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Index 2

INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

January - June 1989

U.S. NUCLEAR REGULATORY COMMISSION

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Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(301/492-8925)

Foreword

Digests and indexes for issuances of the Commission (CLI), the Atomic Safety and Licensing Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions of Rulemaking are presented in this document. These digests and indexes are intended to serve as a guide to the issuances.

Information elements common to the cases heard and ruled upon are:

Case name (owner(s) of facility)
Full text reference (volume and pagination)
Issuance number
Issues raised by appellants
Legal citations (cases, regulations, and statutes)
Name of facility, Docket number
Subject matter of issues and/or rulings
Type of hearing (for construction permit, operating license, etc.)
Type of issuance (memorandum, order, decision, etc.).

These information elements are displayed in one or more of five separate formats arranged as follows:

1. Case Name Index

The case name index is an alphabetical arrangement of the case names of the issuances. Each case name is followed by the type of hearing, the type of issuance, docket number, issuance number, and full text reference.

2. Digests and Headers

The headers and digests are presented in issuance number order as follows: the Commission (CLI), the Atomic Safety and Licensing Appeal Panel (ALAB), the Atomic Safety and Licensing Board Panel (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking.

The header identifies the issuance by issuance number, case name, facility name, docket number, type of hearing, date of issuance, and type of issuance.

The digest is a brief narrative of an issue followed by the resolution of the issue and any legal references used in resolving the issue. If a given issuance covers more than one issue, then separate digests are used for each issue and are designated alphabetically.

3. Legal Citations Index

This index is divided into four parts and consists of alphabetical or alphanumerical arrangements of Cases, Regulations, Statutes, and Others. These citations are listed as given in the issuances. Changes in regulations and Statutes may have occurred to cause changes in the number or name and/or applicability of the citation. It is therefore important to consider the date of the issuance.

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4. Subject Index

Subject words and/or phrases, arranged alphabetically, indicate the issues and subjects covered in the issuances. The subject headings are followed by phrases that give specific information about the subject, as discussed in the issuances being indexed. These phrases are followed by the issuance number and the full text reference.

5. Facility Index

This index consists of an alphabetical arrangement of facility names from the issuance. The name is followed by docket number, type of hearing, date, type of issuance, issuance number, and full text reference.

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3. Legal Citations Index

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5. Facility Index

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CLI-89-1 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning); OPERATING LICENSE; February 2, 1989; MEMORANDUM AND ORDER

A The Commission determines that Intervenors' motion regarding an aspect of applicant's emergency plan constitutes a motion to reopen a portion of the record that has been closed and, therefore, must be judged against the appropriate standards in 10 C.F.R. § 2.734(a)(1). The Commission finds that Intervenors have failed to comply with its requirements for even considering a motion to reopen and, accordingly, denies the motion.

B In order to prevail on a request to reopen the record, the movant must demonstrate that (1) its motion is timely, i.e., that the issue it now seeks to raise could not have been raised earlier; (2) the motion addresses a significant safety or environmental issue; and (3) a materially different result would be or would have been likely had the newly proffered evidence been considered. 10 C.F.R. § 2.734(a)(1)-(3). See, e.g., Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 149-50 (1987).

C The Commission's regulations require that a motion to reopen the record must be accompanied by one or more affidavits which set forth the factual and/or technical basis for the movant's claim that the three criteria in 10 C.F.R. § 2.734(a)(1)-(3) have been satisfied. 10 C.F.R. § 2.734(b).

D The new material in support of a motion to reopen the record must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. § 2.714(b) for admissible contentions. Such supporting information must be more than mere allegations; it must be tantamount to evidence. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986), cert. denied, 479 U.S. 923 (1986).

E If a motion to reopen is to succeed, it must be based on evidence through affidavit(s) as required in 10 C.F.R. § 2.734(b). It is not enough merely to express a willingness to provide unspecified, additional information at some unknown date in the future. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985), quoting Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983).

F In denying an intervenor's motion to admit a new contention alleging an applicant's noncompliance with 10 C.F.R. § 50.47(b)(12), which requires provision for emergency medical services for contaminated injured individuals in the event of an accident, which is considered by the Commission as a motion to reopen a portion of the record that is closed, the Commission is not addressing the merits of the proposed contention or the applicant's noncompliance with 10 C.F.R. § 50.47(b)(12). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 181 (1981).

CLI-89-2 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket Nos. 50-322-OL-3, 50-322-OL-5; OPERATING LICENSE; March 3, 1989; DECISION

A On directed certification from the Appeal Board on the question of whether the conduct of the Intervenor Governments in the Shoreham proceeding warrants their dismissal from the proceeding, or some other sanction, the Commission concludes that the Intervenors' willful defiance of Licensing Board orders caused great harm and delay to Applicant's efforts to demonstrate the sufficiency of its emergency plan and to the integrity of the Commission's adjudicatory process. Accordingly, in view of all of the circumstances,

the Commission dismisses Suffolk County, the State of New York, and the Town of Southampton as parties from all pending proceedings.

B In its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), the Commission established a graduated scale of sanctions including, in severe cases of a participant's failure to meet its obligations, dismissal from the proceeding.

C In its Statement of Policy on Conduct of Licensing Proceedings, the Commission identified the following factors to consider in deciding what sanction to impose: "the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances." 13 NRC at 454.

D The Commission finds that the County's production of a detailed emergency plan dating back to 1983 and its announcement that it would no longer comply with the Board's discovery orders, both events occurring in June 1988, constitute a hearing in which one party controls the information to be disclosed and the evidence that may be produced to be so grossly unfair and biased as to amount to hardly any hearing at all.

E The Governments' obstructionist tactics and refusal to comply with discovery obligations as ordered by the Board were patently unfair to the Applicant and effectively "stalled the proceeding in its tracks." Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1417 (1982).

F In determining whether sanctions should be imposed against the Intervenor Governments, the Commission notes that the record amply demonstrates that the Governments have engaged in a pattern of resistance to Board orders and authority.

G Taking into account all the circumstances, the Commission fashions a sanction that will, if possible, mitigate the harm caused by the parties' failure to fulfill their obligations and that will bring about improved future compliance not just for this case but for future cases and parties as well.

H Even though NRC regulations recognize a distinct role for state and local governments in NRC proceedings, the Commission has always held that all parties, including interested states and local governments, must strictly adhere to NRC requirements. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977).

CLI-89-3 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; March 6, 1989; MEMORANDUM AND ORDER.

A The Commission denies motions urging reconsideration of its decision in CLI-88-10, 28 NRC 573, on the basis (1) that the Commission should not have denied Intervenors' rule waiver petition on the ground that no significant safety question was presented because the parties were unaware of that criterion, and (2) that the Commission should not have resolved decommissioning funding issues on the basis of the existing record. The Commission determines that implicit in the "compelling circumstances" standard for granting rule waiver is a requirement that a rule waiver petition show that the safety matter at issue, if not "compelling," is at least "significant" and thus, absent such a showing, the Commission should be expected to deny the petition. On the decommissioning decision, the Commission determines that when CLI-88-7, 28 NRC 271, invoked both the reopening requirements and the standards for a late-filed contention, Intervenors must have been on notice that they should make an evidentiary case when they presented their contentions and that Applicants' prima facie case would prevail absent evidence to the contrary. Moreover, the Commission was under no obligation to search for "a needle in a haystack" with reference to a figure for spent fuel costs which appeared in a massive document incorporated by reference in the Massachussetts Attorney General's motion to reopen the record.

B Implicit in the "compelling circumstances" standard in an agency whose mission is to ensure public health and safety is that to qualify for consideration, a rule waiver petition would need to show that the safety matter at issue, if not "compelling," was at least "significant."

C The Commission's interest in financial qualifications is focused on any possible relationship to safety. Absent a showing of safety significance, the Commission should be expected to deny rule waiver petitions.

D Since the parties did not present any contrary argument on safety significance in their motions for reconsideration, the Commission maintains the view that, having provided for decommissioning funding, a rule waiver is not necessary to address a significant safety problem on its merits.

E Parties must clearly identify evidence on which they rely.

F A petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions. Wholesale incorporation by reference does not serve the purposes of a pleading.

G Parties shall clearly identify the matters on which they intend to rely with reference to a specific point. The Commission cannot be faulted for not having searched for a needle that may be in a haystack.

H Where a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source.

I A motion for reconsideration cannot open the door for a new contention, nor can a party complain when it receives essentially what it requested.

CLI-89-4 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning); OPERATING LICENSE; March 6, 1989; MEMORANDUM AND ORDER

A The Commission determines that Intervenors had not met their burden of showing a lack of fundamental fairness in the hearing schedule that rose to the level of a violation of due process.

