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July 1972 - June 1989

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UNITED STATES NUCLEAR REGULATORY COMMISSION

STAFF PRACTICE AND PROCEDURE DIGEST

(The October, 1989 Update includes Commission, Appeal Board, and Licensing Board Decisions issued from July 1, 1972 through June 30, 1989.)

NRC STAFF PRACTICE AND PROCEDURE DIGEST

UPDATE, OCTOBER 1989

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PREFACE

This Revision 4 of the fifth edition of the NRC Staff Practice and Procedure Digest contains a digest of a number of Commission, Atomic Safety and Licensing Appeal Board, and Atomic Safety and Licensing Board decisions issued during the period from July 1, 1972 to June 30, 1989 interpreting the NRC's Rules of Practice in 10 CFR Part 2. This Revision 4 replaces in part earlier editions and revisions and includes appropriate changes reflecting the amendments to the Rules of Practice effective through June 30, 1989.

The Practice and Procedure Digest was originally prepared by attorneys in the NRC's Office of the Executive Legal Director (now, Office of the General Counsel) as an internal research tool. Because of its proven usefulness to those attorneys, it was decided that it might also prove useful to members of the public. Accordingly, the decision was made to publish the Digest and subsequent editions thereof. This edition of the Digest was prepared by attorneys from Aspen Systems Corporation pursuant to Contract number 18-89-346.

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

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

This edition of the Digest will be updated in the future. The updates will be prepared in the form of replacement pages.

We hope that the Digest will prove to be as useful to the members of the pubiic as it has been to the members of the Office of the General Counsel. We would appreciate from the users of the Digest any comments or suggestions which would serve to improve its usefulness.

Office of the General Counsel
U.S. Nuclear Regulatory Commission

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PROCEDURAL CONSIDERATIONS

1.0 APPLICATION FOR LICENSE/PERMIT

1.1 Applicants

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

1.2 Renewal Applications

Applications for a renewal of a license may be filed with the NRC. 10 CFR § 2.109 provides that where an application for renewal is filed at least 30 days prior to the expiration of an existing license authorizing activities of a continuing nature, the existing license will not be deemed to expire until the renewal application has been finally determined.

1.3 Applications for Early Site Review

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

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

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

Three years after the Licensing Board sanctioned a limited work authorization (LWA) and before applicant had proceeded with any construction activity, applicant indicated it wanted to amend its construction permit application to focus only on site suitability issues. The Appeal Board adopted applicant's suggestion to "vacate without prejudice" the decisions of the Licensing Board sanctioning the LWA. The Appeal Board remanded the cause for proceedings deemed appropriate by the Licensing Board upon formal receipt of an early site approval application. Delmarva Power & Light Company (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5, 6 (1979).

1.4 Form of Application for Construction Permit/Operating License

1.4.1 Form of Application for Initial License/Permit

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

1.4.2 Form of Renewal Application for License/Permit

(RESERVED)

1.5 Contents of Application

1.5.1 Incomplete Applications

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

1.5.2 Material False Statements in Applications

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

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

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

2.9.3.3.1 Time for Filing Intervention Petitions

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

A Licensing Board did not abuse its discretion in shortening the time to file contentions where there were many intervenors. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).

2.9.3.3.2 Sufficiency of Notice of Time Limits on Intervention

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

2.9.3.3.3 Consideration of Untimely Petitions to Intervene

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

(1) good cause, if any, for failure to file on time;

(2) the availability of other means for protecting the petitioner's interests;

(3) the extent to which petitioner's participation might reasonably assist in developing a sound record;

(4) the extent to which the petitioner's interest will be represented by existing parties; and

(5) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1429 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.3 (1983), citing 10 CFR § 2.714(a)(1); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1170 n.3 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 883 (1984); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1643-1644 (1984); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98 n.3 (1985), affirmed, ALAB-816, 22 NRC 461 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 278 n.6 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 608-609 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989).

This consideration must be weighed against the petitioner's strong interest in the proceeding under 10 CFR § 2.714(d). Skagit/Hanford, supra, 16 NRC at 984.

In ruling on a petition for leave to intervene that is untimely, the Commission must consider, in addition to the factors set forth in 10 CFR § 2.714(a)(1), the following factors set forth in 10 CFR § 2.714(d): (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983).

The burden of proof is on the petitioner. Thus, a person who files an untimely intervention petition must affirmatively address the five lateness factors in his petition, regardless of whether any other parties in the proceeding

raise the tardiness issue. Even if the other parties waive the tardiness of the petition, a Board, on its own initiative, will review the petition and weigh the five lateness factors. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).

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

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

Amendments to Section 2.714 make it clear that a showing of good cause for the untimeliness of a petition is only one factor to be considered and balanced. Prior to these amendments, the "good cause" factor was given special treatment, although a showing of good cause would not relieve a Licensing Board of its obligation to consider the other factors. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460 (1977); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612 (1977); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2026 (1982). In addition, it has been held that even if a petitioner fails to establish good cause for the untimely petition, the other factors must be examined, Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975), although the burden of justifying intervention on the basis of the other factors is considered to be greater when the petitioner fails to show good cause. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Station, Units 1 & 2), ALAB-289, 1 NRC 395, 398 (1975); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279 (1986).

Absent a showing of good cause for a very late filing, an intervention petitioner must make a "compelling showing"

on the other four factors stated in 10 CFR § 2.714(a) governing late intervention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764 (1982), citing, Grand Gulf, supra, 16 NRC at 1730; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1645 (1984).

A satisfactory explanation for failure to file on time does not automatically warrant the acceptance of a late-filed intervention petition. The additional four factors specified under 10 CFR § 2.714(a) must also be considered. However, where a late filing of an intervention petition has been satisfactorily explained, a much smaller demonstration with regard to the other factors of 10 CFR § 2.714(a) is necessary than would otherwise be the case. Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 83 (1978).

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

The first factor of those specified in 10 CFR § 2.714(a) is whether there exists "good cause, if any, for the failure to file on time." Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 862 (1980). In considering the "good cause" factor, the Appeal Board pointed out that a strong excuse for lateness will attenuate the showing necessary on the other factors of 10 CFR § 2.714. It added that the 1978 amendment of the language of § 2.714, far from altering this substantive principle, regarding excuse for lateness, merely codified it. Puget Sound Power & Light Company (Skagit Nuclear Power Project,

Units 1 and 2), ALAB-523, 9 NRC 58, 63 (1979). See also Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 22 (1977), affirmed, CLI-78-12, 7 NRC 939 (1978).

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

The Appeal Board has held that whether there is "good cause" for a late filing depends entirely upon the substantiality of the reasons assigned for not having filed at an earlier date. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981).

Although a concrete definition as to what constitutes "good cause" has not been established, certain excuses for delay have been held to be insufficient to justify late filing. For example, in Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), LBP-74-63, 8 AEC 330 (1974), aff'd, ALAB-238, 8 AEC 656 (1974), it was held that neither the fact that the corporate citizens' group seeking to intervene was not chartered prior to the cutoff date for filing, nor the fact that the applicant changed its application by dropping one of the two units it intended to build, gave good cause for late filing. Similarly, claims by a petitioner that there was a "press blackout" and that he was unaware of the Commission's rules requiring timely intervention will not excuse an untimely petition for leave to intervene. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976), nor will failure to read the Federal Register. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981), citing, New England Power and Light Co. (NEP Units 1 and 2), LBP-78-18, 7 NRC 932, 933-934 (1978). The showing of good cause is required even though a petitioner seeks to substitute itself for another party. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977).

Licensing Boards and Appeal Boards have both considered various excuses to determine whether they constitute "good cause." Newly-acquired organizational existence does not constitute good cause for delay in seeking intervention. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), cited in Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980) and South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981); and Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984). Nor does preoccupation with other

matters afford a basis for excusing a nontimely petition to intervene. Poor judgment or imprudence is not good cause for late filing. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), LBP-79-16, 9 NRC 711, 714 (1979). The Appeal Board did not accept as an excuse for late intervention the claim that petitioner, a college organization, could not meet an August petition deadline because most of its members were away from school during the summer and hence unaware of developments in the case. Such a consideration does not relieve an organization from making the necessary arrangements to insure that its interest is protected in its members' absence. On the other hand, new regulatory developments and the availability of new information may constitute good cause for delay in seeking intervention. Duke Power Company (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148-149 (1979). See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-573 (1980).

The Licensing Board will not accept a petitioner's claim of excuse for late intervention where the petitioner failed to uncover and apply publicly available information in a timely manner. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117, aff'd, ALAB-743, 18 NRC 387 (1983).

Newly arising information has long been recognized as providing "good cause" for acceptance of a late contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 574 (1980), appeal dismissed, ALAB-595, 11 NRC 860 (1980).

Before admitting a contention based on new information, factors must be balanced such as the intervenor's ability to contribute to the record on the contention and the likelihood and effects of delay should the contention be admitted. However, in balancing those factors, the same weight given to each of them is not required. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

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

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

Just as a petitioner may not rely upon interests being represented by another party and then justify an untimely petition to intervene on the others' withdrawal, so a petitioner may not rely on the pendency of another proceeding to protect its interests and then justify a late petition on that reliance when the other petition fails to represent those interests. A claim that petitioner believed that its concerns would be addressed in another proceeding will not be considered good cause. Consolidated Edison Co. (Indian Point Station, Unit No.

2), LBP-82-1, 15 NRC 37, 39-40 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2027 (1982). It must be established that petitioners were furnished erroneous information on matters of basic fact and that it was reliance upon that information that prompted their own inaction. Palo Verde, supra, 16 NRC at 2027-2028.

Where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong. Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977) and cases there cited. See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 887 (1984); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing, Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Absent a showing of good cause for late filing, an intervention petitioner must make a "compelling showing" on the other four factors stated in 10 CFR § 2.714(a) governing late intervention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989).

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

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

The second factor in 10 CFR § 2.714(a) points away from allowing late intervention if the interest which the petitioner asserts can be protected by some means other than litigation. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1433 (1982).

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

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

A petition under 10 CFR § 2.206 for a show cause proceeding is not an adequate alternative means of protecting a late petitioner's interests. The Section 2.206 remedy cannot substitute for the petitioner's participation in an adjudicatory proceeding concerned with the grant or denial ab initio of an application for an operating license. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-1176 (1983).

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

As to the third factor with regard to "assistance in developing the record," a late petitioner placing heavy reliance on this factor and claiming that it has substantial technical expertise in this regard should present a bill of particulars in support of such a claim. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-

476, 7 NRC 759, 764 (1978). At the same time, it is not necessary that a petitioner have some specialized education, relevant experience or ability to offer qualified experts for a favorable finding on this factor to be made. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 212-213 (1978).

When an intervention petitioner addresses the 10 CFR § 2.714(a)(3) criterion for late intervention requiring a showing of how its participation may reasonably be expected to assist in developing a sound record, it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. See generally South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982); Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399 (1983), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-767, 19 NRC 984, 985 (1984); General Electric Co. (GETR Vallecitos), LBP-84-54, 20 NRC 1637, 1644 (1984); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989).

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

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

The ability to contribute to the development of a sound record is an even more important factor in cases where the grant or denial of the petition will also decide whether there will be any adjudicatory hearing. There is no reason to grant an inexcusably late intervention

petition unless there is cause to believe that the petitioner not only proposes to raise at least one substantial safety or environmental issue, but is also able to make a worthwhile contribution on it. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180-1181 (1983). See also Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

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

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

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

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

(3) In Kewaunee, the Board concluded that petitioners' interest would not be represented absent a hearing and decided that the fourth factor weighed in favor of admitting them as intervenors. Wisconsin Public

Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 84 (1978).

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

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

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

With respect to the fifth factor, the extent to which a late petitioner's participation would delay a proceeding, the Appeal Board in Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172 (1979), assessed this factor, as of the time of the Appeal Board's hearing, not as of the time the petitioners filed their petition. A person who attempts to intervene three and a half years after the petition deadline has no right to assume that his intervention will go unchallenged; rather, he has every right to assume that objections will be made and that the appellate process might be invoked. Skagit, supra, 10 NRC at 172-173.

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

The fifth and final factor of 10 CFR § 2.714(a)(1), potential for delay, is also of immense importance in the overall balancing process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983).

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

An untimely intervention petition need not introduce an entirely new subject matter in order to "broaden the issues" for the purposes of 10 CFR § 2.714(a); expansion of issues already admitted to the proceeding also qualifies. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 891 (1981).

The mere fact that a late petitioner will not cause additional delay or a broadening of the issue does not mean that an untimely petition should necessarily be granted. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 798 (1977). However, from the standpoint of precluding intervention, the delay factor is extremely important and the later the petition to intervene, the more likely it is that the petitioner's participation will result in delay. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 762 (1978). The question is whether, by filing late, the petitioner has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180 (1983).

In the instance of a very late petition, the strength or weakness of the tendered justification may thus prove

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

The permissive grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. Although Section 2.714(c) of the Rules of Practice may not shut the door firmly against unjustifiably late petitions, it does reflect the expectation that, absent demonstrable good cause for the late filing, an individual so interested in the outcome of a particular proceeding will act to protect his interest within the established time limits. Skagit, supra, 10 NRC at 172-173.

A late intervenor may be required to take the proceeding as it finds it. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983), citing, Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975). Licensing Boards have very broad discretion in their approach to the balancing process required under 10 CFR § 2.714(a). Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). Given this wide latitude with regard to untimely petitions to intervene, a Licensing Board has the discretion to permit intervention, even though an acceptable excuse for the untimely filing is not forthcoming, if other considerations warrant its doing so. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977).

A petitioner whose late-filed petition to intervene has met the five-part test of 10 CFR § 2.714(a)(1) need not meet any further late-filing qualifications to have its contentions admitted. It is not to be treated differently than a petitioner whose petition to intervene was timely filed. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-84-17A, 19 NRC 1011, 1015 (1984).

In evaluating intervention petitions to determine whether the requisite specificity exists, whether there has been an adequate delineation of the basis for the contentions, and whether the issues sought to be raised are cognizable in an individual licensing proceeding, Licensing Boards will not appraise the merits of any of the assertions

would be the proximate result of anticompetitive activities by the applicant or licensee and such injury must be more than remote and tenuous. Id. at 13 NRC 30-32.

The Commission's regulations make clear that an antitrust intervention petition: (1) must first describe a situation inconsistent with the antitrust laws; (2) would be deficient if it consists of a description of a situation inconsistent with the antitrust laws - however well pleaded - accompanied by a mere paraphrase of the statutory language alleging that the situation described therein would be created or maintained by the activities under the license; and (3) must identify the specific relief sought and whether, how and the extent to which the request fails to be satisfied by the license conditions proposed by the Attorney General. The most critical requirement of an antitrust intervention petition is an explanation of how the activities under the license would create or maintain an anticompetitive situation. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-665, 15 NRC 22, 29 (1982), citing, Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 574-575 (1975) and Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973).

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

Although Section 105 of the Atomic Energy Act encourages petitioners to voice their antitrust claims early in the licensing process, reasonable late requests for antitrust review are not precluded so long as they are made concurrent with licensing. Licensing Boards must have discretion to consider individual claims in a way which does justice to all of the policies which underlie Section 105c and the strength of particular claims justifying late intervention. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

Late requests for antitrust review hearings may be entertained in the period between the filing of an application for a construction permit -- the time when the advice of the Attorney General is sought -- and its issuance. However, as the time for issuance of the construction permit draws closer, Licensing Boards should scrutinize more closely and carefully the petitioner's claims of

good cause. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978). The criteria of 10 CFR § 2.714 for late petitioners are as appropriate for evaluation of late antitrust petitions as in health, safety and environmental licensing, but Section 2.714 criteria should be more stringently applied to late antitrust petitions, particularly in assessing the good cause factor, Id. Where an antitrust petition is so late that relief will divert from the licensee needed and difficult-to-replace power, the Licensing Board may shape any relief granted to meet this problem. Id.

Where a late petition for intervention in an antitrust proceeding is involved, the special factors set forth within 10 CFR § 2.714(a)(1) must be balanced and applied before petitions may be granted; the test becomes increasingly vigorous as time passes. Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-28, 14 NRC 333, 338, 342 (1981).

2.9.3.7 Intervention in High-Level Waste Licensing Proceedings

The standards for intervention in high-level waste licensing proceedings are specified in 10 CFR § 2.1014.

2.9.4 Interest and Standing for Intervention

Assertions of broad public interest in (a) regulatory matters, (b) the administrative process, and (c) the development of economical energy resources do not establish the particularized interest necessary for participation by an individual or group in NRC adjudicatory processes. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

Economic interest as a ratepayer does not confer standing in NRC licensing proceedings. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 n.4 (1983); Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98, affirmed on other grounds, ALAB-816, 22 NRC 461 (1985).

In Commission practice, a "generalized grievance" shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983), citing, Transnuclear Inc., CLI-77-24, 6 NRC 525, 531 (1977); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), LBP-87-2, 25 NRC 32, 34-35 (1987).

Both the Atomic Energy Act of 1954, as amended, and the Commission's regulations permit intervention only by a

"person whose interest may be affected." The term "person" in this context includes corporate environmental groups which may represent members of the group provided that such members have an interest which will be affected. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). Standing to intervene as a matter of right does not hinge upon a petitioner's potential contribution to the decisionmaking process. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). Nevertheless, a petitioner's potential contribution has a definite bearing on "discretionary intervention." See Section 2.9.4.2. infra.

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

(1) Should standing in NRC proceedings be governed by "judicial" standards?

(2) If no "right" to intervene exists under whatever standing rules are found to be applicable, what degree of discretion exists in a Board to admit a petitioner anyway?

The Commission's response to the certified question is contained in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976). Therein, the Commission ruled that judicial concepts of standing should be applied by adjudicatory boards in determining whether a petitioner is entitled to intervene as of right under Section 189 of the Atomic Energy Act. As to the second question referred by the Appeal Board, the Commission held that Licensing Boards may, as a matter of discretion, grant intervention in domestic licensing cases to petitioners who are not entitled to intervene as of right under judicial standing doctrines but who may, nevertheless, make some contribution to the proceeding.

Standing to intervene, unlike the factual merits of contentions, may appropriately be the subject of an evidentiary inquiry before intervention is granted. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978).

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

2.9.4.1 Judicial Standing to Intervene

The Commission has held that contemporaneous judicial concepts should be used to determine whether a petitioner has standing to intervene. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

Judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under Section 189 of the Atomic Energy Act of 1954. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983), citing, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

Judicial concepts of standing require a showing that (a) the action sought in a proceeding will cause "injury-in-fact," and (b) the injury is arguably within the "zone of interests" protected by statutes governing the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

In order to establish standing, a petitioner must show: (1) that he has personally suffered a distinct and palpable harm that constitutes injury-in-fact; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision. Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988).

Where a petitioner does not satisfy the judicial standards for standing, intervention could still be allowed as a matter of discretion. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983).

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

Although the Commission's Pebble Springs ruling (CLI-76-27, 4 NRC 610) permits discretionary intervention in certain limited circumstances, it stresses that, as a general rule, the propriety of intervention is to be examined in the light of judicial standing principles. The judicial principles referred to are those set forth in Sierra Club v. Morton, 405 U.S. 727 (1972); Barlow v. Collins, 397 U.S. 159 (1970); and Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Such standards require a showing that (1) the action being challenged could cause injury-in-fact to the person seeking to establish standing, and (2) such injury is arguably within the zone of interests protected

contentions need not be undertaken as a precondition to a board's acceptance of a contention for the limited purpose of determining whether to allow intervention under 10 CFR § 2.714. Rather, that obligation arises solely (1) in response to a subsequent motion of another party seeking to dispose of the contention summarily under 10 CFR § 2.749 for want of a genuine issue of material fact; or (2) in the absence of such a motion, at the evidentiary hearing itself. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-551 (1980); Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 789 (1983), citing, Allens Creek, supra, 11 NRC at 550; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1271 n.6 (1983).

