Contention V insofar as it sought to challenge the interim measures adopted to compensate for the reliance on Thermo-Lag. But we did not read the contention as a challenge to the adequacy of the interim measures. On the bases submitted by MFP, we ruled that the contention was limited to PG&E's implementation of the interim measures — i.e., the "adequacy of the Applicant's adherence to interim measures."²²

²⁰ *Id.* at 29-30, 36.

²¹ *Id.* at 27.

²² Memorandum and Order (Discovery and Hearing Schedules), dated February 9, 1993 (unpublished), at 2.

As resubmitted, the contention clearly challenges the adequacy of the interim measures as well as the Applicant's implementation of those measures. Additional bases are provided in support of such an expansion.

1. MFP Position

One of the primary thrusts of the newly formulated contention is that Thermo-Lag is combustible — that “the material itself creates a fire hazard.” As MFP points out, it made a similar claim in filing its initial Thermo-Lag contention. But we rejected the combustibility claim for lack of an adequate basis — in particular, a purported study that MFP conceded did not in fact exist, and newspaper accounts that appeared to misinterpret statements of certain NRC officials. (Certain information in NRC Bulletin 92-01, dated June 24, 1992, was also referenced, but only in terms of the necessity for compensatory measures.)²³

MFP now makes further claims with respect to the adequacy of fire watches to serve as an interim corrective action. It also cites what it claims are newly discovered deficiencies with respect to the seismic aspects of Thermo-Lag, ampacity derating requirements, voids, and the validity of hose stream tests. Finally, it provides general data concerning the likelihood of fires in nuclear power plants.

In support of these theses, MFP particularly cites NRC Information Notice 92-82, dated December 15, 1992. (That document was issued subsequent to the date of the first prehearing conference in this proceeding, where we considered the various contentions that previously had been filed, including Contention V.) More important, MFP cites a Partial Director's Decision issued by the Director of NRC's Office of Nuclear Reactor Regulation (NRR) on February 1, 1993,²⁴ and statements made to Congress on March 3, 1993, by the NRC Inspector General and by the Chairman of the Commission. (MFP further references an October 21, 1992, NRR Memorandum indicating that further evaluations of Thermo-Lag by its manufacturer would be completed in 30-45 days.)

2. Applicant and Staff Positions

As in the previous contention, the Applicant and Staff each claim both that MFP lacks good cause for its late filing and that the contention, as filed, lacks adequate bases and hence does not comport with NRC contention standards.

²³ Bulletin 92-01 referenced tests of Thermo-Lag indicating that the material would not provide the degree of fire protection required, but did not suggest that the material itself was combustible. (Other bases included in the contention concerned faulty implementation of the compensatory measures and provided authority for the implementation claim that we actually admitted.)

²⁴ *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), DD-93-3, 37 NRC 113 (1993).

The Applicant adds that the adequacy of the interim measures has been resolved generically by the Commission and, in any event, is unrelated to the proposed license amendments at issue in this proceeding.²⁵

3. Board Analysis

At the outset, we reject out of hand the Applicant's claim that the February 1, 1993 Partial Director's Decision could somehow operate to bar MFP's claim. That decision is no more than a decision of an NRC Division Director on a 10 C.F.R. § 2.206 claim. It is not subject to appellate review at the behest of a party, either before the Commission or a Court of Appeals, even for abuse of discretion. See *Heckler v. Cheney*, 470 U.S. 821 (1985); *Arnow v. NRC*, 868 F.2d 223 (7th Cir. 1989); *Safe Energy Coalition of Michigan v. NRC*, 866 F.2d 1473 (D.C. Cir. 1989). It thus does not constitute an adjudicatory decision under section 189b of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(b), and quite likely could not even bar the petitioner from seeking relief before NRC in an adjudicatory forum, were one available.²⁶

Similarly, we reject PG&E's claim that the adequacy of interim measures is not related to the license amendments at issue in this proceeding. We dealt with this issue in LBP-93-1 and add only that it is far too late in the day to seek reconsideration of that decision.

Turning to the contention itself, we first note that its primary allegation is that Thermo-Lag itself creates a fire hazard — i.e., is combustible. We examined each basis cited by MFP to determine whether any supported this claim.

In that connection, our Memorandum (Questions for Parties), dated April 16, 1993 (unpublished), posed a question concerning a possible inconsistency between the Applicant's characterization of Thermo-Lag as "noncombustible" (under specified criteria) in its interim plan submission (concerning use of Thermo-Lag as a radiant energy shield inside the containment) and the Staff's evaluation of the material as being "combustible" (using other criteria) in Information Notice 92-82.²⁷ We asked that parties be prepared to address this inquiry at the prehearing conference.

Although not required to do so, the Applicant submitted a written response dated May 7, 1993. It differentiated the use of Thermo-Lag as a radiant energy shield inside the containment from its use as a fire barrier. PG&E further stated,

²⁵ Pacific Gas & Electric Company's Response to San Luis Obispo Mothers for Peace Second Late-Filed Contention, dated April 6, 1993, at 1-2, 28-29, 35-37.

²⁶ Cf. 10 C.F.R. Part 52, where denial of a section 2.206 petition was explicitly made reviewable. With such reviewability, the licensing provisions in question were upheld. *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992).

²⁷ MFP specifically cited Information Notice 92-82 (December 15, 1992) for this aspect of its combustibility claim.

however, that, as provided in its letter to the Staff dated April 30, 1993, it has elected to replace Thermo-Lag radiant energy heat shields at the Diablo Canyon facility with shields of another manufacturer. Because of that action, time has overtaken this portion of the contention: the aspect of Thermo-Lag combustibility raised by MFP about which we had inquired. To that extent, we are treating that aspect of MFP's contention as no longer raising an issue concerning which there is a genuine dispute.

The other aspect of the contention that has been overtaken by time is the alleged ampacity derating errors resulting from reported miscalculations by the manufacturer of Thermo-Lag insulation. MFP claims that PG&E "has yet to take steps" to address this issue other than through compensatory measures. As a result, according to MFP, a fire could result. However, at the prehearing conference, in response to our explicit inquiry, PG&E reported that, as of April 16, 1993, it had performed at least a preliminary recalculation and had determined that its margins were adequate (Tr. 450-51).²⁸ Because the gist of this aspect of the contention was the asserted failure of PG&E to have performed any recalculation, there no longer appears to be a genuine dispute on MFP's ampacity claims.²⁹

Furthermore, those two allegations appear to form the only genuine bases potentially supporting MFP's claim that Thermo-Lag itself creates a fire hazard. In terms of regulatory standards, except where specifically required (as in the containment example noted above), there appears to be no general requirement or (for the Diablo Canyon facility) technical specification that Thermo-Lag (or any other fire-barrier material) be noncombustible — only that it provide a fire barrier for a specified time period. Specifically, MFP's fire-watch claim states that Thermo-Lag failed the "NRC cold side temperature limit in 22 minutes and burned through in 46 minutes" (citing NRC Information Notice 92-55, July 27, 1992). However, the cited Information Notice had nothing to do with Thermo-Lag creating a fire hazard but, rather, referenced tests that measured its ability to serve as a fire barrier to protect various components.

With regard to combustibility, apart from the claims for which a genuine dispute no longer exists (see earlier discussion), MFP's further references to Information Notice 92-82 (December 15, 1992) concern heat release of the material but have nothing to do with flammability. They accordingly do not stand for the proposition for which cited.

²⁸ PG&E referenced its letter to the NRC Staff dated April 16, 1993. On June 9, 1993, confirming an offer made at the prehearing conference (Tr. 450-51), PG&E provided the Licensing Board with copies of its April 16, 1993 letter, indicating that it had earlier provided copies to other parties.

²⁹ We express no view of the contention's validity (apart from timeliness considerations) at the time it was filed, prior to the Applicant's performance of the recalculation in question. Nor do we express any view of the adequacy of the recalculation effort. No claim to the contrary is currently before us. Cf. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149 (1991).

Similarly, MFP's "seismic" claims also do not support combustibility. They state that the material "may crack or crumble into powder material or fragments" and then hypothesize (without further basis) that the crumbled material "provides the potential scenario of loss of fire protection and fuel for the fire." No bases are cited for either of the claims — most particularly, the "fuel for the fire" claim. Without such support, the contention cannot be accepted.

With respect to "voids," MFP has offered no information demonstrating any voids in Thermo-Lag insulation used at Diablo Canyon. Although, as MFP claims, voids arguably may contribute to the material's flammability, there is no basis offered that would connect this claim to the Diablo Canyon facility.

MFP next references the failure of Thermo-Lag to pass certain "hose stream" tests. As the Applicant points out,³⁰ the tests are used as an indicator of the potential for electrical faulting after suppression of a fire. They do not relate to the flammability of the material or the validity of fire watches used as the heart of the interim corrective measures. The test failures of Thermo-Lag, therefore, cannot validly found the contention before us.³¹

Finally, MFP's references to investigations and to the frequency and significance of fires at nuclear plants generally appear to have no specific relationship to the Diablo Canyon facility. Indeed, the Commission has specifically held that the "bare pendency of an investigation" does not reflect that there is a substantive problem, that there has been any violation, or, indeed, that there even exists an outstanding significant safety issue. *Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)*.³² These claims, therefore, thus cannot serve as valid bases for this contention.

In conclusion, we have determined that two aspects of this contention are no longer in dispute because of action taken by PG&E and that there are no bases adequate to create a genuine issue with respect to the other allegations. We thus are denying this contention without regard to its timeliness. In that connection, however, although aspects of the Thermo-Lag contention might not have survived a timeliness analysis, we note that the contention involves an issue that has been developing over several years. At the time that problems with Thermo-Lag first were revealed (or, in this case, at the time timely contentions could have been filed), there was considerable doubt as to whether an appropriate contention could have been formulated. At that time, sufficient tests had not

³⁰ PG&E's Response to MFP Second Late-Filed Contention, dated April 6, 1993, at 34.

³¹ MFP's complaint concerning the planned substitution of other tests for hose-stream tests relates to proposed standards by which Thermo-Lag is to be judged in the future and clearly bears no relationship to the use at Diablo Canyon of Thermo-Lag insulation.

³² This ruling related to a motion to reopen a closed record, where a higher standard of relevance or significance must be satisfied. Nonetheless, we believe the ruling reflects the likely reasoning of the Commission in a situation such as is present here. This is particularly so where, as here, the investigations in question do not appear to be directed at the Diablo Canyon facility but rather (as the Staff observes) at various practices followed by the manufacturer of Thermo-Lag.

been performed to indicate whether there was a significant safety problem. The Applicant (although not the Staff) took the position that "Proposed Contention V addresses a current issue . . . that is not safety significant."³³ The tests relied on by MFP in support of its original contention were inconclusive at best. Indeed, MFP tried to submit an appropriate contention but, except for one limited issue, did not succeed.

As MFP now points out, tests by the manufacturer were not scheduled to be completed prior to 30 to 45 days from October 20, 1992.³⁴ And the results of the NIST test, although apparently provided to the NRC Staff on August 31, 1992, were not necessarily available to the public on that date. The test was released as part of Information Notice 92-82, dated December 15, 1992.

Given these considerations, we cannot conclude that all aspects of MFP's contention would or should have been rejected on timeliness grounds.

D. Contention XII

The third late-filed contention reads as follows:

XII. The San Luis Obispo Mothers for Peace contends that deficiencies exist at the DCNPP with the environmental qualification of safety-related and non-safety-related electrical cables (Okonite cables or other cables with bonded jackets). Furthermore, deficiencies exist in the adequacy of maintenance and surveillance practices at DCNPP to verify that the actual operating environment of these cables are bounded by the environmental parameters used to qualify the equipment. Because these deficiencies make the plant more vulnerable to a severe accident, Pacific Gas and Electric Company's ("PG&E") license amendment request must be denied.

This contention was formally filed on April 12, 1993, but on April 1 and 2, 1993, MFP's technical advisors (MHB Technical Associates) forwarded underlying data to the Staff. (The Board was served with these documents, either by MFP or the NRC Staff.) On April 14, 1993, the Staff responded to the technical advisors, and on April 16, 1993, it prepared a Board Notification (#93-08) advising the Board and parties of its response, and transmitting the response together with the incoming communication from MHB Associates (the above-mentioned April 1-2, 1993 communications).³⁵

³³ PG&E's Response to Petitioner's Supplement to Petition to Intervene, dated November 18, 1992, at 37.

³⁴ MFP Second Late-Filed Contention, dated March 16, 1993, Attachment 4.

³⁵ On April 28, 1993, PG&E furnished the Board and parties with a report to the Staff concerning cable failures. On May 3, 1993, the Staff furnished the Board and parties with a further Board Notification (#93-09) transmitting copies of an Inspection Report dealing, *inter alia*, with the cable failures.

1. MFP Position

In submitting this contention, MFP first notes that there may be some overlap with Contention I (Maintenance and Surveillance). As written, the contention formally challenges both the Maintenance and Surveillance programs for cables and the environmental qualification program.

As bases, MFP cites four examples of failed cables (one 12-kV cable and three 4-kV cables). The most recent occurred on February 5, 1993, and was the subject of the April 1-2, 1993 communications with the Staff; it resulted in an electrical fire. The earlier cable failures allegedly occurred in October 1989, May 1992, and October 1992. MFP cites these failures as the type of cable failure identified (generically) by the Staff in NRC Information Notice 92-81, "Potential Deficiency of Electrical Cables with Bonded Hypalon Jackets," dated December 12, 1992 (dealing with the failure of certain cables to meet Environmental Qualification standards). MFP also cites several internal Staff communications and an NRC memorandum to NUMARC relating to cables with bonded Hypalon jackets.

MFP goes on to assert that the cable failures resulted from exposure to water and that the maintenance and surveillance system fails to detect whether the cables are being used in an environment for which they are qualified.

2. Applicant and Staff Positions

The Applicant and Staff treat this contention in essentially three parts. First, they claim that Environmental Qualification is irrelevant to the four cables in question, inasmuch as none of them are required to be environmentally qualified (pursuant to standards set forth in 10 C.F.R. § 50.49). As set forth in an affidavit of the co-author of IN 92-81:

The cables that failed at Diablo Canyon are 12 kV and 4 kV power cables. These cables have EPR insulation, shielding, and a neoprene jacket They do not have a bonded jacket. The 12 kV cables that failed were severely degraded, apparently as a result of chemical attack. The 4 kV cables were not degraded and may have failed due to a manufacturing defect. The 12 kV cables are not used in any safety-related application at Diablo Canyon. They are not required to be environmentally qualified³⁶

PG&E and the Staff further claim that an environmental qualification issue is untimely, without good cause, inasmuch as IN 92-81 had been issued as far back as December 1992 (more than 4 months prior to the filing of the contention). Finally, they claim that the failed-cable questions are also untimely.

³⁶ Affidavit of Ann M. Dummer, NRR, dated April 21, 1993, at 2, ¶ 5.

3. *Board Analysis*

It is clear that, insofar as environmental qualification is concerned, this contention lacks any basis that would indicate that there is any such problem at Diablo Canyon. This portion of the contention must therefore be dismissed for lack of a viable basis.

As for the cable failures at Diablo Canyon, the prime question is whether the surveillance and maintenance system is adequate to detect any incipient failures. At least some of the documentation submitted as part of the contention indicates that submerged cables are not within the current scope of the maintenance and surveillance programs. These questions are already litigable under Contention I, so that a new, late-filed contention is not warranted. As we announced at the prehearing conference (Tr. 458), we are thus denying the contention but permitting the failed-cable questions at Diablo Canyon to be litigated under Contention I. (We reiterate that, in LBP-93-1, we specifically permitted additional bases for Contention I to be identified.³⁷)

E. *Conclusion on Contentions*

We have examined all of the bases cited for the proposed contentions and find that, except for those portions of Contentions XI and XII already litigable under Contention I, none warrant the admission of new contentions. In so holding, we reiterate that we are operating under the raised threshold for contentions enacted by the Commission in 1989.³⁸

F. *Discovery*

1. *Discovery Requests from MFP to PG&E*

At the prehearing conference, we were faced with a number of discovery motions filed by MFP against PG&E — including motions for additional discovery, motions to compel discovery, motions for protective orders, and motions to impose sanctions for discovery deficiencies. Because many of the motions were related in part to whether or not the new contentions were admitted, we suggested, after our ruling on the contentions, that MFP and PG&E attempt to resolve their differences and agree upon a revised schedule for discovery (including further discovery on the enhanced portion of Contention I). With minor disagreements (which we resolved), they did so. We approved the following discovery schedule (*see* Tr. 491-98):

³⁷ 37 NRC at 20-21.

³⁸ *See id.* at 13; Tr. 458.

Cables

- May 19, 1993: MFP to file additional interrogatories on cable matters (four copies to be faxed to PG&E by May 21, 1993).
- May 26, 1993: PG&E to respond to earlier filed MFP interrogatories 1-7 on cable questions.
- PG&E to respond to MFP additional interrogatories on cable matters within 7 days of receipt.

Thermo-Lag

- May 16, 1993: PG&E to respond to Interrogatories 23-30 in MFP third set of interrogatories (Re: Thermo-Lag).
- May 26, 1993: MFP may inspect fire logs until the end of May 26.

Aging

- June 4, 1993: MFP Interrogatories on component-specific aging issues to be faxed to PG&E. Interrogatories to include followup interrogatories, including particular locations of check valves in connection with Interrogatory No. 6 of MFP third set. (Tr. 492, 498.)

Maintenance and Surveillance (Followup Discovery)

- May 21, 1993: MFP to provide by fax list of NCRs referenced in 1990-92 NCRs that may date back to 2 years prior to 1990. PG&E to respond within 7 days of receipt of request.
- May 26, 1993: PG&E to provide specified NCRs and responses to specified Action Requests (ARs), plus 1990-92 OSRG annual and quarterly reports to the extent relevant to maintenance and surveillance.
- May 26, 1993: PG&E to provide copies of specified plant procedures.
- May 26, 1993: PG&E to provide further response to MFP Question 9, second set of interrogatories.

Information from INPO Documents

MFP filed a motion to compel relating to its Interrogatories 12 and 13 of its second set of interrogatories. Those interrogatories sought reports prepared by the Institute for Nuclear Power Operations (INPO) concerning "fire protection and/or maintenance and surveillance programs or activities" (Interrogatory 12) and "fire protection and/or maintenance and surveillance programs or activities specifically at DCNPP" (Interrogatory 13). PG&E objected to these requests as overbroad and as seeking information that is "privileged and subject to non-disclosure," citing *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 61 U.S.L.W. 3647 (Mar. 22, 1993).