B The schedule at issue simply cannot be said to be so draconian as to raise an issue of constitutional due-process dimensions.

CLI-89-5 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION, et al. (Three Mile Island Nuclear Station, Unit 2), Docket No. 50-320-OLA; OPERATING LICENSE AMENDMENT; April 13, 1989; ORDER

A As a result of the Commission's review of the final initial decision and comments by the parties, the Commission holds that the Licensing Board's decision should become effective immediately.

B As a result of the Commission's review of the final initial decision and the comments submitted by the parties regarding whether the decision should be made effective immediately, the Commission finds no reason to stay the effectiveness of the Licensing Board's decision pending completion of the appellate process. Therefore, the Commission finds that the Licensing Board's decision resolving all relevant matters in favor of the licensee, and granting the licensee's application for an operating license amendment should become effective immediately.

CLI-89-6 TEXAS UTILITIES ELECTRIC COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445-OL, 50-446-OL, 50-445-CPA; OPERATING LICENSE AND CONSTRUCTION PERMIT AMENDMENT; April 20, 1989; MEMORANDUM AND ORDER

A The Commission denies motions for limited intervention and for reconsideration of its decision in CLI-88-12, 28 NRC 605 (1988). The Commission holds that the petition for reconsideration makes no attempt to demonstrate compliance with the required criteria for an untimely filing found in 10 C.F.R. § 2.714(a)(1)(i)-(v), and includes no discussion of the five factors that the petition is required to address by that same section. The Commission holds that the petitioner does not have standing to seek either a stay or reconsideration, since he was not a party to the proceeding when the order was issued, nor has he demonstrated an interest that might be affected by the proceeding. Nothing in CLI-88-12 hinders petitioner from presenting his objections to a Settlement Agreement to the Secretary of Labor or precludes the Department of Labor from invalidating the agreement, nor does it preclude litigation before DOL under the principles of res judicata or collateral estoppel. The Commission finds that petitioner has not met Commission stay criteria, as he makes no attempt to demonstrate that he meets a balancing of the four traditional factors that would cause a court to grant a preliminary injunction. The Commission holds that the essential basis for denying the petition for late intervention — that a party may not rely upon another party to represent its position and interest without assuming the risk that it will not do so — is independent of the validity of the agreement.

B The motion for limited intervention cannot be granted because it makes no attempt to demonstrate compliance with the required criteria for filing an untimely petition to intervene in an ongoing proceeding found in 10 C.F.R. § 2.714(a)(1)(i)-(v). Neither does it discuss the five factors that a late-filed petition for

intervention must address. Therefore, the Commission cannot grant the motion for limited intervention to gain party status under § 2.714(a)(1)(i)-(v).

C Petitioner does not have standing to seek a stay or reconsideration of a previous Commission decision because he was not a party to the proceeding when that decision was issued. 10 C.F.R. § 2.771(a) (reconsideration) and 10 C.F.R. § 2.788(a) (stay) both specify that a party must request the action.

D Petitioner does not have the requisite interest to seek reconsideration, i.e., he has not demonstrated an interest that might be affected by the proceeding. Nothing in the Commission's prior order prevents Petitioner from presenting his objections to the settlement agreement to the Secretary of Labor or prevents the Department of Labor from invalidating the agreement if it so chooses, nor is his litigation before DOL precluded under the principles of res judicata or collateral estoppel because neither Petitioner nor his adversary were parties to the Commission's order.

E Petitioner has not attempted to demonstrate that he meets Commission stay criteria. Under regulations and long-standing precedent, a party seeking a stay must show that it meets a balancing of the traditional four factors that would cause a court to grant a preliminary injunction.

F Assuming arguendo that the settlement agreement that is the subject of this motion violated some law or regulation, neither of the Petitioners has demonstrated that the disputed agreement constitutes "good cause" for late intervention in the operating license and construction permit amendment proceedings under 10 C.F.R. § 2.714. The essential basis for denying Petitioners's late intervention — that a party may not rely upon another party to represent its position and interest without assuming the risk that it will not do so — is independent of the validity of the agreement.

CLI-89-7 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; May 3, 1989; MEMORANDUM AND ORDER

A The Commission denies a "Second Motion for Reconsideration of CLI-88-10," in that Intervenors have again fundamentally misperceived the purpose and nature of the decommissioning funding requirements and thus failed to make a case for reconsideration. The Commission finds that the changed circumstances brought to them by Intervenors should not be expected to alter substantially the sums estimated by the Commission.

B Even in the event that all three waste disposal sites were barred to Seabrook and the state of New Hampshire does not move to meet its obligations under LLRWPA, the Commission sees no need to alter its decision in CLI-88-10, 28 NRC 573 (1988).

C No demonstration has been made to cause the Commission to believe that the sum that it ordered to be set aside in CLI-88-10, including a contingency in excess of $14 million, is inadequate to provide the requisite assurance for the limited additional potential costs of continued onsite storage for the term of years until the state of New Hampshire itself becomes responsible for the waste.

D The Commission finds that the changed circumstances brought to it by Intervenors should not be expected to alter substantially the sums estimated by the Commission, and thus reconsideration is not warranted.

E Because of allegedly changed circumstances that could not have been brought to them, the Commission gives consideration here to matters beyond the original record of the order for which reconsideration is sought.

CLI-89-8 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; May 18, 1989; MEMORANDUM AND ORDER

A The Commission has before it three separate motions seeking to stay authorization to conduct low-power testing at Seabrook. The Commission denies the motions after analyzing the four factors relevant to consideration of stay motions. Those factors did not favor a stay. The Commission finds that Intervenors' claims of harm did not meet the standards of irreparable harm, and Intervenors did not demonstrate how the irreversible effects from irradiating the reactor were harm to them. The Commission found further that Intervenors did not make a strong showing that they are likely to prevail on the merits: (1) Intervenors err in interpreting the Atomic Energy Act to bar any operation of a nuclear reactor until all issues material to the issuance of a full-power license are decided; (2) low-power operation is not a new circumstance, or a separate federal action, either of which could require further Environmental Impact Statement analysis

under NEPA; (3) delay of corrective measures to three items of the Safety Parameter Display System until as late as the first refueling outage would not result in a lack of reasonable assurance of public health and safety. The Commission found that delay would harm Applicants and would not serve the public interest.

B The Commission's determination of whether to grant or deny a stay application involves consideration of four factors. But it is incontrovertible that the most significant factor is whether the party requesting a stay has shown that it would be irreparably injured unless a stay is granted.

C Simply reciting claims of risk of some future harm, without discussing the likelihood or degree of any such risk does not meet the standard of irreparable harm required by this Commission or the courts.

D At a nuclear plant that complies with Commission requirements for low-power operation, there is no threat of irreparable harm either from the risks or the irradiation of the reactor that occur during low-power testing.

E The Commission has consistently found that the risk of an accident during low-power operations is not irreparable harm. Certain factors contribute to a substantial reduction in risk and potential accident consequences for low-power testing as compared to the higher risks of continuous full-power operations.

F The Commission has recognized a somewhat increased risk of operator error in early phases of operations where operators are less experienced, but nonetheless, determined that the slightly higher risks due to the relative inexperience of operators are significantly outweighed.

G The greatly lowered likelihood of any offsite harm even in the unlikely event of an accident during low-power testing is all the more true here where the Commission has strictly limited the operation that may occur pursuant to the low-power license.

H Irradiation of the reactor is not irreparable harm to the intervenors.

I It is true that criticality of the reactor will irradiate the reactor core and thus effect some irreversible changes. The D.C. Circuit, in denying a stay of low-power operation at the Shoreham reactor, evaluated the irreversible changes from low power and found that they did not rise to the level of irreparable injury.

J The Commission's provisions to ensure availability of funds to decommission after low-power testing mean that any necessary action to avoid hazards from radioactive contamination resulting from low-power testing can be taken promptly. Adequate provisions have been made for decontamination and decommissioning of the reactor and the safe storage of nuclear waste until it can be removed from the site.

K No irreparable harm arises from the "potential mootness" of Intervenors' claims. Those claims would not become moot simply by the occurrence of low-power operation. Were Intervenors ultimately to prevail on their claim that the operator-related exercise was wrongly rejected, their contention could be admitted to reopened hearing for adjudication. Were Intervenors to prevail in the ensuing litigation, Applicants would be required to cure whatever deficiencies were found. Thus Intervenors would not be deprived of the opportunity to have their cause of action heard and to receive meaningful relief.