The basis with reasonable specificity standard requires that an intervenor include in a safety contention a statement of the reason for his contention. This statement must either allege with particularity that an applicant is not complying with a specified regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent. In the absence of a "regulatory gap," the failure to allege a violation of the regulations or an attempt to advocate stricter requirements than those imposed by the regulations will result in a rejection of the contention, the latter as an impermissible collateral attack on the Commission's rules. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982), citing, 10 CFR § 2.758.

Prior to entertaining any suggestion that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response. The petitioners cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for denying admission of those proffered contentions. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to contentions as are filed. The cardinal rule of fairness is that each side must be heard. Allens Creek, supra, 11 NRC at 524.

2.9.5.4 Material Used in Support of Contentions

While it may be true that the important document in evaluating the adequacy of an agency's environmental review is the agency's final impact statement, a petitioner for intervention may look to the applicant's Environmental Report for factual

material in support of a proposed contention. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 303 (1979).

The specificity and basis requirements for a proposed contention under 10 CFR § 2.714(b) can be satisfied where the contention is based upon allegations in a sworn complaint filed in a judicial action and the applicable passages therein are specifically identified. This holds notwithstanding the fact that the allegations are contested. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292-94 (1984).

An intervenor can establish a sufficient basis for a contention by referring to a source and drawing an assertion from that reference. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548-49 (1980). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 69-70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989). However, where a contention is based on a factual underpinning in a document which has been essentially repudiated by the source of that document, a Licensing Board will dismiss the contention if the intervenor cannot offer another independent source of information on which to base the contention. Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 136 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989).

2.9.5.5 Timeliness of Submission of Contentions

Not later than 15 days before a special prehearing conference or, where no special prehearing conference is held, 15 days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of his contentions. Additional time for filing the supplement may be granted based upon a balancing of the factors listed in 10 CFR § 2.714(a)(1). 10 CFR § 2.714(b); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 576 (1982), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 67-68 (1989), aff'd, ALAB-918, 29 NRC 473 (1989).

Commission regulations direct that contentions be filed in advance of a prehearing conference. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing, 10 CFR § 2.714(b).

In considering the admissibility of late-filed contentions, the Licensing Board must balance the five factors specified in 10 CFR § 2.714(a) for dealing with nontimely filings. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-22, 10 NRC 213, 214 (1979); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985).

A late filed contention must meet the requirements concerning good cause for late filing pursuant to 10 CFR § 2.714(a)(1). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-90, 16 NRC 1359, 1360 (1982); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983).

The factors which must be balanced in determining whether to admit a late filed contention pursuant to 10 CFR § 2.714(a)(1) are: (1) Good cause, if any, for failure to file on time; (2) The availability of other means whereby the petitioner's interest will be protected; (3) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) The extent to which the petitioner's interest will be represented by existing parties; (5) The extent to which the petitioner's participation will broaden the issues or delay the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1141 (1983); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261-1262 (1983), citing, Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1405 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 31 (1984), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1291 (1984), citing, Catawba, supra, 17 NRC 1041; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 526 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 909, 913-14 (1985); Texas Utilities Electric Co. (Comanche Peak

Steam Electric Station, Unit 1), LBP-86-36A, 24 NRC 575, 579-80 (1986), aff'd, ALAB-868, 25 NRC 912, 921 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 74 n.4 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 49 (1988), vacated in part on other grounds, CLI-88-8, 28 NRC 419 (1988); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 447-48 & n.9 (1988), reconsidered on other grounds, LBP-89-6, 29 NRC 127 (1989); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 68 (1989), aff'd, ALAB-918, 29 NRC 473 (1989).

A Board must perform this balancing of the five lateness factors, even where all the parties to the proceeding have waived their objections and agreed, by stipulation, to the admission of the late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 251 (1986). See Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985).

The required balancing of factors is not obviated by the circumstances that the proffered contentions are those of a participant that has withdrawn from the proceeding. South Texas, supra, 16 NRC at 1367, citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-99 (1977).

In balancing the lateness factors, all factors must be taken into account; however, there is no requirement that the same weight be given to each of them. South Texas, supra, 16 NRC at 1367, citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984). A Board is entitled to considerable discretion in the method it employs to balance the five lateness factors. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 107 (1976).

When there are no other available means to protect a petitioner's interests, that factor and the factor of the extent to which other parties would protect that interest are entitled to less weight than the other three factors enumerated in 10 CFR § 2.714(a). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 118 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear

Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241, 245 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989).

Where good cause for failure to file on time has not been demonstrated, a contention may still be accepted, but the burden of justifying acceptance of a late contention on the basis of the other factors is considerably greater. Even where the factors are balanced in favor of admitting a late-filed contention, a tardy petitioner without a good excuse for lateness may be required to take the proceeding as he finds it. South Texas, supra, 16 NRC at 1367, 1368, citing, Nuclear Fuel Services, Inc. and N.Y.S. Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275, 276 (1975).

Where good cause for a late filing is demonstrated, the other factors are given lesser weight. Midland, supra, 16 NRC at 589; Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984).

In considering the extent to which the petitioner had shown good cause for filing supplements out-of-time, the Licensing Board recognized that the petitioner was appearing pro se until just before the special prehearing conference. Petitioner's early performance need not adhere rigidly to the Commission's standards and, in this situation, the Board would not weigh the good cause factor as heavily as it might otherwise. Florida Power and Light Company (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 190 (1979).

Withdrawal of one party has been held not to constitute good cause for the delay of a petitioner in seeking to substitute itself for the withdrawing party, or, comparably, to adopt the withdrawing party's contentions. South Texas, supra, 16 NRC at 1369, citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 796-97 (1977). The same standards apply to an existing intervenor seeking to adopt the abandoned contentions of another intervenor as to a "newly arriving legal stranger." South Texas, supra, 16 NRC at 1369. However, if under the circumstances of a particular case, there is a sound foundation for allowing one entity to replace another, it can be taken into account in making the "good cause" determination under 10 CFR § 2.714(a). Houston Lighting and Power Co. (South Texas Project, Units 1 and 2),

ALAB-799, 21 NRC 360, 384 (1985), citing, River Bend, supra, 6 NRC at 796.

The appearance of a newspaper article is not sufficient grounds for the late-filing of a contention about matters that have been known for a long time. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-11, 15 NRC 348 (1982). Compare, LBP-82-53, 16 NRC 196, 200-01 (1982) (Up-to-date journals demonstrate good cause) and LBP-82-15, 15 NRC 555, 557 (1982).

An intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available several months prior to the filing of the contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628-629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21 (1986).

The determination whether to accept a contention that was susceptible of filing within the period prescribed by the Rules of Practice on an untimely basis involves a consideration of all five 10 CFR § 2.714(a) factors and not just the reason, substantial or not as the case may be, why the petitioner did not meet the deadline. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 470 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

The proponent of a late contention should affirmatively address the five factors and demonstrate that, on balance, the contention should be admitted. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982), citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

Section 189a of the Atomic Energy Act of 1954, as amended ("Atomic Energy Act" or "Act") does not require the Commission to give controlling weight to the good cause factor in 10 CFR § 2.714(a)(1)(i) in determining whether to admit a late-filed contention based on licensing documents which were not required to be prepared early enough to provide a basis for a timely-filed contention. The unavailability of those documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983).

The institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was publicly available early enough to

provide the basis for the timely filing of that contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 436-37 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84-85 (1985). Section 189a of the Act is not offended by a procedural rule that simply recognizes that the public's interest in an efficient administrative process is not properly accounted for by a rule of automatic admission for certain late-filed contentions. Catawba, supra, 17 NRC at 1046. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing, Catawba, CLI-83-19, supra, 17 NRC at 1045-47. Cf. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974).

10 CFR § 2.714(a)(1) requires that all five factors enumerated in that regulation should be applied to late-filed contentions even where the licensing-related document, upon which the contentions are predicated, was not available within the time prescribed for filing timely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82 (1985), citing, Catawba, CLI-83-19, supra, 17 NRC at 1045. The Commission has held that any refiled contention would have to meet the five-factor test of 10 CFR § 2.714(a)(1), if not timely filed, even if the specifics could not have been known earlier because the documents on which they were based had not yet been issued. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780, 796 (1983), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

Even where an applicant does not comply with a standing order to serve all relevant papers on the Board and parties, the admissibility of an intervenor's late-filed contention directed toward such papers must be determined by a balancing of all five factors. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 657 (1984), overruling in part, LBP-84-16, 19 NRC 857, 868 (1984).

Under 10 CFR § 2.714(a), good cause may exist for a late-filed contention if it: (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once that document comes into existence and is accessible for public examination. Nevertheless, such a contention is amenable to rejection on the strength of a balancing of all five of the late intervention

factors set forth in that section. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 31 (1984). See also Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-16, 29 NRC 508, 514 (1989). When a licensing-related document becomes available, an intervenor must file promptly its contentions based on that document. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989). However, an intervenor is not required to file contentions based upon a draft licensing-related document. West Chicago, supra, 29 NRC at 514.

An intervenor who has previously submitted timely contentions may establish good cause for the late filing of amended contentions by showing that the amended contentions: restate portions of the earlier timely-filed contentions; and were promptly filed in response to a Commission decision which stated a new legal principle. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), LBP-86-26A, 24 NRC 575, 579 (1986), aff'd, ALAB-868, 25 NRC 912, 923 (1987).

A submitted document, while perhaps incomplete, may be enough to require contentions related to it to be filed promptly. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

The fact that a party may have delayed the filing of a contention in the hopes of settling the issue without resorting to litigation in an adjudicatory proceeding does not constitute good cause for failure to file on time. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986).

The admissibility of a late-filed contention must be determined by a balancing of all five of the late intervention factors in 10 CFR § 2.714(a). Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-83-23, 18 NRC 311, 312 (1983).

When an intervenor does not show good cause for the non-timely submission of contentions, it must make a compelling showing on the other four criteria of 10 CFR § 2.714(a). Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and

remanded on other grounds, CLI-86-8, 23 NRC 241, 244 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989).

With respect to the second factor of 10 CFR § 2.714(a) (availability of other means of protecting late petitioners' interest) and the fourth factor (the extent to which late petitioners' interest will be represented by existing parties), the applicants in Zimmer, supra, 10 NRC at 215, claimed that the Staff would represent the public interest and by inference, late petitioners' interest as well. The Licensing Board ruled that although the Staff clearly represents the public interest, it cannot be expected to pursue all issues with the same diligence as an intervenor would pursue its own issue. Moreover, unless an issue was raised in a proceeding, the Staff would not attempt to resolve the issue in an adjudicatory context. Applicants' reliance on the Staff review gave inadequate consideration to the value of a party's pursuing the participational rights afforded it in an adjudicatory hearing. Zimmer, supra, 10 NRC at 215; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1407-1408 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 527-528 (1985); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173-77 (1983); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 913-14 (1985).

When considering the second factor of 10 CFR § 2.714(a)(1), the availability of other means to protect an intervenor's interests, a Board may only inquire whether there are other forums in which the intervenor itself might protect its interests. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985), citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.13 (1982).

Informal negotiations among parties, even under a Board's aegis, is not an adequate substitute for a party's right to pursue its legitimate interest in issues in formal adjudicatory hearings. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1191 (1985).

Late contentions filed by a city did not overlap a contention of another intervenor which had already been accepted in the proceeding. The representative of a private party cannot be expected to represent adequately the presumably broader interests represented by a governmental body. Zimmer, supra, 10 NRC at 216 n.4, citing, Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

In determining what other means are available to protect a petitioner's interests, a board will consider the issues sought to be raised, the relief requested, and the stage of the proceeding. There may well be no alternative to providing a petitioner with an opportunity to participate in an adjudicatory hearing. However, in some circumstances, such as where the proposed contention deals with routinely filed post licensing reports by an applicant, a 10 CFR 2.206 petition may be sufficient to protect the petitioner's interests. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21-22 (1986).

A contention based on a Draft Environmental Statement (DES) which contains no new information relevant to the contention, lacks good cause for late filing. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1118 (1982).

Before a contention is excluded from consideration, the intervenor should have a fair opportunity to respond to applicant's comments. When an intervenor files a late contention and argues that it has good cause for late filing because of the recent availability of new information, intervenor should have the chance to comment on applicant's objection that the information was available earlier. Intervenors should be permitted to reply to the opposition to the admission of a late filed contention. The principle that a party should have an opportunity to respond is reciprocal. When intervenor introduces material that is entirely new, applicant will be permitted to respond. Due process requires an opportunity to comment. If intervenors find that they must make new factual or legal arguments, they should clearly identify the new material and give an explanation of why they did not anticipate the need for the material in their initial filing. If the explanation is satisfactory, the material may be considered, but applicant will be permitted to respond. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1356 (1982).

The finding of good cause for the late filing of contentions is related to the total previous unavailability of information. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

Ability to contribute to the record is relevant to the admissibility of late-filed contentions. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 56 n.5 (1983). An intervenor should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), citing, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 75 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989). An intervenor need not present expert witnesses or indicate what testimony it plans to present if it has established its ability to contribute to the development of a sound record in other ways. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC 1404, 1408 n.14 (1983). See also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1182-1183 (1983).

Nevertheless, an intervenor should provide specific information from which a Board can infer that the intervenor will contribute to the development of a sound record on the particular issue in question. An intervenor's bare assertion of past effectiveness in contributing to the development of a sound record on other issues in the current proceeding and in past proceedings is insufficient. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985), citing, WPPSS, supra, 18 NRC at 1181, and Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

In determining an intervenor's ability to assist in the development of a sound record, it is erroneous to consider the performance of counsel in a different proceeding. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246-47 (1986). Contra Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 926-27 (1987).

The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record is only meaningful when the proposed participation is on a significant, triable issue. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 440 (1984).

The extent to which an intervenor may reasonably be expected to assist in developing a sound record is the most significant of the factors to be balanced with respect to late-filed

contentions, at least in situations where litigation of the contention will not delay the proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 528 (1985).

Given a proceeding initially noticed in 1978 for which a Special Prehearing Conference was held early in 1979, any currently filed contentions would be untimely. That does not mean, after balancing the factors in 10 CFR § 2.714(a) that the untimeliness should bar admission of the contention. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 55 (1983), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982).

A party seeking to add a new contention after the close of the record must satisfy both standards for admitting a late-filed contention set forth in 10 CFR § 2.714(a)(1) and the criteria, as established by case law, for reopening the record, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982), despite the fact that nontimely contentions raise matters which have not been previously litigated. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing, Diablo Canyon, supra, 16 NRC at 1714-15.

In evaluating the extent to which admission of a late-filed contention would delay the proceeding, a Board must determine whether, by filing late, the intervenor has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 927 (1987).

Where the delay in filing contentions is great and the issues are serious, the seriousness of an issue does not imply that the party raising it is somehow forever exempted from the Rules of Practice. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983).

The fifth criteria for admission of a late-filed contention requires a board to determine whether the proceeding, and not the issuance of a license or the operation of a plant, will be delayed. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 23 (1986).

The admission of any new contention may broaden and delay the completion of a proceeding by increasing the number of issues which must be considered. A Board may consider the following

factors which may minimize the impact of the new contention: how close to the scheduled hearing date the new contention was filed; and the extent of discovery which had been completed prior to the filing of the new contention. A Board will not admit a new contention which is filed so close to the scheduled hearing date that the parties would be denied an adequate opportunity to pursue discovery on the contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 630-631 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 889 (1981).

A Board may refuse to admit a late-filed contention where it determines that the contention is so rambling and disorganized that any attempt to litigate the contention would unduly broaden the issues and delay the proceeding. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1262-1263 (1983).

An intervenor's voluntary withdrawal of other, unrelated contentions may not be used to counterbalance any delays which might be caused by the admission of a late-filed contention. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 248 (1986).

In evaluating the potential for delay, it is improper for the Board to balance the significance of the late-filed contention against the likelihood of delay. Such a balancing of factors is made in the overall evaluation of the five criteria for the admission of a late-filed contention. Braidwood, supra, 23 NRC at 248.

The Licensing Board's general authority to shape the course of a proceeding, 10 CFR § 2.718(e), will not be utilized as the foundation for the Board's acceptance of a late-filed contention. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1290 (1984).

2.9.5.6 Contentions Challenging Regulations

The assertion of a claim in an adjudicatory proceeding that a regulation is invalid is barred as a matter of law. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978).

Contentions challenging the validity of NRC regulations are inadmissible under the provisions of 10 CFR § 2.758. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 692-93 (1980); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 NRC 845, 846 (1984); Carolina Power and Light Co.

and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 18 (1989).

When a Commission regulation permits the use of a particular analysis or technique, a contention which asserts that a different analysis or technique should be utilized is inadmissible because it attacks the Commission's regulations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-83-76, 18 NRC 1266, 1273 (1983).

Although Commission regulations may permit a board in some situations to approve minor adjustments to Commission-prescribed standards, a board will reject as inadmissible a contention which seeks major changes to those standards. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 147-48 (1986) (intervenors sought major expansion of the emergency planning zone), rev'd in part, CLI-87-12, 26 NRC 383, 395 (1987) (the Appeal Board incorrectly admitted contentions which involved more than just minor adjustments to the emergency planning zone). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 507 n.48 (1986).

Under 10 CFR § 2.758, the Commission has withheld jurisdiction from Licensing Boards to entertain attacks on the validity of Commission regulations in individual licensing proceedings except in certain "special circumstances." Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 444 (1985). 10 CFR § 2.758 sets out those special circumstances which an intervenor must show to be applicable before a contention attacking the regulations will be admissible. Further, 10 CFR § 2.758 provides for certification to the Commission of the question of whether a rule or regulation of the Commission should be waived in a particular adjudicatory proceeding where an adjudicatory board determines that, as a result of special circumstances, a prima facie showing has been made that application of the rule in a particular way would not serve the purposes for which the rule was adopted and, accordingly, that a waiver should be authorized. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 584-585 (1978); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546 (1986).

Intervenors are authorized to file a petition for a waiver of a rule, pursuant to 10 CFR § 2.758. It is not, however,

enough merely to allege the existence of special circumstances; such circumstances must be set forth with particularity. The petition should be supported by proof, in affidavit or other appropriate form, sufficient for the Licensing Board to determine whether the petitioning party has made a prima facie showing for waiver. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

2.9.5.7 Contentions Involving Generic Issues

Licensing Boards should not accept in individual licensing cases any contentions which are or are about to become the subject of general rulemaking. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 815 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985). They appear to be permitted to accept "generic issues" which are not and are not about to become the subject of rulemaking, however. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-83-76, 18 NRC 1266, 1271 (1983). In order for a party or interested State to introduce such an issue into a proceeding, it must do more than present a list of generic technical issues being studied by the Staff or point to newly issued Regulatory Guides on a subject. There must be a nexus established between the generic issue and the particular permit or application in question. To establish such a nexus, it must be shown that (1) the generic issue has safety significance for the particular reactor under review, and (2) the fashion in which the application deals with the matter is unsatisfactory or the short term solution offered to the problem under study is inadequate. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 773 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1608 (1982), citing, River Bend, supra, 6 NRC at 773; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1657 (1982); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 418, 420 (1984), citing, River Bend, supra, 6 NRC at 773, and Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 248 (1978).

Parties interested in litigating unresolved safety issues must do something more than simply offer a checklist of unresolved issues; they must show that the issues have some specific safety significance for the reactor in question and that the application fails to resolve the matters satisfactorily. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 889 (1983), aff'd on other

grounds, CLI-84-11, 20 NRC 1 (1984), citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772-73 (1977).

In Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-1A, 15 NRC 43 (1982), the Licensing Board rejected the applicant's contention that Douglas Point, supra, requires dismissal whenever there is pending rulemaking on a subject at issue. The Board distinguished Douglas Point on several grounds: (1) In Douglas Point, there were no existing regulations on the subject, while in Perry, regulations do exist and continue in force regardless of proposed rulemaking; (2) The issue in Perry -- whether Perry should have an automated standby liquid control system (SLCS) given the plant's specific characteristics -- is far more specific than the issues in Douglas Point (i.e., nuclear waste disposal issues); (3) The proposed rules recommend a variety of approaches on the SLCS issue requiring analysis of the plant's situation, so any efforts by the Board to resolve the issue would contribute to the analysis; (4) The Commission did not bar consideration of such issues during the pendency of its proposed rulemaking, as it could have. Unless the Commission has specifically directed that contentions be dismissed during pendency of proposed rulemaking, no such dismissal is required.

Where the Commission has explicitly barred Board consideration of the subject of a contention on which rulemaking is pending, the Board may not exercise jurisdiction over the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 and 2), LBP-82-11, 15 NRC 348, 350 (1982). Where the Commission has held its own decision whether to review an Appeal Board opinion in abeyance pending its decision whether or not to initiate a further rulemaking, and has instructed the Licensing Boards to defer consideration of the issue, a contention involving the issue is unlitigable and inadmissible. Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 417-18 (1984), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

A brief suspension of consideration of a contention will not be continued when it no longer appears likely that the Commission is about to issue a proposed rule on the matter which was the subject of the contention. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842, 846-847 (1981).

While a Licensing Board should not accept contentions that are or are about to become the subject of general rulemaking, where a contention has long since been admitted and is still pending when notice of rulemaking is published, the intent of

the Commission determines whether litigation of that contention should be undertaken. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-51, 14 NRC 896, 898 (1981), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

Before a contention presenting a generic issue can be admitted, the intervenor must demonstrate a specific nexus between each contention and the facility that is the subject of the proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-15, 15 NRC 555, 558-59 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-24, 26 NRC 159, 165 (1987), aff'd on other grounds, ALAB-880. 26 NRC 449, 456-57 n.7 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988).

Contentions which constitute a general attack upon the methods used by the NRC Staff to insure compliance with regulations, without raising any issues specifically related to matters under construction, are not appropriate for resolution in a particular licensing proceeding. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 690 (1980).

2.9.5.8 Contentions Challenging Absent or Incomplete Documents

At the contention formulation stage of the proceeding, an intervenor may plead the absence or inadequacy of documents or responses which have not yet been made available to the parties. The contention may be admitted subject to later refinement and specification when the additional information has been furnished or the relevant documents have been filed. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683 (1980). Note, however, that the absence of licensing documents does not justify admission of contentions which do not meet the basis and specificity requirements of 10 CFR § 2.714. That is, a non-specific contention may not be admitted, subject to later specification, even though licensing documents that would provide the basis for a specific contention are unavailable. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Rulings on contentions concerning undeveloped portions of emergency plans may be deferred. To admit such contentions would be to risk unnecessary litigation. But to deny the contentions would unfairly ignore the insufficient development of these portions. Fairness and efficiency seem to dictate that rulings on such contentions be deferred. The objectives of such deferrals are to encourage negotiation, to

avoid unnecessary litigation, and to make necessary litigation as focused as possible. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-18, 19 NRC 1020, 1028 (1984). Cf. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), ALAB-727, 17 NRC 760, 775-76 (1983).

When information is not available, there will be good cause for filing a contention based on that information promptly after the information becomes available. However, the five late-filing factors must be balanced in determining whether to admit such a contention filed after the initial period for submitting contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985).

2.9.5.9 Contentions re Adequacy of Security Plan

The adequacy of a nuclear facility's physical security plan may be a proper subject for challenge by intervenors in an operating license proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980); Consolidated Edison Co. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 949 (1974).

An intervenor may not introduce a contention which questions the adequacy of an applicant's security plan "against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities." Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 135-36, 138 (1985), citing, 10 CFR § 50.13.

Where an intervenor seeking to challenge an applicant's security plan does not produce a qualified expert to review the plan and declines to submit to a protective order, its vague contentions must be dismissed for failure to meet conditions that could produce an acceptably specific contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 177 (1982).

2.9.5.10 Defective Contentions

Where contentions are defective, for whatever reason, Licensing Boards have no duty to recast them to make them acceptable under 10 CFR § 2.714. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974).

However, although a Licensing Board is not required to recast contentions to make them acceptable, it also is not precluded

from doing so. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-296 (1979).

A Licensing Board has consolidated otherwise inadmissible contentions with properly admitted contentions involving the same subject matter where such consolidation would not require the applicant to mount a defense that is substantially different or expanded from that which would be required by the admitted contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 33-34 (1989).

2.9.5.11 Discovery to Frame Contentions

A petitioner is not entitled to discovery to assist him in framing the contentions in his petition to intervene. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

2.9.5.12 Stipulations on Contentions

(RESERVED)

2.9.5.13 Appeals [illegible]ings on Contentions

Appellate [illegible] of a Licensing Board ruling rejecting some but not [illegible] a party's contentions is available only at the end of [illegible]se. Northern States Power Co. (Tyrone Energy Park, Un[illegible]), ALAB-492, 8 NRC 251, 252 (1978).

An Appeal Board may grant interlocutory review of a Licensing Board's rejection of one or more contentions only if the effect of the rejection is to wholly deny a petition to intervene. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-873, 26 NRC 154, 155 (1987), citing, 10 CFR § 2.714a.

Appeal Boards grant Licensing Boards broad discretion in balancing the five factors which make up the criteria for late-filed contentions listed in 10 CFR § 2.714(a)(1). However, an Appeal Board may overturn a Licensing Board's decision where no reasonable justification can be found for the outcome that is determined. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985), citing, Washington Public Power Supply System (WPPSS Nuclear Project 3), ALAB-747, 18 NRC 1167, 1171 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20-21 (1986) (abuse of discretion by Licensing Board). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 443 (1987); Texas Utilities Electric Co.

(Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 922 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 481-82 (1989).

2.9.6 Conditions on Grants of Intervention

10 CFR § 2.714(e) empowers a Licensing Board to condition an order granting intervention on such terms as may serve the purposes of restricting duplicative or repetitive evidence and of having common interests represented by a single spokesman. 10 CFR § 2.715a deals with the general authority to consolidate parties in construction permit or operating license proceedings. In a license amendment proceeding, there is no good reason why the provisions of Section 2.715a cannot be looked to in exercising the power granted by Section 2.714(e), which section applies to all adjudicatory proceedings. Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 n.9 (1979).

2.9.7 Appeals of Rulings on Intervention

The regulations contain a special provision allowing an interlocutory appeal from a Licensing Board order on petitions to intervene. The appellant must file a notice to appeal and supporting brief within 10 days after service of the Licensing Board's order. 10 CFR § 2.714a. Other parties may file briefs in support of or in opposition to the appeal within 10 days of service of the appeal.

An Appeal Board will not review the grant or denial of an intervention petition unless an appeal has been taken under 10 CFR § 2.714a. Once the time prescribed in that Section for perfecting an appeal has expired, the order below becomes final. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 84 n.1 (1983).

It is settled under the Commission's Rules of Practice that a petitioner for intervention may not take an interlocutory appeal from Licensing Board action on his petition unless that action constituted an outright denial of the petition. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 384 (1979); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-712, 17 NRC 81, 82 (1983). A petitioner may appeal only if the Licensing Board has denied the petition in its entirety, i.e., has refused the petitioner entry into the case. A petitioner may not appeal an order admitting petitioner but denying certain contentions. 10 CFR § 2.714(b); Power Authority of the State of New York (Greene County Nuclear Plant), ALAB-434, 6 NRC 471 (1977);

Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-302, 2 NRC 856 (1975); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-273, 1 NRC 492, 494 (1975); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-269, 1 NRC 411 (1975); Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-206, 7 AEC 841 (1974).

A Licensing Board's failure, after a reasonable length of time, to rule on a petition to intervene is tantamount to a denial of the petition. Where the failure of the Licensing Board to act is both unjustified and prejudicial, the petitioner may seek interlocutory review of the Licensing Board's delay under 10 CFR § 2.714a, which provides for interlocutory review of denials of petitions to intervene. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

A State seeking to participate as an "interested State" under 10 CFR § 2.715(c) may appeal an order barring such participation. However, the State's special status does not confer any right to seek review of an order which allows the State to participate but excludes an issue which it seeks to raise. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

Unlike a private litigant who must file at least one acceptable contention in order to be admitted as a party to a proceeding, an interested State may participate in a proceeding regardless of whether or not it submits any acceptable contentions. Thus, an interested State may not seek interlocutory review of a Licensing Board rejection of any or all of its contentions because such rejection will not prevent an interested State from participating in the proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 589-90 (1986).

The applicant, the Staff and any party other than the petitioner can appeal an intervention order only on the ground that the petition should have been denied in whole. 10 CFR § 2.714a(c). An appeal from an intervention order carries with it a mandatory briefing requirement. Failure to file a brief will result in dismissal of the appeal. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973).

For a reaffirmation of the established rule that an appeal concerning an intervention petition must await the ultimate grant or denial of that petition, see Houston Lighting & Power

Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472 (1980); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978). In this vein, a Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors overcome the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition to intervene. Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 864 (1980); Greenwood, supra; Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-833, 23 NRC 257, 260-61 (1986).

Similarly, the action of a Licensing Board in provisionally ordering a hearing and preliminarily ruling on petitions for leave to intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioners denied intervention may qualify on refiling. Consumers Power Company (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978).

While the regulations do not explicitly provide for Commission review of decisions on intervention, the Commission has entertained appeals in this regard and review by the Commission apparently may be sought. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939 (1978).

With regard to briefing on appeals, 10 CFR § 2.714a does not authorize an appellant to file a brief in reply to parties' briefs in opposition to the appeal. Rather, leave to file a reply brief must be obtained. Nuclear Engineering Co. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 n.9 (1978).

2.9.7.1 Standards for Reversal of Rulings on Intervention

A Licensing Board has wide latitude to permit the amendment of defective petitions prior to the issuance of its final order on intervention. The Board's decision to allow such amendment will not be disturbed on appeal absent a showing of gross abuse of discretion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 194 (1973).

A Licensing Board's determination as to the "personal interest" of a petitioner will be reversed only if it is irrational. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); Prairie Island, supra.

Similarly, a Licensing Board's determination that good cause exists for untimely filing will be reversed only for an abuse of discretion. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

The principle that Licensing Board determinations on the sufficiency of allegations of affected interest will not be overturned unless irrational presupposes that the appropriate legal standard for determining the "personal interest" of a petitioner has been invoked. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

2.9.8 Reinstatement of Intervenor After Withdrawal

A voluntary withdrawal of intervention is "without prejudice" in that it does not constitute a legal bar to the later reinstatement of the intervention upon the intervenor's showing of good cause. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1057 (1973). The factors to be considered in the good cause determination are generally the same as those considered under 10 CFR § 2.714(a) with primary emphasis on the delay of the proceeding, prejudice to other parties and adequate protection of the intervenor's interests. Grand Gulf, supra.

2.9.9 Rights of Intervenors at Hearing

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor in an operating license proceeding is free to challenge directly an unresolved generic safety issue by filing a proper contention, but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Concomitantly, once the record has closed, a generic safety issue may be litigated directly only if standards for late-filed contentions and reopening the record are met. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

The rules cannot legitimately be read as requiring that, once an intervenor is represented by counsel, that counsel be the party's sole representative in the proceeding. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 994 (1983).

When a party is permitted to enter a case late, it is expected to take the case as it finds it. It follows that when a party that has participated in a case all along simply changes representatives in midstream, knowledge of the matters already heard and received into evidence is imputed to it. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An intervenor's status as a party in a proceeding does not of itself make it a spokesman for others. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 550 n.1 (1986), aff'd, ALAB-854, 24 NRC 783 (1986), citing, Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 33 (1979).

Under principles enunciated in Prairie Island, an intervenor may ordinarily conduct additional cross-examination and submit proposed factual and legal findings on contentions sponsored by others. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863, 867-68 (1974), aff'd in pertinent part, CLI-75-1, 1 NRC 1 (1975). However, that does not elevate the intervenor's status to that of co-sponsor of the contentions. The Commission's regulations require that, at the outset of a case, each intervenor submit "a list of the contentions which it seeks to have litigated." 10 CFR § 2.714(b). It follows from this that one intervenor may not introduce affirmative evidence on issues raised by another intervenor's contentions. Prairie Island, supra, 8 AEC at 869 n.17; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 n.102 (1985).

Contentions left without a sponsor due to the withdrawal of one intervenor may be adopted by another intervenor upon satisfaction of the five-factor balancing test ordinarily used to determine whether to grant a non-timely request for intervention, or to permit the introduction of additional contentions by an existing intervenor after the filing date. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381-82 (1985). See 10 CFR §§ 2.714(a)(1),(b). For a detailed discussion of the five-factor test, See Sections 2.9.3.3.3 and 2.9.5.5.

A contention which has been joined by two joint intervenors may not be withdrawn without the consent of both joint intervenors. Either of the joint intervenors may litigate the contention upon the other intervenor's withdrawal of sponsorship for the contention. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-22, 24 NRC 103, 106 (1986).

An intervenor in an operating license proceeding may not proceed on the basis of allegations that the Staff has somehow failed in its performance; at least when the evidence shows that the alleged inadequate Staff review did not result in inadequacies in the analyses and performance of the applicant. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 565 n.29 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-720, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

2.9.9.1 Burden of Proof

A licensee generally bears the ultimate burden of proof. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982), citing, 10 CFR § 2.732. But intervenors must give some basis for further inquiry. Three Mile Island, supra, 16 NRC at 1271, citing, Pennsylvania Power and Light Co. and Alleghany Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980). See Section 3.7.

An intervenor has the burden of going forward with respect to issues raised by his contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 388-89 (1974). For a more detailed discussion, see Section 3.7.2.

2.9.9.2 Presentation of Evidence

2.9.9.2.1 Affirmative Presentation by Intervenor/Participants

An intervenor may not adduce affirmative evidence on an issue not raised by him unless and until he amends his contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 869 n.17, reconsid. den., ALAB-252, 8 AEC 1175 (1974), aff'd, CLI-75-1, 1 NRC 1 (1975). This rule does not apply to an interested State participating under 10 CFR § 2.715(c). Such a State may produce evidence on issues not raised by it. Project Management Corp. (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 392-93 (1976).

2.9.9.2.2 Consolidation of Intervenor Presentations

A Licensing Board, in permitting intervention, may consolidate intervenors for the purpose of restricting duplicative or repetitive evidence and argument. 10 CFR § 2.714(e). In addition, parties with substantially similar interests and contentions may be ordered to consolidate their presentation of evidence, cross-examination and participation in general pursuant to 10 CFR § 2.715a. An

order consolidating the participation of one party with the others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308-309 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-83-52A, 18 NRC 265, 272-73 (1983), citing, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1601 (1985).

The NRC Rules of Practice permit the consolidation of intervenors, but only where those parties have substantially the same interest that may be affected by the proceeding and where consolidation would not prejudice the rights of any party. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 993 (1983).

Only parties to a Commission licensing proceeding may be consolidated. Petitioners who are not admitted as parties may not be consolidated for the purposes of participation as a single party. 10 CFR § 2.715a; Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

Where intervenors have filed consolidated briefs they may be treated as a consolidated party; one intervenor may be appointed lead intervenor for purposes of coordinating responses to discovery, but discovery requests should be served on each party intervenor. It is not necessary that a contention or contentions be identified to any one of the intervening parties, so long as there is at least one contention admitted per intervenor. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 687 (1981).

The Commission has issued a policy statement relating to consolidation of intervenors and the conduct of licensing proceedings. Pursuant to that Commission guidance, consolidation should not be ordered when it will prejudice the rights of any intervenor; however, in all appropriate cases, single, lead intervenors should be designated to present evidence, conduct cross-examination, submit briefs, and propose findings of fact, conclusions of law, and argument. Except where other intervenors' interests will be prejudiced or upon a showing that the record will be incomplete, those activities should not be performed by such other intervenors. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981).

2.9.9.3 Cross-Examination by Intervenors

An intervenor may engage in cross-examination of witnesses dealing with issues not raised by him if the intervenor has a

discernible interest in resolution of those issues. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 867-68 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986). Licensing Boards must carefully restrict and monitor such cross-examination, however, to avoid repetition. Prairie Island, supra, 1 NRC 1.

In general, the intervenor's cross-examination may not be used to expand the number or boundaries of contested issues. Prairie Island, supra, 8 AEC 857. For a further discussion, see Section 3.13.1.

2.9.9.4 Intervenor's Right to File Proposed Findings

An intervenor may file proposed findings with respect to all issues whether or not raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-85-2, 21 NRC 24, 32 (1985), vacated as moot, ALAB-842, 24 NRC 197 (1986).

A Board in its discretion may refuse to rule on an issue in its initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

The right to file proposed findings of fact in an adjudication is not unlawfully abridged unless there was prejudicial error in refusing to admit the evidence that would have been the subject of the findings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

2.9.9.5 Attendance at/Participation in Prehearing Conferences/ Hearings

An intervenor seeking to be excused from a prehearing conference should file a request to this effect before the conference date. Such a request should present the justification for not attending. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 190-91 (1978). For a discussion of a party's duty to attend hearings, see Section 3.6.

Where an intervenor indicates its intention not to participate in the evidentiary hearing, the intervenor may be held in default and its admitted contentions dismissed although the Licensing Board will review those contentions to assure that

they do not raise serious matters that must be considered. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 155, 157 (1976).

An appropriate sanction for willful refusal to attend a Prehearing Conference is dismissal of the petition for intervention. In the alternative, an appropriate sanction is the acceptance of the truth of all statements made by the applicant or the NRC Staff at the Special Prehearing Conference. Application of that sanction would also result in dismissal. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 (1982).

A Licensing Board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 CFR § 2.718, a Licensing Board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. Furthermore, pursuant to 10 CFR § 2.707, the refusal of a party to comply with a Board order relating to its appearance at a proceeding constitutes a default for which a Licensing Board may make such orders in regard to the failure as are just. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

A party may not be heard to complain that its rights were unjustly abridged after having purposefully refused to participate. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935 (1982).

Dismissal of a party is the ultimate sanction applicable to an intervenor. On the other hand, where a party fails to carry out the responsibilities imposed by the fact of its participation in the proceeding, such a party may be found to be in default and its contentions dismissed. Consumers Power Co. (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-1596 (1982), citing, Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit No. 2), LBP-76-7, 3 NRC 156 (1976).

2.9.9.6 Pleadings and Documents of Intervenors

An intervenor may not disregard an adjudicatory board's direction to file a memorandum without first seeking leave of the board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187 (1978).

2.9.10 Cost of Intervention

2.9.10.1 Financial Assistance to Intervenors

The question of funding of intervenors' participation was addressed by the Commission in Nuclear Regulatory Commission

(Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494 (1976). Therein, the Commission stated that it would not provide funding for participants in licensing, enforcement or antitrust proceedings and that it also would not provide such funding for participants in rulemaking proceedings as a general proposition, although it would attempt to provide funds for qualified GESMO participants.