As justification for its Motion to Compel, MFP noted that "PG&E does not cite any regulation or case that requires the Board to protect these documents from disclosure."³⁹ MFP goes on to claim that the INPO documents are "relevant and useful because they provide the industry's own analysis of the effectiveness of safety programs."⁴⁰ At the prehearing conference, MFP withdrew its request for Interrogatory 12 information (general information) and information concerning the fire-protection program (a portion of Interrogatory 13). It limited its request to information explicitly relevant to maintenance and surveillance at Diablo Canyon (Interrogatory 13) (Tr. 502). The information specifically relates to INPO's evaluation of the DCNPP maintenance and surveillance program and is clearly relevant to Contention I.

In evaluating this claim of privilege, we note first that the information does not appear to be "privileged" in the traditional sense but, rather, only subject to nondisclosure under the Freedom of Information Act (FOIA). According to the court decision relied upon, the information is of the type falling within FOIA exemption 4. Those standards are set forth in 10 C.F.R. § 2.790 of the Commission's Rules of Practice, and the exemption 4 criteria are spelled out in 10 C.F.R. § 2.790(a)(4).

The Board heard arguments concerning whether the information should be released in litigation circumstances and, if so, whether it should be subject to a protective order. MFP was not able to demonstrate any particular need for the document beyond that set forth in its motion, other than curiosity (Tr. 511). PG&E maintained that the information on which the INPO evaluations were formulated is all publicly available data, that MFP could reach its own conclusions from those data, and that PG&E would not use INPO reports as part of its affirmative case (Tr. 503-04).

³⁹ Motion to Compel, dated April 26, 1993, at 3, emphasis supplied.

⁴⁰ *Id.*

As for reasons for the "privilege," PG&E referenced the "strong public policy interest in favor of self-critical, internal review and evaluation by licensees of potential problems." It adds that

. . . the confidentiality of INPO evaluations is crucial to the accuracy, value, and self-critical nature of these evaluations.

PG&E also claims that the information sought is overly broad.⁴¹

In making our determination as to whether the information in question should or should not be released, we must take into account the factors spelled out in 10 C.F.R. § 2.790(b)(4)-(6). At the present time, the record is inadequate for us to make that determination. Accordingly, we invite parties to submit by affidavit information contemplated by those paragraphs. Such information would include that contemplated by 10 C.F.R. § 2.790(b)(4) (concerning the nature of the information) and section 2.790(b)(5) (concerning the necessity of the information for the effective performance of this Board's duties). In addition, we invite parties to discuss whether the provisions of 10 C.F.R. § 2.790(b)(6) require us to order release of the information subject to a protective order.

Such affidavits and briefs on the legal question should be submitted within 10 days of service of this Order. Pending our receipt and consideration of any such affidavits and brief, we are withholding any ruling on the requested discovery.

2. *Discovery from PG&E to MFP*

By June 21, 1993, MFP is to provide certain specified additional answers to PG&E interrogatories (including identification of proposed witnesses) (Tr. 527, 537-38).

3. *Discovery from MFP to the Staff*

Discovery against the NRC Staff is subject to different standards than would be applicable between other parties. See 10 C.F.R. § 2.720(h). Under those standards, availability of information in the Public Document Room will bar discovery of that information. The Board declined to grant MFP's Motion to Compel, dated April 26, 1993, against the NRC Staff (Tr. 559). The questions related to the reliability of fire-watch personnel, inspections of PG&E's fire-watch program prior to July 1991 (the Staff had provided information subsequent to that time), and the Staff's position on certain contentions or issues. The Board was advised that there was no general information or studies on the reliability of

⁴¹ PG&E's Response to Second Set of Written Interrogatories and Requests for the Production of Documents filed by MFP, dated April 12, 1993, at 14-15.

fire watches of which the Staff was aware, that inspections of PG&E's program were available in the public document room or through NUDOCs, and that the Staff had not yet taken a position on the contentions or issues, beyond that in its briefs opposing admission of the contentions.

G. Future Schedules

- July 2, 1993: Filing of Motions for Summary Disposition pursuant to 10 C.F.R. § 2.749. Responses to follow times specified in 10 C.F.R. § 2.749.⁴²
- Mid-September: Simultaneous filing of direct testimony on remaining contentions. These dates could be advanced if parties were to waive the filing of summary disposition motions, as informally discussed at the prehearing conference (Tr. 567).
- October, 1993: Target for hearing.

H. Order

For the reasons stated, it is, this 17th day of June 1993, ORDERED:

1. The admittance of the three proposed late-filed contentions, dated March 12, 1993, March 16, 1993, and April 12, 1993, respectively, is hereby *denied*.
2. Various discovery motions are *decided* as set forth in part F of this Memorandum and Order.
3. Affidavits and briefs with respect to INPO information may be filed not later than 10 days following service of this Order. Our ruling on discovery requests involving INPO information is hereby *deferred*.

⁴²The Board advised the parties that, if they were to forego the opportunity to file motions for summary disposition on all issues, the hearing dates could be advanced. PG&E declined to accept that offer at the time, although indicating that it may still do so (Tr. 561, 567).

4. The schedule outlined in part G of this Memorandum and Order is hereby *confirmed*, subject to more precise delineation at a later date.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE**

**Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE**

**Frederick J. Shon
ADMINISTRATIVE JUDGE**

**Bethesda, Maryland,
June 17, 1993**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

Docket No. 30-31765-EA
(ASLBP No. 93-674-03-EA)
(EA 93-006)
(Order Suspending
Byproduct Material
License No. 37-28540-01)

ONCOLOGY SERVICES
CORPORATION

June 23, 1993

In response to an NRC Staff motion for an additional delay in conducting a license suspension proceeding, the Licensing Board orders discovery stayed for ninety days and, at the direction of the Commission, certifies the question whether the proceeding should be delayed further.

NUCLEAR REGULATORY COMMISSION (OR NRC):
SUPERVISORY AUTHORITY

**RULES OF PRACTICE: CERTIFICATION OF ISSUES TO THE
COMMISSION; DISCRETIONARY INTERLOCUTORY REVIEW;
INTERLOCUTORY APPEALS (DIRECTED CERTIFICATION,
DISCRETIONARY REVIEW, REFERRAL OF RULING);
INTERLOCUTORY REVIEW (DIRECTED CERTIFICATION);
REFERRAL OF RULING**

Although a Licensing Board decision to delay a proceeding in light of ongoing NRC Staff and state investigations is not appealable, *see* 10 C.F.R. § 2.730(f),

under the agency's longstanding rules and practice governing review of interlocutory matters that determination or, alternatively, the issues presented by that ruling could come before the Commission (1) by the Board's discretionary referral of that ruling to the Commission, *see id.* §§ 2.730(f), 2.786(g); (2) by discretionary Board certification of a question on any issues (decided or undecided) relating to that ruling or by the Commission's direction that the Board certify a question to it relative to such issues, *see id.* §§ 2.718(i), 2.786(g); or (3) by the Commission taking review of that ruling or issues relating to that ruling in accordance with its plenary power to oversee the conduct of agency adjudications, *see Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977).

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The "good cause" provision of 10 C.F.R. § 2.202(c)(2)(ii) incorporates a balancing test described by the Supreme Court in *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency*, 461 U.S. 555, 564 (1983), as entailing "a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *See* LBP-93-6, 37 NRC 207, 213-14 (1993).

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The first two delay factors — length of the delay and the reason for the delay — are closely related. As the Court pointed out in *\$8,850*, 461 U.S. at 565, short delays need less justification than long delays.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

The potentially deleterious impact of a civil adjudication on an ongoing investigation and any criminal prosecution that could follow has generally been recognized as a factor meriting serious consideration in determining whether delay of the civil proceeding is appropriate. *See* LBP-93-6, 37 NRC at 214. *See also United States v. Premises Located at Route 13*, 946 F.2d 749, 755 (11th Cir. 1991); *United States v. Forty-Seven Thousand Nine Hundred Eighty Dollars (\$47,980) in Canadian Currency*, 804 F.2d 1085, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1072 (1987).

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

To obtain an investigation-related delay of an agency adjudication, besides providing the Board with an adequate explanation of the reasons why an ongoing

investigation will be impaired without a delay in the proceeding, the Staff must make a credible showing that it is attempting to complete its investigation expeditiously. So long as that information is in hand, the Board's duty to monitor any delay generally does not require that it engage in overseeing the precise details of exactly how the Staff is employing its investigative resources and whether its efforts are meeting with success.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

A licensee's challenge to a Staff request to delay a proceeding is not an appropriate forum for litigating the licensee's potential criminal liability vis-a-vis an ongoing investigation. *See* LBP-93-6, 37 NRC at 216.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

Relative to the third delay factor — the licensee's assertion of its right to a hearing — a licensee's protest about any delay in a proceeding puts this element on the licensee's side of the balance. Nonetheless, a licensee's failure to invoke the 10 C.F.R. § 2.202(c)(2)(i) procedure to challenge a suspension order's immediate effectiveness, and thereby avail itself of an important opportunity to avoid a significant portion of the harm asserted as the overriding ground for denying a Staff delay request, renders the support this factor provides limited, at best.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

A Licensing Board has a general duty to monitor those Staff activities that are posited as a basis for delaying a proceeding to ensure that the Staff is proceeding in good faith and to minimize the effects of any delay. *See* LBP-93-6, 37 NRC at 220-21.

MEMORANDUM AND ORDER **(Granting in Part NRC Staff Motion to Delay Proceeding;** **Requiring Submission of Staff Status Report;** **Certifying Question to the Commission)**

Citing a "significant corporate management breakdown in the control of licensed activities," 58 Fed. Reg. 6825, 6826 (1993), on January 20, 1993, the NRC Staff suspended Oncology Services Corporation's (OSC) byproduct materials license as it authorizes the use of sealed-source iridium-192 for high

dose radiation (HDR) human brachytherapy treatments at six specified OSC facilities in Pennsylvania. In this proceeding, OSC challenges the validity of the Staff's order. Previously, in accordance with 10 C.F.R. § 2.202(c)(2)(ii), we granted in part an NRC Staff request to delay this proceeding for 120 days by staying discovery for that period. *See* LBP-93-6, 37 NRC 207 (1993). The Staff now has submitted another motion asking that we delay the proceeding for an additional 120-day period. *See* NRC Staff Motion for Additional Delay of Proceeding (June 3, 1993) [hereinafter Staff Additional Delay Motion].

According to the Staff, this further delay period is necessary to permit the agency's Office of Investigations (OI) and Office of the Inspector General (OIG) to conclude their ongoing investigations of OSC's activities under its license. A principal focus of their investigations is a November 1992 incident at OSC's Indiana (Pennsylvania) Regional Cancer Center (IRCC) in which an HDR brachytherapy patient was returned to her nursing home with a iridium-192 source mistakenly lodged in her abdomen. As it did previously, OSC opposes the Staff's request and demands that this proceeding go forward without additional delay. *See* Response of [OSC] to NRC Staff Motion for Additional Delay of Proceeding (June 4, 1993) [hereinafter OSC Additional Delay Motion Response].

For the reasons set forth below, we grant the Staff's request in part, staying discovery for a period of ninety days. In addition, we again require the Staff to report on the progress of the OI and OIG investigations. Further, in conformity with the Commission's explicit directive, *see* CLI-93-13, 37 NRC 419, 421 (1993), pursuant to 10 C.F.R. § 2.718(i) we certify to the Commission for its consideration the question whether this proceeding should be delayed further.¹

¹In CLI-93-13, the Commission ruled upon the April 12, 1993 OSC petition for review and/or directed certification of LBP-93-6. Although the Commission did not explicitly state that it was acting upon that portion of OSC's filing denominated as a motion for directed certification, it presumably granted that request because it cited 10 C.F.R. § 2.786(g). *See* 37 NRC at 421. The Commission, however, went on to declare that because so little time remained until the expiration of the 120-day delay period authorized by LBP-93-6 and because similar issues were likely to be raised by a Board ruling on the Staff's June 3, 1993 motion for additional delay, in lieu of reviewing LBP-93-6 it was directing that the Board "refer that ruling to the Commission." *Id.*

Although our decision in LBP-93-6 seemingly was not appealable, *see* 10 C.F.R. § 2.730(f), under the agency's longstanding rules and practice governing review of interlocutory matters that determination or, alternatively, the issues presented by that ruling could come before the Commission (1) by the Board's discretionary referral of that ruling to the Commission, *see id.* §§ 2.730(f), 2.786(g); (2) by discretionary Board certification of a question on any issues (decided or undecided) relating to that ruling or by the Commission's direction that the Board certify a question to it relative to such issues, *see id.* §§ 2.718(i), 2.786(g); or (3) by the Commission taking review of that ruling or issues relating to that ruling in accordance with its plenary power to oversee the conduct of agency adjudications, *see Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977). Under this procedural scheme, we understand the Commission's directive in CLI-93-13 to be a command that, in accordance with section 2.718(i), we certify to it the general question, addressed in this memorandum and order, of whether this proceeding should be delayed further.

I. BACKGROUND

In LBP-93-6, 37 NRC at 210-13, we provided an extensive description of the background of this proceeding up through the time of that March 23, 1993 determination, a narrative we will not repeat here. Thereafter, in accordance with that decision, the Staff filed a status report on the ongoing OI, OIG, and Commonwealth of Pennsylvania investigations into the November 1992 alleged IRCC misadministration incident and subsequent events at other OSC facilities.

In its May 5, 1993 report, referencing the attached affidavit of Pennsylvania Chief Deputy Attorney General Lawrence N. Claus, the Staff indicated that although no decision had yet been reached by Commonwealth officials about whether to institute any criminal prosecutions relative to the IRCC incident, they anticipated making a determination on or before the June 23, 1993 date upon which the present 120-day discovery delay period expires. *See* NRC Staff Status Report on Investigations (May 5, 1993) at 1-2 [hereinafter Staff Status Report]. The Staff reported that Pennsylvania officials thus envisioned that no additional delay of this proceeding would be necessary to accommodate their investigative process.

This was not the case with the OI and OIG investigations. Referencing the attached affidavits of OI Region I Field Office Director Barry R. Letts and OIG Assistant Inspector General Leo J. Norton, the Staff stated that OI and other Staff offices were conducting interviews and were in the process of reviewing subpoenaed documents and that OIG had completed one investigative report and was pursuing additional issues. *See id.* at 2. The Staff also declared that at that time it anticipated that these offices' investigations and their determinations about making referrals to the Department of Justice (DOJ) would be completed by September 1993.² *See id.*

In its June 3, 1993 motion for additional delay, the Staff now states that another 120-day delay period (i.e., until late October 1993) is necessary to complete the OI and OIG investigations. Citing statements in the attached affidavits of Mr. Norton and Mr. Letts, the Staff contends that the additional time is needed because of the complexity and scope of the ongoing OI and OIG investigations and that permitting this proceeding, particularly discovery, to go forward pending the completion of the agency's investigations could result in the premature disclosure of investigative information that could adversely affect those investigations, as well as any possible Justice Department criminal investigation

²As is alluded to in the Staff's motion, *see* Staff Additional Delay Motion at 7, upon completing their investigations, OI and OIG each will make a determination about whether the results of its inquiry warrant referral to the Justice Department for possible criminal prosecution. If a referral is made, under a memorandum of understanding between NRC and DOJ, the Department generally is to notify the agency within 60 days concerning its preliminary decision about whether a referred matter warrants criminal investigation or prosecution. *See* 53 Fed. Reg. 50,317, 50,319 (1988).

or prosecution based upon the agency's inquiries. *See Staff Additional Delay Motion at 6-7.*

In its next-day response, OSC contends that the Staff has failed to meet its "good cause" burden under 10 C.F.R. § 2.202(c)(2)(ii) so as to justify granting any additional delay in this proceeding. OSC challenges the sufficiency of the Staff's purported reasons for any additional delay, asserting that the Staff has not met its burden of establishing there is any purpose for further agency investigations. *See OSC Additional Delay Motion Response at 2-4.* OSC also declares that the recent decision of the United States Supreme Court in *United States Department of Justice v. Landano*, 124 L. Ed. 2d 84 (1993), mandates that discovery go forward because the Staff has failed to demonstrate any "implication of confidentiality" sufficient to entitle it to continue to deny OSC access to witness statements currently being withheld. *OSC Additional Delay Motion Response at 5.* Additionally, OSC reiterates the claims of financial and reputational prejudice it made in opposing the initial Staff delay request and asserts that these establish the requisite harm to its interests that compels denial of the Staff's additional delay request. *See id.* at 4-5.

II. ANALYSIS

As we outlined in LBP-93-6, 37 NRC at 213-14, the "good cause" provision of 10 C.F.R. § 2.202(c)(2)(ii) incorporates a balancing test described by the Supreme Court in *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency*, 461 U.S. 555, 564 (1983), as entailing "a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." And, as we did previously, in making a determination about the propriety of the Staff's new delay request, we consider each of these factors in turn.

In LBP-93-6, 37 NRC at 214 (footnote omitted), we noted that "the first two factors — length of the delay and the reason for the delay — are closely related. As the Court pointed out in *\$8,850*, [461 U.S. at 565,] short delays need less justification than long delays." As before, the delay sought by the Staff is of moderate duration, and its significance is enhanced by the fact that it comes on the heels of the prior 120-day delay period. Moreover, the Staff's filing once again suggests that this may not be its last request. *See supra* note 2.

The upshot of these circumstances is that the Staff once again must provide a reasonably compelling justification for the requested delay. As before, the foundation upon which the Staff anchors its petition is the potentially deleterious impact of a civil adjudication on an ongoing investigation and any criminal prosecution that could follow, a factor generally recognized as meriting serious consideration. *See LBP-93-6, 37 NRC at 214. See also United States v. Premises*

Located at Route 13, 946 F.2d 749, 755 (11th Cir. 1991); *United States v. Forty-Seven Thousand Nine Hundred Eighty Dollars (\$47,980) in Canadian Currency*, 804 F.2d 1085, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1072 (1987). In its previous motion, the Staff's assertions were based on the stated concerns of Commonwealth, OI, and OIG officials about the effect on their ongoing investigations of (1) naming theretofore unidentified witnesses to some of the events constituting the basis for the January 20, 1993 suspension order, and (2) disclosure of witness interview transcripts, particularly those conducted by the Staff's Incident Investigation Team (IIT) shortly after the November 1992 IRCC incident, and documentary information gathered by Staff investigators. See LBP-93-6, 37 NRC at 215. In its current motion, as a basis for delaying this proceeding further the Staff does not mention the first ground, but continues to rely upon the injury to the ongoing agency investigative processes that will accrue with the release of witness interview transcripts and other documentary material collected during the course of the agency's investigations.³ As is explained by OI Region I Field Office Director Letts:

OI continues to believe that the early release of [IIT] documents/transcripts would adversely impact the ongoing OI investigation, particularly, that portion focusing on possible incomplete and/[or] inaccurate statements by cancer center personnel and corporate officials. The release of the documents/transcripts obtained from the IIT could adversely impact the investigation because the premature release of information could jeopardize the integrity of the interviews yet to be conducted, and allow personnel an opportunity to tailor their testimony or statements in subsequent interviews so as to explain previous statements in order to avoid culpability or conform testimony with the testimony of others who have been interviewed. Furthermore, it is my concern that information obtained during the course of the OI investigation conducted subsequent to the Staff's Order Suspending License could be prematurely released through civil discovery.