L The Commission's consideration of the Onsite Exercise contention, which is before the Appeal Board on the merits, is without prejudice to the merits of Intervenors' ongoing appeal. In order to make the required predictive finding on the likelihood of success on the merits, the Commission must give at least threshold consideration to the Licensing Board's decision and the record before the Appeal Board.

M The Commission's rules are clear that only the Commission may waive a rule in an NRC proceeding. A rule waiver will be presented to the Commission only when the adjudicatory tribunal finds that a prima facie case for waiver has been made, but the decision on whether a waiver is necessary rests with the discretion of the Commission.

N Withdrawal of an application is neither automatic nor a matter of right, especially where Applicants would be in possession of an irradiated reactor.

O The Commission may deny a pending full-power application if it is not pursued. Subsequent to the denial of the application, NRC would nonetheless retain regulatory authority over applicans that are in possession of nuclear materials.

P An adjudicatory licensing hearing is not a permissible forum for a challenge to Commission regulations. Such a challenge may be brought by means of a petition for rulemaking.

Q Intervenors' claim that Congress did not intend to allow plant operation at any power level before the conclusion of all hearings is difficult to understand in view of the Commission's consistent interpretation of its organic statute as permitting low-power testing before the conclusion of all hearings.

R Intervenors' challenge to the Commission regulation that specifically eliminates the need for review and findings on offsite state and local emergency response plans before granting a low power license is impermissible under the Commission rules.

S Section 50.47(d) was issued on a legally sound basis, and the Commission has been issuing low-power licenses pursuant to it for 7 years. It is significant that Congress has been made aware of this process and has never suggested that the practice is unlawful.

T Intervenors' contention that full-power operation is unlikely amounts to no more than speculation as to the eventual outcome of litigation on offsite emergency planning issues and is not a new circumstance requiring further analysis under NEPA.

U Intervenor provided no explanation to the Appeal Board or to the Commission as to why permitting corrective measures with respect to three items of the Safety Parameter Display System to occur at any time up to the first refueling outage would result in a lack of reasonable assurance that the health and safety of the public will be protected, nor does the Commission find any reason to disturb the contrary conclusions of the two boards which carefully considered this matter.

V The Commission finds that there will be harm to the Applicants from further delay of low-power testing. In general the Commission has found that longer periods of time for low-power testing hold the advantage that any problem that may be revealed during the testing process can be corrected without delaying full-power operations with their attendant benefits.

W The public has an interest in the resolution of licensing proceedings with reasonable expedition. It is consistent with the expressed intent of Congress, which defines the public interest, that a plant that has been found to be safe for the purposes of low-power testing and is ready to be tested be so permitted.

CLI-89-9 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; May 24, 1989; ORDER

A The Commission finds that Intervenors' motion for reconsideration of CLI-89-8, 29 NRC 399 (1989), does not seek reconsideration of matters before the Commission, but rather seeks a stay based on an entirely new theory. The Commission determines that intervenors' failure even to address the irreparable harm factor in the context of the new theory is fatal to the stay motion and therefore denies the motion. The Commission also notes that intervenors have not made the substantial showing required for reopening of a closed record.

B A substantial showing would be needed to reopen a hearing where not only is the evidentiary record closed, but also the Commission has issued a final detailed decision.

DIGESTS

ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

ALAB-909 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; January 17, 1989; MEMORANDUM AND ORDER

A In the absence of an appeal from a Licensing Board's grant of the applicants' motion for summary disposition on an issue relating to the environmental qualification of a particular coaxial cable used principally for data transmission in the Seabrook facility's computer system, LBP-88-31, 28 NRC 652, the Appeal Board conducts a sua sponte review of that decision and affirms it.

B It is appeal board practice to review on its own initiative any unappealed licensing board decision that finally disposes of significant safety or environmental issues.

ALAB-910 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning); OPERATING LICENSE; February 8, 1989; MEMORANDUM AND ORDER

A The Appeal Board forwards to the Commission for decision the intervenors' motion for directed certification of a Licensing Board order establishing a hearing schedule for the remaining issues pending in the offsite emergency planning phase of this operating license proceeding.

B The Appeal Board ordinarily will review a scheduling order on a motion for directed certification for the limited purpose of determining whether the schedule set forth therein deprives a party of procedural due process. See ALAB-889, 27 NRC 265, 269 (1988); ALAB-864, 25 NRC 417, 420-21 (1987); ALAB-858, 25 NRC 17, 20-21 (1987).

ALAB-911 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3 (Emergency Planning); OPERATING LICENSE; March 13, 1989; MEMORANDUM AND ORDER

A Following the Commission's termination of the proceeding by its dismissal of the intervenors, the Appeal Board dismisses their pending appeals from the Licensing Board's decision on certain emergency planning issues, LBP-88-24, 28 NRC 311 (1988), and, in the exercise of its sua sponte review authority, renders an advisory opinion on the results of its review of the record on those issues.

B Under long-established, Commission-endorsed practice, in the absence of an appeal, the Appeal Board reviews "sua sponte 'any final disposition of a licensing proceeding that either was or had to be founded upon substantive determinations of significant safety or environmental issues.'" Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981) (quoting Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979)). See also Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301 (1980).

C Although the Appeal Board usually undertakes sua sponte review in proceedings that have become uncontested because all of the intervenors have either withdrawn or declined to appeal, sua sponte review is not precluded where intervenors have been dismissed as a sanction. See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897 (1982), review declined, CLI-83-2, 17 NRC 69 (1983).

D The purpose of Appeal Board sua sponte review is protection of the public interest in general (as opposed to a particular litigant's interest) by providing another independent level of review of significant health, safety, and environmental issues on which a substantial evidentiary record already exists.

E The Appeal Board generally will not undertake sua sponte review where all the parties have agreed to a stipulated settlement of the contested issues, effectively resulting in a dismissal of the proceeding. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-796, 21 NRC 4 (1985).

F The Commission's Rules of Practice allow the taking of official notice only of "any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body." 10 C.F.R. § 2.743(j).

G Absent NRC regulations or evidence to the contrary, it can be presumed that a station that undertakes to become a part of an established Emergency Broadcast System will carry out in any emergency (nuclear or otherwise) the responsibilities it has assumed.

H If, in the course of sua sponte review, the Appeal Board concludes that corrective action adverse to a party's interest is necessary, the Board ordinarily affords that party an opportunity to address the matter. See Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 891 n.8 (1982).

I The following technical issues are discussed: Emergency Broadcast System; Role Conflict Faced by School Bus Drivers During Emergencies.

ALAB-912 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-5 (EP Exercise); OPERATING LICENSE; March 13, 1989; ORDER

A Implementing the Commission's decision terminating this proceeding (CLI-89-2, 29 NRC 211), the Appeal Board issues an order ending its consideration of the matters before it.

B Unreviewed licensing board decisions do not have precedential effect. See Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

ALAB-913 ALL CHEMICAL ISOTOPE ENRICHMENT, INC. (AlChemIE Facility-1 CPDF; AlChemIE Facility-2 Oliver Springs), Docket Nos. 50-603-CP/OL, 50-604-CP; CONSTRUCTION PERMIT AND OPERATING LICENSE; March 20, 1989; DECISION

A The Appeal Board conducts a sua sponte review of the Licensing Board's decision in favor of the applicant in this uncontested, combined construction permit/operating license proceeding for two facilities that will use gas centrifuge machines to enrich nonradioactive isotopes for medical, industrial, and other uses. With two minor clarifications, the Appeal Board affirms the Licensing Board's authorization of the issuance of construction permits and an operating license for the plants.

ALAB-914 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Three Mile Island Nuclear Station, Unit 2), Docket No. 50-320-OLA (Disposal of Accident-Generated Water); OPERATING LICENSE AMENDMENT; April 4, 1989; MEMORANDUM AND ORDER

A The Appeal Board denies the joint intervenors' application for a stay of a Licensing Board initial decision authorizing a license amendment for the now shut down Three Mile Island, Unit 2. The license amendment would delete certain technical specifications from the license that currently prohibit the disposal of accident-generated water at the facility.

B The Commission's Rules of Practice provide that, in determining whether a stay is warranted, consideration must be given to the following questions: (a) whether the moving party has made a strong showing that it is likely to prevail on the merits; (b) whether the party will be irreparably injured unless a stay is granted; (c) whether the granting of a stay would harm other parties; and (d) where the public interest lies. 10 C.F.R. § 2.788(e).

C The burden of persuasion on each of the questions involved in determining whether a stay is warranted falls on the movant and, "[w]hile no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay." Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

D A party seeking a stay "who establishes no amount of irreparable injury is not entitled to a stay in the absence of a showing that a reversal of the decision under attack is not merely likely, but a virtual certainty." Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). See Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985).

