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 NUCLEAR REGULATORY COMMISSION
 ATOMIC SAFETY AND LICENSING BOARD PANEL
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MEMORANDUM FOR: Leonard Bickwit, General Counsel

FROM: Robert M. Lazo, Acting Chairman, ASLBP

SUBJECT: ALAB-590 (ALLENS CREEK)



In light of the extraordinary attention being given the Appeal Board's most recent decision in Allens Creek (ALAB-590) which discussed the requirement of §2.714 that petitioners seeking to intervene state "... the bases for each contention set forth with reasonable specificity", it occurs to me that it would be helpful to the Commission in deciding whether to review ALAB-590 to have the Panel's assessment of the likely effects of this decision on future proceedings. In writing this memorandum, it is not my intent to argue for or against the result reached in ALAB-590, but rather to inform the Commission of possible implications of this decision for its licensing proceedings.

Prior to ALAB-590, it has been the practice to exclude contentions at the initial stages of the proceeding unless the intervenor advanced bases for the contentions which would justify their admission to the proceeding.

It appears to many of us on the Licensing Board Panel that ALAB-590 has eliminated the "bases" requirement. If so, the only restrictions on the initial admission of contentions are: (1) that the contention be within the jurisdiction of the board as defined by the notice of hearing and the regulations; and (2) that the contention not constitute a challenge to the Commission's regulations. Thus, even frivolous contentions would become the subject of discovery and summary disposition procedures where formerly they had been eliminated prior to the commencement of those procedures. Of course, discovery and summary disposition procedures can be and often are time-consuming, cumbersome and expensive not only to the government but to the applicant and the intervenor as well. Further, ALAB-590 has the effect of shifting the burden with respect to contentions which are frivolous on their face. Rather than requiring the intervenor to provide some basis for the contention in order to have it considered, ALAB-590 places the burden on the applicant and staff to demonstrate that there is no basis for the contention.

This contrasts with the recent decision in Costle v. Pacific Legal Foundation, ___ L.Ed. 2d ___, 14 ERC 1153, in which the Supreme Court approved an EPA requirement that a person seeking an evidentiary hearing raise a material issue of fact, noting that it had in the past approved similar requirements that

one seeking a hearing meet a threshold burden of tendering evidence showing the need for a hearing.

Thus in practical terms ALAB-590 presents the Commission with a question of the policy it wishes to adopt in dealing with matters raised by members of the public in connection with licensing proceedings.

A copy of this memorandum is being sent to the Docketing and Service Branch with the request that it be served on the parties to the Allens Creek proceeding and incorporated in the docket.

Robert M. Lazo

Robert M. Lazo
Acting Chairman
Atomic Safety and Licensing
Board Panel

cc: A. Rosenthal, ASLAP