Staff Additional Delay Motion, Affidavit of Barry R. Letts at 4 [hereinafter Letts Affidavit]. This, the Staff maintains, provides sufficient reason for the additional delay.

As explained in the statement of Mr. Letts, the Staff's asserted reasons for seeking an additional delay are well-grounded. In an ongoing inquiry, a relevant concern of investigators is that, to the degree possible, witnesses' statements are based upon their recollection of events rather than a desire to "get the story straight" relative to their prior statements or the statements of other witnesses. This is a particularly telling consideration when, as here, the primary witnesses are principals or employees of the same corporate entity. Moreover, as we declared previously, investigators "have a well-grounded concern that 'the scope

³ Other than as a factor explaining why the agency investigative process has not been completed, see Staff Additional Delay Motion at 6 & n.3, the Staff has not placed any reliance on the ongoing Commonwealth investigation as a basis for its additional delay request. In assessing its request, we do likewise.

of the evidence being reviewed' not be revealed relative to any possible criminal proceedings." LBP-93-6, 27 NRC at 215 (footnote omitted) (quoting NRC Staff Motion for Temporary Delay of Proceeding (Feb. 23, 1993), Declaration of Chief Deputy Attorney General Lawrence N. Clause, ¶ 10; *id.*, Affidavit of Ben B. Hayes at 3).

None of the objections interposed by OSC effectively counter these legitimate Staff concerns. OSC first argues that the Staff has failed to provide a reason for continuing its inquiry, other than "investigational insatiety." OSC Additional Delay Motion Response at 4. According to OSC, to justify any additional delay the Staff must demonstrate that "the documents and transcripts already in its possession have been either reviewed in their entirety, understood, or concluded to evidence regulatory violations." *Id.* at 3. We cannot agree.

To obtain an investigation-related delay of an agency adjudication, besides providing the Board with an adequate explanation of the reasons why an ongoing investigation will be impaired without a delay in the proceeding, the Staff must make a credible showing that it is attempting to complete its investigation expeditiously. So long as that information is in hand, the Board's duty to monitor any delay, *see infra* p. 465, generally does not require that it engage in overseeing the precise details of exactly how the Staff is employing its investigative resources and whether its efforts are meeting with success.⁴

Here, the Staff has provided such information. In addition to explaining why further delay is necessary to the successful completion of the investigative process, *see supra* p. 461, it has provided a credible demonstration of why that process is not yet complete and when it might be finished. The affidavit of OI Field Office Director Letts makes clear that between early March and late April, in response to subpoenas OSC provided the Staff with some 11,000 pages of documents that are under review and, not unexpectedly, that a followup document request is likely, which may yield several thousand pages more. *See* Staff Additional Delay Motion, Letts Affidavit at 2. Further, Mr. Letts declares that, although it already has conducted more than twenty-five interviews, in response to a Commonwealth request — the legitimacy of which OSC does not challenge — OI has delayed conducting the twenty-five or more additional witness interviews needed to complete its investigation to avoid any adverse impact on the state's ongoing criminal investigation. *See id.* at 3. He concludes that, barring any further delays relative to document production or witnesses' interviews, the OI investigation will not be completed until October 1993, *see id.* at 3-4, a date coinciding with that given by OIG Deputy Director Norton in his affidavit, *see id.*, Affidavit of Leo J. Norton at 1-2.

⁴ As we observed in LBP-93-6, 37 NRC at 216, we do not consider a licensee challenge to a Staff request to delay a proceeding an appropriate forum for litigating the licensee's potential criminal liability vis-a-vis an ongoing investigation.

In contrast to these explanations of why the investigative process is not yet completed and when it might be finished, other than OSC's speculative suggestions, we have no information indicating that the Staff is "milking" or "sitting on" any investigation so as to delay this proceeding unnecessarily in clear contravention of OSC's right to a timely hearing. We thus can give no credence to OSC's argument that a failure to finish these investigations warrants denying *in toto* the Staff's further delay request.

Also unavailing is OSC's argument rooted in the Supreme Court's *Landano* decision. At issue in that case was the evidentiary showing needed by the Federal Bureau of Investigation (FBI) to establish that a source is "confidential" within the meaning of Exemption 7(D) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(D), so as to permit agency withholding of any record that "could reasonably be expected to disclose" the identity of or information provided by, a "confidential source." The Court held that while there is no presumption that all sources supplying information to the FBI in the course of a criminal investigation are "confidential," some narrowly defined circumstances can provide a basis for inferring confidentiality. *See* 124 L. Ed. 2d at 96-98. These might include situations when an informant is paid or when the character of the crime at issue and the source's relation to the crime support a reasonable inference that the source cooperated with an implied assurance of confidentiality. *See id.* at 98-99. According to OSC, because the Staff has not established any "implication of confidentiality" relative to the witness statements gathered during the agency's investigations, under the *Landano* decision the Staff now has no basis for withholding those statements from discovery and, as a consequence, asking that this proceeding be delayed further. OSC Additional Delay Motion Response at 5.

Although the Staff has not sought to provide us with an explanation of its position concerning this recent and, according to OSC, dispositive authority, based on our own analysis we conclude that the *Landano* case is inapposite here. Even putting aside the generally recognized precept that the "FOIA is not a substitute for discovery or a basis for enlarging discovery rights," *Hale v. United States Department of Justice*, 973 F.2d 894, 898 n.5 (10th Cir. 1992), *petition for cert. filed*, No. 92-7433 (U.S. Jan. 28, 1993), application of the Court's interpretation of Exemption 7(D) in *Landano* does not aid OSC regarding the question whether the Staff has provided an adequate reason for delaying the conduct of this proceeding.

The issue here is not whether the statements the witnesses provided to agency investigators were intended by those witnesses to be confidential. Indeed, because a number of them were given by OSC's own employees, for present

purposes we will assume they were not.⁵ A central reason for which the Staff seeks to delay this proceeding, and thereby prevent access to those witness statements at present, is to protect the overall investigative process from being tainted in the manner outlined by OI Field Office Director Letts in his affidavit, quoted above. *See supra* p. 461. Therefore, source confidentiality, which is the linchpin of the *Landano* decision, is irrelevant in this instance. That case thus does not affect our determination that, under the \$8,850 balancing test, the Staff has provided compelling reasons for a further delay of this proceeding.

Of course, this does not end the matter, because we still must assess the third and fourth balancing factors. As we indicated in LBP-93-6, 37 NRC at 216, the third element — the licensee's invocation of its hearing right — does rest on OSC's side of the balance. Nonetheless, for the reasons we alluded to in our earlier decision, *see id.* at 216 & n.9, under the circumstances here OSC is not necessarily entitled to all the benefit this factor might otherwise engender. By failing to invoke the 10 C.F.R. § 2.202(c)(2)(i) procedure described in the Staff's January 20 order to challenge its immediate effectiveness, OSC allowed the order to remain operative. OSC thereby failed to avail itself of an important opportunity to avoid a significant portion of the harm it now asserts is the overriding ground for denying the Staff's delay request. Consequently, although this factor weighs in for OSC, the support it provides is, at best, limited.

Looking to the final factor — injury to the licensee — it appears that the harm underscored by OSC has changed from that highlighted in its earlier filings. As we noted in our previous determination, in evoking this factor OSC placed great significance on the purported harm that would be imposed upon its potential patients who would not be able to obtain needed HDR treatments at OSC facilities, particularly its Pittsburgh and Harrisburg centers. *See* LBP-93-6, 37 NRC at 216-17. We found OSC's assertions about this harm unpersuasive based on the Staff's showing that it had established and was administering fairly a procedure to permit OSC to provide patient treatment on a case-by-case basis at those facilities. *See id.* at 217-20. In its additional delay motion, the Staff now asserts that this purported injury has been eliminated because OSC has been granted broad permission to conduct HDR treatments at these two facilities. *See* Staff Additional Delay Motion at 9-10. Apparently in recognition of this fact, OSC now makes no mention of this "patient need" upon which it previously placed such stress. Instead, referencing its filings in response to the previous Staff motion, OSC contends they establish injury to its financial welfare and reputation that is sufficiently compelling to outweigh any asserted Staff basis for further delay. *See* OSC Additional Delay Motion Response at 3-4.

⁵ Of course, in the face of an FOIA request for those statements, the Staff may seek to establish otherwise. *Cf.* Staff Additional Delay Motion at 7 n.4.

As is reflected in a June 3, 1993 letter from the Regional Administrator of NRC Region I to OSC, *see* June 9, 1993 Letter from M. Zobler to [Licensing Board] (first attachment), the Staff has permitted OSC to resume HDR patient treatments at its Pittsburgh and Harrisburg facilities without submitting individual patient requests. This action effectively nullifies OSC's prior concerns about "patient need" and the inequity of the earlier case-by-case approach. Further, as we indicated in our prior decision, OSC's claims in its previous filings about professional reputation and financial harm are too conclusory to be convincing. *See* LBP-93-6, 37 NRC at 216-17. OSC thus has failed to provide any persuasive evidence that the additional delay will harm its interests, or the public interest generally.⁶

In sum, in balancing the four relevant factors we again find that a limited period of additional delay will not harm OSC's interests. Further, OSC's invocation of its right to a prompt hearing, standing alone, does not provide an adequate counterweight to the Staff's persuasive showing regarding the harm that allowing this administrative proceeding to go forward without restriction could inflict on the ongoing agency investigations and any resulting federal criminal prosecutions. As we noted previously, the passage of time continues, albeit slowly, to shift the balance in OSC's favor. *See id.* at 220. Nonetheless, with OSC's continued failure to present any particularized showing of harm to its interests, we are unable to conclude that the balance has yet swung in its favor.

III. FURTHER PROCEEDINGS BEFORE THE BOARD

As we also noted previously, *see id.* at 220-21, the Board has a general duty to monitor those Staff activities that are posited as a basis for delay to ensure that the Staff is proceeding in good faith and to minimize the effects of any delay. As before, in exercising this responsibility we grant the Staff's delay request only as it encompasses discovery and any portion of the adjudicatory process that can proceed only after discovery is completed.

In discharging this responsibility, we also conclude that it is appropriate to grant only a portion of the delay period the Staff requests. As the cumulative period of delay lengthens, the Board's obligation to monitor the progress of the investigation necessarily escalates. This is especially so when, as here, an

⁶In our decision on the first Staff delay request, we also brought up the issue of delay-related harm to OSC's interests resulting from faded witness memories or unavailable witnesses or documents and found that factor did not provide any significant support for OSC's position. *See* LBP-93-6, 37 NRC at 220 n.51. Once again, OSC has not raised that matter before us. Be that as it may, in the absence of any particularized showing by OSC regarding problems with particular witnesses or documents, we cannot conclude that, in and of itself, the passage of time from the November 1992 IRCC incident to either the present moment (seven months) or the expiration of the delay period we provide with this order (10 months) will produce significant harm to OSC.

investigation appears to be reaching its culmination. Moreover, there is some indication that the potential "whipsaw" effect of simultaneous federal and state proceedings about which we previously expressed concern, *see* LBP-93-6, 37 NRC at 221-22, might be having an impact upon the completion of the agency investigations.⁷ Given these circumstances, a measure of heightened scrutiny on our part is warranted. Accordingly, we approve the Staff's delay request, but only for ninety days rather than the requested 120 days.

Additionally, in carrying out our monitoring responsibilities, we again will require that forty days from the date of this memorandum and order the Staff provide us with a status report, accompanied by supporting affidavits, regarding the ongoing agency investigations. As before, the Staff should indicate when OI and OIG anticipate making a referral, if any, of their investigative findings to the Justice Department for possible criminal prosecution. Further, although the Staff apparently no longer relies upon the Commonwealth's investigation/prosecution activities as a direct basis for delaying this proceeding, *see supra* note 3, if it anticipates that the Commonwealth's efforts may be relevant to any further delay request, the Staff should advise us of the status of these activities as well. Also, in line with our previous delay order, the Staff continues to be responsible for advising the Board promptly of any criminal indictment or information filed against OSC or any of its employees or agents relative to the November 1992 IRCC incident or any of the other matters that are the basis of the Staff's January 20 suspension order.

Finally, as we required in our previous determination, to obtain a delay of this proceeding beyond this added ninety-day period, twenty days before the expiration of that period the Staff must file a further request with the Board. In its motion, the Staff should indicate the specific period of additional delay sought and describe, with supporting affidavits and documentation, the specific reasons why "good cause" exists for the delay.⁸

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

⁷ As described above, *see supra* p. 459, in its May 1993 status report the Staff indicated that the OI and OIG investigations and any criminal referral determinations were to be completed by September 1993. Now we are told these activities will not be completed until October. *See id.* The only apparent explanation for the slippage is a request, the date of which is not revealed, from Commonwealth officials to defer additional agency witness interviews pending the completion of their investigative process. *See* Staff Additional Delay Motion, Letts Affidavit at 3.

⁸ In this regard, the Staff is reminded of our earlier admonition "that as the [overall] period of delay lengthens, the reasons it must provide in support of a delay request must be increasingly specific and detailed." LBP-93-6, 37 NRC at 221. The type of affidavit supplied by OIG in support of Staff's June 3 delay request, which fails to provide any details about why its investigation is incomplete so that more time is needed or why its investigation would be compromised if this proceeding is allowed to go forward, is not likely to be given any weight by the Board in reaching a decision about any additional delay.

1. The June 3, 1993 motion of the Staff to delay this proceeding for a period of 120 days is *granted in part* in that all discovery in this proceeding is stayed for a period of ninety days, up through and including *Tuesday, September 21, 1993*, provided, however, that if the Staff files a request for additional delay in accordance with ¶ 4 below, discovery will continue to be stayed pending further order of the Board.

2. The Staff should notify the Board immediately when it becomes aware that a state or federal criminal indictment or information has been filed against OSC or any of its employees or agents relative to the November 1992 IRCC incident or any of the other matters that form the basis for the Staff's January 20, 1993 suspension order.

3. On or before *Monday, August 2, 1993*, the Staff should file a report, with supporting affidavits, describing:

- A. The status of any OI or OIG investigations relating to the matters set forth as the basis for the January 20, 1993 suspension order, including an estimate of (i) when OI and OIG anticipate their investigations will be completed and any referral of their investigative findings will be made to the Department of Justice for possible criminal prosecution, or (ii) if a referral has been made, when the Justice Department will reach a determination relative to the referral, and
- B. The status of the Commonwealth's investigative/prosecutorial activities relative to the November 1992 IRCC incident, if the Staff anticipates that those activities will be relevant to any further Staff delay request.

4. A Staff request for an additional delay of any aspect of this proceeding beyond *Tuesday, September 21, 1993*, must be filed on or before *Wednesday, September 1, 1993*. In its motion the Staff must describe in detail, with supporting affidavits and documentation, why "good cause" exists for the delay, including an exposition of the specific reasons why the Board's failure to grant the additional period of delay sought will prejudice any ongoing federal or state investigation or criminal prosecution. OSC will have *ten days* within which to respond to the Staff's request. Both the Staff's motion and OSC's response should be served on the Board's members and opposing counsel by a method (e.g., express mail) that ensures delivery by the next business day.

5. In conformity with the Commission's directive, *see* CLI-93-13, 37 NRC at 421, pursuant to 10 C.F.R. §2.718(i) we *certify* to the Commission the question whether this proceeding should be delayed further.⁹

**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
June 23, 1993**

⁹ Copies of this memorandum and order are being provided to OSC and Staff counsel by facsimile transmission this date.

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)

June 24, 1993

The Licensing Board determined that Six Tapes, which were compiled at the direction of an attorney from 277 taped conversations, were not entitled to be protected from discovery because they are either attorney work product or subject to attorney-client privilege.

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

The Licensing Board applied NRC's discovery rules regarding the work product doctrine, as set out in 10 C.F.R. § 2.740(b)(2). It went through each of the criteria of the rule and systematically determined that there were several reasons that the Six Tapes were not privileged. The Board also reviewed case-law precedents relevant to the interpretation of the regulatory criteria.

MEMORANDUM AND ORDER

(Order to Mr. Mosbaugh to Release Six Tapes)

In our June 1, 1993 Memorandum and Order, "Information and Brief Concerning Protective Order" (unpublished), we requested further information concerning whether or not to uphold Mr. Mosbaugh's claim of privilege for "Six Tapes." The claim is that the Six Tapes, which are copies of portions of 277 recordings of conversations, are protected by the attorney-client and work product privileges because their disclosure would reveal the legal theories and strategies of Mr. Mosbaugh's attorney, who allegedly directed their preparation.

After receiving the filings of the parties, we have determined that these tapes are not protected either by the work product privilege or the attorney-client privilege and that they should be released promptly to the Applicant.

We are concerned about what we consider undue intransigence to discovery on the part of Mr. Mosbaugh, particularly with respect to his discovery responses that do not involve the Six Tapes. We are charged with compiling a full, orderly, and complete record. In the interest of justice, we want all the unprivileged facts on the table. In this administrative proceeding, there is little room for surprise tactics. The Board will not condone questionable tactics and practices similar to those that Administrative Law Judge Bernard J. Gilday, Jr., complained of in prior litigation between these parties.¹

If Mr. Mosbaugh has the goods, he should lay them on the table. We intend to address this issue in more detail in a Memorandum and Order dealing with Applicant's Motion to Compel of June 17, 1993. However, we note that Mr. Mosbaugh's apparent lack of openness and fair play may be inhibiting Applicant's efforts to institute negotiations that could shortcut the discovery process and save everyone unnecessary expense in litigating every discovery detail.² We urge Mr. Mosbaugh to actively seek full and fair disclosure by all parties and to engage in negotiations to accomplish that end.

I. FACTS: INCLUDING APPARENT INCONSISTENCY

In our June 1 Memorandum, we described the Six Tapes as follows:

On May 14, 1993, Allen Mosbaugh filed a motion that contained a Request for a Protective Order with respect to six tape recordings (Six Tapes) allegedly made in preparation

¹ Georgia Power Company Response to Intervenor's Request for a Protective Order, May 27, 1993, Exh. 4, Order of Judge B.J. Gilday, Jr., *Mosbaugh v. Georgia Power Co.*, DOL Case No. 90-ERA-58. ("Complainant's actions raise serious questions, not only about his true motives and goals, but also about the quality of the techniques which have been employed. If, early on, any semblance of openness and fair play had been exhibited, substantial effort, expense and time, on the part of many, would have been saved.")

² Applicant's Letter of June 17, 1993.

of litigation pending before the U.S. Department of Labor. Georgia Power, in a May 27 Response to that Request, has alleged that the Six Tapes are not privileged based on its understanding of how they were prepared and on its understanding that the Six Tapes were not kept confidential but were voluntarily shared with others.