Part of the basis for the Commission's determination was an opinion issued by the Comptroller General. Noting that the Commission lacks express statutory authority to provide funds, the opinion stated that the Commission might nevertheless provide funds to a participant if the Commission determines that: (1) it cannot make the necessary licensing or rulemaking determinations unless financial assistance is extended to the participant who requires it; and (2) the funded participation is "essential" to the Commission's disposition of the issues. The Commission found that it could not make these determinations with respect to participants in licensing, enforcement, antitrust and general rulemaking proceedings. On the other hand, due to the singular importance of the GESMO proceedings, the Commission would seek to provide financial assistance to GESMO participants who applied by a specified deadline and who qualified for such assistance.

Subsequent to CLI-76-23, the Comptroller General issued an opinion on funding of intervenors in FDA proceedings. That ruling was a major shift from the opinion issued by the Comptroller General in the NRC case in that the test set out therein was not whether intervention was "essential" but whether it could "reasonably be expected to contribute substantially to a full and fair determination" of the pending matter.

In 1976, the Comptroller General issued two decisions in which he held that "funding of intervenors in the absence of specific Congressional authorization was permissible where participation by the intervenor is required by statute or intervention is necessary to assure adequate representation of opposing points of view and the intervenor is indigent or otherwise unable to bear the financial cost of participation." However, this position was overruled by the Second Circuit Court of Appeals, which held that an agency could not fund participants in its proceedings without a specific grant of authority from the Congress. Greene County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1977), cert. denied, 434 U.S. 1086 (1978). On this basis, in part, funding for intervenors was denied in Exxon Nuclear Company, Inc. (Low Enriched Uranium Exports to EURATOM Member Nations), CLI-77-31, 6 NRC 849 (1977).

The Commission is in favor of funding intervenors but Congress has precluded such funding for fiscal year 1980. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-19, 11 NRC 700 and CLI-80-20, 11 NRC 705 (1980). Authorization acts for subsequent fiscal years have explicitly prohibited NRC from utilizing appropriated monies to fund intervenors. See Rochester Gas and Electric Corp. (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1239 (1983).

A claim for funding by intervenor for past participation is precluded because the Commission has determined not to initiate a program to provide funding for intervenors. Puerto Rico Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC 765, 767-768 (1980).

Some financial assistance was made available to intervenors for procedural matters, such as free transcripts in adjudicatory proceedings on an application for a license or an amendment thereto in prior Commission rules. 10 CFR §§ 2.708(d), 2.712(f) and 2.750(c). (45 Fed. Reg. 49535, July 25, 1980). Those rules have since been amended so that procedural financial assistance is not now available.

The Commission is not empowered to expend its appropriated funds for the purpose of funding consultants to intervenors. See P.L. 97-88, Title V Section 502 [95 Stat. 1148 (1981)] and P.L. 97-276 Section 101(g) [96 Stat. 1135 (1982)]. Nor does it appear that the Commission has authority to require the utility-applicants to do so or to assess fees for that purpose where the service to be performed is for intervenors' benefit and is not one needed by the Commission to discharge its own licensing responsibilities. See Mississippi Power and Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). See also National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1978); Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-40, 16 NRC 1717 (1982); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1273 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1212 (1985), citing, Pub. L. No. 98-360, 98 Stat. 403 (1984). See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13, 14-15 (1981).

2.9.10.2 Intervenors' Witnesses

The Appeal Board has indicated that where an intervenor would call a witness but for the intervenor's financial inability to do so, the Licensing Board may call the witness as a Board witness and authorize NRC payment of the usual witness fees and expenses. The decision to take such action is a matter of Licensing Board discretion which should be exercised with circumspection. If the Board calls such a witness as its own, it should limit cross-examination to the scope of the direct examination. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603, 607-608 (1977).

2.9.11 Appeals by Intervenors

An intervenor may seek appellate redress on all issues whether or not those issues were raised by his own contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 863 (1974).

2.9.12 Intervention in Remanded Proceedings

The Licensing Board was "manifestly correct" in rejecting a petition requesting intervention in a remanded proceeding where the scope of the remanded proceeding had been limited by the Commission, and the petition for intervention dealt with matters outside that scope. The Licensing Board had limited jurisdiction in the proceeding and could consider only what had been remanded to it. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979).

2.10 Nonparty Participation - Limited Appearance and Interested States

2.10.1 Limited Appearances in NRC Adjudicatory Proceedings

Although limited appearees are not parties to any proceeding, statements by limited appearees can serve to alert the Licensing Board and the parties to areas in which evidence may need to be adduced. Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

2.10.1.1 Requirements for Limited Appearance

The requirements for becoming a limited appearee are set out in 10 CFR § 2.715. Based upon that section, the requirements for limited appearances are generally within the discretion of the presiding officer in the proceeding. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981).

2.10.1.2 Scope/Limitations of Limited Appearances

Under 10 CFR § 2.715(a), the role of a limited appearee is restricted to making oral or written statements of his position on the issues within such limits and on such conditions as the Board may fix.

Pursuant to 10 CFR § 2.715(a), limited appearance statements may be permitted at the discretion of the presiding officer, but the person admitted may not otherwise participate in the proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI 83-25, 18 NRC 327, 333 (1983).

A limited appearance statement is not evidence and need only be taken into account by the Licensing Board to the extent that it may alert the Board or parties to areas in which evidence may need to be adduced. Iowa Electric Light & Power Co., ALAB-108, supra, (dictum).

The purpose of limited appearance statements is to alert the Licensing Board and parties to areas in which evidence may need to be adduced. Such statements do not constitute evidence, and accordingly, the Board is not obligated to discuss them in its decision. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983), citing, 10 CFR § 2.715(a); Iowa Electric Light and Power Co (Duane Arnold Energy Center), ALAB-108, 6 AEC 195, 196 n.4 (1973).

A person who makes a limited appearance before a Licensing Board may not appeal from that Board's decision. Metropolitan Edison Company (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

2.10.2 Participation by Nonparty Interested States

Under 10 CFR § 2.715(c), an interested State may participate in a proceeding even though it is not a party. In this context, the Board must afford representatives of the interested State the opportunity to introduce evidence, interrogate witnesses and advise the Commission. In so doing, the interested State need not take a position on any of the issues. Even though a State has submitted contentions and intervened under 10 CFR § 2.714, it may participate as an "interested State" under 10 CFR § 2.715(c) on issues in the proceeding not raised by its own contentions. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1079 (1982), citing, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760

(1977). However, once a party is admitted as an interested State under Section 2.715(c), it may not reserve the right to intervene later under Section 2.714 with full party status. A petition to intervene under the provisions of the latter section must conform to the requirements for late filed petitions. Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2) and Power Authority of the State of N.Y. (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 723 (1982).

A Licensing Board may require the representative of an interested State to indicate in advance of the hearing the subject matter on which it wishes to participate, but such a showing is not a prerequisite of admission under 10 CFR § 2.715(c). Indian Point, supra, 15 NRC at 723.

Section 2.715(c) states that the Commission shall "afford representatives of an interested State... and or agencies thereof, a reasonable opportunity to participate." Given this language, a Licensing Board is not limited to recognizing only one representative of a State. Thus the Licensing Board may admit the Attorney General of an interested State even though a State law designates another person as the State's representative. Indian Point, supra, 15 NRC at 719. Although some language in the Indian Point decision seemed to indicate that State law does not control the designation of a State representative, the decision actually rested upon the fact that the State Attorney General did not agree that the State law designated someone other than the Attorney General to represent the State. In the absence of a contrary judicial decision, the Commission will defer to the Attorney General's interpretation of the State law designating the State's representative. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 148, 149 and n.13 (1987).

A State participating as an interested State may appeal an adjudicatory board's decision so that an interested State participating under 10 CFR § 2.715(c) constitutes the sole exception to the normal rule that a nonparty to a proceeding may not appeal from the decision in that proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978).

Section 274(1) of the Atomic Energy Act confers a right to participate in licensing proceedings on the State of location for the subject facility. However, 10 CFR § 2.715(c) of the Commission's Rules of Practice extends an opportunity to participate not merely to the State in which a facility will be located, but also to those other States that demonstrate an interest cognizable under Section 2.715(c). Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873 (1977). See, e.g.,

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-74-32, 8 AEC 217 (1974).

Although a State seeking to participate as an "interested State" under Section 2.715(c) need not state contentions, once in the proceeding it must comply with all the procedural rules and is subject to the same requirements as parties appearing before the Board. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Illinois Power Co. (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1615 (1982), citing, River Bend, supra, 6 NRC at 768. Nevertheless, the Commission has emphasized that the participation of an interested sovereign State, as a full party or otherwise, is always desirable in the NRC licensing process. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535 (1977). A State's participation may be so important that the State's desire to be a party to Commission review may be one factor to consider in determining whether the State should be permitted to participate in the Commission review, even though the State has not fully complied with the requirements for such participation. Id.

A State has no right to participate in administrative appeals when it has not participated in the underlying hearing. The Commission will deny a State's extremely untimely petition to intervene as a non-party interested State which is filed on the eve of the Commission's licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-20, 24 NRC 518, 519 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987).

10 CFR § 2.715(c) has been amended to include counties and municipalities and agencies thereof as governmental entities in addition to States which may participate in NRC adjudicatory proceedings as "interested" government bodies.

A governmental body must demonstrate a genuine interest in participating in the proceeding. A Licensing Board denied a municipality permission to participate as an interested State in a reopened hearing where the municipality failed to: file proposed findings of fact; comply with a Board Order to indicate with reasonable specificity the subject matters on which it desired to participate; appear at an earlier evidentiary hearing; and specify its objections to the Staff reports which were the focus of the reopened hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 136 (1986).

Section 2.715(c) was also amended to more clearly delineate the participation rights of "interested" government bodies. As amended, this section provides that "interested" government

bodies may introduce evidence, interrogate witnesses, advise the Commission without taking a position on any issue, file proposed findings, appeal the Licensing Board's decision, and seek review by the Commission.

The mere filing by a State of a petition to participate in an operating license application pursuant to 10 CFR § 2.715(c) as an interested State is not cause for ordering a hearing. The application can receive a thorough agency review, outside of the hearing process, absent indications of significant controverted matters or serious safety or environmental issues. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 216 (1983); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 426 (1984), citing, Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980).

Although a State has a statutory right to a reasonable opportunity to participate in NRC proceedings, it may not seek to appeal on issues it did not participate in below, or seek remand of those issues. However, the State is given an opportunity to file a brief amicus curiae. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447 (1980).

A late decision by the Governor of a State to participate as representative of an interested State can be granted, but the Governor must take the proceeding as he finds it. He cannot complain of rulings made or procedural arrangements settled prior to his participation. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 8 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-13, 17 NRC 469, 471-72 (1983), citing, 10 CFR § 2.715(c); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Station), LBP-80-6, 11 NRC 148, 151 (1980).

An interested State that has elected to litigate issues as a full party under 10 CFR § 2.714 is accorded the rights of an "interested State" under 10 CFR § 2.715(c) as to all other issues. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-9, 17 NRC 403, 407 (1983), citing, Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-93 (1976).

10 CFR § 2.715(c) authorizes an interested State to introduce evidence with respect to those issues on which it has not taken a position. However, at the earliest possible date in advance of the hearing, an interested State must state with reasonable specificity those subject areas, other than its own contentions, in which it intends to participate. Seabrook, supra, 17 NRC at 407.

The presiding officer may require an interested governmental entity to indicate with reasonable specificity, in advance of the hearing, the subject matters on which it desires to participate. However, once the time for identification of new issues by even a governmental participant has passed, either by schedule set by the Board or by circumstances, any new contention thereafter advanced by the governmental participant must meet the test for nontimely contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1140 (1983). See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982).

An interested State, once admitted to a proceeding, must observe the procedural requirements applicable to other participants. Every party, however, may seek modification for good cause of time limits previously set by a Board. Moreover, good cause, by its very nature, must be an ad hoc determination based on the facts and circumstances applicable to the particular determination. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983).

Although an interested State must observe applicable procedural requirements, including time limits, the facts and circumstances which would constitute good cause for extending the time available to a State may not be coextensive with those warranting that action for another party. States need not, although they may, take a position with respect to an issue in order to participate in the resolution of that issue. Reflecting political changes which uniquely bear upon bodies such as States, a State's position on an issue (and the degree of its participation with respect to that issue) might understandably change during the course of a Board's consideration of the issue. The Commission itself has recognized such factors, and it has permitted States to participate even where contrary to a procedural requirement which might bar another party's participation. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535 (1977). See 10 CFR § 2.715(c).

A county does not lose its right to participate as an interested governmental agency pursuant to 10 CFR § 2.715(c) because it has elected to participate as a full intervenor on specified contentions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1139 (1983), citing, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982).

Any governmental participant seeking to advance a late contention or issue, whether or not it be a participant already in the case or one seeking to enter, must satisfy the criteria for late-filed contentions as well as the criteria for reopening the record. Shoreham, supra, 17 NRC at 1140.

2.11 Discovery

2.11.1 Time for Discovery

Discovery begins on admitted contentions after the first prehearing conference. 10 CFR 2.740(a)(1). Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1945 (1982).

Under 10 CFR § 2.740(b)(1), there can be no formal discovery prior to the special prehearing conference provided for in Section 2.751a. In any event, a potential intervenor has no right to seek discovery prior to filing his petition to intervene. Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 & 2), CLI-74-45, 8 AEC 928 (1974); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973). See also BPI v. AEC, 502 F.2d 424, 428-29 (D.C. Cir. 1974). Once an intervenor has been admitted, formal discovery is limited to matters in controversy which have been admitted. 10 CFR § 2.740(b)(1). Discovery on the subject matter of a contention in a licensing proceeding can be obtained only after the contention has been admitted to the proceeding. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988) (the scope of a contention is determined by the literal terms of the contention, coupled with its stated bases), reconsid. denied on other grounds, LBP-88-25A, 28 NRC 435 (1988).

A Licensing Board denied an applicant's motion for leave to commence limited discovery against persons who had filed petitions to intervene (at that point, nonparties). The Board entertained substantial doubt as to its authority to order the requested discovery, but denied the motion specifically because it found no necessity to follow that course of action. The Board discussed at length the law relating to the prohibition found in 10 CFR § 2.740(b)(1) against discovery beginning prior to the prehearing conference provided for in 10 CFR § 2.751a. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 577-584 (1978).

Applicants are entitled to prompt discovery concerning the bases of contentions, since a good deal of information is already available from the FSAR and other documents

early in the course of the proceeding. Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30-A, 14 NRC 364, 369 (1981).

Under 10 CFR § 2.740(b)(1), discovery is ordinarily to be completed before the prehearing conference held pursuant to 10 CFR § 2.752, absent good cause shown. The fact that a party did not engage in prehearing discovery to obtain an expert witness' "backup" calculations does not preclude a request at trial for such information, but the Licensing Board may take into account the delay in deciding to grant such a last minute request. Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

The fact that late intervention has been permitted should not disrupt established discovery schedules since a tardy petitioner with no good excuse must take the proceeding as he finds it. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

Under 10 CFR § 2.740(b)(1), discovery is available after a contention is admitted and may be terminated a reasonable time thereafter. Litigants are not entitled to further discovery as a matter of right with respect to information relevant to a contention which first surfaces long after discovery on that contention has been terminated. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1418, 1431-32 (1984), aff'd, ALAB-813, 22 NRC 59 (1985). However, an Appeal Board has recently held that a Licensing Board abused its discretion by denying intervenors the opportunity to conduct discovery of new information submitted by the applicant and admitted by the Board on a reopened record. The Appeal Board found that, although there might have been a need to conduct an expeditious hearing, it was improper to deny the intervenors the opportunity to conduct any discovery concerning the newly admitted information where it was not shown that the requested discovery would delay the hearing. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 160-61 (1986), rev'd in part on other grounds, CLI-87-12, 26 NRC 383 (1987).

The Commission has expressly advised the Licensing Boards to see that the licensing process moves along at an expeditious pace, consistent with the demands of fairness, and the fact that a party has personal or other obligations or fewer resources than others does not relieve the party of its hearing obligations. Nor does it entitle the party to an extension of time for discovery absent a showing of good cause, as judged by the standards of 10 CFR § 2.711. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982).

A party is not excused from compliance with a Board's discovery schedule simply because of the need to prepare for a related state court trial. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 (1985).

Though the period for discovery may have long since terminated, at least one Appeal Board decision seems to indicate that a party may obtain discovery in order to support a motion to reopen a hearing provided that the party demonstrates with particularity that discovery would enable it to produce the needed materials. Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973). But see Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985) and Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986) where the Commission has made it very clear that a movant seeking to reopen the record is not entitled to discovery to support its motion.

The question of Board management of discovery was addressed by the Commission in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-456 (1981). The Commission stated that in virtually all cases individual Boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted. A Licensing Board may establish reasonable deadlines for the completion of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-79, 18 NRC 1400, 1401 (1983), citing, Statement of Policy, supra, 13 NRC at 456. Although a Board may extend a discovery deadline upon a showing of good cause, a substantial delay between a discovery deadline and the start of a hearing is not sufficient, without more, to reopen discovery. Perry, supra, 18 NRC at 1401.

An intervenor who has agreed to an expedited discovery schedule during a prehearing conference is considered to have waived its objections to the schedule once the hearing has started. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-85-15, 22 NRC 184, 185 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 251 (1986).

2.11.2 Discovery Rules

In general, the discovery rules as between all parties except the Staff follow the form of the Federal Rules of Civil Procedure. The legal authorities and court decisions pertaining to Rule 26 of the Federal Rules of Civil Procedure provide appropriate guidelines for interpreting NRC discovery rules. Allied-General Nuclear Services

(Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983), citing, Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975).

If there is no NRC rule that parallels a Federal Rule of Civil Procedure, the Board is not restricted from applying the Federal rule. While the Commission may have chosen to adopt only some of the Federal rules of practice to apply to all cases, it need not be inferred that the Commission intended to preclude a Licensing Board from following the guidance of the Federal rules and decisions in a specific case where there is no parallel NRC rule and where that guidance results in a fair determination of an issue. Seabrook, supra, 17 NRC at 497.

Rule 26(b)(4) differentiates between experts whom the party expects to call as witnesses and those who have been retained or specially employed by the party in preparation for trial. The Notes of Advisory Committee on Rules explain that discovery of expert witnesses is necessary, particularly in a complex case, to narrow the issues and eliminate surprise, but that purpose is not furthered by discovery of non-witness experts. Seabrook, supra, 17 NRC at 497; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 178-79 (1986) (discovery of a non-witness expert permitted only upon a showing of exceptional circumstances). The filing of an affidavit as part of a non-record filing with a Licensing Board does not make an individual an expert witness. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945, 947 (1987).

In modern administrative and legal practice, including NRC practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing or trial. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981); Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494 (1984).

A party may seek discovery of another party without the necessity of Licensing Board intervention. Where, however, discovery of a nonparty is sought (other than by deposition), the party must request the issuance of a subpoena under Section 2.720. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 690 (1979).

Only those State agencies which are parties in NRC proceedings are required to respond to requests under 10 CFR § 2.741 for the production of documents. In order to obtain documents from non-party State agencies, a party must file a request for a subpoena pursuant to 10 CFR § 2.720. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 21-22 (1985), citing, Stanislaus, supra, 9 NRC at 683.

Applicants are entitled to discovery against intervenors in order to obtain the information necessary for applicant to meet its burden of proof. This does not amount to shifting the burden of proof to intervenors. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 338 (1980).

Each co-owner of a nuclear facility has an independent responsibility, to the extent that it is able, to provide a Licensing Board with a full and accurate record and with complete responses to discovery requests. The majority owner must keep the minority owners sufficiently well informed so that they can fulfill their responsibilities to the Board. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-27, 26 NRC 228, 230 (1987).