E In order to establish irreparable injury, the party seeking a stay must demonstrate that the injury claimed is "'both certain and great.'" Perry, 22 NRC at 747 (quoting Cuomo, 772 F.2d at 976).

F As the Commission has held, "[m]ere exposure to risk . . . does not constitute irreparable injury if the risk, as here, is so low as to be remote and speculative. . . ." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

ALAB-915 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); OPERATING LICENSE; May 15, 1989; DECISION

A The Appeal Board affirms a Licensing Board's ruling, LBP-89-3, 29 NRC 51 (1989), denying an intervenor's petition to reopen a closed record to consider certain seismic issues.

B A motion to reopen a closed record must address a significant safety or environmental issue. 10 C.F.R. 2.734(a). In addition, such a motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that such an issue is involved. Further, the affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. 10 C.F.R. 2.734(b).

C Reopening motions that do not meet the requirements of 10 C.F.R. 2.734 within their four corners is subject to rejection out-of-hand; i.e., it must appear from the movant's own submissions that the standards for reopening have been satisfied. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987).

D A petitioner who seeks to reopen a closed record is not relieved of the requirements of the reopening standard by virtue of being represented by a non-lawyer. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

ALAB-916 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); OPERATING LICENSE; May 24, 1989; MEMORANDUM AND ORDER

A The Appeal Board grants directed certification and reverses a Licensing Board's oral ruling "expunging" for lack of subject matter jurisdiction a portion of a previously admitted contention of an intervenor in the proceeding.

B An appeal board normally undertakes discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (footnote omitted).

C In the absence of contrary directions from the Commission, the Chief Administrative Judge of the Licensing Board Panel is empowered both (1) to establish two or more licensing boards to hear and decide discrete portions of a licensing proceeding; and (2) to determine which portions will be considered by one board as distinguished from another. See, generally, 10 C.F.R. 2.704, 2.721.

D The power of the Chief Administrative Judge of the Licensing Board Panel (1) to establish two or more licensing boards to hear and decide discrete portions of a licensing proceeding; and (2) to determine which portions will be considered by one board as distinguished from another must be exercised within the confines of the totality of issues that are properly before one Board or another as a result of the notice of hearing or some Commission directive. See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

ALAB-917 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (Offsite Emergency Planning Issues); OPERATING LICENSE; June 16, 1989; MEMORANDUM AND ORDER

A The Appeal Board (1) denies the applicants' motion to strike an intervenor's notice of appeal from a Licensing Board order (unpublished) addressing (but not disposing of) an issue in this operating license proceeding, and (2) dismisses the notice of appeal as premature.

B The test of finality for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory. ALAB-894, 27 NRC 632, 636 (1988) (quoting Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-200, 2 NRC 752, 758 (1975) (footnotes omitted)).

C When a party totally fails to come to grips with pivotal and manifestly nonfrivolous arguments advanced by an adversary, a permissible inference arises that that party recognizes the force of the arguments.

D Even in the absence of assistance from the litigants, an Appeal Board has some responsibility for looking independently at questions put before it that have jurisdictional overtones.

ALAB-918 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (Onsite Emergency Planning); OPERATING LICENSE; June 20, 1989; MEMORANDUM AND ORDER

A On the appeal of the intervenors from the Licensing Board's denial of their motion to admit an emergency preparedness exercise contention or, in the alternative, to reopen the record, the Appeal Board affirms the denial of the motion to admit the contention.

B The Rules of Practice provide that any contention filed "later than fifteen (15) days prior to the holding of the special prehearing conference . . . or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference" is nontimely and can be admitted only upon a balancing of the five lateness factors of 10 C.F.R. § 2.714(a)(1). 10 C.F.R. § 2.714(b).

C The intervenors' contention was late-filed and subject to a balancing of the five lateness factors even though the emergency preparedness exercise on which the contention was based had yet to be held at the time the period for filing contentions in this proceeding closed. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

D Appeal Board review of the Licensing Board's balancing of the factors in 10 C.F.R. § 2.714(a)(1) is strictly limited to determining whether the Licensing Board abused its discretion. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 922 (1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20-21 (1986); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1763 (1982).

E To establish that the Licensing Board transgressed the abuse of discretion standard, the intervenors have a heavy burden on appeal. It is insufficient for the intervenors to show merely that the Board below might legitimately have determined that the five lateness factors of 10 C.F.R. § 2.714(a)(1) weighed in favor of admitting the contention; rather, the intervenors must demonstrate that a reasonable mind could reach no other result. Comanche Peak, 25 NRC at 922; Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983).

F It is settled that a late-filed contention must be tendered promptly upon the discovery of the information upon which it is based. Catawba, 17 NRC at 1048 (1983). See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986).

G The Commission has restricted licensing hearings on the results of emergency planning exercises to contentions involving "deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken, i.e., fundamental flaws in the plan." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986).

H In defining a "fundamental flaw" the Appeal Board has stated that "[f]irst, it reflects a failure of an essential element of the plan, and, second, it can be remedied only through a significant revision of the plan." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 505 (1988) (emphasis in original).

DIGESTS
ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

LBP-89-1 LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-5R (ASLBP No. 89-581-01-OL-5R) (EP Exercise); OPERATING LICENSE; January 3, 1989; MEMORANDUM AND ORDER

A Applying the standards set out in this proceeding in ALAB-903, 28 NRC 499 (1988), the Licensing Board accepts for litigation portions of five (out of a total of twenty) contentions advanced with respect to the 1988 exercise of the Applicant's offsite emergency plan for the Shoreham Station which adequately allege a failure in an essential plan element requiring significant plan revisions to correct. The Licensing Board denies contentions that allege facts that do not materially differ from those found not to constitute a fundamental flaw in the litigation of the 1986 exercise and admits those alleging facts that do not materially differ from those found to constitute a fundamental flaw in the earlier litigation.

B Because litigation of offsite emergency plan exercises must be completed in 2 years following the exercise, an appellate decision that follows an initial decision and reverses the denial of a contention would leave little if any time to hear and decide that contention. Therefore, the Licensing Board concludes that deferring appeals of its rulings on contentions could affect the proceeding in a pervasive or unusual manner and certifies those rulings to the Appeal Board.

C Footnote 4 to 10 C.F.R. Part 50, Appendix E, ¶ IV.F.1 defines the scope of the "full-participation exercise" that is required prior to full-power operation of a reactor as one in which "appropriate offsite local and State authorities and licensee personnel" participate. It does not require the participation of organizations such as the American National Red Cross, the U.S. Departments of Commerce and Agriculture, the Federal Aviation Administration, and the Long Island Rail Road.

D It is inappropriate to consolidate an otherwise inadmissible contention with one that is admissible if to do so would require an applicant to mount a defense that is substantially different or expanded from that which is required by the admitted contention.

LBP-89-2 UNIVERSITY OF CALIFORNIA, BERKELEY (Research Reactor), Docket No. 50-224-OLA (ASLBP No. 87-574-07-OLA); OPERATING LICENSE AMENDMENT; January 5, 1989; ORDER

LBP-89-3 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL) (Offsite Emergency Planning); OPERATING LICENSE; January 30, 1989; MEMORANDUM AND ORDER

LBP-89-4 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (ASLBP No. 88-583-01-OL) (Onsite EP Exercise); OPERATING LICENSE; January 30, 1989; MEMORANDUM AND ORDER

A The Licensing Board denies certain Intervenors' motion to admit exercise contention, or, in the alternative, to reopen the record.

B A licensing board possesses the inherent right (indeed, the duty) to determine in the first instance the bounds of its jurisdiction. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-591, 11 NRC 741, 742 (1980).

C Pursuant to 10 C.F.R. § 2.714(a)(1) and (b), any contention that is not filed within 15 days prior to the holding of a special prehearing conference or that is not filed within 15 days prior to the holding of the first prehearing conference (if a special prehearing conference has not been held), is deemed to be late filed, and any request to file a nontimely contention may be granted based upon the balancing of the five factors.

D Section 189a of the Atomic Energy Act does not provide members of the public with an unqualified right to a hearing, but rather the Act permits the establishment of reasonable threshold requirements for the admission of contentions, and the five-factor test in 10 C.F.R. § 2.714 represents a permissible exercise of that authority. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-47 (1983). In Union of Concerned Scientists v. NRC, 735 F.2d 1437 (1984), the Court of Appeals neither held nor implied that the Act either prohibits the establishment of reasonable threshold requirements, such as the five-factor test, for the admission of contentions, or precludes the application of standards to reopen a closed record under 10 C.F.R § 2.734.