This description was derived from Mr. Mosbaugh's representation that:

These recordings constitute counsel's work product and are predicated on attorney-client communications. A total of six (6) such tape recordings were made in preparation of litigation pending before the U.S. Department of Labor. The recordings were also utilized by counsel to file a petition with the Chairman of the U.S. Nuclear Regulatory Commission on September 11, 1990.³

In response to our request for further information, however, Mr. Mosbaugh's attorney, Mr. Michael D. Kohn, significantly changed his position. He now states:

The method I chose to employ to properly represent Mr. Mosbaugh during legal proceedings before the NRC and, subsequently, before the DOL was as follows: After discussions with my client, wherein he would identify a sequence of events, Mr. Mosbaugh was instructed by counsel to make excerpts of relevant taped conversations. Mr. Mosbaugh made excerpted segments from the original recordings and produced six tape recordings of excerpted conversations (hereinafter "Six Tapes").

. . . The excerpted segments of the six tapes represent portions of 277 original tape recordings [of conversations between Mr. Mosbaugh and others, some allegedly covering practices of Georgia Power at the Vogtle Electric Generating Plant], which after consulting with Mr. Mosbaugh about the facts of the case, I deemed were significant and necessary to prepare for Mr. Mosbaugh's litigation.⁴

In September 1990, Mr. Mosbaugh gave his original tape recordings to NRC-OI.⁵ On July 29, 1992, the Six Tapes were released to a member of the staff of the U.S. House of Representatives Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce "on a confidential and privileged basis."⁶ Furthermore, there is another governmental entity with which the tapes may have been shared.⁷

Intervenor states that it "may call" Allen Mosbaugh as a witness.⁸ The Board notes that this language appears to be as definitive as Intervenor ever gets. The

³ Allen Mosbaugh's Response to the Board's April 21, 1993 Scheduling Order and Request for a Protective Order, May 14, 1993 (Mosbaugh Initial Response).

⁴ Intervenor's Information and Brief Concerning Motion for Protective Order, June 9, 1993 (Intervenor's Protective Order Brief), Exh. 1: Affidavit of Michael D. Kohn at 2 (Kohn Affidavit).

⁵ Kohn Affidavit at 3.

⁶ *Id.* at 4.

⁷ *Id.*

⁸ Intervenor's Response to the First Request for Documents by Georgia Power Company (Intervenor's Response to First Request), June 2, 1993, at 38.

Board expects Mr. Mosbaugh to be a witness, as his case likely will rise or fall on his direct testimony, on authentication of the audio tapes made by him, and on some contemporaneous documentation alleged to exist.

The Six Tapes were made by Allen Mosbaugh.⁹ The Six Tapes were excerpted from 277 original audio recordings, 76 of which are still in the possession of the NRC Office of Investigations.¹⁰ The Six Tapes were considered by Mr. Kohn to be "significant and necessary to prepare for Mr. Mosbaugh's litigation."¹¹

Although Intervenor has argued that discovery of its tapes would compromise an ongoing investigation by the NRC,¹² the Staff has not asserted such a privilege and has denied that other parties have the right to claim such a privilege on the Staff's behalf.¹³

II. APPLICABLE LAW

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

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

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

⁹ Intervenor's Response to First Request at 1.

¹⁰ Intervenor's Protective Order Brief at 2, Kohn Affidavit at 2, ¶ 3.

¹¹ Kohn Affidavit at 2, ¶ 3.

¹² Intervenor's Information and Brief at 6-7.

¹³ Staff Letter in Lieu of a Brief [title provided by the Licensing Board], June 22, 1993.

III. APPLICATION OF THE REGULATORY PROVISIONS

A. Prepared in Anticipation of the Hearing

The Six Tapes were not prepared in anticipation of this hearing. Furthermore, a section 2.206 petition, for which it was prepared, is not a hearing — it is a request for government action. Nor is there any precedent cited for a privilege that covers documents prepared for the purpose of inducing prosecution or an agency enforcement action, as occurred in this case.

That the Six Tapes became relevant to the Department of Labor litigation or to this case is incidental to their preparation. This later use of previously compiled information does not retroactively create a privilege. We find that these tapes were not prepared in anticipation of a hearing.

B. By a Party's Agent

It is Intervenor's claim that Mr. Mosbaugh was acting as an agent for his attorney in the way in which he assembled the Six Tapes. Since clients often find it necessary to conserve expenses by doing tasks at their attorney's suggestion, this is plausible. On the other hand, this is a claim that requires some specificity concerning the detailed directions given to Mr. Mosbaugh.

Even after submitting an additional affidavit at the Board's request, all Intervenor has done is to suggest that he gave general directions about what was important and what was not. In this proceeding, counsel for Mr. Mosbaugh also has specified what is important and what is not through the contentions, bases, and answers to interrogatories filed by him. We have no reason to believe that the directions given to Mr. Mosbaugh were any more than the current specification of charges in this case. To that extent, the directions are already public and nothing will be lost through disclosure of the tapes.

In the absence of further specificity, we resolve doubts about the nature of the directions given to Mr. Mosbaugh against the assertion of privilege. We are not persuaded that he was acting as an agent of his attorney. *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 22 (N.D. Cal. 1985). See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982) (“[t]he attorney-client privilege does not protect against discovery of underlying facts from their source, merely because those facts have been communicated to an attorney”).

C. Substantial Need

Licensee has a substantial need to discover the Six Tapes. They represent Intervenor's view of what is important among 277 audio tapes made by him.

Since he was present at the conversations, his view of what is important is crucial. Furthermore, he is likely to be influenced in his testimony by his familiarity with the Six Tapes, and the process of preparing them and of subsequently listening to them is an important part of how his testimony has been shaped for trial.

This material is most helpful to understanding the importance of his testimony, including what he has focused on and what he has chosen to omit. As material that has influenced testimony of a key witness, it should be made available to the other party. In a criminal case, disclosure of this material might not be made until trial. However, civil cases and administrative proceedings operate on principles of full and early disclosure, and there is every reason to make available now what would become available later. *United States v. Noble*, 422 U.S. 225, 239 (1975) (holding that it was appropriate to rule that an investigator could testify only if his investigative report, which even included statements by the defendant, would then be required to be provided to the prosecution).

The 277 tapes, including the 76 in the possession of the NRC, would not be a substitute for these summary tapes. It is the Six Tapes that will fully inform the Applicant of the basis for the contentions that it is facing. Fairness and efficiency both require that the Applicant have this information. We find that Applicant has a substantial need to obtain it.

D. Unable Without Substantial Hardship to Obtain the Substantial Equivalent

We find that Applicant would confront a substantial hardship in taking 277 audio tapes and, without having been present while the tapes were made, extract important information from those tapes. Hence, the Six Tapes are important in avoiding substantial hardship. Furthermore, for reasons discussed in the just-preceding Section C, above, the 277 tapes are not the substantial equivalent of the Six Tapes.

E. Protecting Against Unnecessary Disclosure

We are aware of our obligation to protect against unnecessary disclosure of the thought processes of Intervenor's attorney in the process of denying the privilege asserted for the Six Tapes. However, none of those processes is alleged to be directly disclosed in the tapes. The tapes are pure evidence, without any thought processes. There is no need to delete anything in order to protect the attorney's thought processes. It is indeed likely that the collection of evidence could have resulted from differing thought processes and that the attorney's

legal theories or thought processes will be no more evident after the tapes have been released than they are already as a result of statements in our record.

F. Waiver of Privilege

In addition to our conclusion that the Six Tapes are not privileged, we also conclude that any privilege that might have attached was waived when they were provided to the Nuclear Regulatory Commission for a section 2.206 proceeding and for an investigation, and privilege was also waived by presenting the tapes to Congress. Documents that are privileged are private. They are not disclosed. *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427-30 (3d Cir. 1991) (Westinghouse was held to have lost any claim to privilege for documents disclosed to the Securities and Exchange Commission and the Department of Justice in order to cooperate with them in ongoing investigations.)¹⁴

In this case, Mr. Mosbaugh's disclosures were freer than those of Westinghouse, which may have felt some pressure to clear its name from ongoing investigations. When Mr. Mosbaugh made the Six Tapes available to the Office of Investigation of the Nuclear Regulatory Commission and to a congressional committee, he waived any claim of privilege. It does not matter that these recipients would keep the alleged "work product" confidential. The act of sharing with them belies the need to keep private the work that was done. The work was not kept private and no longer has a claim to privilege.

G. Conclusion of Law

The Six Tapes must be released promptly. They are not privileged. Were they privileged, the privilege would have been waived.

IV. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 24th day of June 1993, ORDERED that:

¹⁴ See also *Synalloy Corp. v. Gray*, 142 F.R.D. 266, 269 (D. Del. 1992) (holding that there is an implied waiver of privilege when a party puts protected information at issue by making it relevant to the case).

The Six Tapes discussed above shall be served in this case by close of business July 1, 1993.

**THE ATOMIC SAFETY AND
LICENSING BOARD**

**James H. Carpenter
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

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-445
50-446TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*
(Comanche Peak Steam Electric
Station, Units 1 and 2)

June 4, 1993

On June 11, 1992, the National Whistleblower Center and its clients, Messrs. Joseph J. Macktal and S.M.A. Nasan (Petitioners) submitted a letter to the U.S. Nuclear Regulatory Commission (NRC) alleging new evidence of restrictive settlement agreements entered into by the Texas Utilities Electric Company (Licensee) regarding its Comanche Peak Steam Electric Station, Units 1 and 2 (CPSES). The letter was referred to the Office of Nuclear Reactor Regulation for the preparation of a response and was considered as a petition pursuant to 10 C.F.R. § 2.206. Additional letters were submitted by Petitioners on October 6 and November 19, 1992, and were considered as supplements to the original Petition.

The Petition alleged that certain settlement agreements entered into by the Licensee and certain former co-owners of CPSES contained restrictive language in violation of section 211 of the Energy Reorganization Act (ERA) and 10 C.F.R. § 50.7. In addition, Petitioners alleged that the settlement agreements have resulted in the suppression of information associated with the safe operation of CPSES and that the Licensee's response to the Petition dated October 16, 1992, contained incorrect and misleading information to the point of being materially false.

On the basis of this information, the Petitioners asked the NRC to suspend the license to operate CPSES Unit 1 and the permit to construct CPSES Unit 2. The Petitioners also asked the NRC to take immediate actions, specifically that

(1) a licensing board be established to allow public scrutiny into the Licensee's alleged practice of paying "hush money"; (2) the NRC notify the Licensee and the former co-owners that no settlement agreement can preclude employees or others from providing information to persons involved in proceedings before the NRC; (3) copies of the settlement agreements be made public and provided to Petitioners' counsel; and (4) the NRC notify the counsel for one of the former co-owners that he and others are free to disclose safety-related information about CPSES to others.

The relief sought has been granted in part and denied in part by the Director of the Office of Nuclear Reactor Regulation. Petitioners sought that the NRC notify the Licensee and the former co-owners that no settlement agreement can preclude individuals and organizations from bringing safety information to the NRC. This was done. The Petitioners also sought that copies of the settlement agreements with the three former co-owners be made public. This was done. Finally, the Petitioners requested that the counsel for one of the former co-owners be notified that he is free to disclose safety information to the NRC. The NRC has caused this to happen.

The other relief sought by Petitioners has been denied. The Director determined that the facts in this matter did not warrant the institution of proceedings. Parties are encouraged to settle their disputes. Public policy only demands that a clear avenue be available to individuals and entities to bring safety concerns to the NRC.

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

I. INTRODUCTION

On June 11, 1992, the National Whistleblower Center and its clients, Messrs. Joseph J. Macktal and S.M.A. Hasan (Petitioners) filed with the Chairman of the U.S. Nuclear Regulatory Commission (NRC or Commission) a letter alleging new evidence of restrictive settlement agreements entered into by the Texas Utilities Electric Company (Licensee or TU Electric) regarding its Comanche Peak Steam Electric Station, Units 1 and 2 (CPSES). The letter is being considered as a Petition pursuant to 10 C.F.R. § 2.206 and was referred to my office for preparation of a response.

The Petition alleged the discovery of new evidence of a continuing practice by the Licensee to pay "hush money" to keep significant information about CPSES from the Petitioners and the NRC. Specifically, the Petition refers to a January 30, 1990 settlement agreement between the Licensee and the Tex-La Electric Cooperative of Texas, Inc. (Tex-La), one of the three former

co-owners of CPSES, that allegedly contains restrictive language in violation of section 210 of the Energy Reorganization Act (42 U.S.C. § 5851(a)) and 10 C.F.R. § 50.7.¹ Petitioners further alleged that the three former co-owners of the CPSES conducted extensive and widespread investigations of TU Electric's management integrity and competence to operate the plant and that TU Electric attempted, through restrictive provisions in the settlement agreements it entered into with the former co-owners, to keep such information from the Petitioners, other parties to the CPSES licensing proceedings, and the NRC.

On the basis of this information, the Petitioners requested (1) that orders be issued suspending the Licensee's authority to operate CPSES Unit 1 and to construct Unit 2; and (2) that the expiration date of the construction permit to construct Unit 2 not be extended. Petitioners also requested that the NRC take immediate actions, specifically that (1) a licensing board be established to allow public scrutiny into the Licensee's alleged practice of paying "hush money"; (2) the NRC notify the Licensee and former co-owners that no settlement agreement can preclude employees, attorneys, agents, consultants, or others from providing information to persons who are, or intend to be, involved in proceedings or petitions before the NRC; (3) copies of the Licensee's agreements with former co-owners be made public and provided to Petitioners' counsel; and (4) the NRC notify the counsel for Tex-La that he and others are free to disclose safety-related information about CPSES to anyone who is currently a party to any ongoing or future contemplated licensing proceedings related to CPSES.

In a letter of August 26, 1992, I acknowledged receipt of the Petition and declined to take any immediate actions. I informed the Petitioners that the NRC Staff (Staff) had reviewed settlement agreements between the Licensee and Tex-La, dated March 23, 1989, and January 30, 1990, and had determined that they did not appear to violate the provisions of section 211 of the ERA or 10 C.F.R. § 50.7. However, I noted that a fuller analysis of the provisions of the settlement agreements to address the points raised in the Petition would be contained in my decision under 10 C.F.R. § 2.206. In that letter, I also informed Petitioners that the NRC had issued an Order dated July 28, 1992 (unpublished), extending the latest construction completion date for CPSES Unit 2. The Staff evaluated the Licensee's application of February 3, 1992, for an amendment to the construction permit extending the construction completion date and concluded, in accordance with 10 C.F.R. § 50.55(b), that good cause had been shown for the delay and that the requested extension was for a reasonable period of time.²

¹ Section 210 of the Energy Reorganization Act (ERA) is now section 211 of the ERA by virtue of revisions in accordance with the Energy Policy Act of 1992, Pub. L. No. 486, 106 Stat. 2776, § 2902. Henceforth in the Decision, this statute will be referred to as section 211 of the ERA.

² The relief sought by Petitioners with regard to the construction permit outstanding for CPSES Unit 2 when the Petition was filed has been rendered moot. The Commission dismissed the proceeding regarding the CPSES

(Continued)

As a result of the review conducted by the Staff, certain of the requested actions were granted. Specifically, the Staff notified TU Electric and the former co-owners that no settlement agreement can preclude individuals and organizations from bringing safety information to the NRC, copies of the settlement agreements have been made public,³ and the counsel of Tex-La has been notified (by Tex-La) that he is free to disclose safety information to the NRC. The remaining relief requested has been denied. The basis for my Decision follows.

II. BACKGROUND

In addition to the issues raised in the Petition, additional submittals were made by both the Petitioners and the Licensee. To support the Staff's review of the Petition, TU Electric and the former co-owners were required to submit documentation. A summary of this correspondence follows.

In a letter of August 6, 1992, TU Electric responded to the Petition. The Licensee stated that the Petition contained no new information, that the agreement with Tex-La did not violate 10 C.F.R. §50.7(f) or section 211 of the ERA, and that the agreement was consistent with the public interest. The Licensee also stated that the agreement explicitly accommodated section 211, and that the agreement was not subject to 10 C.F.R. §50.7(f) because it was not an agreement affecting the compensation, terms, conditions, and privileges of employment. TU Electric claimed that the agreement did not prohibit individuals, on their own behalf, from providing information to the NRC, requesting the NRC to take action, or appearing as a witness in an NRC proceeding. The Licensee also took issue with Petitioners' position that prohibitions against assisting third persons violated regulations.

In a letter of October 6, 1992, Petitioners responded to the Licensee's letter of August 6, 1992. This filing is being considered as a supplement to the Petition. Petitioners took issue with the Licensee's response and reiterated the view that the Tex-La settlement agreement (the only agreement Petitioners had available to them at the time) contained a blanket prohibition precluding Tex-La employees, attorneys, and agents from assisting in any manner whatsoever in activities related to the NRC licensing of CPSES and prohibited any

Unit 2 construction permit amendment on March 30, 1993. See CLI-93-10, 37 NRC 192 (1993). An operating license was issued by the NRC for CPSES Unit 2 on February 2, 1993.

³Copies of the agreements between the Licensee and the three former co-owners are available for inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW, Washington, DC 20555, and at The University of Texas at Arlington Library, Government Publications/Maps, 701 South Cooper, P.O. Box 19497, Arlington, TX 76019. Although Petitioners' counsel requested that he be served with copies of these agreements, placement of these documents in the NRC public document rooms gives the public ready access to them.

Tex-La employee, attorney, and agent from assisting the current intervenors at CPSES. In addition, Petitioners stated that the agreements had resulted in the suppression of information associated with the safe operation of CPSES. Therefore, Petitioners argued, the Tex-La agreement violated section 50.7, the ERA, and other important public policies.

In a letter of October 16, 1992, supplemented by a letter of October 29, 1992, the Licensee responded to Petitioners' letter of October 6, 1992. The Licensee restated its previous position and argued that there was nothing improper about a commercial party, such as Tex-La, promising not to bring an action before the NRC in exchange for settlement of a lawsuit. The Licensee stated that accepting the Petitioners' argument would essentially prohibit any settlement involving a nuclear plant, and that such an outcome was inconsistent with public policy and the Commission's policy in favor of settlement of NRC proceedings.

On November 19, 1992, Petitioners responded to the TU Electric letter of October 16, 1992. This response is also considered to be a supplement to the original Petition. Petitioners took issue with Licensee positions and alleged that the TU Electric letter of October 16, 1992, contained incorrect and misleading information, including some statements that Petitioners considered "misleading to the point of being materially false."