Intervenor may not directly seek settlement papers of the applicant through discovery. Rule 408 of the Federal Rules of Evidence provides that offers of settlement and conduct and statements made in the course of settlement negotiations are not admissible to prove the validity of a claim. 10 CFR § 2.759 states a policy encouraging settlement of contested proceedings and requires all parties and boards to try to carry out the settlement policy. Requiring a party to produce its settlement documents because they are settlement documents would be inconsistent with this policy. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 183-184 (1979).

A plan to seek evidence primarily through discovery is a permissible approach for an intervenor to take. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1943 (1982).

Lack of knowledge is always an adequate response to discovery. A truthful "don't know" response is not sanctionable as a default in making discovery. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1945, 1945 n.3 (1982).

At least one Licensing Board has held that intervenors may develop and support their contentions by getting a first round of discovery against other parties before the intervenors are required to provide responses to discovery

against them. Catawba, supra, 16 NRC at 1945. But see 2.9.5.11, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).

Discovery of the foundation upon which a contention is based is not only clearly within the realm of proper discovery, but also is necessary for an applicant's preparation for hearing. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494 (1983); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).

A party's need for discovery outweighs any risk of harm from the potential release of information when the NRC Staff has indicated that no ongoing investigation will be jeopardized, when all identities and identifying information are excluded from discovery; and when all other information is discussed under the aegis of a protective order. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 288 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), affirmed, ALAB-764, 19 NRC 633 (1984).

2.11.2.1 Construction of Discovery Rules

For discovery between parties other than the Staff, the discovery rules are to be construed very liberally. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974); Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1742 (1981).

Where a provision of the NRC discovery rules is similar or analogous to one of the Federal rules, judicial interpretations of that Federal rule can serve as guidance for interpreting the particular NRC rule. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 581 (1978).

2.11.2.2 Scope of Discovery

The test as to whether particular matters are discoverable is one of "general relevancy." This test will be easily satisfied unless it is clear that the evidence sought can have no possible bearing on the issues. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974). A party seeking discovery after the discovery period is over, however, must meet a higher standard of relevance. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), LBP-76-8, 3 NRC 199, 201 (1976). While the "general relevancy" test is fairly liberal, it does not permit the discovery of material far beyond the scope of issues to be considered in a proceeding. Thus,

parties may obtain discovery only of information which is relevant to the controverted subject matter of the proceeding, as identified in the prehearing order, or which is likely to lead to the discovery of admissible evidence. This rule applies as much to Part 70 licenses for special nuclear material as to Part 50 licenses for construction of utilization facilities. Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977). Moreover, while the scope of discovery is rather broad, requests phrased in terms of "all documents..." are not favored. Illinois Power Co. (Clinton Nuclear Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

An intervenor may obtain information about other reactors in the course of discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982).

An intervenor's motion which sought to preserve deficient components which the applicant was removing from its plant was denied because the motion did not comply with the requirements for (1) a stay, or (2) a motion for discovery, since it did not express an intention to obtain information about the components. The questions raised in the intervenor's motion, including the possible need for destructive evaluation of the components, were directed to the adequacy and credibility of the applicant's evidence concerning the components. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434, 438 n.6 (1985).

In general, the discovery tools are the same as or similar to those provided for by the Federal Rules of Civil Procedure. The Commission's regulations permit depositions and requests for production of documents between intervenors and applicants without leave of the Commission and without any showing of good cause (10 CFR §§ 2.740a, 2.741). The regulations (10 CFR § 2.740b) specifically provide for interrogatories similar to those addressed by Rule 33 of the Federal Rules, although such interrogatories are not available for use against nonparties. The scope of discovery under the Commission's Rules of Practice is similar to discovery under the Federal Rules of Civil Procedure. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

Since written answers to interrogatories under oath as provided by 10 CFR § 2.740(b) are binding upon a party and may be used in the same manner as depositions, the authority of the person signing the answers to, in fact, provide such answers may be ascertained through discovery. Statements of counsel in briefs or arguments are not sufficient to establish this authority. Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1045 (1978).

If a party has insufficient information to answer interrogatories, a statement to that effect fulfills its obligation to respond. If the party subsequently obtains additional information, it must supplement its earlier response to include such newly acquired information, 10 CFR § 2.740(c). Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 911 (1980).

To determine subject matter relevance for discovery purposes, it is first necessary to examine the issue involved. In an antitrust proceeding, a discovery request will not be denied where the interrogatories are relevant only to proposed antitrust license conditions and not to whether a situation inconsistent with the antitrust laws exists. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

At least one Licensing Board has held that, in the proper circumstances, a party's right to take the deposition of another party's expert witness may be made contingent upon the payment of expert witness fees by the party seeking to take the deposition. Public Service Co. of Oklahoma (Black Fox, Units 1 & 2), LBP-77-18, 5 NRC 671, 673 (1977).

Based on 10 CFR § 2.720(d) and § 2.740a(h), fees for subpoenas and the fee for deponents, respectively, are to be paid by the party at whose instance the subpoena was issued, and the deposition was held. Pursuant to 10 CFR § 2.740a(d), objections on questions of evidence at a deposition are simply to be noted in short form, without argument. The relief of a stay of a hearing to permit deposition of witnesses is inappropriate in the absence of any allegation of prejudice. Each party to an NRC proceeding is not required to convene its own deposition if it seeks to question a witness as to any matter beyond the scope of those issues raised on direct by the party noticing the deposition. No party has a proprietary interest in a deposition; therefore, no party has a proprietary interest in a subpoena issued to a deponent. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1544-1546 (1982).

The Licensing Board, as provided by 10 CFR § 2.740(c) and 10 CFR § 2.740(d), may and should, when not inconsistent with fairness to all parties, limit the extent or control the sequence of discovery to prevent undue delay or imposition of an undue burden on any party. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979). Thus, a Licensing Board may issue a protective order which limits the representatives of a party in a proceeding who may conduct discovery

of particular documents. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 75 (1987).

A party is only required to reveal information in its possession or control. A party need not conduct extensive independent research, although it may be required to perform some investigation to determine what information it actually possesses. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334 (1980).

A party is not required to search the record for information in order to respond to interrogatories where the issues that are the subject of the interrogatories are already defined in the record and the requesting party is as able to search the record as the party from whom discovery is requested. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-87-18, 25 NRC 945, 948 (1987).

2.11.2.3 Requests for Discovery During Hearing

Requests for background documents from a witness, to supply answers to cross-examination questions which the witness is unable to answer, cannot be denied solely because the material had not been previously requested through discovery. However, it can be denied where the request will cause significant delay in the hearing and the information sought has been substantially supplied through other testimony. Illinois Power Co. (Clinton Nuclear Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976).

2.11.2.4 Privileged Matter

As under the Federal Rules of Civil Procedure, privileged or confidential material may be protected from discovery under Commission regulations. To obtain a protective order (10 CFR § 2.740(c)), it must be demonstrated that:

(1) the information in question is of a type customarily held in confidence by its originator;

(2) there is a rational basis for having customarily held it in confidence;

(3) it has, in fact, been kept in confidence; and

(4) it is not found in public sources.

Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). See also Section 6.23.3.

The claimant of a privilege must bear the burden of proving that it is entitled to such protection, including pleading it adequately in its response. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982), citing, In re Fischel, 557 F.2d 209 (9th Cir. 1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983). See Shoreham, supra, 16 NRC at 1153. Intervenors' mere assertion that the material it is withholding constitutes attorney work product is insufficient to meet that burden. Seabrook, supra, 17 NRC at 495.

It is not sufficient for a party asserting certain documents to be privileged from discovery to await a motion to compel from the party seeking discovery prior to the asserting party setting forth its assertions of privilege and specifying those matters which it claims to be privileged. Shoreham, supra, 16 NRC at 1153.

Pursuant to 10 CFR § 2.740(b)(1), parties may generally obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the proceeding. While the Federal Rules of Civil Procedure are not themselves directly applicable to practice before the Commission, judicial interpretations of a Federal Rule can serve as guidance for the interpretation of a similar or analogous NRC discovery rule. By choosing to model Section 2.740(b) after Federal Rule 26(b), without incorporating specific limitations, the Commission implicitly chose to adopt those privileges which have been recognized by the Federal Courts. Shoreham, supra, 16 NRC at 1157.

A party objecting to the production of documents on grounds of privilege has an obligation to specify in its response to a document request those same matters which it would be required to set forth in attempting to establish "good cause" for the issuance of a protective order, i.e., there must be a specific designation and description of (1) the documents claimed to be privileged, (2) the privilege being asserted, and (3) the precise reasons why the party believes the privilege to apply to such documents. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1942 (1982).

Claims of privilege must be specifically asserted with respect to particular documents. Privileges are not absolute and may or may not apply to a particular document, depending upon a variety of circumstances. Shoreham, supra, 16 NRC at 1153, citing, United States v. El Paso Co., 682 F.2d 530, reh'g denied, 688 F.2d 840 (1982), cert. denied, 104 S. Ct. 1927 (1984); United States v. Davis, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981).

In determining whether a party's inadvertent disclosure of a privileged document constitutes a waiver of the privilege, a Board will consider the adequacy of the precautions taken initially to prevent disclosure, whether the party was compelled to produce the document under a Board-imposed expedited discovery schedule, the number of documents which the party had to review, and whether the party, upon learning of the inadvertent disclosure, promptly objected to the production of the document. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 19-20 (1985).

Even where a First Amendment or common law privilege is found applicable to a party or nonparty resisting discovery, that privilege is not absolute. A Licensing Board must balance the value of the information sought to be obtained with the harm caused by revealing the information. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 288 (1983), reconsideration denied, LBP-83-64, 18 NRC 766, 768 (1983), aff'd, ALAB-764, 19 NRC 633, 641 (1984).

Although a report prepared by a party's non-witness experts qualifies for the work product privilege, a Licensing Board may order discovery of those portions of the report which are relevant to 10 CFR 50, Appendix B determinations concerning the causes of deficiencies in the plant. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), LBP-87-20, 25 NRC 953, 957 (1987).

Statements from an attorney to the client are privileged only if the statements reveal, either directly or indirectly, the substance of a confidential communication by the client. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing, In re Fischel, 557 F.2d 209 (9th Cir. 1977); Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980). An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction. Shoreham, supra, 16 NRC at 1158, citing, Fischel, 557 F.2d at 212.

The attorney-client privilege does not protect against discovery of underlying facts from their source, merely because those facts have been communicated to an attorney. Shoreham, supra, 16 NRC at 1158, citing, Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

The attorney-client privilege may not be asserted where there is a conflict of interests between various clients represented by the same attorney. There is no attorney-client relationship unless the attorney is able to exercise independent professional judgment on behalf of the interests of a client.

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1468-1469 (1984), citing, Rule 1.7 of the ABA Model Rules of Professional Conduct.

A qualified work product immunity extends over material gathered or prepared by an attorney for use in litigation, either current or reasonably anticipated at a future time. Although the privilege is not easily overridden, a party may gain discovery of such material upon a showing of a substantial need for the material in the preparation of its case and an inability to obtain the material by any other means without undue hardships. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1473-1474 (1984), citing, Hickman v. Taylor, 329 U.S. 495 (1947), and 10 CFR § 2.740(b)(2).

To claim the attorney-client privilege, it must be shown that: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom a communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) legal assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094, 1098 (1983), citing, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The fact that a document is authored by in-house counsel, rather than by an independent attorney is not relevant to a determination of whether such a document is privileged. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1158 (1982), citing, O'Brien v. Board of Education of City School District of New York, 86 F.R.D. 548, 549 (S.D.N.Y. 1980).

The attorney-client privilege is only available as to communications revealing confidences of the client or seeking legal advice. Shoreham, supra, 16 NRC at 1158, citing, SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), interlocutory appeal dismissed, 534 F.2d 1031 (2d Cir. 1976). Even if some commonly known factual matters were included in the discussion, or non-legal advice was exchanged, where the primary purpose of a meeting was the receipt of legal advice, the entire contents thereof are protected by privilege. Midland, supra, 18 NRC at 1103, citing, Barr Marine Products Co. v. Borg-Warner Corp., 84

F.R.D. 631, 635 (E.D. Pa. 1979); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950).

An attorney's representation, that all communications between the attorney and the party were for the purpose of receiving legal advice, is sufficient for an assertion of attorney-client privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 285 (1983), reconsideration denied, LBP-83-64, 18 NRC 766 (1983).

Communications from the attorney to the client should be privileged only if it is shown that the client had a reasonable expectation in the confidentiality of the statement; or, put another way, if the statement reflects a client communication that was necessary to obtain informed legal advice [and] which might not have been made absent the privilege. Shoreham, supra, 16 NRC at 1159, citing, Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980).

Where legal advice is sought from an attorney in good faith by one who is or is seeking to become a client, the fact that the attorney is not subsequently retained in no way affects the privileged nature of the communications between them. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094 (1983).

The attorney-client privilege was not waived by the presence of third persons at a meeting between client and attorney, where the situation involved representatives of two joint clients seeking advice from the attorney of one such client about common legal problems. Midland, supra, 18 NRC at 1100.

Where the date of a meeting, its attendees, its purpose, and its broad general subject matter are revealed, the attorney-client privilege was not waived as to the substance of the meeting. Midland, supra, 18 NRC at 1102.

Under appropriate circumstances, the attorney-client privilege may extend to certain communications from employees to corporate counsel. However, not every employee who provides a privileged communication is thereby a "client" represented by corporate counsel, or a "party" to any pending legal dispute, for purposes of ABA Disciplinary Rule 7-104. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-31, 18 NRC 1303, 1305 (1983), citing, Upjohn Co. v. United States, 449 U.S. 383 (1981). Upjohn, supra, did not overturn the well-established principle that counsel should be at liberty to approach witnesses for an opposing party. Catawba, supra, 18 NRC at 1305, citing, Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977).

Drafts of canned testimony not yet filed by a party are not subject to discovery. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-75-28, 1 NRC 513, 514 (1975).

Security plans are not "classified," and are discoverable in accordance with the provisions of 10 CFR § 2.790(d). However, they are sensitive documents and are not to be made available to the public at large. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977). In order to discover such plans, (1) the moving party must demonstrate that the plan or a portion of it is relevant to the party's contentions; (2) the release of the plant security plan must usually be subject to a protective order; and (3) no witness may review the plan until he is first qualified as an expert with sufficient competence to evaluate it. Id. Only those portions of a security plan which are both relevant and necessary for the litigation of a party's contentions are subject to discovery. Id. at 1405.

An interrogatory seeking the identity and professional qualifications of persons relied upon by intervenors to review, analyze and study contentions and issues in a proceeding and to provide the bases for contentions is proper discovery. Such information is not privileged and is not a part of an attorney's work product even though the intervenor's attorney solicited the views and analyses of the persons involved and has the sole knowledge of their identity. General Electric Company (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461, 464-468 (1978).

The Government enjoys a privilege to withhold from disclosure the identity of persons furnishing information about violations of law to officers charged with enforcing the law. Rovario v. United States, 353 U.S. 53, 59 (1957), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981).

This applies not only in criminal but also civil cases, In re United States, 565 F.2d 19, 21 (1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978), and in Commission proceedings as well, Northern States Power Co. (Monticello Plant, Unit 1), ALAB-16, 4 AEC 435, affirmed by the Commission, 4 AEC 440 (1970); 10 CFR §§ 2.744(d), 2.790(a)(7); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 91 (1983); and is embodied in FOIA, 5 USC 552(b)(7)(D). The privilege is not absolute; where an informer's identity is (1) relevant and helpful to the defense of an accused, or (2) essential to a fair determination of a cause (Rovario, supra) it must yield. However, the Appeal Board reversed a Licensing Board's order to the Staff to

reveal the names of confidential informants (subject to a protective order) to intervenors as an abuse of discretion, where the Appeal Board found that the burden to obtain the names of such informants is not met by intervenor's speculation that identification might be of some assistance to them. To require disclosure in such a case would contravene NRC policy in that it might jeopardize the likelihood of receiving future similar reports. South Texas, supra.

There may be a limited privilege for the identity of individuals who have expressly asked or been promised anonymity in coming forward with information concerning safety-related problems at a nuclear plant. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 537 (1982).

In determining whether or not to issue a protective order to protect the confidentiality or to limit the disclosure of the identities of prospective witnesses, a Board will weigh the benefit of encouraging the testimony of such witnesses against the detriment of inhibiting public access to that information and the cumbersome procedures necessitated by a protective order. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-40, 22 NRC 759, 763 (1985).

Privilege to withhold the names of confidential informants is not absolute; it must yield where the informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. Comanche Peak, supra, 16 NRC at 537.

Even where an informer's qualified privilege exists, it will fail in light of the Board's need for the particular information in informed decisionmaking. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-59, 16 NRC 533, 538 (1982).

FOIA does not establish new government privileges against discovery. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

The Commission's rules on discovery have incorporated the exemptions contained in the FOIA. Id.

Section 2.790 of the Rules of Practice is the NRC's promulgation in obedience to the Freedom of Information Act. Id. at 120. The Commission, in adopting the standards of Exemption 5, and "necessary to a proper decision" as its document privilege standard under 10 CFR § 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Id. at 123. The Government is no less entitled to normal privilege than is any other party in civil litigation. Id. at 127.

The executive or deliberative process privilege protects from discovery governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984), citing, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967).

The executive privilege may be invoked in NRC proceedings. Shoreham, supra, 19 NRC at 1333, citing, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971).

Documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice including analysis, reports, and expression of opinion within the agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164 (1982), citing, Federal Open Market Committee of the Federal Reserve System v. Merril, 443 U.S. 340, 360 (1979).

The executive privilege is a qualified privilege, and does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. Shoreham, supra, 16 NRC at 1164, citing, EPA v. Mink, 410 U.S. 73, 87-88 (1973); Smith v. FTC, 403 F. Supp. 1000, 1015 (D. Del. 1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1225 (1983). The executive privilege does apply where purely factual material is inextricably intertwined with privileged communications or the disclosure of the factual material would reveal the agency's decisionmaking process. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1342 (1984), citing, Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

The executive privilege protects both intra-agency and inter-agency documents and may even extend to outside consultants to an agency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1346 (1984), citing, Lead Industries Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979).

Communications that fall within the protection of the privilege may be disclosed upon an appropriate showing of need. Shoreham, supra, 16 NRC at 1164, citing, United States v. Leggett and Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Long Island Lighting

To establish reversible error from the curtailment of discovery procedures, a party must demonstrate that such curtailment made it impossible to obtain crucial evidence. Implicit in such a showing is proof that more diligent discovery was impossible. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). The Appeal Board has refused to review a discovery ruling referred to it by a Licensing Board when the Board below did not explain why it believed Appeal Board involvement was necessary, where the losing party had not indicated that it was unduly burdened by the ruling and where the ruling was not novel. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-438, 6 NRC 638 (1977). The aggrieved party must make a strong showing that the impact of the discovery order upon that party or upon the public interest is indeed "unusual." Id.

Questions about the scope of discovery concern matters which are particularly within a trial board's competence and appellate review of such rulings is usually best conducted at the end of case. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321 (1980).

2.11.7 Discovery in High-Level Waste Licensing Proceedings

2.11.7.1 Pre-License Application Licensing Board

Pursuant to 10 CFR § 2.1010, a Pre-License Application Licensing Board is authorized to resolve questions concerning: access to the Licensing Support System (LSS); the entry of documentary material into the LSS; discovery requests; and the development and operation of the LSS.

2.11.7.2 Licensing Support System

The Licensing Support System (LSS) is an electronic information management system, established pursuant to Subpart J of 10 CFR Part 2, which will contain the documentary material generated by the participants in the high-level waste licensing proceeding as well as NRC orders and decisions related to the proceeding.

Licensing Boards are capable of fairly judging a matter on a full record, even where the Commission has expressed tentative views. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4-5 (1980).