E Good cause can be shown for failing to propose a contention in a timely manner if intervenors submit the contention promptly after receiving the pertinent document, and all that is required is that they state the reasons (i.e., the basis) for the contention by referring to that document, and set forth assertions and conclusions drawn therefrom. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548-49 (1980).

F Once the institutional unavailability of a licensing-related document is removed, intervenors must promptly formulate their contentions. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

G Absent good cause for late filing, a compelling showing must be made on the other four factors in § 2.714(a)(1). Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). However, favorable findings on some or even all of the other factors in the rule need not in a given case outweigh the effect of inexcusable tardiness. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

H The second and fourth factors in § 2.714(a)(1) are accorded less weight than the three other factors. With respect to the third factor, a petitioner 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. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245-46 (1986).

I Section 2.734 is a part of the adjudicatory process provided for under § 189(a)(1) of the Atomic Energy Act. In contrast, a 10 C.F.R. § 2.206 procedure can hardly be equated with the ability to litigate issues in an adjudicatory setting, accompanied by a right of appeal to the Appeal Board and an entitlement to petition for Commission review if dissatisfied with the appellate result. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1176 (1983).

J A mere threshold showing is insufficient because it is well settled that a proponent of a motion to reopen has a heavy burden. 51 Fed. Reg. 19,535 (1986); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978).

K Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the proceeding. The questions whether the matters sought to be raised present significant safety issues and whether they present triable issues of fact are intertwined and will be so treated. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-24 (1973).

L Barren allegations that the NRC Staff has acted in bad faith will be ignored. The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, we presume that they have properly discharged their official duties. United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926).

M Only facts raising a significant safety issue, not conjecture or speculation, can support a reopening motion. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant Units 1 and 2), ALAB-775, 19 NRC 1361, 1367 n.18 (1984).

N It is normal NRC procedure, when an exercise inspection report identifies "open items," for the Staff to conduct a followup inspection to determine whether those open items should be closed in a subsequent inspection report.

LBP-89-5 ALL CHEMICAL ISOTOPE ENRICHMENT, INC. (AIChemIE Facility-1 CPDF; AIChemIE Facility-2, Oliver Springs), Docket Nos. 50-603-CP/OL, 50-604-CP (ASLBP Nos. 88-570-01-CP/OL, 88-571-01-CP); CONSTRUCTION PERMIT AND OPERATING LICENSE; February 1, 1989; INITIAL DECISION

A Although the Applicant does not intend to use the subject centrifuge machines for enriching uranium, because the machines are capable of doing so, they are defined as a "production facility" and must be licensed by the Nuclear Regulatory Commission as provided by §§ 11v and 101 of the Atomic Energy Act of 1954, as amended.

B Where chemical hazards related to the production of stable isotopes are unrelated to materials licensed under the Atomic Energy Act and the hazards will be subject to regulation by other agencies, the issues considered of importance in licensing by the Nuclear Regulatory Commission are those associated with ensuring adequate protection of the common defense and security.

C The exact nature of the precautions the licensee will take to provide physical protection, material control, and accounting for special nuclear material will be withheld from public disclosure in a licensing proceeding, pursuant to 10 C.F.R. § 2.790(d)(1).

LBP-89-6 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271-OLA (ASLBP No. 87-547-02-LA); OPERATING LICENSE AMENDMENT; February 2, 1989; MEMORANDUM AND ORDER

A The Licensing Board, on the basis of a recent court opinion as well as a further explanation of an earlier ruling, grants reconsideration of its exclusion in LBP-88-26 (28 NRC 440 (1988)) of a contention raising questions as to the risk of a particular severe accident (a self-sustaining zirconium fire in the spent fuel pool). The Board also amends an existing contention to include the severe-accident considerations as an additional basis. The Board refers its ruling to the Appeal Board and postpones its effectiveness until after the Appeal Board acts on the referral.

B Parties are not expected to respond to motions for reconsideration absent an invitation from the Licensing Board to do so.

C Although the National Environmental Policy Act does not in itself mandate the consideration of the risks of a beyond-design-basis accident, the Commission's Severe Accident Policy Statement, 50 Fed. Reg. 32,138, 32,144 (1985), permits examination of the risk of such accidents in a spent fuel pool expansion proceeding.

D The Commission's Severe Accident Policy Statement permits examination of the risk of such accidents, using the methodology spelled out in the Commission's NEPA Policy Statement, 40 Fed. Reg. 40,101 (1980).

E Referral of a ruling to the Appeal Board, pursuant to 10 C.F.R. § 2.730(f), is appropriate where review of that ruling is necessary to prevent detriment to the public interest and unusual delay in the proceeding.

LBP-89-7 GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION, et al. (Three Mile Island Nuclear Station, Unit 2), Docket No. 50-320-OLA (ASLBP No. 87-554-3-OLA) (Disposal of Accident-Generated Water); OPERATING LICENSE AMENDMENT; February 2, 1989; FINAL INITIAL DECISION

A The Board approves Applicants' proposal to evaporate the accident-generated water (AGW) resulting from the Three Mile Island accident. As a result of the evaporation process, solid radioactive materials would be drawn off and shipped for burial. The liquid wastes, whose primary radioactive component is tritium, would be evaporated.

B The Board found that implementation of Applicants' proposal would have extremely small radiation exposure consequences, both to workers and the general public.

C As Intervenors pointed out, there would be some dose saving through radioactive decay if the AGW were stored on site for 30 years. However, the total dose that might be saved by storing the wastes on site, permitting decay prior to evaporation, would be no more than 36.4 person-rem, but the cost of the storage alternative was estimated to exceed $800,000. Thus, the dose saving was considered inadequate to require that much expenditure.

D Applicants' proposal to evaporate AGW shall be approved by the Licensing Board unless it finds that another alternative is obviously superior. It is Intervenors' burden to propose the other alternative. The

burden of proof remains on the Applicants, who must show by a preponderance of the evidence that the other alternative is not obviously superior.

E It is the licensing board's obligation to consider all the facts in the record and to determine whether alternatives to Applicants' proposal are obviously superior. At the hearing stage, it is no longer relevant whether the Preliminary Environmental Impact Statement was deficient. The hearing record is part of the agency record on which an environmental decision is reached.

F The agency's $1000 per person-rem standard for reducing radioactive effluent is applicable to a proposed license amendment regarding the evaporation of AGW that is contaminated by radioactivity. When the total radiation exposure is no more than 36.4 person-rem, it is not appropriate to require Applicants to spent $800,000 to further reduce the radiation exposure consequences of its proposed action.

G The following technical issues are discussed: Radiation releases from tritium evaporation; Tritium, health effects of; Maximally exposed offsite person; Dose to the total exposed population; Evaporation of radiation-contaminated water; Occupational exposures; Accident risks, shipment and burial; Dose modeling; MIDAS code; Radiation, low-level (health effects); Radiation, genetic risk; Cost estimates, alternative proposals; Radiation consequences, alternatives compared; Tritium, measurement of; Microorganisms, effect of evaporation system.

LBP-89-8 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL) (Offsite Emergency Planning); OPERATING LICENSE; February 16, 1989; MEMORANDUM AND ORDER

LBP-89-9 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1 (ASLBP No. 88-858-01-OL) (Onsite Emergency Planning and Safety Issues); OPERATING LICENSE; March 3, 1989; MEMORANDUM AND ORDER

A After considering issues raised by a summary disposition motion, the Licensing Board admitted genuine issues of fact under three bases for an emergency planning contention. It encouraged the parties to develop agreed site visitation procedures to resolve issues under one of the bases.

B Legal standard for summary disposition reviewed.

C Relationship among emergency planning regulations and guidance reviewed.

D The following technical issues are discussed: Hearing damage from sirens; Discomfort from sirens; Siren loudness; reflection from buildings; Measurement of elapsed time for alerting and notification (emergency planning); Readiness of emergency personnel — mobile siren (VANS) drivers; Measurement of elapsed time for route transit (emergency planning); Siren rotation, effect on sound levels.

LBP-89-10 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL, 50-444-OL (ASLBP No. 82-471-02-OL) (Offsite Emergency Planning); OPERATING LICENSE; March 8, 1989; MEMORANDUM AND ORDER

LBP-89-11 ADVANCED MEDICAL SYSTEMS, INC. (One Factory Row, Geneva, Ohio 44041), Docket No. 30-16055-SP (ASLBP No. 87-545-01-SP) (Suspension Order); SPECIAL PROCEEDING; March 21, 1989; MEMORANDUM AND ORDER

A In this Memorandum and Order, the Licensing Board holds (1) that this challenge to an immediately effective suspension order is not moot despite the subsequent revocation of the suspension order and resumption of operations by the Licensee under an amended license, and (2) that an award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504, is, in appropriate circumstances, within the Board's authority.