In order to complete its evaluation of the settlement agreements entered into between the Licensee and the former co-owners, the Staff requested in a letter of September 15, 1992, that the Licensee provide the Staff with copies of settlement agreements entered into between the Licensee and the other former co-owners of CPSES. The Licensee responded on September 21, 1992, and submitted copies of agreements entered into between the Licensee and Brazos Electric Power Cooperative, Inc. (Brazos) on July 5, 1988, and between the Licensee and Texas Municipal Power Agency (TMPA) on February 12, 1988.

As a result of its evaluation of the three settlement agreements, the Staff determined that none of the provisions of these agreements violated section 211 of the ERA or NRC regulations. However, the Staff did determine that each agreement contained a number of provisions that were restrictive and also contained language that could have a chilling effect.⁴ This position was stated in the Staff's letters of January 12, 1993, to TU Electric, Tex-La, TMPA, and Brazos. Each company was notified that it should take actions to ensure that all individuals and organizations that could be affected by the restrictive and chilling provisions in the agreements clearly understand that those provisions, if interpreted to preclude individuals or organizations from providing information

⁴The provisions are restrictive as to the entities bound by the settlement agreements, i.e., the parties to the agreements and individuals acting on behalf of the parties to the agreements. The agreements are not restrictive regarding individuals who act on their own behalf. It is in this sense that the term "restrictive" is used throughout this Decision.

to the NRC, are void and unenforceable, and that anyone may, at any time, bring safety information to the NRC or assist third parties to do so if the individual or organization so chooses. Each company was asked to inform the NRC of the actions taken or to be taken to ensure that individuals and organizations do not believe that they are precluded from coming to the NRC with safety concerns.

TU Electric responded in a letter of February 11, 1993. The Licensee stated that it had advised each of the former co-owners that the subject provisions of the settlement agreements were not intended to prohibit the former co-owners, their employees, or representatives from communicating safety concerns to the NRC, and that it would not attempt to impose or enforce any provision so as to prohibit the communication of safety concerns to the NRC. The Licensee's letters to the former co-owners stated that TU Electric continued to believe that the settlement agreements, including the provisions cited by the Staff, are consistent with official Commission policy in that the agreements state that the minority owners (and those acting on their behalf) are free to comply with section 211 of the ERA. TU Electric also reminded each former co-owner that it had made affirmative representations and warranties that it did not know of any violation, actual or alleged, of section 211 that had not been previously disclosed to TU Electric in writing. The Licensee stated that it was thus clearly the intention of TU Electric to ensure that all safety concerns had been or would be made known to the NRC.

In its response of February 9, 1993, TMPA represented that it and TU Electric are the only parties bound by the TMPA agreement and that TMPA had obtained the written assurance of TU Electric that TU Electric does not interpret the agreement to prohibit TMPA, its employees, or its representatives from communicating safety concerns to the NRC. TMPA further stated that it does not interpret the agreement to contain any such provision. Finally, TMPA represented that it is unaware of any individual or organization connected with it who has interpreted the language of its February 12, 1988, agreement with TU Electric to deprive the NRC of safety information with respect to CPSES.

In its response of February 10, 1993, Brazos represented that it had never read any of the provisions of its July 5, 1988 agreement with TU Electric as prohibiting the communication of safety information to the NRC and that Brazos had taken no actions to stifle any individuals or organizations in such regard. With regard to the experts and consultants working for Brazos on the Comanche Peak matter, on July 6, 1988, they were informed that an agreement with TU Electric had been reached, that Brazos would no longer be requiring their professional services, and that they were directed to immediately cease work on any projects undertaken at the direction of attorneys representing Brazos. In addition, Brazos has given its Comanche Peak litigation attorneys a copy of the NRC letter of January 12, 1993, and a copy of a letter TU Electric sent to Brazos on February 3, 1993, wherein TU Electric advises Brazos that no provisions of

the Brazos agreement were intended to prohibit the former co-owners, their employees, or their representatives from communicating safety concerns to the NRC, and that TU Electric would not attempt to impose or enforce any such provision.

In its response of February 10, 1993, Tex-La represented that, by letters of March 28, 1989, an attorney then with the law firm of Heron, Burchette, Ruckert & Rothwell notified the consultants who had assisted Tex-La in the litigation between Tex-La and TU Electric that they were asked not to oppose, or assist any third party in opposing, TU Electric in connection with any matters relating to CPSES. The letters did not, either explicitly or implicitly, communicate to the recipients that they were prohibited from taking safety concerns to the NRC. In letters of February 10, 1993, Tex-La notified the same consultants who received the March 28, 1989 letters, that the NRC had taken the position that section 9.2(d) of the Tex-La agreement was potentially restrictive because it could be interpreted to prohibit individuals from taking safety concerns to the NRC. Tex-La informed these individuals that the settlement agreement was not intended to restrict Tex-La consultants from taking safety concerns to the NRC. Finally, in a letter of February 10, 1993, Tex-La notified its counsel, William H. Burchette, that the settlement agreement should not be interpreted to restrict the submittal of safety concerns to the NRC.⁵

III. DISCUSSION

The Staff has identified five allegations raised by the original Petition and its supplements that require resolution. The allegations are that (1) the settlement agreements between TU Electric and Tex-La, Brazos, and TMPA violate section 211 of the ERA and 10 C.F.R. § 50.7; (2) the settlement agreements are inconsistent with Commission policy; (3) the settlement agreements resulted in information associated with the safe operation of CPSES being withheld from the NRC; (4) by virtue of the settlement agreements, TU Electric has engaged in a practice of paying "hush money" to keep significant information from the NRC; and (5) TU Electric has submitted inaccurate or material false statements to the NRC in its October 16, 1992 response to this Petition. These issues are addressed below.

⁵ Petitioners submitted a letter from Mr. Burchette, dated May 20, 1992, in support of their Petition.

A. Petitioners' Allegation That Settlement Agreements Violate Section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7

Petitioners alleged that the settlement agreements between the Licensee and the former co-owners violated section 211 of the ERA and 10 C.F.R. § 50.7 in that they contained restrictive language.⁶ The Staff addressed this issue in its January 12, 1993 letters to TU Electric, Tex-La, TMPA, and Brazos. As noted therein, the Staff determined that the subject settlement agreements did not violate either section 211 or section 50.7. The basis for this determination is repeated below.

The settlement agreements are not within the scope of either section 211 of the ERA or section 50.7 of NRC regulations. Section 211 of the ERA provides protection for employees who bring information of regulatory concern to the NRC. Section 50.7 of the NRC regulations prohibits discrimination against employees as a result of bringing safety concerns to the NRC. The settlement agreements are not within the scope of either of these provisions because these agreements do not preclude employees acting on their own behalf from bringing safety concerns to the NRC. These agreements only apply to the corporate entities and not to individual employees acting on their own behalf. The agreements do not contain provisions that restrict an employee or former employee. Indeed, the language of the agreements indicates that the agreements are limited to the named parties acting for themselves and on behalf of any person or entity, private or governmental, claiming by, through, or under a named party, including insurers, agents, servants, employees, officers, directors, consultants, attorneys, and representatives. Such language indicates that the agreements apply to employees who act on behalf of the named parties and not to employees who act on their own behalf.

The agreements are not within the scope of section 50.7 for another reason. Specifically, section 50.7(f) states that no agreements affecting the compensation, terms, conditions, and privileges of employment, including an agreement to settle a complaint by an employee with the Department of Labor (DOL) pursuant to the ERA, may contain any provision that would prohibit, restrict, or otherwise discourage an employee from participating in a protected activity that includes, but is not limited to, providing information to the NRC on potential violations or on other matters within NRC regulatory responsibilities. None of the settlement agreements between the Licensee and the three former co-owners is an agreement of the type described by the regulation. They are, in essence,

⁶Petitioners argue that section 211 of the ERA statutorily protects Petitioners' "rights" to unbridled access to witnesses as well as the "right" to gain assistance from employees of the former co-owners to prepare petitions and to initiate proceedings with regard to CPSES under the Atomic Energy Act of 1954, as amended. Petition at 2. The NRC does not share this expansive view of section 211. That statute was clearly limited to providing a personal remedy for whistleblowers. It created no ancillary "rights" such as those claimed by Petitioners as running to them.

agreements between corporate entities (to buy and sell portions of ownership of CPSES) and are not agreements affecting the compensation, terms, conditions, and privileges of employment. Accordingly, Petitioners' claims regarding the violation of federal statute or Commission regulations are without merit.

B. Petitioners' Allegation That the Settlement Agreements Are Inconsistent with Commission Policy

The NRC has expressed a policy that looks unfavorably upon any restrictions on the free flow of information to the NRC. *See Preserving the Free Flow of Information to the Commission*, 55 Fed. Reg. 10,397 (1990). Although the agreements do not fall within the scope of either section 211 of the ERA or section 50.7 of NRC regulations, the NRC has stated that, "no restrictions on bringing information to the Commission should be allowed." *Id.* at 10,402. To the extent that any of the provisions of the settlement agreements would preclude organizations or individuals from bringing information of regulatory concern to the NRC, those provisions would be inconsistent with the above-stated policy and would be without force and effect, at least insofar as they relate to communications with the NRC.

The Staff has completed its review of the settlement agreements and determined that they are restrictive with regard to organizations.⁷ In addition, although the agreements do not explicitly preclude individuals from bringing information to the NRC, the Staff is concerned that the settlement agreements contain language that could have a "chilling effect," i.e., individuals could interpret the agreements as prohibiting them from bringing, or assisting others in bringing, information to the NRC.

All three agreements contain a similar structure and similar, although not identical, language. A review of one of the agreements, the Tex-La agreement, reveals the types of provisions they all contain.⁸

The covenant not to sue on the part of Tex-La, at page 46 of the Tex-La agreement and at page 5 of Exhibit M to the Tex-La agreement, contains language whereby Tex-La is restricted from directly or indirectly opposing, challenging, or contesting any aspect of CPSES including its planning, design, licensing, and construction. Other restrictive language appears at pages 47 and 48 of the Tex-La agreement and at page 7 of Exhibit M to the Tex-La agreement.

⁷The provisions are restrictive as to the entities bound by the settlement agreements, i.e., the parties to the agreements and individuals acting on behalf of the parties to the agreements. The agreements are not restrictive regarding individuals who act on their own behalf. It is in this sense that the term "restrictive" is used throughout this Decision.

⁸Three Tex-La agreements exist. The agreement of March 23, 1989, was amended by agreements of December 21, 1989, and January 30, 1990. The three agreements do not differ in any material respect with regard to the issues raised in the Petition. It is the January 30, 1990 agreement that the NRC Staff discusses in this Decision.

According to those terms, Tex-La shall in no event use any information obtained by it or its attorneys in any manner adverse to the Licensee. The restrictive nature of this provision is amplified by other terms of the Tex-La agreement which permit Tex-La to respond only to specific discovery requests and permit Tex-La to tell the truth under oath in response to a specific request. Additional restrictive language appears at page 61 of the Tex-La agreement. There Tex-La agrees not to oppose, or assist any third party in opposing, a position being advocated by the Licensee.⁹ Such restrictive provisions are inconsistent with Commission policy. These provisions, however, do not explicitly prohibit individuals, acting on their own behalf, from bringing safety concerns to the NRC.

The NRC is also concerned that the language of the restrictive provisions could have a potential chilling effect on some individuals. In addition, language with a potential chilling effect appears on pages 49 and 50 of the Tex-La agreement. Tex-La agrees that it will encourage its attorneys and consultants not to oppose, or assist any third party in opposing, the Licensee in connection with any matters relating to CPSES.¹⁰ The Tex-La agreement, although it does not explicitly restrict the rights of individuals acting on their own behalf, does not make it clear that safety concerns may be brought to the attention of the NRC without restriction. Rather, the Tex-La agreement contains broad and sweeping language that could discourage some individuals from bringing safety concerns to the NRC.

The NRC recognizes a need for the settlement of disputes. *See Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 456 (1981), and 10 C.F.R. §§ 2.203, 2.205, and 2.759. Settlement contemplates the need for language in settlement agreements to preclude endless litigation. However, any provisions in settlement agreements limiting litigation must be carefully written to ensure that a clear avenue remains open for individuals and organizations to bring safety concerns to the NRC, or to assist others in doing so, should they so wish. A balance must be struck in settlement agreements between the need to bring an end to disputes involving the parties and the need to ensure that a clear avenue remains available to bring safety information to the NRC. The agreements at issue here do not strike a proper balance between these competing interests. The agreements contain language restricting the former minority co-owners with regard to providing information to the NRC that would be adverse to the Licensee. To this extent, the Petitioners' allegation that the

⁹ Similar, though not identical, language is found in the other two agreements between the Licensee and Brazos and the Licensee and TMPA. For purposes of this Decision, it is not necessary to summarize these essentially repetitive provisions.

¹⁰ Petitioners attached to the Petition a letter of May 20, 1992, to Mr. R. Micky Dow from William H. Burchette, Esq., as evidence of the restrictive nature of the Tex-La agreement. It would appear that Mr. Burchette is referencing the language on page 49 of the Tex-La agreement in his response. Mr. Burchette concludes that he is precluded from assisting or cooperating in any way with any third party in opposing TU Electric in connection with the licensing of CPSES.

settlement agreements are inconsistent with Commission policy is correct. In addition, although the agreements do not explicitly restrict individuals acting on their own behalf, the language in the agreements is broad and sweeping in nature and could lead individuals to conclude that they are restricted from providing information to the NRC which would be adverse to the Licensee. The agreements thus have a potential chilling effect.

Therefore, the Staff took actions to ensure that TU Electric, Brazos, Tex-La, and TMPA did not consider the agreements to restrict the right of organizations and individuals to bring safety concerns to the NRC. The representations made by TU Electric and the former co-owners in their responses to the January 12, 1993 letters from the Staff provide reasonable assurance that the Licensee and former co-owners did not intend the agreements to prevent safety concerns from being brought to the NRC. In addition, I am satisfied that all parties to the settlement agreements in question now understand that there must be a clear avenue available for anyone at any time to bring safety concerns to the NRC. In the case of Mr. Burchette, upon whose letter of May 20, 1992, Petitioners in part rely, he too has been informed by Tex-La that he may bring safety concerns to the NRC if he so chooses.¹¹

I consider the responses to my letters of January 12, 1993, to be sufficient to resolve any potential concerns or doubts about the effect of certain language contained in the three settlement agreements at issue. The Commission itself has reviewed this very issue in its consideration of a motion for a stay of the issuance of the full-power license for CPSES Unit 2 and has reached the same conclusion. See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 259 (1993).

C. Petitioners' Allegation That the Settlement Agreements Resulted in Information Associated with the Safe Operation of CPSES Being Withheld from the NRC

Petitioners allege that the settlement agreements have resulted in information associated with the safe operation of CPSES being withheld from the NRC.

With regard to the three former co-owners, the settlement agreements contain language restricting them from providing information to the NRC. However, I

¹¹ While the responses of TU Electric, TMPA, Brazos, and Tex-La all make clear that the settlement agreements were never intended to preclude any entity or individual from bringing safety information to the NRC if that entity or individual wished to do so, the responses do not address whether the settlement agreements preclude such entities or individuals from assisting third parties in their bringing of safety information to the NRC. The NRC sees no meaningful distinction here. An entity or individual may bring safety concerns directly to the NRC or may assist a third party in doing so. A clear avenue must be available to bring safety concerns to the NRC whether that avenue is direct or indirect. As I stated in my letters of January 12, 1993, to TU Electric, TMPA, Brazos, and Tex-La, anyone may, at any time, bring safety information to the NRC, or assist third parties in bringing such information to the NRC, if the individual or organization so chooses.

am satisfied from the responses of the three former co-owners that they did not interpret the agreements as preventing them from raising safety concerns to the NRC and the Licensee has never asserted to the former co-owners that the agreements prevent them from raising safety concerns. The Commission itself has reviewed this very issue in its consideration of a motion for a stay of the issuance of the full-power license for CPSES Unit 2 and has reached the same conclusion. See *Comanche Peak*, CLI-93-11, 37 NRC at 259.

Because of the restrictive and potentially chilling nature of these agreements, however, the actions taken by TU Electric and the former co-owners cannot ensure that there are no instances where information associated with the safe operation of CPSES has been withheld from the NRC as a result of these agreements. Even in such a situation, the Staff has determined that in this case a significant threat to the public health and safety does not exist. The Staff made this determination on the basis of the limited involvement of the former co-owners in the design, construction, maintenance, and operation of CPSES, and the programs that both the Licensee and the NRC have in place to ensure that the plant was designed and constructed safely, and can be maintained and operated safely. The basis for this determination is given below.

TU Electric has been the entity responsible for the design, construction, maintenance, and operation of CPSES. This was true even when Brazos, TMPA, and Tex-La had an interest in the facility. The safety evaluations for the amendments adding Brazos and TMPA¹² and Tex-La¹³ to the construction permits for CPSES noted that TU Electric (formerly TUGCO) retained exclusive responsibility for the design, construction, operation, and maintenance of the plant. Hence, the involvement of the former co-owners was indirect. Therefore, even if the former co-owners' employees considered the settlement agreements to be restrictive, it is unlikely that a significant number of personnel with direct knowledge of CPSES would have been affected.

The NRC also has an allegation management program to facilitate a review and possible validation of concerns of impropriety or inadequacy associated with NRC-regulated activities identified by a variety of sources. However, because there are no guarantees that allegers will find problems and bring them to the NRC, the NRC has not designed its program for ensuring adequate protection on an assumption that allegers will reveal safety deficiencies. Although allegations have led to the early identification of safety-significant deficiencies, the Staff does not include its allegation management program in its bases for ensuring adequate protection of the public health and safety. Rather, the NRC relies on

¹² Brazos and TMPA were added to the construction permits for CPSES Unit 1 (CPR-126) and Unit 2 (CPR-127) by Amendment 3 to each permit. See NRC Letter of December 13, 1979.

¹³ Tex-La was added to the construction permits for CPSES Unit 1 (CPR-126) and Unit 2 (CPR-127) by Amendment 4 to each permit. See NRC Letter of September 30, 1981.

adequate protection of the public health and safety. Rather, the NRC relies on its inspections of licensee programs, policies, and facilities to ensure that such protection exists.

To this end, the Staff has conducted extensive inspections of CPSES to ensure that the facility was constructed safely and can be operated safely. Since 1973, the NRC has performed more than 150,000 direct inspection hours, approximately half of which were completed since inception of the Corrective Action Program (CAP) in early 1987. The findings of these inspections are documented in more than 500 inspection reports. These inspections offer a reasonable assurance that CPSES was constructed safely and can be operated safely.

In parallel with the NRC's allegation management program, as part of its policies for treating employee concerns, the Licensee has established a mechanism for individuals to bring a broad range of issues to its attention. This is the TU Electric SAFETEAM Program. The SAFETEAM Program is not a regulatory requirement. It does, however, have a nexus to the Licensee's commitment to safety and, therefore, its success is of interest to the NRC. A recent NRC review of the Licensee's SAFETEAM Program concluded that the program provides an avenue for employees with safety concerns to present these concerns to management and gives plant management a mechanism for the early identification of issues that could affect the safety of the plant.