A Licensing Board may conduct separate hearings on environmental, and radiological health and safety issues. Absent persuasive reasons against segmentation, contentions raising environmental questions need not be heard at the health and safety stage of a proceeding notwithstanding the fact they may involve public health and safety considerations. Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 908 (1980).

It is impractical to delay licensing proceedings to await ASME action. The responsibility of the Board is to form its own independent conclusions about licensing issues. Regulations that reference the ASME code were not intended to give over the Commission's full rulemaking authority to a private organization on an ongoing basis; nor is a private organization intended to become the authority concerning criteria necessary to the issuance of a license. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-33, 18 NRC 27, 35 (1983).

3.1.2 Powers/Duties of Licensing Board

The Licensing Board has the right and duty to develop a full record for decisionmaking in the public interest. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-87, 16 NRC 1195, 1199 (1982).

Licensing Boards are authorized to certify questions or refer rulings to the Appeal Board. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 989 n.1 (1983).

When new information is submitted to the Licensing Board, it has the responsibility to review the information and decide whether it casts sufficient doubt on the safety of a facility. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-52, 18 NRC 256, 258 (1983).

A Licensing Board is required to issue an initial decision in a case involving an application for a construction permit even if the proceeding is uncontested. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 489 (1984), citing, 10 CFR § 2.104(b)(2) and (3).

Although the limited work authorization and construction permit aspects of the case are simply separate phases of the same proceeding, Licensing Boards have the authority

to regulate the course of the proceeding and limit an intervenor's participation to issues in which it is interested. Clinch River, supra, 19 NRC at 492, citing, 10 CFR §§ 2.718 and 2.714(e) and (f).

A Board may express its preliminary concerns based on its review of early results from an applicant's intensive review program which seeks to verify the design and construction quality assurance of the facility. The Board's expression of its concerns during an early stage of the program may enable the applicant to modify its program in order to address more effectively the Board's concerns and questions. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-86-20, 23 NRC 844, 845 (1986).

3.1.2.1 Scope of Jurisdiction of Licensing Board

A Licensing Board has only the jurisdiction and power which the Commission delegates to it. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167 (1976); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985); Public Service Co. of Indiana and Wabash Valley Power Association (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719, 725 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988). See also Consolidated Edison Co. of N.Y.; Power Authority of the State of N.Y. (Indian Point, Unit No. 2; Indian Point, Unit No. 3), LBP-82-23, 15 NRC 647, 649 (1982). Nevertheless, it has the power in the first instance to rule on the scope of its jurisdiction when it is challenged. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293, 298 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 646 (1983), citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980); Kerr-McGee Corp. (Kress Creek Decontamination), ALAB-867, 25 NRC 900, 905 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 67 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989). Once a board determines it has jurisdiction, it is entitled to proceed directly to the merits. Zimmer, supra, 18 NRC at 646, citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870, 873 (1980).

The effect of a Policy Statement of the Commission that deprives a Board of jurisdiction, is to prohibit that Board from inquiring into the procedural regularity of the policy statement. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-69, 16 NRC 751 (1982).

After the issuance of a Licensing Board's initial decision on a particular issue, exclusive jurisdiction over the issue lies with the Appeal Board. Section 2.717(a) of the Rules of Practice is reconcilable with 2.718(j) in that the identity of the presiding officer with exclusive jurisdiction over a particular issue changes as the proceeding moves up the appellate ladder. The parties should not be able to bestow jurisdiction on a presiding officer by selecting the tribunal for the relief sought by a motion. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-86, 16 NRC 1190, 1191, 1193 (1982).

Absent special circumstances, a Licensing Board may consider ab initio whether it has power to grant relief that has been specifically sought of it. Every tribunal possesses inherent rights and duties to determine in the first instance its own jurisdiction. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980).

A Licensing Board's jurisdiction is defined by the Commission's notice of hearing. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 298 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985). See Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-87-23, 26 NRC 81, 84 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 504, 506 (1989).

A Licensing Board generally can neither enlarge nor contract the jurisdiction conferred by the Commission. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974); Three Mile Island, supra, 26 NRC at 476.

Where the Commission's notice of hearing is general and only refers to the application for an operating license, a Licensing Board has jurisdiction to consider all matters contained in the application, regardless of whether the matters were specifically listed in the notice of hearing. Catawba, supra, 22 NRC at 791-92 (application for an operating license contained proposal for spent fuel storage).

A reconstituted Licensing Board is legally competent to rule on all matters within its jurisdiction, including a party's objections to any orders issued by the original Licensing

Board prior to the reconstitution of the Board. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-86-38A, 24 NRC 819, 821 (1986).

A Licensing Board does not have the jurisdiction to refer NRC examination cheaters for criminal prosecution, nor does it have authority over formulation of generic Staff procedures for administering NRC examinations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 302, 372 (1982).

The NRC's regulations do not contain provisions conferring jurisdiction on Licensing Boards to impose fines sua sponte. The powers granted to a Licensing Board by 10 CFR § 2.718 to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order do not include the power to impose a civil penalty. 10 CFR § 2.205(a) confers the authority to institute a civil penalty proceeding only upon the NRC's Director of Nuclear Reactor Regulation, the Director of Nuclear Material Safety and Safeguards, and the Director, Office of Inspection and Enforcement. A Licensing Board becomes involved in a civil penalty proceeding only if the person charged with a violation requests a hearing. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-31, 16 NRC 1236, 1238 (1982); see 10 CFR § 2.205(f).

In a previously uncontested operating license proceeding, a Licensing Board has the jurisdiction to entertain a late-filed petition to intervene and to decide the issues raised by it until the Commission exercises its authority to license full power operation. The Board's jurisdiction does not terminate until the time the Commission issues a final decision or the time expires for Commission certification of record. Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1380-1381 (1982).

The five notices and orders by which authority may be delegated to a Licensing Board include an order to show cause (10 CFR § 2.202); an order calling for a hearing on imposition of civil penalties (10 CFR § 2.205(e)); a notice of hearing on an application for which a hearing must be provided (10 CFR § 2.104); a notice of opportunity for a hearing on an application not covered by 10 CFR § 2.104 (10 CFR § 2.105); and notice of opportunity for a hearing on antitrust matters (10 CFR § 2.102(d)(3)).

Where certain issues sought to be raised by an intervenor are not fairly within the scope of the issues for the proceeding as set forth in the Commission's notice of hearing, such additional issues are beyond the jurisdiction of the Licensing Board to decide. Union Electric Co. (Callaway Plant; Units 1 & 2), LBP-78-31, 8 NRC 366, 370-371 (1978); Duke Power Co.

sequestration, with the Staff being less subject to sequestration than other witnesses, depending on the circumstances.

3.12.3 Board Witnesses

The Appeal Board has indicated that where an intervenor would call a witness but for the intervenor's financial inability to do so, the Licensing Board may call the witness as a Board witness and authorize NRC payment of the usual witness fees and expenses. The decision to take such action is a matter of Licensing Board discretion which should be exercised with circumspection. If the Board calls such a witness as its own, it should limit cross-examination to the scope of the direct examination. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603, 607-08 (1977).

In the interest of a complete record, the Appeal Board may order the Staff to submit written testimony from a "knowledgeable witness" on a particular issue in a proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-607, 12 NRC 165, 167 (1980).

A Licensing Board should not call upon independent consultants to supplement an adjudicatory record except in that most extraordinary situation in which it is demonstrated that the Board cannot otherwise reach an informed decision on the issue involved. Part 2 of 10 CFR and Appendix A both give the Staff a dominant role in assessing the radiological health and safety aspects of facilities involved in licensing proceedings. Before an adjudicatory board resorts to outside experts of their own, they should give the NRC Staff every opportunity to explain, correct and supplement its testimony. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1146, 1156 (1981). 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). Thus, while Licensing Boards have the authority to call witnesses of their own, the exercise of this discretion must be reasonable and, like other Licensing Board rulings, is subject to appellate review. A Board may take this extraordinary action only after (1) giving the parties to the proceeding every fair opportunity to clarify and supplement their previous testimony, and (2) showing why it cannot reach an informed decision without independent witnesses. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 27-28 (1983).

Applying the criteria of Summer, supra, 14 NRC at 1156, 1163, a Licensing Board determined that it had the authority to call an expert witness to focus on matters the Staff had apparently ignored in a motion for summary disposition of a health

effects contention. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 442-43 (1984), reconsid. den. on other grounds, LBP-84-15, 19 NRC 837, 838 (1984).

3.12.4 Expert Witnesses

When the qualifications of an expert witness are challenged, the party sponsoring the witness has the burden of demonstrating his expertise. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977). The qualifications of the expert should be established by showing either academic training or relevant experience or some combination of the two. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 570 (1978). As to academic training, such training that bears no particular relationship to the matters for which an individual is proposed as an expert witness is insufficient, standing alone, to qualify the individual as an expert witness on such matters. Diablo Canyon, LBP-78-36, 8 NRC at 571. In addition, the fact that a proposed expert witness was accepted as an expert on the subject matter by another Licensing Board in a separate proceeding does not necessarily mean that a subsequent Board will accept the witness as an expert. Diablo Canyon, LBP-78-36, 8 NRC at 572.

A witness is qualified as an expert by knowledge, skill, experience, training, or education. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 732 n.67 (1985), citing, Fed. R. Evid. 702. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

The value of testimony by a witness at NRC proceedings is not undermined merely by the fact that the witness is a hired consultant of a licensee. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1211 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

It is not acceptable for an expert witness to state his ultimate conclusions on a crucial aspect of the issue being tried, and then to profess an inability--for whatever reason--to provide the foundation for them to the decision maker and litigants. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 26 (1979). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), LBP-89-7, 29 NRC 138, 171-72 (1989), stay denied on other grounds, ALAB-914, 29 NRC 357 (1989). An assertion of "engineering judgment", without any explanation or reasons for the judgment, is

relitigation of issues, neither collateral estoppel nor res judicata applies. Farley, supra, 7 AEC 203; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 NRC 680 (1977); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 286 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 537 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 56-57 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989). Furthermore, under neither principle does a judicial decision become binding on an administrative agency if the legislature granted primary authority to decide the substantive issue in question to the administrative agency. 2 Davis, Administrative Law Treatise, § 18.12 at pp. 627-28. Cf. US v. Radio Corp. of America, 358 U.S. 334, 347-52 (1959). Where application of collateral estoppel would not affect the Commission's ability to control its internal proceedings, however, a prior court decision may be binding on the NRC. Davis-Besse, supra.

In appropriate circumstances, the doctrines of res judicata and collateral estoppel which are found in the judicial setting are equally present in administrative adjudication. One exception is the existence of broad public policy considerations on special public interest factors which would outweigh the reasons underlying the doctrines. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 574-575 (1979).

There is no basis under the Atomic Energy Act or NRC rules for excluding safety questions at the operating license stage on the basis of their consideration at the construction permit stage. The only exception is where the same party tries to raise the same question at both the construction permit and operating license stages; principles of res judicata and collateral estoppel then come into play. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 464 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1044 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974).

An operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1081 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986). A contention already litigated between the same parties at the construction permit stage may not be relitigated in an operating license proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1808 (1982), citing, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210 (1974); Southern California Edison Co. (San Onofre Nuclear Generating

Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 78-82 (1982); Shearon Harris, supra, 23 NRC at 536.

A party which has litigated a particular issue ouring an NRC proceeding is not collaterally estopped from litigating in a subsequent proceeding an issue which, although similar, is different in degree from the earlier litigated issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 849 (1987), aff'd, ALAB-869, 26 NRC 13, 22 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987).

A party countering a motion for summary judgment based on res judicata need only recite the facts found in the other proceedings, and need not independently support those "facts." Houston Lighting & Power Co. (South Texas Project, Units 1 & 2). ALAB-575, 11 NRC 14, 15 n.3 (1980).

Collateral estoppel requires presence of at least four elements in order to be given effect: (1) the issue sought to be precluded must be the same as that involved in the prior action, (2) the issue must have been actually litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the prior judgment. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 566 (1979); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-34, 18 NRC 36, 38 (1983), citing, Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167 (1981); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-37 (1986). In addition, the prior tribunal must have had jurisdiction to render the decision, and the party against whom the doctrine of collateral estoppel is asserted must have been a party or in privity with a party to the earlier litigation. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 620 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Shearon Harris, supra, 23 NRC at 536.

The doctrine of collateral estoppel traditionally applies only when the parties in the case were also parties (or their privies) in the previous case. A limited extension of that doctrine permits "offensive" collateral estoppel, i.e., the claim by a person not a party to previous litigation that an issue had already been fully litigated against the defendant and that the defendant should be held to the previous decision because he has already had his day in court. Parklane Hosiery Co., Inc. v. Leo M. Shore, 439 U.S. 322 (1979). At least one Licensing Board has held that, in operating license proceedings, estoppel may also be applied defensively, to preclude an intervenor who was not a party from raising issues litigated in the constructon permit proceeding. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 199-201 (1981). This would not appear to be

wholly consistent with the Appeal Board's ruling in Philadelphia Electric Co. (Peach Bottom Station, Units 2 and 3), Metropolitan Edison Co. (Three Mile Island Station, Unit 2), Public Service Electric and Gas Co. (Hope Creek Station, Units 1 and 2), ALAB-640, 13 NRC 487, 543 (1981).

The Licensing Board which conducted the San Onofre operating license hearing relied upon similar reasoning. The Board held that, although "identity of the parties" and "full prior adjudication of the issues" are textbook elements of the doctrines of res judicata and collateral estoppel, they are not prerequisites to foreclosure of issues at the operating stage which were or could have been litigated at the construction permit stage. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 82 (1982). When an issue was known at the construction permit stage and was the subject of intensive scrutiny, anyone who could have (even if no one had) litigated the issue at that time can not later seek to do so at the operating license hearing without a showing of changed circumstances or newly discovered evidence. San Onofre, supra, 15 NRC at 78-82. The Appeal Board subsequently found that the Licensing Board had erred. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 694-696 (1982); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 353-354 (1983). The doctrines of res judicata, collateral estoppel and privity provide the appropriate bases for determining when concededly different persons or groups should be treated as having their day in court. There is no public policy reason why the Agency's administrative proceedings warrant a looser standard. San Onofre (ALAB-673), supra, 15 NRC at 696. The Appeal Board also disagreed with the Licensing Board's statement that organizations or persons who share a general point of view will adequately represent one another in NRC proceedings. San Onofre (ALAB-673), supra, 15 NRC at 695-696.

The standard for determining whether persons or organizations are so closely related in interest as to adequately represent one another is whether legal accountability between the two groups or virtual representation of one group by the other is shown. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-34, 18 NRC 36, 38 n.3 (1983), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 1 and 2), ALAB-673, 15 NRC 688, 695-96 (1982) (dictum).

An operating license Board will not apply collateral estoppel to an issue which was considered during an uncontested construction permit hearing. When there are no adverse parties in the construction permit hearing, there can be neither privity of parties nor "actual litigation" of the issue sufficient to support reliance on collateral estoppel. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 622-624 (1985), rev'd and

remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 694-696 (1982). See also Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 506 (1989) (collateral estoppel does not apply to an issue which was reviewed by the NRC Staff, but which was not previously the subject of a contested proceeding).

An intervenor in an operating license proceeding, who was not a party in the construction permit proceeding, is not collaterally estopped from raising and relitigating issues which were fully investigated in the construction permit proceeding. However, the intervenor has the burden of providing even greater specificity than normally required for its contentions. The intervenor must specify how circumstances have changed since the construction permit proceeding or how the Licensing Board erred in the construction permit proceeding. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 539-40 (1986). Cf. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 590-91 (1985). See generally Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 354 n.5 (1983).

Where the legal standards of two statutes are significantly different, the decision of issues under one statute does not give rise to collateral estoppel in litigation of similar issues under a different statute. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-29-27, 10 NRC 563, 571 (1979).

The Commission will give effect to factual findings of Federal courts and sister agencies when those findings are part of a final judgment, even when the party seeking estoppel effect was not a party to the initial litigation. Although the application of collateral estoppel would be denied if a party could have easily joined in the prior litigation, the Commission will apply collateral estoppel even though it is alleged that a party could have joined in, if the prior litigation was a complex antitrust case. Furthermore, FERC determinations about the applicability of antitrust laws are sufficiently similar to Commission determinations to be entitled to collateral estoppel effect. Even a shift in the burden of persuasion does not exclude the application of collateral estoppel when it is apparent that the FERC opinion did not arrive at its antitrust conclusions because of the burden of persuasion. On the other hand, the decision of a Federal district court on a summary judgment motion is not a final judgment entitled to collateral estoppel effect, particularly when the court did not fully explain the grounds for its opinion and when its decision was issued after the hearing board had already begun studying the record and had formed factual conclusions which were not adequately addressed in the district court's opinion. Florida Power and Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167, 1173-80, 1189-90 (1981).

Summary disposition may be denied on the basis of res judicata and collateral estoppel. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-575, 11 NRC 14 (1980), affirming, LBP-79-27, 10 NRC 563 (1979).

3.18 Termination of Proceedings

3.18.1 Procedures for Termination

Termination of adjudicatory proceedings on a construction permit application should be accomplished by a motion filed by applicant's counsel with those tribunals having present jurisdiction over the proceeding. A letter by a lay official to the Commission when the Licensing Board has jurisdiction over the matter is not enough. Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667, 668-9 (1980).

An operating license proceeding may not be terminated solely on the basis of a Stipulation whereby all the parties have agreed to terminate the proceeding. The parties must formally file a motion to terminate with the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-89-14, 29 NRC 487, 488-89 (1989).

3.18.2 Post-Termination Authority of Commission

10 CFR § 2.107(a) expressly empowers Licensing Boards to impose conditions upon the withdrawal of a permit or license application after the issuance of a notice of hearing. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667, 669 n.2 (1980).

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in order to raise a new non-emergency planning contention. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1138 (1983).

4.4.1 Motions to Reopen Hearing

A motion to reopen the hearing can be filed by any party to the proceeding. The motion need not be supported by an affidavit and the movant is free to rely on, for example, Staff-applicant correspondence to establish the existence of a newly discovered issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973). A movant may also rely upon documents generated by the applicant or the NRC Staff in connection with the construction and regulatory oversight of the facility. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 17 & n.7 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).

As is well settled, the proponent of a motion to reopen the record has a heavy burden to bear. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 283 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989).

Where a motion to reopen relates to a previously uncontested issue, the moving party must satisfy both the standards for admitting late-filed contentions, 10 CFR § 2.714(a), and the criteria established by case law for reopening the record. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3),

ALAB-812, 22 NRC 5, 14 & n.4 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 & n.2 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 17 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 n.1 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987).

The new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 CFR 2.714(b) for admissible contentions. 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). The supporting information must be more than mere allegations; it must be tantamount to evidence which would materially affect the previous decision. Id.; Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 74 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989). To satisfy this requirement, it must possess the attributes set forth in 10 CFR § 2.743(c) which defines admissible evidence as "relevant, material, and reliable." Id. at 1366-67; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). Embodied in this requirement is the idea that evidence presented in affidavit form must be given by competent individuals with knowledge of the facts or by experts in the disciplines appropriate to the issues raised. Id. at 1367 n.18; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14, 50 n.58 (1985); Turkey Point, supra, 25 NRC at 962; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 431-32 (1989).

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 licensing proceeding. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989).

Exhibits which are illegible, unintelligible, undated or outdated, or unidentified as to their source have no probative value and do not support a motion to reopen. In order to comply with the requirement for "relevant, material, and reliable" evidence, a movant should cite to specific portions of the exhibits and explain the points or purposes which the exhibits serve. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 21 n.16, 42-43 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1366-67.