B While the burden of establishing a causal connection between an enforcement proceeding and parallel action by the NRC Staff in its regulatory capacity may indeed be a heavy one, the question of "prevailing party" status under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, turns on an analysis of the applicable facts rather than narrow and strained constructions of the statutory terms in the EAJA.

C The Equal Access to Justice Act, 5 U.S.C. § 504, has been severely limited by subsequent legislation that precludes the NRC from using any of its appropriated funds to pay the expenses of intervenors. See, e.g., § 502 of the Energy and Water Development Appropriations Act of 1981, Pub. L. No. 96-367; and § 502 of the Energy and Water Development Appropriations Act of 1989, Pub. L. No. 100-371. This restriction has been interpreted to encompass any awards under the EAJA. See Matter of Availability of Funds for Payment of Intervenor Attorney Fees — Nuclear Regulatory Commission, 62 Comp. Gen. 692 (1983) (B-208637); Business & Professional People for the Public Interest v. NRC, 793 F.2d 1366 (D.C. Cir. 1986).

D A Licensing Board's authority to award attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504, is limited only as to intervenors in NRC adjudicatory or regulatory proceedings. The EAJA continues to authorize, in appropriate circumstances, fees and expenses to licensees who, as petitioners, challenge NRC enforcement actions.

E The Licensing Board has authority to entertain requests for fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504, in enforcement proceedings where the licensee prevails on all or some of the issues joined for litigation.

F The grant of declaratory relief requires affirmative answers to two separate but related questions. First, does a genuine and live controversy exist sufficient to support a declaratory order. Second, is the issuance of declaratory relief appropriate. The former is necessary to ensure that a board has jurisdiction over the matter to be decided, without which it cannot issue any relief, declaratory or otherwise. The latter is necessary because declaratory relief is discretionary and is to be granted only to terminate a controversy or eliminate uncertainty and avoid unnecessary delay.

G The revocation of an immediately effective suspension order does not render a challenge to the suspension order moot where there was injury that was "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911).

H A Licensing Board's authority flows from and thus is limited to those matters contained in the Notice of Hearing. However, a Board is not precluded from reaching and deciding all the issues necessary to resolve the particular case before it simply because their resolution might have generic implications.

LBP-89-12 FLORIDA POWER & LIGHT COMPANY (St. Lucie Nuclear Power Plant, Unit 1), Docket No. 50-335-OLA (ASLBP No. 88-560-01-LA); OPERATING LICENSE AMENDMENT; May 9, 1989; INITIAL DECISION

A In this issuance, the Licensing Board sustains the NRC Staff's grant of a license amendment permitting an increase in the storage capacity of the St. Lucie Unit 1 spent fuel pool by reracking the pool into two discrete regions using new, high-density storage racks. However, the Board conditioned the license amendment to require evaluations of the Boraflex panels within 30 days of in-service surveillance test results indicating gama irradiation above a Board-specified threshold.

B In considering whether a license amendment granted by the NRC Staff may remain in effect, the Licensing Board must determine, for each of the factual issues remaining in dispute, whether the preponderance of the evidence supports the Licensee's position. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 577 (1984), review declined, CLI-84-14, 20 NRC 285 (1984).

C The following technical issues are discussed: Criticality excursions in spent fuel pools; Spent fuel pool design (racks); Spent fuel pool design (Boraflex panels).

LBP-89-13 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271-OLA-2 (Testing Requirements for ECCS and SLC Systems) (ASLBP No. 88-567-04-OLA); OPERATING LICENSE AMENDMENT; May 23, 1989; MEMORANDUM AND ORDER

A The Licensing Board grants a joint motion by the Intervenors and the Applicant to withdraw the only contention in the proceeding and to dismiss the proceeding.

LBP-89-14 PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL, 50-353-OL (ASLBP No. 89-587-03-OL-R); OPERATING LICENSE; June 2, 1989; MEMORANDUM AND ORDER

LBP-89-15 FLORIDA POWER AND LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4), Docket Nos. 50-250-OLA-4, 50-251-OLA-4 (ASLBP No. 89-584-01-OLA) (Pressure-Temperature Limits); OPERATING LICENSE AMENDMENT; June 8, 1989; MEMORANDUM AND ORDER

A Following a request for a hearing seeking to challenge the issuance of license amendments under 10 C.F.R. § 50.91(a) ("no significant hazards consideration"), the Licensing Board rejects one contention for lack of jurisdiction and accepts two contentions for litigation.

B A proffered contention must fall within the scope of the issues set out in the Federal Register notice of opportunity for hearing. See, e.g., Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

C Petitioners need only set forth the bases, i.e., the reasons, for each contention with reasonable specificity and need not detail the evidence in support thereof. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973). However, "reasonable specificity" means that the bases must be sufficiently detailed so that they: (1) demonstrate that the issue is admissible and requires further inquiry into the matter; and (2) put the parties on notice as to what they will have to oppose or defend.

D The admissibility of contentions must be decided on a case-by-case basis. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

E The Commission's rules do not permit admitting a contention that constitutes an attack on a Commission regulation absent special circumstances that would justify waiving the prohibition. 10 C.F.R. § 2.758.

F A contention that seeks to address an issue previously considered in an earlier proceeding cannot be admitted for relitigation in a subsequent proceeding. Portland General Electric Co. (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 745 (1978), aff'd, ALAB-534, 9 NRC 287 (1979).

G Licensing boards derive their subject matter jurisdiction from the orders, rules, and regulations promulgated by the Commission. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985).

H The Commission has made the Staff's "no significant hazards consideration" under 10 C.F.R. § 50.91(a) determination final and reserved only a discretionary right of review in the Commission itself. There is no right to appeal the Staff's hazards determination, itself, to the licensing boards or any other body within the agency. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4 (1986), rev'd in part on other grounds, San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986).

I Where a prior license amendment, handled as an administrative matter, was not accompanied by a notice of opportunity for hearing and thus no party was available that did challenge or could have challenged the amendment, a petitioner is not estopped from raising the issue in a subsequent license amendment proceeding. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 621-24 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986).

J The following technical issues are discussed: General Design Criteria 31, 10 C.F.R. Part 50, Appendix A; Fracture Toughness Requirements, 10 C.F.R. Part 50, Appendix G; Reactor Vessel Material Surveillance Program Requirements, 10 C.F.R. Part 50, Appendix H; Reference Temperature for nil-ductility transition.

LBP-89-16 KERR-McGEE CHEMICAL CORPORATION (West Chicago Rare Earths Facility), Docket No. 40-2061-ML (ASLBP No. 83-495-01-ML); MATERIALS LICENSE; June 22, 1989; MEMORANDUM AND ORDER

A Following issuance of the final supplement to the Final Environmental Impact Statement (SFES) pertaining to disposal of certain thorium mill tailings stored at the West Chicago site, the Staff moved to hold this proceeding in abeyance pending Commission action on Illinois' request to assume responsibility for the tailings, and Illinois, while concurring in Staff's motion, sought to file new contentions based on the SFES. The Board held that basic fairness requires a prompt conclusion to this proceeding and denied Staff's motion. The Board also admitted certain of Illinois' contentions.

B Contentions filed after the deadline originally established must satisfy all five factors set out in 10 C.F.R. § 2.714(a)(1)(i-v). Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

C Applicants and intervenors are entitled to a prompt resolution of the issues pending in NRC proceedings. While Staff's concerns that future events may moot the proceeding with the consequence that resources may have been wasted are entitled to deference, they do not outweigh an applicant's interest in a decision on its application, particularly where Staff's resources are already largely invested.

LBP-89-17 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1R2, 50-444-OL-1R2 (ASLBP No. 88-858-01-OL) (Onsite Emergency Planning and Safety Issues — Notification); OPERATING LICENSE; June 23, 1989; FINAL INITIAL DECISION

A The Licensing Board finds a portion of Applicants' emergency plans to be adequate. The portion relates to plans to alert people within the portion of the emergency planning zone that is in Massachusetts.

Those plans are found to result in the alerting and notification of the public within about 15 minutes, as required by regulations and guidance, and the sounding of a signal that is adequate — although it somewhat exceeds in volume the 124-dB maximum volume standard found in applicable guidance.

B The total time for alerting the public, pursuant to applicable regulations and guidance, includes conservative estimates of time for all actions prior to the time that essentially all the people within 5 miles of the plant are both alerted by a siren signal and informed by the simultaneously broadcast emergency message. Some of the people to be alerted are considered to have tuned in the message approximately 20 seconds after the 3-minute siren stops sounding.