Finally, TU Electric implemented a far-ranging CAP for CPSES. The CAP is a comprehensive program that validated both the design and hardware at CPSES, including resolution of specific Comanche Peak Response Team (CPRT) and external issues. The design validation portion of the CAP identified the design-related licensing requirements and commitments. These requirements and commitments formed the bases for the design validation effort and were assembled in design-basis documents. The hardware validation portion of the CAP was implemented by the Post Construction Hardware Validation Program (PCHVP). The purpose of the PCHVP was to demonstrate that as-built systems, structures, and components were in compliance with the installation specifications (validated design), or to identify modifications that were necessary to bring the hardware into compliance with the validated design. The NRC has regularly reviewed the CAP and has found that the program results in the effective identification and correction of problems at CPSES. The findings of NRC reviews are documented in over 100 inspection reports and in NUREG-0797, "Safety Evaluation Report Related to the Operation of Comanche Peak Steam Electric Station, Units 1 and 2."

In summary, despite the restrictive provisions regarding parties to the agreements and the potentially chilling nature of the settlement agreements, on the basis of TU Electric's and former co-owners' statements that the agreements were not intended or interpreted to restrict information from the NRC, the limited

involvement of the former co-owners, the allegation management and inspection programs of the NRC, and the Licensee's SAFETEAM and CAP Programs, the Staff has a reasonable assurance that no significant safety issues have been left unresolved. The Commission reached a similar conclusion with regard to this issue in its Memorandum and Order of April 6, 1993. CLI-93-11, 37 NRC at 259.

D. Petitioners' Allegation That, by Virtue of the Settlement Agreements, TU Electric Has Engaged in a Practice of Paying "Hush Money" to Keep Significant Information from NRC

Petitioners alleged that TU Electric has, by virtue of the settlement agreements, engaged in a continuing practice of paying "hush money" to keep significant information from the NRC. Petitioners cite as evidence the TU Electric settlement agreement with Tex-La. It is clear that the primary purpose of the agreements was to effect the transfer of ownership interests from the former co-owners to TU Electric. Although the Staff found that portions of the TU Electric-former co-owner settlement agreements are restrictive regarding parties to the agreement and could cause a chilling effect, it does not appear that TU Electric, Brazos, Tex-La, or TMPA intended them to be. In any event, the agreements do not rise to the level of "hush money."

Petitioners failed to establish that TU Electric has engaged in a "continuing practice" of paying "hush money" for the purpose of withholding evidence from the NRC. Therefore, the Staff finds that the Petitioners' allegation is without merit.

E. Petitioners' Allegation That TU Electric Submitted Inaccurate or Material False Statements to the NRC in a Response to This Petition

Petitioners alleged in their November 19, 1992 supplement to the petition that the TU Electric response of October 16, 1992, contained "incorrect and misleading information" and a statement "misleading to the point of being materially false." November 19, 1992 Supplement at 1, 3. Although the Staff, as noted above in Section III.B, has differed with TU Electric on the interpretation of Commission policy and the nature of portions of the settlement agreements, the Staff does not agree that TU Electric intended to provide misleading or material false information to the NRC in its October 16, 1992 response to the Petition and its supplements. Rather, TU Electric is offering a plausible interpretation of documents that are at best extremely complex, and at worst obfuscatory. Therefore, the Staff finds that the Petitioners' allegation is without merit.

IV. CONCLUSION

The institution of proceedings pursuant to 10 C.F.R. § 2.202, as requested by Petitioners, is appropriate only where substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). The facts in this matter do not warrant the institution of proceedings.

A clear avenue must be available at all times to ensure that individuals and organizations may bring safety information to the NRC either directly or through third parties. This is particularly so when settlement agreements are involved. The Staff determined that the settlement agreements did not violate section 211 of the ERA or 10 C.F.R. § 50.7. The Staff also determined that the settlement agreements were restrictive as to the former co-owners who are parties to the agreements. In addition, the Staff determined that the co-owner settlement agreements could have a chilling effect. However, there are other considerations that mitigate the Staff's concerns on this issue. The actions taken by the NRC Staff in this matter and the representations made in the responses provide the Staff with reasonable assurance that the Licensee and former co-owners did not intend the settlement agreements to restrict organizations and individuals including employees and contractors of the former co-owners from bringing safety concerns to the NRC. I am also satisfied that the parties to the agreements in question did not interpret the agreements as preventing them from raising safety concerns and now understand that a clear avenue must be available to all to bring safety concerns to the NRC. Finally, given the indirect involvement of the former co-owners in the design, construction, maintenance, and operation of CPSES, and the programs that both the NRC and Licensee have in place to identify and correct safety concerns, the Staff has reasonable assurance that no significant safety issues have been left unresolved with regard to CPSES.

Certain relief sought by Petitioners has been granted in this matter. Petitioners sought that the NRC notify TU Electric and the former co-owners that no settlement agreement can preclude individuals and organizations from bringing safety information to the NRC. This has been done. Petitioners also sought that copies of the three settlement agreements be made public. This has been done. Finally, Petitioners requested that counsel for Tex-La be notified that he is free to disclose safety information to the NRC. The NRC has caused this to happen.

The other relief sought by Petitioners has been denied. The facts in this matter do not warrant the institution of proceedings. Parties are encouraged to settle their disputes. Public policy only demands that a clear avenue be available to individuals and entities to bring safety concerns to the NRC.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation**

**Dated at Rockville, Maryland,
this 4th day of June 1993.**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Dr. Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-250
50-251

FLORIDA POWER AND LIGHT
COMPANY, *et al.*
(Turkey Point Nuclear Generating
Plant, Units 3 and 4)

June 7, 1993

The Director, Office of Nuclear Reactor Regulation, denies a Petition filed by Mr. Regino R. Diaz-Robainas requesting that the Nuclear Regulatory Commission not permit Florida Power and Light Company to resume operating Turkey Point Nuclear Generating Plant Units 3 and 4 after Hurricane Andrew until the concerns raised in the Petition are addressed. As basis for the request, the Petitioner alleges deficiencies in the areas of compliance with emergency procedures, evacuation mechanisms and offsite power and communication systems, reliability and margin of safety of emergency diesel generators, radiation monitoring, security, interim fire protection, compliance with plant Technical Specification requirements, Technical Specification and design basis adequacy, licensee staffing and economics of reconstruction, and co-existence of nuclear and fossil units.

**OPERATING LICENSE: PROPOSED CHANGES —
DOCUMENTATION**

Pursuant to 10 C.F.R. § 50.59, licensees must determine, and document in safety evaluations, whether a proposed change to the facility as described in the safety analysis report can be made without prior NRC approval or must be made by license amendment.

TECHNICAL SPECIFICATIONS: DEPARTURE DURING AN EMERGENCY

When a plant is in an Unusual Event or other emergency condition, 10 C.F.R. § 50.54(x) allows a licensee to take reasonable action that departs from a license condition or a technical specification when this action is immediately needed to protect the public health and safety and no action consistent with the license conditions and technical specifications that can provide adequate or equivalent protection is immediately apparent.

TECHNICAL SPECIFICATIONS: DEPARTURE DURING AN EMERGENCY

Section 50.54(y) requires that the licensee's action permitted by 10 C.F.R. § 50.54(x) shall be approved, as a minimum, by a licensed senior operator prior to taking the action.

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

I. INTRODUCTION

On October 15, 1992, Mr. Regino R. Diaz-Robainas (Petitioner) filed a Petition, pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), and alleged a number of deficiencies with the restart of the Turkey Point nuclear units after Hurricane Andrew. On October 21, 1992, the Petitioner filed an addendum to the Petition. The Petitioner requested that the U.S. Nuclear Regulatory Commission (NRC or the Staff) not permit the Florida Power and Light Company (FPL or Licensee) to resume operating Turkey Point Nuclear Generating Plant Units 3 and 4 until the concerns raised in the Petition were addressed. The Petition and its addendum (hereinafter referred to as the Petition) were referred to the Office of Nuclear Reactor Regulation (NRR) for action in accordance with section 2.206.

In a letter of October 23, 1992, to the Petitioner, the Director acknowledged receiving the Petition and informed the Petitioner that the issues raised in the Petition were not of sufficient safety significance to warrant action by the NRC to preclude restart of the Turkey Point nuclear units. The Director based this determination on NRC inspections and evaluations of the Licensee's restart activities. In its October 23, 1992 letter, the Staff indicated that it was documenting NRC inspection activities at the Turkey Point facility in inspection reports which, upon completion, would be made available to the Petitioner and that it would issue detailed responses to the specific issues raised in the Petition

within a reasonable time. The Staff has completed its review of the issues and has reached final conclusions which are discussed herein.

II. BACKGROUND

Turkey Point, situated on the shore of Biscayne Bay approximately 25 miles south of Miami, Florida, is the site of four electric generation units that are owned and operated by FPL. Turkey Point Units 1 and 2 are fired by oil or gas, and Units 3 and 4 are pressurized-water nuclear units. Tropical storms pass through the area about once every 2 years, and hurricane-force winds are experienced about once every 7 years.

On August 24, 1992, Class 4 Hurricane Andrew hit south Florida. The eye of the storm passed slightly north of the Turkey Point site and caused damage at the site and throughout the 10-mile emergency planning zone (EPZ) around the plant. The storm damage included loss of offsite power, loss of communications, loss of access by road, and damage to the fire protection and security systems, the material warehouse, and the smoke stacks for the fossil fuel units. When the hurricane warning was issued for southern Florida, FPL declared an "Unusual Event" and brought the units to "hot shutdown" in accordance with its Emergency Plan Implementing Procedures (EPIPs). On August 24, 1992, at 9:16 a.m., the Licensee upgraded the event classification to an "Alert" because of degradation of the fire protection system after the hurricane hit the site. The Licensee remained in the Alert status until August 30, 1992. Upon completing storm damage repairs, FPL restarted Unit 4 on September 28, 1992. On October 1, 1992, FPL voluntarily shut down Unit 4 after being informed by the NRC that the Federal Emergency Management Agency (FEMA) had not completed the post-hurricane reverification of the adequacy of the offsite emergency planning facilities and equipment located within the 10-mile EPZ around the site. FPL suspended operation of the unit until FEMA completed the re-assessment. After FEMA reaffirmed the adequacy of offsite emergency preparedness, on October 25, 1992, FPL resumed operating Unit 4. Upon restarting Unit 4, FPL began its previously scheduled Cycle 13 refueling outage for Unit 3 and repaired the storm damage to this unit. On December 1, 1992, FPL brought Unit 3 to power operation.

The Petitioner alleged deficiencies with the restart of Turkey Point Unit 4 after Hurricane Andrew. The alleged deficiencies are related to the following broad areas: emergency procedures; evacuation mechanisms and offsite power and communications systems; reliability and margin of safety of emergency diesel generators; radiation monitoring; security; interim fire protection; violation of plant Technical Specification (TS) requirements and missed surveillances; TS

and design basis adequacy; Licensee staffing and economics of reconstruction; and co-existence of nuclear and fossil units.

The Staff has reviewed the Petition, and the review results are discussed below. On the basis of its review, the Staff has concluded that the issues raised in the Petition are not of sufficient safety significance to warrant action by the NRC to preclude continued operation of the nuclear units.

III. DISCUSSION

Emergency Procedures

The Petitioner alleged that the Licensee violated its emergency procedure, EPIP-20106, which requires plant shutdown to Mode 4 within 2 hours of the projected onset of sustained hurricane-force winds (over 73 mph) at the site. The Petitioner expressed concern that Unit 4 did not reach Mode 4 until 4:05 a.m. on August 24, 1992, and should have been shut down before 3:50 a.m. based on the 5:50 a.m. storm arrival time recorded at the National Hurricane Center in Coral Gables.

The Licensee's procedures require the units to be in at least Mode 4 (hot shutdown) 2 hours before the *projected* arrival of hurricane-force winds. The hurricane was projected to arrive at early to mid-day on August 24, 1992. The Licensee could not accurately determine the exact time that hurricane-force winds arrived at the site because the meteorological towers that measure wind speed were damaged. The last credible wind speed measured was approximately 70 mph at 4:50 a.m. on August 24. Estimating 8 hours to achieve hot shutdown, the Licensee began shutting down the Unit 3 reactor at 6:00 p.m. on August 23, and began shutting down the Unit 4 reactor at 8:05 p.m. on August 23, 1992, to comply with its procedural requirements. On August 24, Unit 3 entered Mode 4 at 3:12 a.m. and Unit 4 entered Mode 4 at 4:05 a.m. The reactors were in hot shutdown when hurricane-force winds arrived at Turkey Point, although the hurricane winds arrived earlier than had been projected when the Licensee began the shutdown. This early arrival had no safety consequence since the Licensee had elected to maintain both units in the hot-shutdown mode to ensure that two methods of cooling were always available: use of the residual heat removal (RHR) system or, on loss of all alternating current (AC), use of the steam-powered auxiliary feedwater pumps with steam from the steam generators.

Although, in the final hours, immediately before landfall, the hurricane intensified and accelerated and hurricane-force winds arrived earlier than projected, the Licensee complied with its procedures by shutting down the plant 2 hours before the *projected* arrival of the storm.

Evacuation Mechanisms and Offsite Power and Communication Systems

As a result of storm damage the Petitioner expressed concern about the design adequacy of critical communication and offsite power systems. The Petitioner stated:

Critical communication and evacuation mechanisms were completely unavailable during hurricane Andrew for a significant period of time during which the units were still in hot shutdown or requiring the operation of critical cooling equipment without offsite power. The burden of proof lies in demonstrating that this absence of safety will no longer occur during future events.

Recognizing that communication and evacuation capabilities could be severely limited or interrupted immediately after the hurricane, the Licensee took extensive precautionary measures and, before the arrival of the hurricane, brought the nuclear plants to Mode 4 (hot shutdown) in accordance with its EIPs. Also, before the hurricane, Dade and Monroe Counties issued an evacuation order to the population in the area, including the 10-mile EPZ. During the hurricane, the nuclear units were in hot shutdown and the nuclear safety-related portions of the units were not damaged. The Staff finds these emergency preparedness measures to be adequate.

Before Hurricane Andrew, the Licensee's communication capabilities included telephone or telephone line-controlled systems, cellular telephone, and radio communication systems. The telephone systems either used Southern Bell Company's overhead copper wire or the Licensee's corporate fiber-optic system. Radio communication and cellular telephone systems used antennas that were installed on top of the plant support buildings. Sustained hurricane-force winds damaged Southern Bell Company's overhead communication transmission lines, antennas, and transmitters. These offsite communication systems were not designed to withstand the event. The communication systems that used the Southern Bell aerial copper wire along Palm Drive, the main road to and from the plant, failed as a result of fallen trees and missiles generated by high-velocity winds.

To improve the reliability of the communication systems, Southern Bell aerial copper wire lines have been replaced by a buried fiber-optic cable along Palm Drive. The Licensee has installed two new high-frequency radio systems for communications between the plant and offsite locations and procured new antennas designed to withstand winds in excess of 322 kilometers per hour (200 mph). Spare portable antennas also are available on site to ensure prompt replacement, if needed. These improvements should adequately reduce the potential for a loss of the offsite communications capability in the future.

The storm also damaged power transmission lines and switchyard equipment, which resulted in loss of offsite power. The nuclear safety systems at the Turkey

Point plant are designed to operate without offsite power. Four emergency diesel generators (EDGs) (two for each unit) are designed to receive an automatic start signal immediately on sensing a loss of load from the offsite power supply buses. Only one EDG is required to supply emergency power for each unit. If necessary, the four EDGs can be cross-tied to supply emergency power to either unit. The EDGs are designated as seismic Class/Category I and designed so their integrity is not impaired by the safe shutdown earthquake, or by the design-basis wind storm or floods. None of the safety-related EDGs were damaged by the storm because they are housed in seismic Category 1 steel-reinforced concrete structures. The EDGs and their safety-related electrical buses remained operable throughout the hurricane and recovery and functioned reliably to supply power for adequate cooling functions when the offsite power was unavailable.

Reliability and Margin of Safety for the Emergency Diesel Generators

The Petitioner alleged that the margin of safety for the EDGs was reduced because of clogging of the intake canal cooling water that supplied cooling water to the EDGs and the unavailability of the black start diesel generators (BSDG) as a backup to the EDGs due to oil surrounding the BSDGs. As the basis for his allegation, the Petitioner quoted from the August 24, 1992 NRC transcript of events at Turkey Point following the hurricane:

Licensee noted that this Black Start Diesel which can be used as backup if EDGs fail is inoperable at this time due to a lot of oil surrounding the Diesel following an oil tank rupture. . . . A lot of grass is in the intake structure and Licensee has to clean the strains every hour to prevent them from clogging up (supplies cooling water to EDGs). . . .

The Petitioner further stated that the abolition of EDG component cooling functions is nonconservative and reduces the margins of safety for EDGs and BSDGs that are required during loss of offsite power.

The statement in the August 24, 1992 NRC transcript of events that the intake structure canal "supplies cooling water to EDGs" is incorrect and may be due to a transcription error or misstatement. The safety-related EDGs, as well as the non-safety-related BSDGs, have closed cooling water radiator systems and do not depend on any outside water source for cooling. Therefore, clogging of the intake canal cooling water by debris did not affect the ability of the EDGs to function.

The hurricane ruptured a fossil unit oil tank and, as a result, the BSDG control and relay panels were covered with fuel oil. This condition did not render the BSDGs inoperable. After the hurricane, moisture intrusion in the non-safety-related breaker cabinets prompted FPL to declare the BSDGs inoperable. The BSDGs are non-safety-related diesel generators and are provided as an additional

defense-in-depth to supply AC power through non-safety-related buses to various non-safety-related loads. Thus, inoperability of the non-safety-related BSDGs did not reduce the margin of safety for the EDGs. On August 27, 1992, FPL restored the BSDGs to service.

Expressing his concern regarding reliability of diesels, the Petitioner asserted that failures in both units' redundant diesels "calls into doubt not just the overall reliability of the diesels, but also specific aspects of system[at]ic vulnerability such as weaknesses of the ground detection and isolation mechanisms. . . ." The EDGs at Turkey Point are designed to receive an automatic start signal immediately on sensing a loss of load from the offsite power supply buses. Once the diesel motor and generator are running at the proper speed, the load sequencer automatically sequences the various safety-related loads to the generator. The EDGs and sequencers worked as designed. In preparing for the storm, the Licensee tested the EDGs and verified that all fuel tanks were full before the storm arrived. Fuel oil can be transferred between fuel oil storage tanks as required. The available fuel exceeded TS requirements. On August 26, 1992, shipments of diesel fuel began arriving by tanker once the road to the plant was open.