A draft document does not provide particularly useful support for a motion to reopen. A draft is a working document which may reasonably undergo several revisions before it is finalized to reflect the actual intended position of the preparer. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 43 n.47 (1985).

Where a motion to reopen is related to a litigated issue, the effect of the new evidence on the outcome of that issue can be examined before or after a decision. To the extent a motion to reopen is not related to a litigated issue, then the outcome to be judged is not that of a particular issue, but that of the action which may be permitted by the outcome of the licensing proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1142 (1983), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

4.4.1.1 Time for Filing Motion to Reopen Hearing

A motion to reopen may be filed and the Licensing Board may entertain it at any time prior to issuance of the full initial decision. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972). Where a motion to reopen was mailed before the Licensing Board rendered the final decision but was received by the Board after the decision, the Board denied the motion on grounds that it lacked jurisdiction to take any action. The Appeal Board implied that this may be incorrect (referring to 10 CFR § 2.712(d)(3) concerning service by mail), but did not reach the jurisdictional question since the motion was properly denied on the merits. Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374 n.4 (1978).

Point Beach, supra, does not establish an ironclad rule with respect to timing of the motion. In deciding whether to reopen, the Licensing Board will consider both the timing of the motion and the safety significance of the matter which has been raised. The motion will be denied if it is untimely and the matter raised is insignificant.

The motion may be denied, even if timely, if the matter raised is not grave or significant. If the matter is of great significance to public or plant safety, the motion could be granted even if it was not made in a timely manner. As such, the controlling consideration is the seriousness of the issue raised. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Vermont Yankee, ALAB-126, 6 AEC 393 (1973); Vermont Yankee, ALAB-124, 6 AEC 365 (1973). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 19 (1986) (most important factor to consider is the safety significance of the issue raised); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986). When timeliness is a factor, it is to be judged from the date of discovery of the new issue.

An untimely motion to reopen the record may be granted, but the movant has the increased burden of demonstrating that the motion raises an exceptionally grave issue rather than just a significant issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76, 78 (1988), citing, 10 CFR § 2.734(a)(1).

A Board will reject as untimely a motion to reopen which is based on information which has been available to a party for one to two years. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 201 (1985).

For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier. 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); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 202 (1985). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982). A party cannot justify its tardiness in filing a motion to reopen by noting that the Board was no longer receiving evidence on the issue when the new information on that issue became available. Three Mile Island, supra, 22 NRC at 201-02.

A party's opportunity to gain access to information is a significant factor in a Board's determination of whether a motion based on such information is timely filed. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-52, 18 NRC 256, 258 (1983). See also Diablo Canyon, supra, 19 NRC at 1369.

A matter may be of such gravity that a motion to reopen may be granted notwithstanding that it might have been presented earlier. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 188 n.17 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1723 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822, 826 (1985).

The Vermont Yankee tests for reopening the evidentiary record are only partially applicable where reopening the record is the Board's sua sponte action. The Board has broader responsibilities than do adversary parties, and the timeliness test of Vermont Yankee does not apply to the Board with the same force as it does to parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978).

Where jurisdiction terminated on all but a few issues, a Board may not entertain new issues unrelated to those over which it retains jurisdiction, even where there are supervening developments. The Board has no jurisdiction to consider such matters. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-226 (1980). Once an appeal has been filed, jurisdiction over the appealed issues passes to the appellate tribunal and motions to reopen on the appealed issues are properly entertained by the appellate tribunal. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326-27 (1982).

4.4.1.2 Contents of Motion to Reopen Hearing

(RESERVED)

4.4.2 Grounds for Reopening Hearing

A decision as to whether to reopen a hearing will be made on the basis of the motion and the filings in opposition thereto, all of which amount to a "mini record." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 523 (1973), reconsid. den., ALAB-141, 6 AEC 576. The hearing must be reopened whenever a "significant", unresolved safety question is involved. Vermont Yankee, ALAB-138, supra; Vermont Yankee, ALAB-124, 6 AEC 358, 365 n.10 (1973). The same "significance test" applies when an environmental issue is involved. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975); Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 AEC 821 (1973). (See also 3.13.3).

Matters to be considered in determining whether to reopen an evidentiary record at the request of a party, as set forth in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), are whether the matters sought to be addressed on the reopened record could have been raised earlier, whether such matters require further evidence for their resolution, and what the seriousness or gravity of such matters is. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83 (1978). As a general proposition, a hearing should not be reopened merely because some detail involving plant construction or operation has been changed. Rather, to reopen the record at the request of a party, it must usually be established that a different result would have been reached initially had the material to be introduced on reopening been considered. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (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). In fact, an Appeal Board has stated that, after a decision has been rendered, a dissatisfied litigant who seeks to persuade an adjudicatory tribunal to reopen the record "because some new circumstance has arisen, some new trend has been observed or some new fact discovered" has a difficult burden to bear. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976). At the same time, new regulatory requirements may establish good cause for reopening a record or admitting new contentions on matters related to the new requirement. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981).

Unlike applicable standards with respect to allowing a new, timely filed contention, the Licensing Board can give some consideration to the substance of the information sought to be added to the record on a motion to reopen. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 n.15 (1984), citing, Vermont Yankee, ALAB-138, supra, 6 AEC at 523-24.

Where a motion to reopen an evidentiary hearing is filed after the initial decision, the standard is that the motion must establish that a different result would have been reached had the respective information been considered initially. Where the record has been closed but a motion was filed before the initial decision, the standard is whether the outcome of the proceeding might be affected. Commonwealth Edison Co.

(Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983).

In certain instances the record may be reopened, even though the new evidence to be received might not be so significant as to alter the original findings or conclusions, where the new evidence can be received with little or no burden upon the parties. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978). Reopening has also been ordered where the changed circumstances involved a hotly contested issue. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 AEC 631 (1974). Moreover, considerations of fairness and of affording a party a proper opportunity to ventilate the issues sometimes dictate that a hearing be reopened. For example, where a Licensing Board maintained its hearing schedule despite an intervenor's assertion that he was unable to attend the hearing and prepare for cross-examination, the Appeal Board held that the hearing must be reopened to allow the intervenor to conduct cross-examination of certain witnesses. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980 (1974).

The proponent of a motion to reopen the record bears a heavy burden. Normally, the motion must be timely and addressed to a significant issue. If an initial decision has been rendered on the issue, it must appear that reopening the record may materially alter the result. Where a motion to reopen the record is untimely without good cause, the movant must demonstrate not only that the issue is significant, but also that the public interest demands that the issue be further explored. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 21 (1978); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 n.4 (1982), citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-365 (1981); Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-90 (1984).

The criteria for reopening the record govern each issue for which reopening is sought; the fortuitous circumstance that a proceeding has been or will be reopened on other issues is not significant. Metropolitan Edison Company (Three Mile Island

Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1720 (1985).

In order to reopen a licensing proceeding, an intervenor must show a change in material fact which warrants litigation anew. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-79-10, 10 NRC 675, 677 (1979).

Whether to reopen a record in order to consider new evidence turns on the appraisal of several factors: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially? Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2031-32 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1065 n.7 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 108 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 578 n.2 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1199 n.5 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 13 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 200 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 798 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 822 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 4-5 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235 (1986), aff'd sub nom. Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986); Houston Lighting and Power Co. (South Texas Project, Units 1 and

2), LBP-86-15, 23 NRC 595, 670 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 505-06 (1986), citing, 10 CFR § 2.734; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-3, 25 NRC 71, 76 and n.6 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 885-86 (1987), reconsid. denied, CLI-88-3, 28 NRC 1 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 962 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 149-50 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 49 (1988), vacated in part on other grounds, CLI-88-8, 28 NRC 419 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 71 n.17 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989).

A party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. Fermi, supra, 17 NRC at 1065.

A motion to reopen an administrative record may rest on evidence that came into existence after the hearing closed. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 n.6 (1980).

A Licensing Board has held that the most important factor to consider is whether the newly proffered material would alter the result reached earlier. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672 (1986).

To justify the granting of a motion to reopen, the moving papers must be strong enough, in light of any opposing filings, to avoid summary disposition. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1186 (1982), citing, Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

The fact that the NRC's Office of Investigations is investigating allegations of falsification of records and harassment of QA/QC personnel is insufficient, by itself, to support a motion to reopen. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5-6 (1986).

Evidence of a continuing effort to improve reactor safety does not necessarily warrant reopening a record. Diablo Canyon, supra, 11 NRC at 887.

Differing analyses by experts of factual information already in the record do not normally constitute the type of information for which reopening of the record would be warranted. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-42, 22 NRC 795, 799 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 994-95 (1981).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Nor do generalized assertions to the effect that "more evidence is needed." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 63 (1981).

Newspaper allegations of quality assurance deficiencies, unaccompanied by evidence, ordinarily are not sufficient grounds for reopening an evidentiary record. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 286 (1984). See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 n.2 (1986).

Generalized complaints that an alleged ex parte communication to a board compromised and tainted the board's decisionmaking process are insufficient to support a motion to reopen. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-840, 24 NRC 54, 61 (1986), vacated, CLI-86-18, 24 NRC 501 (1986) (the Appeal Board lacked jurisdiction to rule on the motion to reopen).

A movant should provide any available material to support a motion to reopen the record rather than rely on "bare allegations or simple submission of new contentions." Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 577 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989) (a movant's willingness to provide unspecified, additional information at some unknown date in the future is insufficient). Undocumented newspaper articles on subjects with no apparent connection to the facility in question do not provide a legitimate basis on which to reopen a record. Waterford, supra, 18 NRC at 1330; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3),

ALAB-786, 20 NRC 1087, 1089-1090 (1984). The proponent of a motion to reopen a hearing bears the responsibility for establishing that the standards for reopening are met. The movant is not entitled to engage in discovery in order to support a motion to reopen. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). An adjudicatory board will review a motion to reopen on the basis of the available information. The board has no duty to search for evidence which will support a party's motion to reopen. Thus, unless the movant has submitted information which raises a serious safety issue, a board may not seek to obtain information relevant to a motion to reopen pursuant to either its sua sponte authority or the Commission's Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984). Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6-7 (1986).

A motion to reopen the record based on alleged deficiencies in an applicant's construction quality assurance program must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to whether the plant can be operated safely. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983), citing, Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985). This standard also applies to an applicant's design quality assurance program. 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).

The untimely listing of "historical examples" of alleged construction QA deficiencies is insufficient to warrant reopening of the record on the issue of management character and competence. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985), citing, Diablo Canyon, ALAB-775, supra, 19 NRC at 1369-70.

Long range forecasts of future electric power demands are especially uncertain as they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, and the general state of economy. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on continued use from historical data, range of years considered, the

area considered, and extrapolations from usage in residential, commercial, and industrial sectors. The general rule applicable to cases involving differences or changes in demand forecasts is stated in Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). Accordingly, a possible one-year slip in construction schedule was clearly within the margin of uncertainty, and intervenors had failed to present information of the type or substance likely to have an effect on the need-for-power issue such as to warrant relitigation. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-79-5, 9 NRC 607, 609-10 (1979).

4.4.3 Reopening Construction Permit Hearings to Address New Generic Issues

Construction permit hearings should not be reopened upon discovery of a generic safety concern where such generic concern can be properly addressed and considered at the operating license stage. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404 (1975).

4.4.4 Discovery to Obtain Information to Support Reopening of Hearing

The Appeal Board has held that, though the period for discovery may have long since terminated, a party may obtain discovery in order to support a motion to reopen a hearing provided that party demonstrates with particularity that discovery would enable it to produce the needed materials. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973). This Appeal Board ruling is substantially undercut by a recent Commission decision in which the Commission noted that the burden is on the movant to establish prior to reopening that the standards for reopening are met and "the movant is not entitled to engage in discovery in order to support a motion to reopen." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). See also Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235-36 & n.1 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672-673 n.33 (1986); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958, 963 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 26 NRC 410, 422 (1987).

4.5 Motions to Reconsider

When a Board has reached a determination of a motion in the course of an on-the-record hearing, it need not reconsider that determination in response to an untimely motion but it may, in its discretion, decide to reconsider on a showing that it has made an egregious error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 283 (1982).

A petitioner lacks standing to seek reconsideration of a decision unless the petitioner was a party to the proceeding when the decision was issued. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 354 (1989).

In certain instances, for example, where a party attempts to appeal an interlocutory ruling, a Licensing Board can properly treat the appeal as a motion to the Licensing Board itself to reconsider its ruling. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1653 (1982).

The Appeal Board has indicated that a motion to it to reconsider a prior decision will be denied where the Appeal Board is left with the conviction that what confronts it is not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead is an entirely new thesis. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977).

A party may not raise, in a petition for reconsideration, a matter which was not contested before the Licensing Board or on appeal. Tennessee Valley Authority (Hartsville Plant, Units 1A, 2A, 1B, 2B), ALAB-467, 7 NRC 459, 462 (1978). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241-42 (1989). In the same vein, a matter which was raised at the inception of a proceeding but was never pursued before the Licensing Board or the Appeal Board cannot be raised on a motion for reconsideration of the Appeal Board's decision. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-477, 7 NRC 766, 768 (1978).

Motions to reconsider an order should be associated with requests for reevaluation in light of elaboration on or refinement of arguments previously advanced; they are not the occasion for advancing an entirely new thesis. Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981).

Where a party petitioning the Court of Appeals for review of a decision of the agency also petitions the agency to reconsider its decision and the Federal court stays its review pending the agency's disposition of the motion to reconsider, the Hobbs Act does not

preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

Repetition of arguments previously presented does not present a basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 2 (1988).

4.6 Sua Sponte Review by the Appeal Board

Sua sponte review of a Licensing Board's decision by an Appeal Board is a long-standing Commission-approved practice that is undertaken in all cases, regardless of their nature or whether exceptions have been filed. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1262 (1982), citing, Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 890 (1982); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987).

The Appeal Board has the power to conduct a de novo review of the record sua sponte to make its own independent findings. Wisconsin Electric Power Co. (Point Beach Nuclear Power Station), ALAB-73, 5 AEC 297, 298 (1972). In uncontested and/or unappealed cases, the Appeal Board will always conduct a sua sponte review of safety and environmental issues. See, e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981), citing, Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687 (1979). See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), ALAB-79, 5 AEC 342 (1972); Detroit Edison Co. (Enrico Fermi Atomic Power Plant), ALAB-77, 5 AEC 315 (1972); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 890 (1982); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 (1982); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1111 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1624 (1984).

In the absence of an appeal, the customary practice of an Appeal Board is to conduct a sua sponte review of an authorization of licensing action. However, an Appeal Board will not conduct a sua sponte review of a proceeding that was dismissed when the parties settled the issues. Thus, an Appeal Board will decline to conduct a sua sponte review of a license amendment proceeding where the parties agreed to proposed findings of fact and conclusions of law, and where the Licensing Board raised no significant safety or environmental issues on its own motion. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-796, 21 NRC 4, 5 (1985). An Appeal Board may conduct a sua sponte review of a proceeding where all the intervenors have been dismissed as parties as a sanction. Long Island

Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 250-51 (1989).

An Appeal Board may undertake sua sponte review either during the course of Licensing Board proceedings or after an initial decision has been issued. 10 CFR § 2.785; Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417 (1977).

An Appeal Board may undertake sua sponte review of a Licensing Board decision concerned with the integrity of the hearing process. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 (1982).

It is not the Appeal Board's function in a sua sponte review of a Licensing Board decision to undertake a detailed scrutiny of the entire record. Rather, the Appeal Board usually addresses only those portions of the Licensing Board's opinion that it believes deserve clarification or correction. Further, absence of Appeal Board comment on a particular Licensing Board statement should not be construed as either agreement or disagreement with it. Midland, supra, 16 NRC at 908-909.

Upon review sua sponte of a Licensing Board's initial decision authorizing facility operation, the Appeal Board will consider operational problems coming to light as a result of facility operation during the period of review only where the problems are extraordinary and have a bearing on whether an operating license should have been issued. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977).

In any event, the following matters will not be reviewed sua sponte absent extraordinary circumstances:

(1) Procedural irregularities. Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633, 634 (1974); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1262 (1982).

(2) Rulings on contentions. Washington Public Power Supply System (Nuclear Projects No. 1 & No. 4), ALAB-265, 1 NRC 374, 375 n.1 (1975); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 848-849 (1974).

(3) Purely economic issues posed in an antitrust proceeding. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-258, 1 NRC 45, 48 n.6 (1975); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 (1982), citing, Waterford, supra, 1 NRC at 48 n.6; Washington Public Power Supply System, supra, 1 NRC at 375 n.1; Pilgrim, supra, 8 AEC at 633-634.

(4) A proceeding which has been dismissed upon settlement of the issues by the parties. Trojan, supra, ALAB-796, 21 NRC 4, 5 (1985).

Appeal Board review will be routinely undertaken of any final disposition of a licensing proceeding founded upon substantive determinations of significant safety or environmental issues. Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 303-304 (1980).

The Appeal Board, on sua sponte review, has the authority to reject or modify the findings of the Licensing Board. Monticello, supra, 12 NRC at 304. As for the standards for an Appeal Board's reversal of a Licensing Board's findings of fact, see Section 5.7.3.

A case, when properly before the Appeal Board on sua sponte review, is not confined to those issues on which the Licensing Board made substantive findings. Issues not raised by parties may be considered. However, in operating license proceedings such issues may be considered only when serious safety, environmental or common defense and security matters exist. Monticello, supra, 12 NRC at 309.

In the course of its review of an initial decision in a construction permit proceeding, an Appeal Board is free to raise sua sponte issues which were neither presented to nor considered by the Licensing Board. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 707 (1979).

If the Appeal Board determines sua sponte more information is needed, it may take evidence to develop the record. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-578, 11 NRC 189 (1980).

The Appeal Board, in lieu of remand, may undertake the conduct of hearings in the interests of expedition. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 231 (1980).

In a special proceeding not specifically addressed by Commission regulations, the Appeal Board has the authority to review the entire record of a proceeding sua sponte, independently of the parties' position. The absence of an appeal does not deprive the Appeal Board of the right to review an issue that was contested before a Licensing Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-685, 16 NRC 449, 451, 452 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 247 (1978); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 n.6 (1981).

The Appeal Board's authority to review the entire record must be distinguished from its power in operating license application

proceedings to consider serious safety, environmental, and common defense and security matters not otherwise placed in issue by the parties and those cases not involving operating license applications where Commission approval is sought before pursuing new safety questions not previously put in controversy or otherwise raised in an adjudicatory context. Three Mile Island, supra, 16 NRC at 452 n.5.

An immediate effectiveness review is not a substitute for the usual sua sponte review. Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 890 (1982).

In no instance has the Appeal Board's conduct of a sua sponte review served (or been construed) to revoke, suspend, or defer issuance of a license. Only the finality of the Licensing Board's underlying decision is deferred pending Appeal Board review; the effectiveness of the decision is not stayed. Manufacturing License, supra, 16 NRC at 891.

If the Appeal Board's sua sponte review uncovers problems in a Licensing Board's decision or a record that may require corrective action adverse to a party's interest, the consistent practice is to give the party ample opportunity to address the matter as appropriate. Manufacturing License, supra, 16 NRC at 891 n.8, citing, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309-313 (1980).

NRC regulations give an adjudicatory board the discretion to raise on its own motion any serious safety or environmental matter. See 10 CFR § 2.785(b)(2). This discretionary authority necessarily places on the board the burden of scrutinizing the record of an operating license proceeding to satisfy itself that no such matters exist. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309 (1980).

4.7 Motions for Post-Judgment Relief

Post-judgment motions for relief are not favored by the regulations governing Commission review of Appeal Board decisions (10 CFR § 2.786(b)(7)) and will not normally be granted absent a showing of "extraordinary circumstances." Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-15, 8 NRC 1, 2 (1978).