C When a siren signal may exceed 124 dBC for a limited time period and within limited local areas, the signal is not considered to be excessively loud. In this case, the signal could be as high as 31 dBC for 4 seconds and it also could experience an increment of 6 dBC in areas near buildings, due to sound reflection.

D The following technical issues are discussed: Emergency Planning: Maximum volume permitted for sirens; Emergency Planning: Determination on whether a warning signal can be sounded fast enough; Sound Reflection (emergency planning); Calculating Time for Alerting of Public (emergency planning).

LBP-89-18 VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station), Docket No. 50-271-OLA (ASLBP No. 87-547-02-LA) (Spent Fuel Pool Amendment); OPERATING LICENSE AMENDMENT; June 30, 1989; MEMORANDUM AND ORDER

A The Licensing Board grants in part motions of the Applicant and NRC Staff to strike testimony of an Intervenor's witness submitted for oral argument. Striking of the testimony was without prejudice to its later submission under defined circumstances. As a result of the Intervenor's determination not to contest further the portion of the contention for which the stricken testimony was submitted, the Board also dismisses for lack of contest that portion of the contention.

B In an Environmental Assessment, under § 102(2)(E) of the National Environmental Policy Act (NEPA), 42 U.S.C § 4332(2)(E), an agency must give informed and meaningful consideration to — i.e., must take a "hard look" at — viable alternatives. See, e.g., Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), U.S. appeal pending; Van Abbema v. Fornell, 807 F.2d 633, 642 (7th Cir. 1986); North Carolina v. Hudson, 665 F. Supp. 428, 447 (E.D.N.C. 1987).

C The unused capacity of a spent fuel pool may constitute a "resource," within the meaning of § 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), as to which there is an "unresolved conflict." City of New York v. U.S. Department of Transportation, 715 F.2d 732, 742 (2d Cir. 1983); North Carolina v. Hudson, 665 F. Supp. 428, 445-46 (E.D.N.C. 1987); cf. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 458 n.14 (1980).

DIGESTS
ISSUANCES OF ADMINISTRATIVE LAW JUDGES

ALJ-89-1 H&G INSPECTION COMPANY, INC., Docket No. 30-29319 (ASLBP No. 88-575-01-CivP) (EA-87-145) (Materials License No. 42-26838-01); ENFORCEMENT; January 9, 1989; ORDER

ALJ-89-2 PRECISION LOGGING & PERFORATING COMPANY , Docket No. 30-19498 (ASLBP No. 88-578-02-CivP) (EA 87-184) (Materials License No. 35-17186-02); CIVIL PENALTY; March 15, 1989; ORDER

DIGESTS
ISSUANCES OF DIRECTORS' DECISIONS

DD-89-1 GENERAL ELECTRIC COMPANY (Wilmington, North Carolina Facility), Docket No. 70-1113; REQUEST FOR ACTION; March 13, 1989; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support grants in part and denies in part a Petition filed pursuant to 10 C.F.R. § 2.206 by Vera M. English and denies action requested in a previous petition filed by Mrs. English which was deferred in an earlier Director's Decision, DD-86-11, 24 NRC 325 (1986). Specifically, the present Petition sought imposition of a civil penalty in the amount of $40,635,000 upon General Electric Company (GE), plus $37,500 per day for every day after April 6, 1987, that GE did not take corrective action for discrimination against Mrs. English, and imposition of a license condition upon GE requiring the Licensee to fully compensate Mrs. English for her losses endured as a result of GE's actions. In this Decision, to the extent that the Petitioner requested that the NRC take enforcement action against GE for discrimination against Mrs. English, the Petition has been granted. However, to the extent that the Petitioner requested that the NRC impose a civil penalty in the amount stated above, and to the extent that the Petitioner requested that the NRC impose a license condition upon GE requiring it to fully compensate Mrs. English, the Petition has been denied.

B Generally, when a complaint has been filed with the Department of Labor alleging discrimination by an NRC licensee, the NRC defers consideration of the matter until the Department of Labor has acted.

C As long as he does not abuse his discretion, a Director, in making a decision regarding a 10 C.F.R. § 2.206 petition, is free to rely on a variety of sources of information, including documents issued by other agencies.

D According to the Enforcement Policy, an action by plant management above first-line supervision in violation of § 210 of the Energy Reorganization Act against an employee is classified as a Severity Level II violation.

E The section in the Enforcement Policy that provides for escalation for prior poor performance refers to the Licensee's enforcement history in the area of concern.

F "Prior notice" under the Enforcement Policy refers to specific notice of particular types of events or potential conditions affecting licensed operations.

G In § 210 of the Energy Reorganization Act, Congress has explicitly given to the Department of Labor the authority and responsibility to provide traditional, labor-related remedies such as compensation for individual losses, while reserving to the NRC its authority under the Atomic Energy Act to take enforcement action against its licensees for violations of NRC requirements. This statutory system has been implemented through a Memorandum of Understanding between the two agencies. The NRC does not have the authority to order individual compensation.

DD-89-2 SACRAMENTO MUNICIPAL UTILITY DISTRICT (Rancho Seco Nuclear Generating Station), Docket No. 50-312; REQUEST FOR ACTION; March 21, 1989; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Ms. Barbara Moller that requested the Nuclear Regulatory Commission (NRC) to shut down the Rancho Seco Nuclear Generating Station (Rancho Seco). The Petitioner based her request on allegations that (1) SMUD management criminally (willfully) disregarded public health and safety as shown by incidents between 1980 and 1984, and again in 1988, in which SMUD released excessive amounts of water containing radionuclides; (2) indications on the pressurizer support lugs demonstrate embrittlement as a result of rapid cooldown events at Rancho Seco; (3) pipe wall thinning has occurred; (4) in March 1988, while starting the reactor, SMUD

lost control of Rancho Seco and was unable to shut the plant down; and, (5) illegal drug use at Rancho Seco poses a danger to public health and safety.

B Where a petitioner provides documentation to establish a factual basis for a request and that documentation contradicts petitioner's asserted facts prima facie, the Director, NRR, need not take action on the request.

C Where the NRC is considering a petitioner's request under 10 C.F.R. § 2.206 and the petitioner makes the same request on the same basis as a part of a subsequent petition, the relevant portion of the latter petition may be considered as a supplement to the former petition.

D Where the NRC has taken enforcement action against a licensee for violations of the Commission's regulatory requirements, the NRC will not normally reopen the enforcement action in response to a petitioner's request for enforcement action based on the violation.

E The following technical issues are discussed: Release of Radioactive Materials in Effluents; In-Service Inspection Program Results; Pipe wall thinning.

DD-89-3 BOSTON EDISON COMPANY (Pilgrim Nuclear Power Station), Docket No. 50-293; CAROLINA POWER & LIGHT COMPANY (Brunswick Station, Units 1 and 2), Docket Nos. 50-324, 50-325; CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Unit 1), Docket No. 50-440; COMMONWEALTH EDISON COMPANY (Dresden Nuclear Power Plant, Units 2 and 3), Docket Nos. 50-237, 50-249; (Quad Cities Nuclear Plant, Units 1 and 2), Docket Nos. 50-254, 50-265; (LaSalle County Station, Units 1 and 2), Docket Nos. 50-373, 50-374; CONSUMERS POWER COMPANY (Big Rock Point Plant), Docket No. 50-155; DETROIT EDISON COMPANY (Enrico Fermi Atomic Power Plant, Unit 2), Docket No. 50-341; GENERAL PUBLIC UTILITIES NUCLEAR CORPORATION (Oyster Creek Nuclear Generating Station), Docket No. 50-219; GEORGIA POWER COMPANY (Hatch Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-321, 50-366; GULF STATES UTILITIES COMPANY (River Bend Station, Unit 1), Docket No. 50-458; ILLINOIS POWER COMPANY (Clinton Power Station), Docket No. 50-461; IOWA ELECTRIC LIGHT & POWER COMPANY (Duane Arnold Energy Center), Docket No. 50-331; LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Plant, Unit 1), Docket No. 50-322; MISSISSIPPI POWER & LIGHT COMPANY (Grand Gulf Nuclear Station, Unit 1), Docket No. 50-416; NEBRASKA PUBLIC POWER DISTRICT (Cooper Station, Unit 1), Docket No. 50-298; NIAGARA MOHAWK POWER CORPORATION (Nine Mile Point Plant, Units 1 and 2), Docket Nos. 50-220, 50-410; NORTHEAST UTILITIES (Millstone Unit 1), Docket No. 50-245; NORTHERN STATES POWER COMPANY (Monticello Nuclear Generating Plant, Unit 1), Docket No. 50-263; PENNSYLVANIA POWER & LIGHT COMPANY (Susquehanna Steam Electric Station, Units 1 and 2), Docket Nos. 50-387, 50-388; PHILADELPHIA ELECTRIC COMPANY (Peach Bottom Atomic Power Station, Units 2 and 3), Docket Nos. 50-277, 50-278; (limerick Generating Station, Unit 1), Docket No. 50-352; POWER AUTHORITY OF THE STATE OF NEW YORK (James A. Fitzpatrick Nuclear Power Plant), Docket No. 50-333; PUBLIC SERVICE ELECTRIC & GAS COMPANY (Hope Creek Generating Station, Unit 1), Docket No. 50-354; TENNESSEE VALLEY AUTHORITY (Browns Ferry Nuclear Plant, Units 1, 2, and 3), Docket Nos. 50-259, 50-260, 50-296; VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Plant), Docket No. 50-271; WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WNP Unit 2), Docket No. 50-397; REQUEST FOR ACTION; April 27, 1989; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Ms. Susan Hiatt on behalf of Ohio Citizens for Responsible Energy, Inc. (Petitioner), that requested the Nuclear Regulatory Commission (NRC or Commission) to order all holders of licenses for boiling water reactors (BWRs) to (1) place their reactors in cold shutdown, (2) develop and implement specified operating procedures to relieve alleged thermal-hydraulic instability problems, (3) demonstrate that certain specified training has been provided relating to these procedures, (4) demonstrate the capability of instrumentation related to power oscillations, (5) develop simulators capable of modeling core-wide and out-of-phase power oscillations, (6) report to the NRC all past and future incidents in which recirculation pumps have tripped off, (7) submit to the NRC justification for continued operation of BWRs, and (8) submit a report to the NRC within 1 year demonstrating compliance with Criterion 12 of 10 C.F.R. Part 50, Appendix A (GDC 12). In addition, the petition requested the Commission to reopen Generic Issues B-19 and B-59, to reopen the Anticipated Transients Without Scram (ATWS) rulemaking proceeding, and to reconsider the use of the end-of-cycle