At 11:57 a.m. on August 24, 1992, the 4A EDG power to the 4-kV bus was lost for approximately 3 minutes because the output breaker inadvertently opened when operators were attempting to isolate an electrical system ground. Upon opening breaker 4D23-5 (emergency load sequencer 4C23A), power to the 4A sequencer was interrupted, resulting in the 4A EDG output breaker opening. This event was due to a procedural problem. Procedure O-ONOP-003.10, "125 VDC System — Location of Grounds," assumes that normal AC and DC power is available. As a corrective action, a cautionary note was added to the procedure reminding personnel that there may be off-normal plant conditions (i.e., EDG operating and supplying power) when certain equipment should not be de-energized. At 7:05 a.m. on August 27, 1992, the 3A EDG tripped because of a lockout that occurred while the 3B EDG remained in operation. Loads were transferred to the 3B EDG. At 9:38 a.m., the 3A EDG was restored to its safety bus. The cause of the 3A EDG lockout could not be determined and did not recur. A single EDG can supply power to all the nuclear safety-related equipment necessary for a single unit during such an event. None of the safety-related EDGs suffered any damage from either the storm or the resultant fossil unit oil spill. Except as noted above, the EDGs and their safety-related electrical buses remained operable throughout the hurricane and recovery.

Radiation Monitoring

The Petitioner alleged that sufficient information regarding monitored radiation/contamination/exposure from August 24, 1992, does not exist. The Pe-

tioner questioned whether there was any radioactive release, or any kind of venting that may have resulted in such release and whether the NRC had enough reliably recorded data to determine radioactive releases to the environment. Referring to an NRC summary of a September 10, 1992 meeting between the Licensee and the NRC, which includes a discussion of "Radiation Monitoring Stack-Instrumentation and Minor Stack Foundation Damage," the Petitioner is concerned that radiological assessment teams were not sent out until 8:01 a.m. on August 24, 1992, and that radiological exposure may have been either not monitorable, or inadequately monitorable for a significant time period.

The Licensee maintains a program to monitor radiation, both onsite and in the environs. In accordance with the TS, the Licensee monitors radiation off site using direct radiation monitors: thermoluminescent dosimeters (TLDs) and air samplers. Onsite radiation is also monitored by TLDs and area radiation monitors (ARM). The storm destroyed four air sampling stations and several TLDs surrounding the plant. During and immediately after the storm, 18 of the 30 environmental TLDs remained available to monitor direct radiation levels and detected no abnormal radiation levels. The NRC also had 37 co-located environmental TLDs, of which 18 were damaged. The remaining 19 TLDs were functional. Approximately 52 of 76 TLDs located within the Licensee's radiologically controlled area (RCA) and protected area boundaries also continued monitoring for any releases from the plant. All results were within normal levels for TLDs, and the Licensee noted no changes to radiation dose rates either inside or outside the RCA. The Licensee conducted special surveillances immediately after the storm and continued routine contamination surveillance programs. These surveillances did not show any abnormal contaminations.

Within a few days after the storm, the NRC Staff performed radiation surveys (on and off the site) with a portable meter and found no readings above background levels. About a month after the storm, the NRC Staff reviewed the Licensee's special and routine radiation protection surveillances conducted during the storm and during recovery efforts. During an onsite inspection conducted from September 26 to October 1, 1992, the Staff compiled details of the Licensee's Radiation Protection (RP) program activities and analyzed data on the monitored radiation, contamination, and exposures. The Staff documented this information in Inspection Report (IR) 50-250,50-251/92-21, dated November 9, 1992. The inspection results are summarized below.

The Licensee analyzed the data from the ARMs and those TLDs recovered after the storm. The data did not indicate any unexpected exposures. The Licensee reviewed the dose rates for selected ARMs for the period from 0:00 hours on August 23 through 12:00 noon on August 24, 1992. The Licensee's records of dose rates for ARMs located in selected areas were as follows: U-3/4 containment refueling floor, approximately 5 millirem per hour (mrem/hr); U-3 containment personnel hatch, 1-1.5 mrem/hr; U-3/4 spent

fuel pit buildings and transfer canals, 0.5-8 mrem/hr; and Auxiliary Building, 0.1-0.5 mrem/hr. The Licensee compared the ARM data collected during or immediately after the storm with data collected before the storm and found no significant changes in the measured radiation values. The TLDs maintained at selected locations in the RCA and protected area perimeter reported exposure rate values from 8 to 37 microrem per hour ($\mu\text{rem/hr}$), which was similar to data for TLDs positioned at each monitoring location during the second quarter of 1992. The Licensee collected and processed at least one TLD from each directional sector except for the NNW directional sector. Preliminary results were similar to previous values, with a maximum exposure rate of 7.9 $\mu\text{rem/hr}$. The Licensee reestablished all required and supplemental TLDs by September 14, 1992. During tours of the environmental monitoring stations on September 26-29, 1992, the inspector verified, by direct observation, the location of the Radiological Environmental Monitoring Program direct radiation monitors (TLDs) as described in the Licensee's records for approximately 30% of the Licensee's current TLD network. The Licensee established all sample stations within several hundred feet of the original locations of these stations. The inspector also verified the location of Licensee and NRC TLDs at two separate sample locations.

NRC inspectors reviewed selected chemistry records and held discussions with cognizant Licensee representatives. The inspectors found that, before declaring the monitors operable, the Licensee established continuous sampling of the main stack effluents with grab samples collected and analyzed every 12 hours. Each week, the Licensee analyzed samples for particulates, iodine, and tritium in accordance with the operability requirements of TS 3.3.3.6 and found no abnormal or elevated gaseous effluent concentrations. The Licensee's records for selected noble gas, iodine, and particulate analyses of main stack grab samples collected before August 24, 1992, indicated that the only noble gas and iodine species found were xenon-133 (Xe-133) and iodine-131 (I-131), with concentrations ranging from 7 E-8 to 1.1 E-6 microcuries per cubic centimeter ($\mu\text{Ci/cc}$) and 7.8 E-14 to 1.5 E-13 $\mu\text{Ci/cc}$, respectively. The Licensee found no radionuclides in the particulate sample analyses.

The hurricane damaged the main stack radiation monitor and the duct from the Radioactive Waste Building to the main stack. During the inspection, NRC representatives verified that before and immediately after the hurricane arrived, the Radioactive Waste Building fan was secured, thus preventing any exhaust from entering the damaged ductwork leading to the main plant stack. To verify the absence of releases from the Radioactive Waste Building, the Licensee began continuously sampling the Radioactive Waste Building gaseous effluent pathway on September 5, 1992. The Licensee collected and analyzed grab samples every 12 hours. Each week, the Licensee also collected and analyzed samples for iodine, particulates, and tritium. The iodine and tritium concentrations were

less than the Licensee's analytical detection limits, and the concentrations of total isotopes in the grab samples ranged from 1.6 E-7 to $2.5 \text{ E-6 } \mu\text{Ci/cc}$. On September 19, 1992, the Licensee discontinued this supplemental sampling after repairing the ductwork leading to the main plant vent.

The inspection team reviewed the analyses conducted for both the main stack and Radioactive Waste Building gaseous effluent samples and found that all radionuclide concentrations were less than the detection limits specified in TS Table 4.11.2. Further, the worst-case minimum dispersion value at the site boundary, $5.8 \text{ E-7 } \mu\text{Ci/cc}$ as listed in the Licensee's Offsite Dose Calculation Manual of June 25, 1991, indicated that the radionuclide concentrations would be significantly below the limits in 10 C.F.R. Part 20, Appendix B, Table 2, col. 1 of $3 \text{ E-7 } \mu\text{Ci/cc}$ for Xe-133 and $1 \text{ E-10 } \mu\text{Ci/cc}$ for I-131, as required by 10 C.F.R. § 20.106.

The storm rendered inoperable four of the five air sampling stations required by TS. As allowed by TS Table 3.12.-1, Notation 1, the initial hazardous environmental conditions and the lack of an electrical power source for the sampling equipment required the Licensee to delay resuming routine airborne pathway monitoring until September 9, 1992, when limited monitoring was established using three sampling stations that were returned to service. By September 19, 1992, the Licensee had reestablished five air sampling stations and returned them to operation. The Licensee reestablished three of the four damaged air sampling stations within several hundred feet of their original locations. Each remained in its original directional sector. However, sample location T-57 in the NW directional sector was not usable. Therefore, the Licensee selected an alternate location, west-8. The Licensee previously established a supplemental air sampler at this location.

The NRC noted no abnormal radionuclide concentrations in gaseous effluents while reviewing selected chemistry records and discussing radiation levels with the Licensee's cognizant representatives. The inspection findings indicated that (1) the sampling frequency for compensatory gaseous effluent samples collected and analyzed for both the main stack and radwaste building effluents met the TS requirements and (2) all radionuclide concentrations were less than the detection limits specified in TS Table 4.11.2.

The inspectors also reviewed the Licensee's actions for other sampling matrices. During tours of the environs surrounding the Turkey Point site, NRC inspectors verified access to all sampling locations. The Licensee's records indicated that on September 9, 1992, it had also collected both broadleaf and water samples to meet the surveillance requirements of the TS radiological environmental monitoring program (REMP). The Licensee has contracts with the State of Florida to conduct the REMP. All results were within expected ranges, and the Staff found no other concerns with the implementation of the REMP program.

Security

The Petitioner expressed concern that during the storm, automatic security systems were compromised and inquired concerning alleged criminal or negligent security infringements at Turkey Point. Specifically, on the basis of a newspaper article in the *Palm Beach Post* reporting stolen cables from an FPL compound that was damaged by the storm and the sale of 1544 pounds of wire to a metal recycling center (scrap metal yard) and a complaint along the same lines to the NRC by a former crane operator, the Petitioner questioned whether the health or safety of his community was compromised by selling possible contaminated or radioactive materials to scrap yards so that they may eventually be recycled into consumer products.

The Licensee's security systems consist of an initial protected-area barrier with associated intrusion detection and assessment equipment. Additional barriers and associated alarms protect the vital equipment. Security officers assess each contingency and respond accordingly. This equipment is not required to withstand hurricane-force winds because the Licensee has provided for compensatory measures in the event of equipment failure. At the perimeter, the hurricane caused damage to several barriers, microwaves, cameras, and the site access building. Some vital-area alarms also briefly failed, but the vital-area barriers remained intact.

In anticipation of severe weather conditions, on August 24, 1992, before the storm, the Licensee suspended certain security safeguards in accordance with its Physical Security Plan. After locking and securing all access control points, the Licensee evacuated all security personnel to shelters in Class I buildings, which are constructed to withstand hurricane-force winds. The security systems, however, were not deactivated. After the storm, upon determination by a damage and safety evaluation team that other personnel could depart shelters, the Licensee deployed security officers to assess damage, to conduct checks of the protected and vital areas, and to secure the site. During these searches of the protected and vital areas, the Licensee found no indications that outsiders had penetrated the site during the storm. On August 24, 1992, after the storm, the security department deployed personnel and reestablished material access controls along with alarm response and implemented compensatory measures for the failed equipment in the protected area.

On September 22, 1992, the Licensee restored the regular security program with some compensatory measures still in place. On September 23-25, 1992, Region II safeguards inspectors reviewed the security measures and found them acceptable.

Expressing concern regarding removal of contaminated/radioactive material from the site, the Petitioner refers to an earlier complaint made in 1991 by a former crane operator, Mr. Gene Hutchinson. NRC Region II inspectors

performed an onsite inspection during July 8-12, 1991, and reviewed the Licensee's RP program for removing material from the RCA. The inspection determined that the scrap material was removed from noncontaminated systems and that, at that time the material was surveyed, the material was free of measurable contamination. The Licensee took corrective actions relating to removal of material from RCA. The Staff documented its findings and acceptance of the Licensee corrective actions in Inspection Report (IR) 50-250,50-251/91-26, dated August 16, 1991. This report is available in the local public document room. By letter dated January 29, 1992, the NRC Staff forwarded IR 50-250,50-251/91-26 to Mr. Gene Hutchinson and informed him that his allegation was not substantiated.

With respect to the *Palm Beach Post* report on the stolen material, the alleged stolen cable material was the backup material for transmission lines. This material was not located at the Turkey Point site and was not under the plant security jurisdiction.

Interim Fire Protection

The Petitioner alleged several deficiencies in the interim fire protection system. The Petitioner alleged that the interim fire protection system violated plant TS § 3.7.8.1, "Fire Water Supply and Distribution System," requirements. Additionally, the Petitioner alleged that the design of the Unit 4 interim fire protection system reduced the margin of safety for fire protection due to several design deficiencies. The alleged design deficiencies include: lack of automatic level control for the fire water supply tank, procurement of electric fire pumps by an unclear specification and procurement process, use of a non-safety-related fire water source due to clogging of the intake canal, use of unreliable screen wash pumps and vulnerable temporary diesel pumps due to their location with unassured power supplies and breaker coordination problems, and reduction of fire water flow due to a 6-inch hose connection. The Petitioner also claimed that the location of the temporary diesel pumps in buildings that were destroyed by the hurricane demonstrated the vulnerability of the pumps.

The hurricane winds caused the service water system high-water storage tank to collapse, which caused damage to the fire protection system. Specifically, the raw water tank (RWT) I and its appurtenances, the county water supply line to RWT II, the casing and controller for the electric-powered fire pump, the jockey system pressure pumps and portions of the fire protection system piping and piping supports, and certain power cables associated with the pumps, were damaged.

After the hurricane, the Licensee fully restored the fire protection system to its design configuration by November 8, 1992. Until the fire protection system was restored, the Licensee implemented an interim fire protection configuration

to enable restart of Unit 4. The Licensee documented the interim fire protection water supply configuration in a 10 C.F.R. § 50.59 evaluation, JPN-PTN-SEMJ-92-034, "Safety Evaluation for the Interim Fire Protection System Configuration to Support Unit 4 Startup," and satisfactorily demonstrated compliance with Appendix R to 10 C.F.R. Part 50 and TS requirements. The Staff reviewed the Licensee's safety evaluation and found it acceptable for restarting Unit 4. On October 14, 1992, the Staff issued a summary of the September 22, 1992 meeting that documented its acceptance of this safety evaluation, which was presented to the Staff at the meeting. This meeting summary was attached to the October 23, 1992 acknowledgment letter to the Petitioner.

Before FPL restarted Unit 4, the NRC Staff inspected and verified the Licensee's implementation of the interim fire protection system configuration, which is documented in Inspection Report 50-250,50-251/92-23 dated October 29, 1992.

The interim fire protection water supply system did not violate the TS § 3.7.8.1, "Fire Water Supply and Distribution System," as discussed below. The limiting condition for operation (LCO) in TS 3.7.8.1 requires that the fire water supply and distribution system shall be operable with:

- a. At least two fire suppression pumps, one electric-driven and one diesel-driven, with their discharges aligned to the fire suppression header;
- b. Two separate water supplies, each with a minimum contained volume of 1,135,623 liters (300,000 gallons); and
- c. An OPERABLE flow path capable of taking suction from the RWT I and RWT II and transferring the water through distribution piping with OPERABLE sectionalizing control or isolation valves to the yard hydrant curb valves, the last valve ahead of the water flow alarm device on each sprinkler or hose standpipe, and the last valve ahead of the deluge valve on each deluge or spray system required to be OPERABLE according to TS 3.7.8.2, 3.7.8.3, and 3.7.8.4.

Action statement (a), associated with TS 3.7.8.1, requires that, with one pump and/or one water supply inoperable, the inoperable equipment must be restored to OPERABLE status within 7 days or an alternate backup pump or supply must be provided. Action statement (b), associated with TS 3.7.8.1, requires that with the fire water supply and distribution system otherwise inoperable, a backup fire water capability should be established within 24 hours. These action statements apply to both units simultaneously.

Only one of the required two water supplies was available in the interim fire protection water supply system configuration. To be consistent with the action statement (a), the Licensee used the screen wash system as the alternate backup supply for the fire protection water supply. The Licensee, by hydraulic calculations, verified in its safety evaluation that the worst-case system demand

with adequate hose stream could be supplied. The Staff found the screen wash system acceptable as an alternate water supply system for the fire protection water supply system. In addition, to meet the requirements of section III.A in Appendix R to 10 C.F.R. Part 50, the Licensee previously used the screen wash pump system as an alternate fire protection water supply, use of which was approved by the Staff in a letter of March 21, 1984.

Use of the screen wash system for fire protection reduced the volume of water available for manual hose streams from 2839 liters per minute (750 gpm) to 1893 liters per minute (500 gpm) with the largest fixed fire water suppression system in operation. The volume of 1893 liters per minute (500 gpm) met the NRC's minimum guidelines for manual hose stream volume and was more than an adequate flow for manual hose streams for use by the fire brigade if a fire activated the largest fixed fire water suppression system. Reducing from 2839 liters per minute (750 gpm) to 1893 liters per minute (500 gpm) for manual hose stream capacity when the screen wash system was used as the primary fire protection water supply did not significantly reduce the effectiveness of the manual hose stream at the Turkey Point Nuclear Plant. This flow reduction is within the current NRC guidelines.

Manual level control, used in the interim fire protection configuration instead of automatic level control for controlling level in the fire water tank, did not reduce the margin of safety for fire protection. RWT II was the existing water supply for the electric- and diesel-driven fire pumps in the interim configuration. The volume of the tank was 2,839,059 liters (750,000 gallons). The tank automatically maintained a minimum level of 1,135,623 liters (300,000 gallons) of water dedicated for fire protection. The service water system, which also drew off the RWT, had its intake nozzles high on the tank wall in a manner equivalent to standpipes to prevent service water draw from the dedicated inventory of the fire suppression system. The minimum volume of water required by NRC guidelines for fire protection water supply at nuclear power plants is 1,135,623 liters (300,000 gallons). This amount of water is the largest expected design demand of any fire suppression system, with 1893 liters per minute (500 gpm) for manual hose streams for a minimum of 2 hours. The Licensee maintained the RWT level by visual inspections, as required by the Turkey Point administrative controls.

The interim fire protection water supply configuration following the hurricane included a new electrically driven fire pump with flow and pressure characteristics similar to the electrically driven fire pump damaged in the hurricane. The Licensee stated that it installed the new pump in accordance with National Fire Protection Association (NFPA) Standard 20, "Standard for the Installation of Centrifugal Fire Pumps." This is a nationally recognized standard for installing fire pumps and is the minimum acceptance standard for installing fire pumps allowed by NRC Fire Protection Guidelines.

To ensure that a fire protection water supply was readily available after the loss of offsite power and the failure of both the electric- and diesel-driven fire pumps, the Licensee evaluated the power supplies to the screen wash pumps. The Licensee modified the interim configuration to correct the breaker fuse coordination to ensure that all power paths to the screen wash pumps were maintained for normal and emergency conditions and demonstrated that these pumps had a reliable source of power under all conditions.

The interim configuration also included a backup supply from three temporary diesel pumps. The hurricane damaged the central receiving and health physics buildings, as alleged. However, the onsite temporary diesel pumps were not located in the central receiving or the health physics buildings but were tied down near the auxiliary building. They were not damaged and were available for fire fighting immediately after the storm. Therefore, the Petitioner's concern as to the vulnerability of the pumps is unfounded.

The Licensee also brought portable diesel pumps to the site to improve its fire-fighting capability. The fire-fighting capability after the hurricane was as follows:

- First 83 hours: portable fire extinguishers and portable diesel fire pumps with hoses.
- August 27, 1992: screen wash pump and fire header meeting TS 3.7.8.1 placed in service in addition to the above.
- August 28, 1992: diesel fire pump and RWT II in service in addition to the above.
- September 26, 1992: electric fire pump in service in addition to the above before Unit 4 restart.
- November 8, 1992: fire protection system restored to original design basis.

The Petitioner also stated that the interim fire protection configuration represents a significant change to the plant and, as a result, alleged that the Licensee's implementation of the change by a safety evaluation rather than a license amendment process violates the requirements of section 50.59. Additionally, the Petitioner alleged that the Licensee's safety evaluation is inadequate in that it did not include specific surveillance and other testing requirements.

The Licensee did not violate section 50.59 requirements. Whenever a proposed change, test, or experiment involves a change in the TS incorporated in the license or an unreviewed safety question, section 50.59 requires all licensees to first obtain the Commission's approval. Licensees must determine, and document in safety evaluations, whether a proposed change can be made without prior NRC approval or must be made by license amendment. Accordingly, the Licensee's safety evaluations were not a circumvention of the process, but were a necessary and essential part of the process to satisfy the regulation.

To verify the changes to the fire protection system, as discussed in the responses to other issues, FPL prepared a safety evaluation report pursuant to section 50.59 in which it documented its evaluation of the interim fire protection system configuration for compliance with the licensing and design basis requirements. The Licensee determined which system configuration requirements, including surveillance and functional testing requirements, were needed before it could restart Unit 4. The Licensee's safety evaluation did not identify any change to the TS or the presence of any unreviewed safety question. Therefore, the plant changes did not require prior NRC approval. In addition, the Staff reviewed the Licensee's safety evaluation and found the changes to be consistent with the plant TS and to not involve an unreviewed safety question and, therefore, to be acceptable.

TS Violations and Missed Surveillances

The Petitioner alleged several operational deficiencies during and after the hurricane. The alleged deficiencies include certain TS violations, failure to perform required surveillances and startup tests, and erroneous actuation of the overpressure mitigation system (OMS). Specifically, the Petitioner alleged that the Licensee "used 'lack of lighting in Containment & support personnel on site' as excuses" and did not depressurize and vent the reactor coolant system as required by TS 3.4.9.3, missed two tests relating to venting of the emergency core cooling system (ECCS), and did not run the standby feedwater pumps on September 29, 1992, and erroneously actuated the overpressure mitigation system (OMS). The Petitioner questioned the reliability of the OMS and contended that these deficiencies constitute serious reduction in the margin of safety for the reactor coolant system. The Petitioner also stated that it is not clear what the NRC position is with regard to the Licensee's implementation of required TSs and LCOs during crises and alleged that failure to follow TS resulted in a dangerous reduction in the margin of safety.

Turkey Point TS 3.4.9.3, "Overpressure Mitigating Systems," "Limiting Condition of Operation," specifies that, when the reactor coolant system (RCS) average temperature falls below 135°C (275°F), the high-pressure safety injection (HPSI) flow paths are to be isolated and require two operable power-operated relief valves (PORVs) or provision for adequate depressurizing and venting of the RCS. These requirements reduce the possibility for a low-temperature over-pressurization (LTOP) condition of the RCS when it is in a cold and water-solid condition by isolating HPSI to prevent injection into a water-solid RCS, by preventing the start of an idle reactor coolant pump when the difference between the RCS and steam generator temperatures is more than 10°C (50°F) and by providing an adequate vent path. The Turkey Point units and many other pressurized-water reactor (PWR) plants also rely on automatic venting through

PORVs to protect against an LTOP. The TS for these plants specify setpoints for the PORVs and also specify the minimum RCS vent size. These requirements are designed to prevent mass and heat input transients more severe than those assumed in the LTOP protection analyses.

To verify that the PORVs are operable, the Licensee should perform surveillance procedure 3/4-OSP-041.4, "OMS Nitrogen Backup Leak and Functional Test" and check the pressure in the nitrogen bottle to verify that the PORV will open on a test signal. The nitrogen bottle is a backup supply to the instrument air system which normally operates the PORV.

During August 24-25, 1992, after the Turkey Point units were brought to a hot shutdown, the Licensee, under the provisions of 10 C.F.R. § 50.54(x), decided not to enter the containment and not to hook up the equipment required to perform the necessary OMS surveillance test procedure. The Licensee took this action because the normal lighting in the containment was not available due to loss of offsite power, and portable lighting would have been required to perform this surveillance. Entry into containment without the normal lighting carried too high a risk of potential human error and injuries that could result in an undesirable plant transient. At the time, the safety importance of the OMS was substantially reduced from its design basis because the unit was not in a water-solid condition during or following the hurricane. Also, the HPSI flow path to the RCS was isolated, as required by the TS under such conditions. The Licensee successfully accomplished the control-room portion of testing the OMS (i.e., cycling of the PORVs within 24 hours of the shutdown of the units) using normal instrument air. The nitrogen portion of the OMS was tested and declared operational by September 7, 1992, when stable offsite power was restored and normal lighting was available inside containment. The instrument air system remained operational throughout the entire event.

Regarding the Petitioner's allegation that the Licensee used "lack of lighting in Containment & support personnel on site as excuses" and its "subjective" implementation of required technical specifications and LCOs during crises, the NRC requires each licensee to conduct TS surveillances during normal operation. However, when a plant is in an Unusual Event or other emergency condition, section 50.54(x) allows a licensee to

take reasonable action that departs from a license condition or a technical specification (contained in a license issued under this part) in an emergency when this action is immediately needed to protect the public health and safety and no action consistent with the license conditions and technical specifications that can provide adequate or equivalent protection is immediately apparent.

The Licensee is expected to exercise good judgment and minimize possible upset situations where feasible. Further, 10 C.F.R. § 50.54(y) requires that the "Licensee's action permitted by paragraph (x) of this [10 C.F.R. § 50.54] section

shall be approved, as a minimum, by a licensed senior operator prior to taking the action. The Licensee actions to depart from the TS-required surveillance tests were not a failure, but rather conscious emergency decision and actions consistent with the provisions of section 50.54(x). The NRC Staff reviewed the Licensee's actions taken during the emergency condition to depart from the TS surveillance noted above and determined that they were immediately needed to protect the public health and safety and no other adequate or equivalent action consistent with license conditions or TS was immediately apparent. The NRC Staff also found the Licensee's actions appropriate on the basis that, as required by section 50.54(y), the departure from TS was approved by a licensed senior reactor operator prior to implementation, the Licensee provided notifications to the NRC as required by 10 C.F.R. §50.72, and the Licensee took necessary actions to recover from the departure from TS as soon as practicable following the hurricane (i.e., departed from TS only to the extent necessary). The NRC Staff evaluation of this event is documented in IR 50-250,50-251/92-20 dated November 20, 1992.

On October 5, 1992, with Unit 4 in cold shutdown, the Licensee was performing the OMS nitrogen backup leak and functional test. The test requires preparation of the primary coolant loop such as to allow opening of the PORVs without depressurization of the RCS. The test is accomplished by introducing a simulated high-pressure signal to the primary coolant loop instrumentation being tested and verifying that the loop instrumentation operates as designed. In performing the test, Licensee personnel erroneously proceeded to apply the simulated high-pressure signal to a backup instrumentation loop instead of the primary loop under test. The backup is a parallel loop that is identical in operation and configuration to the primary loop. Since the backup loop was not prepared for the test, application of the test pressure resulted in a brief opening of the PORV and a slight depressurization of the RCS, approximately 82.74 kiloPascal (12 psig). The incorrect simulated high RCS pressure signal also inadvertently caused a suction valve in the RHR system to close. This resulted in a brief loss of RHR cooling and a less than 1°C (1°F) increase in the RCS temperature. After the event, the PORV was closed. Additionally, the RHR system was returned to normal operation in a timely manner. No high system pressure actually occurred as a result of the inadvertent actuation of the PORV, and the OMS and RHR system functioned as expected. With the plant in cold shutdown at approximately 2413 kiloPascal (350 psig), a spurious safety injection (SI) would not have occurred because, by procedure, the HPSI flow path was isolated. The Licensee successfully completed the test and has implemented appropriate corrective actions to prevent recurrence of inadvertent actuation of OMS. The NRC Staff evaluated the deficiencies discussed above and documented its evaluations in IR 50-250,50-251/92-24. As noted in the inspection report, this resulted in a noncited violation, in accordance with

NRC enforcement policy, for the Licensee's failure to follow procedures, which resulted in the inadvertent opening of a PORV.

The tests that the Petitioner contends were not completed are related to the venting of the ECCS and the running of the non-safety-related standby feedwater pumps in the recirculation mode. The Turkey Point TSs require that each ECCS component and flow path and the standby feedwater pumps be demonstrated to be operable at least monthly while the units are in Modes 1, 2, or 3. On September 29, 1992, with Unit 4 in Mode 2, the Licensee discovered that, contrary to these TS requirements, ECCS pump and piping venting and the standby feedwater pump operability demonstration had not been performed prior to entry into Mode 3. ECCS venting had been last performed on August 7, 1992, and standby feedwater pump operability had been last demonstrated on August 5, 1992.

In response to the discovery of these missed surveillances, the Licensee satisfactorily completed them promptly and demonstrated that both the ECCS and the non-safety-related standby feedwater pumps were operable. Further, the Licensee returned Unit 4 to Mode 3 and satisfactorily verified that all other required surveillances had been performed. During this time the normal feedwater and safety-related auxiliary feedwater remained available. In addition, ECCS pump and piping venting (high head safety injection pump readiness test) showed no evidence of air when venting the piping or pump casing. The Licensee also walked down the RHR and safety injection systems to verify valve alignment. Prior to entry into Mode 4, cooling of the RCS was provided by an RHR pump which ran normally. It is important to note that there was no reactor trip, nor was there an inability to cool the primary system under any required condition as a result of these missed surveillances, as alleged.

The Licensee attributed the cause of this event to personnel error, in that the surveillance due dates were improperly changed in the computer, and has implemented corrective measures to require supervisory review and approval of all changes to surveillance dates in the computer. The NRC Staff reviewed the Licensee's event analyses and actions and determined that the missed surveillances did not result in any health and safety concern and that the Licensee's corrective actions were satisfactory. In accordance with NRC enforcement policy, however, this resulted in a noncited violation for the Licensee's failure to perform TS-required surveillances within the specified time frames. The NRC Staff evaluation is documented in IR 50-250,50-251/92-20.

TS and Design Basis Adequacy

The Petitioner has raised several issues regarding plant TS adequacy and design bases. Specifically, the Petitioner claimed that the Turkey Point nuclear units performed poorly during the storm, and that there were post-hurricane

operational deficiencies including certain violations of TS, and questioned the adequacy of the Turkey Point design bases and TS and whether they should be reevaluated to ensure maintenance of an adequate margin of safety.

As discussed in detail in this Director's Decision, the Turkey Point nuclear units functioned well and withstood the hurricane wind forces. Although the storm caused significant onsite and offsite damage, it did not damage the nuclear safety-related portions of Units 3 and 4, which could pose a radiological hazard to the public if they failed. These safety-related systems were designed to withstand hurricane-force winds. All emergency systems functioned as designed and the EDGs operated in a reliable manner and supplied adequate power to critical cooling functions throughout the period when the offsite power was not available. Before the storm arrived, the Licensee, in accordance with its emergency planning procedures, brought the units to the hot shutdown mode, and the units remained in a stable condition throughout.

During the storm, the Licensee departed from TS requirements relating to OMS surveillances, fire watch, and AC electrical power sources. These departures from TS surveillances were not a failure, but rather conscious and prudent emergency licensee actions consistent with the provisions of section 50.54(x). For a full discussion of this issue, see "TS Violations and Missed Surveillances," *supra*. Further, the startup problems identified by the Petitioner were related to human errors that have subsequently been evaluated and corrective actions taken. However, these problems did not reduce any margins of safety.

To minimize any future damage of the types experienced during Hurricane Andrew, the Licensee has implemented several design enhancements. Specifically, the design enhancements include: (1) elimination of the service-water high-water storage tank that caused damage to the fire protection system, (2) attachment of TLDs to the warning siren poles, which will better withstand hurricane-force winds and enable recovery of the TLDs after a hurricane, (3) replacement of the communications systems that relied on the Southern Bell aerial copper wire with a buried fiber-optic cable along Palm Drive, and (4) installation of two new high-frequency radio systems for communications between the plant and offsite locations. In addition, the Licensee has procured new antennas, designed to withstand winds above 200 mph, to improve system reliability. Spare portable antennas also are available on site to ensure prompt replacement, if needed.

The Staff's inspection of the Licensee's emergency preparations and actions before, during, and after the storm revealed that they were prudent and consistent with the regulations and did not identify any reduction in the margin of safety in the design of safety-related systems. Therefore, the Staff concludes that the plant design bases and TS, and Licensee's design enhancements, are adequate.

Licensee Staffing and Economics of Reconstruction

The Petitioner questioned whether the Licensee had adequate staffing to perform necessary onsite and offsite support activities during the storm. The Petitioner also asserted that "insufficient workers under overworked and rushed conditions led to the accident of a worker, operating a crane, falling inside radioactive water in the Reactor cavity." In addition, the Petitioner contended that economics of reconstruction of the nuclear units to "reliably prevent or mitigate an accident of unpredictable magnitude" and need for development of alternate energy sources must be evaluated.

The conditions in the area after the storm required the Licensee to limit support personnel at the site. The Licensee limited the number of onsite personnel (volunteers) to approximately 150. The Licensee considered this staffing level, which included two complete operating crews, adequate to shut down both units and to maintain them in a safe shutdown condition. After the hurricane, Licensee personnel were available in sufficient numbers to accomplish the cleanup and repair efforts that made it possible for Unit 4 to be ready for startup by September 28, 1992.

On October 9, 1992, a maintenance technician was giving directional assistance to a crane operator when he lost his footing and slipped into the Unit 3 reactor cavity approximately up to his waist. This event resulted from human error and was reviewed for preventive corrective action. The event occurred after the Licensee had voluntarily shut down Unit 4 on October 1, 1992, and no rush or haste was involved.

The Petitioner's contention regarding economics of reconstruction is not within the scope of the NRC's responsibilities.

Coexistence of Nuclear and Fossil Units

On the basis of the Hurricane Andrew experience, including damage to the fossil unit stacks and the rupture of oil tanks, the Petitioner questioned whether such events on the fossil side, or the non-safety side of the nuclear units, could adversely affect the containment structures or any nuclear safety-related systems and whether they have been evaluated.

Class I structures, systems, and equipment, which could pose radiological hazards if they failed, are designed to withstand earthquakes, and other severe natural phenomena, and failure as a result of interaction with other nonsafety structures, systems, and components without any loss of function.

If the fossil unit stacks had failed, potential existed for debris from these stacks impacting certain safety-related systems such as the EDG buildings, the EDG oil tank, and the switchgear building. However, due to redundancies and physical separation of these safety-related equipment and structures, it is not

expected that the falling of fossil stacks could adversely affect the safe operation of the plant. The hurricane caused severe damage to the Unit 1 stack, which posed a personnel safety concern. The Licensee responded by removing the stack, using controlled demolition techniques. Before the stack was demolished, the Staff reviewed the Licensee's evaluation and safety precautions and found them to be acceptable. The Unit 2 stack sustained only minor damage. The Licensee performed a detailed inspection and analysis of the stack to verify its structural integrity. The Licensee concluded that the stack, in its existing condition, has adequate margin to failure and, therefore, can withstand its original design wind load without adversely interacting with the nuclear units. The Staff reviewed the Licensee's analyses and found them acceptable for restart of the nuclear units. The Licensee agreed to the Staff's recommendation to periodically perform surveillance on the Unit 2 stack until it is reinforced, to ensure that it has not degraded. By April 1993, the Licensee completed the modifications and reinforcements to the Unit 2 stack and erected a new Unit 1 stack.

Failure of sections of fossil units did not endanger the nuclear units. The puncture of the oil tank created a cleanup problem for both the fossil and nuclear units but did not create a safety problem.

IV. CONCLUSION

For the reasons discussed above, the NRC concludes that Turkey Point Units 3 and 4 are being operated in accordance with applicable regulations and do not endanger the health and safety of the public. 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); *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 Petitioner to determine if enforcement action is warranted. Therefore, any further action on the issues addressed in this Director's Decision and the Petitioner's request for action pursuant to section 2.206 is denied. As provided in 10 C.F.R.

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

**FOR THE NUCLEAR
REGULATORY COMMISSION**

**Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation**

**Dated at Rockville, Maryland,
this 7th day of June 1993.**



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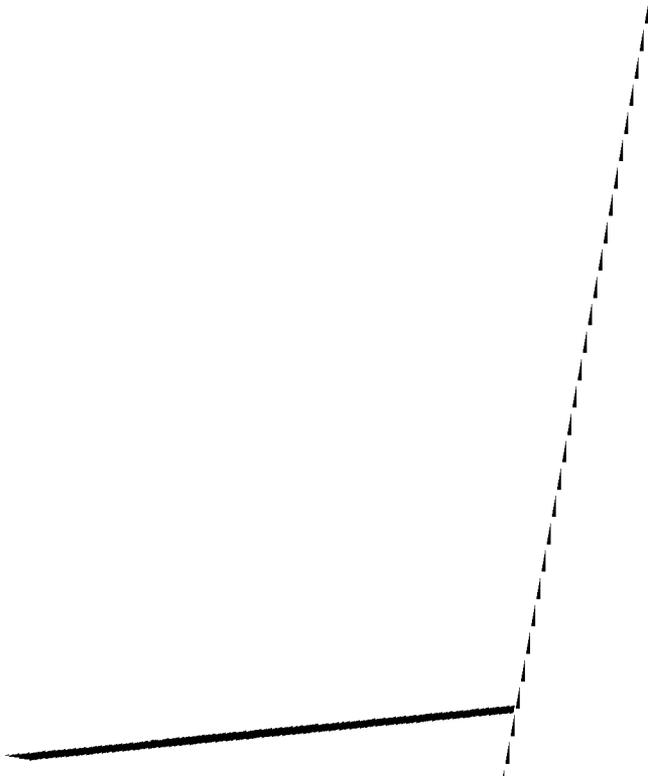
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