recirculation pump trip on BWRs. Petitioner based her requests on the power oscillation event at LaSalle Unit 2, which occurred on March 9, 1988 (LaSalle Event). Petitioner specifically alleged that (1) decay ratios determined by licensing calculations are not reliable indicators of core stability, and design analyses of the reactor cannot be relied upon to ensure that oscillations are not possible in BWRs; (2) the General Electric Company's guidance for operations, provided in Servi... Information Letter (SIL) 380, Revision 1, is inadequate to ensure compliance with GDC 12; and (3) BWR plant instrumentation may not detect power oscillations if they occur out of phase or too rapidly. The Director, NRR, agrees that decay ratios are not reliable indicators of core stability but, based on licensee responses to generic communications, concludes that licensees have procedures in place that would prevent any power oscillation events.

B Where a petitioner requests certain actions because of an event and where the NRC has requested licensees to take action through a generic bulletin in response to the event, and the licensees have confirmed that they have taken the action the NRC requested, the Director, NRR, need not take action on petitioner's request if the petitioner has not supplied any new information.

C Where a petitioner includes a request for rulemaking in a petition submitted pursuant to 10 C.F.R. § 2.206, that portion of the petition will be treated as a petition for rulemaking and not as a request made pursuant to § 2.206.

D Where a petitioner requests reopening of a closed generic issue and raises no questions regarding that issue that the prior resolution does not answer, the Director, NRR, need not take action on the petitioner's request.

E Where a petitioner requests the NRC to require reports from a licensee and the Commission's regulations already require licensees to report the subject information, the Director, NRR, need not take action on the petitioner's request.

F The following technical issues are discussed: Stability predictions in BWRs by decay ratio; Procedural guidance in GE letter SIL 380, Revision 1, to BWR operators; BWR instrumentation for neutron flux measurement; Power oscillation safety significance; Training and simulation relating to BWR thermal-hydraulic instability; End-of-cycle recirculation pump trip on BWRs.

DD-89-4 WOLF CREEK NUCLEAR OPERATING CORPORATION (Wolf Creek Generating Station, Unit 1), Docket No. 50-482; REQUEST FOR ACTION; June 5, 1989; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

A The Director of the Office of Nuclear Reactor Regulation denies a petition filed by the Kansas Chapter of the Sierra Club that requested the Nuclear Regulatory Commission (NRC) to suspend the operating license issued to the Wolf Creek Nuclear Operating Corporation (WCNOC or Licensee) until the Licensee takes the corrective actions requested in the Petition to achieve assurance of adequate protection of the public health and safety. Petitioners based their request on allegations that (1) from the inception of its Quality Assurance program to date, management at Wolf Creek has ignored real safety concerns; (2) from the inception of operations at Wolf Creek, management has repeatedly failed to safeguard the integrity of its quality assurance program and has failed to demonstrate management competence to address and resolve real safety concerns; and (3) the NRC's actions to date provide no reason to conclude that the acknowledged safety problems at Wolf Creek have been resolved or will be resolved within a reasonable period of time.

B Where the Director, NRR, has issued a decision denying a petitioner's request, and a second petitioner makes a request based on the same grounds as the first petitioner without submitting any new information, the Director, NRR, may rely on his prior decision.

C Where a licensee has initiated a voluntary program to resolve employee allegations and the NRC has inspected all the files generated by the program and resolved 100% of the technical issues raised in those files, the NRC need not take further action, even though the files contained documentation of procedural deficiencies unrelated to the safety aspects of any allegation.

D Where the NRC has taken enforcement action against a licensee for violations of the Commission's regulatory requirements, the NRC will not normally reopen the enforcement action in response to a petitioner's request for enforcement action based on the violation.

E The following technical issues are discussed: Quality Assurance Program; Q1 Program (voluntary); SALP Reports.

DIGESTS

ISSUANCES OF DENIALS OF PETITIONS FOR RULEMAKING

DPRM-89-1 UNIVERSITY OF MISSOURI, Docket No. PRM 50-48; April 5, 1989; DENIAL OF PETITION FOR RULEMAKING

A The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM 50-48) filed by Mr. William F. Reilly, Manager, Reactor Upgrade Project, and endorsed by Dr. Don M. Alger, Associate Director, Research Reactor Facility of University of Missouri. The petition is being denied because: (1) the existing regulations are adequate to ensure protection to public health and safety in licensing test reactors and testing facilities; (2) the proposed amendments would not sufficiently protect the public health and safety; and (3) the need for the clarifications proposed is not otherwise demonstrated by the documentation provided by the Petitioner. The petition requested that NRC amend its regulation to add a new definition for the term "research reactor" and redefine the terms "testing facility" and "testing reactor" based on the function of the facility and its power level. The Petitioner stated that the current definition of "testing facility" results in excessive and unnecessary regulatory requirements being applied to research reactors which are contrary to congressional intent in the Atomic Energy Act of 1954.

B When the current definition of testing facility was proposed in 1959, the Atomic Energy Commission (AEC) adopted a definition based on the type of facility that would involve a significant hazards consideration. The Advisory Committee on Reactor Safeguards (ACRS) reviewed and agreed on this definition. Those definitions are still valid and conservative when considered in light of current technology. Facilities with thermal power levels above 10 megawatts are currently regulated as testing facilities.

C The definition of research reactor appears in the existing regulations in 10 C.F.R. § 170.3(h). If a nonpower reactor is not a test reactor or test facility, it is a research reactor; therefore, a need for clarification does not exist. Because of power levels and postulated accident considerations, the existing regulatory process for testing facilities and testing reactors is intended to be more comprehensive than that for research reactors.

D All the distinctions between research and test reactors in the regulations at 10 C.F.R. Parts 50, 140, and 170 have been promulgated by NRC to ensure the protection of public health and safety and the environment. These distinctions reflect the importance of reactor power level, postulated accidents, and facility function in NRC licensing decisions.

E The regulatory process used in any licensing action must be of sufficient detail to ensure protection of the health and safety of the public. The NRC Staff considers the power level of the facility and postulated accidents to be important safety considerations when evaluating licensing actions on research reactors and testing facilities. The present regulatory options available to the Staff for research reactors (such as referring an application to the ACRS) will continue to exist and will be used by the Staff if warranted.

F A licensee can apply to operate a research reactor with a power level greater than 10 MW(t) if it follows the current licensing process for a testing facility. Because the existing regulations for testing facilities and testing reactors are of greater complexity than those for research reactors, it may require a longer time to complete a testing reactor licensing action. Nevertheless, ensuring the health and safety of the public takes precedence over arbitrarily relaxing licensing requirements for operation.

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