Although termed a "motion for reformation", an applicant's motion which seeks a major revision of the text of a Commission order, including the deletion of the Commission's rationale for denying the applicant's petition for review of an Appeal Board decision, is in reality a motion for reconsideration of a Commission order. The

Commission's regulations make it clear that such motions for reconsideration will not be entertained. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-21, 24 NRC 681, 682-83 (1986), citing, 10 CFR § 2.786(b)(7).

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5.7.1 Requirements for a Stay Pending Appeal

The Rules of Practice do not provide for an automatic stay of an order upon the filing of a notice of appeal. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 97 (1983).

The Appeal Board has long held that a stay of an initial decision will be granted only upon a showing similar to that required for a preliminary injunction in the Federal courts. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-81, 5 AEC 348 (1972). The test to be applied for such a showing is that laid down in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-221, 8 AEC 95, 96 (1974); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-199, 7 AEC 478, 480 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420, 421 (1974). See also Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27 (1981); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898 (1981); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-30, 14 NRC 357 (1981); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 691 (1982); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1184-85 (1982); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 96-97 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 803 n.3 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1440 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1632 n.7 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1599 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1618 (1985); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 178 n.1 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 193, 194 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.5 (1985); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121-122 (1986); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267,

270 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 5 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 435 (1987); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 290 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989). Under this test, four factors are examined:

(1) has the movant made a strong showing that it is likely to prevail upon the merits of its appeal;

(2) has the movant shown that, without the requested relief, it will be irreparably injured;

(3) would the issuance of a stay substantially harm other parties interested in the proceeding;

(4) where does the public interest lie?

The Virginia Petroleum Jobbers criteria for granting a stay have been incorporated into the regulations at 10 CFR § 2.788(e). Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 130 (1982). Since that section merely codifies long-standing agency practice which parallels that of the courts, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 170 (1978), prior agency case law delineating the application of the Virginia Petroleum Jobbers criteria presumably remains applicable.

The Virginia Petroleum Jobbers rule applies not only to stays of initial decisions of Licensing Boards, but also to stays of Licensing Board proceedings in general, Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975), and stays pending judicial review, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 272 (1974). In addition, the concept of a stay pending consideration by the Appeal Board of a petition for directed certification has been recognized. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-307, 3 NRC 17 (1976). The rule applies to stays of limited work authorizations, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630 (1977), as well as to requests for emergency stays pending final disposition of a stay motion. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 (1977). The rule also applies to stays of implementation and enforcement of radiation protection standards. Environmental

Radiation Protection Standards for Nuclear Power Operations, (40 CFR § 190), CLI-81-4, 13 NRC 298 (1981); Uranium Mill Licensing Requirements (10 CFR Parts 30, 40, 70 and 150), CLI-81-9, 13 NRC 460, 463 (1981). It also applies to postponements of the effectiveness of a license amendment issued by the NRC Staff. In the case of a request for postponement of an amendment, the Commission has stated that a bare claim of an absolute right to a prior hearing on the issuance of a license amendment does not constitute a substantial showing of irreparable injury as required by 10 CFR § 2.788(e). Nuclear Fuel Services, Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), CLI-81-29, 14 NRC 940 (1981).

The Commission has recently issued revised regulations concerning stays of the effectiveness of license amendments. 10 CFR § 50.58(b)(6), as amended in 51 Fed. Reg. 7744, 7765 (March 6, 1986). The NRC Staff's issuance of an immediately effective license amendment based on a "no significant hazards consideration" finding is a final determination which is not subject to either a direct appeal or an indirect appeal to the Commission through the request for a stay. However, in special circumstances, the Commission may, on its own initiative, exercise its inherent discretionary supervisory authority over the Staff's actions in order to review the Staff's "no significant hazards consideration" determination. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986), rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986).

Note that 10 CFR § 2.788 does not expressly deal with the matter of a stay pending remand of a proceeding to the Licensing Board. Prior to the promulgation of Section 2.788, the Commission held that the standards for issuance of a stay pending proceedings on remand are less stringent than those of the Virginia Petroleum Jobbers test. Public Service Co. of New Hampshire (Seabrook Station, Units 1, 2 & 3), CLI-77-8, 5 NRC 503 (1977). In this vein, the Commission ruled that the propriety of issuing a stay pending remand was to be determined on the basis of a traditional balance of equities and on consideration of possible prejudice to further actions resulting from the remand proceedings. Similarly, in Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772 (1977), the Appeal Board ruled that the criteria for a stay pending remand differ from those required for a stay pending appeal. Thus, it appears that the criteria set forth in 10 CFR § 2.788 may not apply to requests for stays pending remand. In this same vein, where a litigant who has prevailed on a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all

relevant equitable considerations. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978). In such circumstances, the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. at 7 NRC 160.

Where the four factors set forth in 10 CFR § 2.788(e) are applicable, no single one of the factors is, of itself, necessarily dispositive. Rather, the strength or weakness of the movant's showing on a particular factor will determine how strong his showing on the other factors must be in order to justify the relief he seeks. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10 (1976); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-30, 14 NRC 357 (1981); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). In any event, there should be more than a mere showing of the possibility of legal error by a Licensing Board to warrant a stay. Philadelphia Electric Co., ALAB-221 supra; Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-158, 6 AEC 999 (1973). The establishment of grounds for appeal is not itself sufficient to justify a stay. Rather, there must be a strong probability that no ground will remain upon which the Licensing Board's action could be based. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977).

The factor which has proved most crucial in Appeal Board deliberations with regard to stays pending appeal is the question of irreparable injury to the movants if the stay is not granted. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-716, 17 NRC 341, 342 n.1 (1983); United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633 n.11 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1599 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 & n.7 (1985); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 436 (1987); General Public Utilities Nuclear Corp. (Three Mile Island

Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361 (1989). See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977); Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit 1), ALAB-507, 8 NRC 551, 556 (1978); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978). See also Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980). It is the established rule that a party is not ordinarily granted a stay of an administration order without an appropriate showing of irreparable injury. Id., quoting Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968). A party must reasonably demonstrate, and not merely allege, irreparable harm. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633-35 (1984). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361-62 (1989).

The irreparable injury requirement is not satisfied by some cost merely feared as liable to occur at some indefinite time in the future. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977). Nor are actual injuries, however substantial in terms of money, time and energy necessarily expended in the absence of a stay, sufficient to justify a stay if not irreparable. Davis-Besse, supra. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437-38 (1987). Similarly, mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 779 (1977); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671 (1975); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

Similarly, the expense of an administrative proceeding is usually not considered irreparable injury. Uranium Mill Licensing Requirements (10 CFR Parts 30, 40, 70, and 150), CLI-81-9, 13 NRC 460, 465 (1981), citing, Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) and Hornblower and Weeks-Hemphill Noyes, Inc. v. Csaky, 427 F. Supp. 814 (S.D.N.Y. 1977).

The "level or degree of possibility of success" on the merits necessary to justify a stay will vary according to the tribunal's assessment of the other factors that must be considered in determining if a stay is warranted. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977), citing, Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977). Where

there is no showing of irreparable injury absent a stay and the other factors do not favor the movant, an overwhelming showing of likelihood of success on the merits is required to obtain a stay. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-1189 (1977); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985) (a virtual certainty of success on the merits). See also Florida Power & Light Co., ALAB-415, 5 NRC 1435, 1437 (1977) to substantially the same effect; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 439 (1987); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 362-63 (1989).

To make a strong showing of likelihood of success on the merits, the movant must do more than list the possible grounds for reversal. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981). A party's expression of confidence or expectation of success on the merits of its appeal before the Commission or the Boards is too speculative and is also insufficient. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-805 (1984).

On a motion for a stay, the burden of persuasion on the four factors of Virginia Petroleum Jobbers (now set forth in 10 CFR § 2.788) is on the movant. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 270 (1978); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981).

In Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-481, 7 NRC 807, 808 (1978), the Appeal Board stressed the importance of the irreparable injury requirement, stating that a party is not ordinarily granted a stay absent an appropriate showing of irreparable injury. Where a decision as to which a stay is sought does not allow the issuance of any licensing authorization and does not affect the status quo ante, the movant will not be injured by the decision and there is, quite simply, nothing for the Appeal Board to stay. Jamesport, supra.

The fact that an appeal might become moot following denial of a motion for a stay does not per se constitute irreparable injury. It must also be established that the activity that will take place in the absence of a stay will bring about concrete harm. Long Island Lighting Co. (Shoreham Nuclear

Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 411-12 (1989).

Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a licensing decision. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985), citing, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 271 (1986).

The risk of harm to the general public or the environment flowing from an accident during low-power testing is insufficient to constitute irreparable injury. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 410 (1989). Similarly, irreversible changes produced by the irradiation of the reactor during low-power testing do not constitute irreparable injury. Seabrook, CLI-89-8, supra, 29 NRC at 411.

Mere exposure to the risk of full power operation of a facility does not constitute irreparable injury when the risk 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).

The importance of a showing of irreparable injury absent a stay was stressed by the Appeal Board in Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978), where the Appeal Board indicated that a stay application which does not even attempt to make a showing of irreparable injury is virtually assured of failure.

If the movant for a stay fails to meet its burden on the first two 10 CFR § 2.788(e) factors, it is not necessary to give lengthy consideration to balancing the other two factors. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing, Catawba, supra, 20 NRC at 1635. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 363 (1989).

Although an applicant's economic interests are not generally within the proper scope of issues to be litigated in NRC

proceedings, a Board may consider such interests in determining whether, under the third stay criterion, the granting of a stay would harm other parties. Thus, a Board may consider the potential economic harm to an applicant caused by a stay of the applicant's operating license. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985). See, e.g., Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471, 477 (1985); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

10 CFR § 2.788 confers the right to seek stay relief only upon those who have filed (or intend to file) a timely appeal from the decision or order sought to be stayed. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 68-69 (1979).

5.7.2 Stays Pending Remand After Judicial Review

Where a litigant who has prevailed upon a judicial appeal of an NRC decision seeks a suspension of the effectiveness of the NRC decision pending remand, such a suspension is not controlled by the Virginia Petroleum Jobbers criteria but, instead, is dependent upon a balancing of all relevant equitable considerations. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 159-60 (1978). In such circumstances, the negative impact of the court's decision places a heavy burden of proof on those opposing the stay. Id. at 7 NRC 160.

5.8 Specific Appealable Matters

5.8.1 Rulings on Intervention

NRC regulations contain a special provision (10 CFR § 2.714a) allowing an interlocutory appeal from a Licensing Board order on a petition for leave to intervene. Under 10 CFR § 2.714a(b), a petitioner may appeal such an order but only if the effect thereof is to deny the petition in its entirety -- i.e., to refuse petitioner entry into the case. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472, 473 (1980); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-683, 16 NRC 160 (1982), citing, Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC 1, 2 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 18 n.6 (1986). Only the petitioner denied leave to intervene can take an appeal of such an order. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17

NRC 17, 22 n.7 (1983), citing, 10 CFR § 2.714a(b). Petitioner may not appeal an order admitting him as an intervenor but denying certain of his contentions. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-302, 2 NRC 856 (1975); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-273, 1 NRC 492, 494 (1975); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-269, 1 NRC 411 (1975). Appellate review of a ruling rejecting some but not all of a petitioner's contentions is available only at the end of the case. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251, 252 (1978). Similarly, where a proceeding is divided into two segments for convenience purposes and a petitioner is barred from participation in one segment but not the other, that is not such a denial of participation as will allow an interlocutory appeal under 10 CFR § 2.714a. River Bend, supra, 3 NRC 607.

A State participating as an "interested State" under 10 CFR § 2.715(c) may appeal an order barring such participation, but it may not seek review of an order which permits the State to participate but excludes an issue which it seeks to raise. River Bend, supra.

Only the petitioner may appeal from an order denying it leave to intervene. USERDA (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212 (1976). Other parties may file briefs in support of or opposition to the appeal. Id. The Applicant, the NRC Staff or any other party may appeal an order granting a petition to intervene or request for a hearing in whole or in part, but only on the grounds that the petition or request should have been denied in whole. 10 CFR § 2.714(c); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-896, 28 NRC 27, 30 (1988).

A Licensing Board's failure, after a reasonable length of time, to rule on a petition to intervene is tantamount to a denial of the petition. Where the failure of the Licensing Board to act is both unjustified and prejudicial, the petitioner may seek interlocutory review of the Licensing Board's delay under 10 CFR § 2.714a. Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977).

Pursuant to 10 CFR § 2.714a, an appeal concerning an intervention petition must await the ultimate grant or denial of that petition. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978). The action of a Licensing Board in provisionally ordering a hearing and in preliminarily ruling on petitions for leave to

intervene is not appealable under 10 CFR § 2.714a in a situation where the Board cannot rule on contentions and the need for an evidentiary hearing until after the special prehearing conference required under 10 CFR § 2.751a and where the petitioners denied intervention may qualify on refiling. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-78-27, 8 NRC 275, 280 (1978). Similarly, a Licensing Board order which determines that petitioner has met the "interest" requirement for intervention and that mitigating factors outweigh the untimeliness of the petition but does not rule on whether petitioner has met the "contentions" requirement is not a final disposition of the petition seeking leave to intervene. Detroit Edison Company (Greenwood Energy Center, Units 2 & 3), ALAB-472, 7 NRC 570, 571 (1978).

10 CFR § 2.714a does not authorize an appellant to file a brief in reply to parties' briefs in opposition to the appeal. Rather, leave to file a reply brief must be obtained. Nuclear Engineering Co. (Sheffield, Ill. Low-Level Waste Disposal Site), ALAB-473, 7 NRC 737, 745 n.9 (1978).

While the regulations do not explicitly provide for Commission review of decisions on intervention, the Commission has entertained appeals in this regard and review by the Commission apparently may be sought. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939 (1978).

Under settled practice, Appeal Boards do not on their own initiative review Licensing Board orders granting or denying intervention. If those affected do not deem themselves sufficiently aggrieved to appeal, there is no reason for Appeal Boards to concern themselves. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 688 (1979).

5.8.2 Scheduling Orders

Since scheduling is a matter of Licensing Board discretion, the Appeal Boards generally will not interfere with scheduling decisions absent a "truly exceptional situation." Virginia Electric & Power Co. (North Anna Power Station, Unit 1 & 2), ALAB-584, 11 NRC 451, 467 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-293, 2 NRC 660 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 250 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986). See also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-344, 4 NRC 207, 209 (1976) (Appeal Board is reluctant to overturn or otherwise interfere with scheduling orders of Licensing Boards absent due process problems); and Houston Lighting and Power Co. (South Texas

Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981) (Appeal Board is loath to interfere with a Licensing Board's denial of a request to delay a proceeding where the Commission has ordered an expedited hearing; in such a case there must be a "compelling demonstration of a denial of due process or the threat of immediate and serious irreparable harm" to invoke discretionary review); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21 (1987) (petitioner failed to substantiate its claim that a Licensing Board decision to conduct simultaneous hearings deprived it of the right to a fair hearing); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 68 (1987) (Appeal Board declined to exercise directed certification authority where intervenors' concerns about infringement of procedural due process were premature); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 277 (1987) (intervenor failed to show specific harm resulting from the Licensing Board's severely abbreviated hearing schedule); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 420-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-4, 29 NRC 243, 244 (1989).

In determining the fairness of a Licensing Board's scheduling decisions, an Appeal Board will consider the totality of the relevant circumstances disclosed by the record. Seabrook, supra, 25 NRC at 421; Seabrook, ALAB-889, supra, 27 NRC at 269.

Where a party alleges that a Licensing Board's expedited hearing schedule violated its right to procedural due process by unreasonably limiting its opportunity to conduct discovery, an Appeal Board will examine: the amount of time allotted for discovery; the number, scope, and complexity of the issues to be tried; whether there exists any practical reason or necessity for the expedited schedule; and whether the party has demonstrated actual prejudice resulting from the expedited hearing schedule. Seabrook, supra, 25 NRC at 421, 425-427.

Although, absent special circumstances, the Appeal Board will generally review Licensing Board scheduling determinations only where confronted with a claim of deprivation of due process, the Appeal Board may, on occasion, review a Licensing Board scheduling matter when that scheduling appears to be based on the Licensing Board's misapprehension of an Appeal Board directive. See, e.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-468, 7 NRC 464, 468 (1978).

Matters of scheduling rest peculiarly within the Licensing Board's discretion; the Appeal Board is reluctant to review

scheduling orders, particularly when asked to do so on an interlocutory basis. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 438 (1979).

5.8.3 Discovery Rulings

5.8.3.1 Rulings on Discovery Against Nonparties

An order granting discovery against a nonparty is final and appealable by that nonparty as of right. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973). An order denying such discovery is wholly interlocutory and an immediate appeal by the party seeking discovery is excluded by 10 CFR § 2.730(f). Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 380-81 (1984).

5.8.3.2 Rulings Curtailing Discovery

In appropriate instances, an order curtailing discovery is appealable. To establish reversible error from curtailment of discovery procedures, a party must demonstrate that the action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery is impossible. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 869 (1975). Absent such circumstances, however, an order denying discovery, and discovery orders in general are not immediately appealable since they are interlocutory. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 472 (1981); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

5.8.4 Refusal to Compel Joinder of Parties

A Licensing Board's refusal to compel joinder of certain persons as parties to a proceeding is interlocutory in nature and, pursuant to 10 CFR § 2.730(f), is not immediately appealable. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977).

5.8.4.1 Order Consolidating Parties

Just as an order denying consolidation is interlocutory, an order consolidating the participation of one party with others may not be appealed prior to the conclusion of the proceeding. Portland General Electric Company (Trojan Nuclear Plant), ALAB-496, 8 NRC 308, 309-310 (1978); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 (1976).

5.8.5 Order Denying Summary Disposition

As is the case under Rule 56 of the Federal Rules of Civil Procedure, an order denying a motion for summary disposition under 10 CFR § 2.749 is not immediately appealable. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-220, 8 AEC 93 (1974). Similarly, a deferral of action on, or denial of, a motion for summary disposition does not fall within the bounds of the 10 CFR § 2.714a exception to the prohibition on interlocutory appeals, and may not be appealed. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175 (1977). (See also 3.5).

5.8.6 Procedural Irregularities

Absent extraordinary circumstances, an Appeal Board will not consider alleged procedural irregularities unless an appeal has been taken by a party whose rights may have been substantially affected by such irregularities. Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633, 634 (1974).

5.8.7 Matters of Recurring Importance

There is some indication that a matter of recurring procedural importance may be appealed in a particular case even though it may no longer be determinative in that case. However, if it is of insufficient general importance (for instance, whether existing guidelines concerning cross-examination were properly applied in an individual case), the Appeal Board will refuse to hear the appeal. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 316 (1978).

5.8.8 Advisory Decisions on Trial Rulings

Advisory decisions on trial rulings which resulted in no discernible injury ordinarily will not be considered on appeal. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858 (1973).

5.8.9 Order on Pre-LWA Activities

A Licensing Board order on the issue of whether offsite activity can be undertaken prior to the issuance of an LWA or a construction permit is immediately appealable as of right. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 3 NRC 771, 774 (1976).

5.8.10 Partial Initial Decisions

Partial initial decisions which do not yet authorize construction activities still may be significant and, therefore, immediately appealable as of right. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-597, 11 NRC 870, 871 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975).

Although 10 CFR § 2.762(a), the sole provision in the Rules of Practice allowing appeals to the Appeal Board, refers only to "initial decisions," a "partial initial decision" with regard to activities prior to the issuance of an LWA is an "initial decision" within the meaning of 10 CFR § 2.762(a), at least where the partial initial decision amounts to a final decision on the merits of the applicant's request for permission to do work prior to issuance of an LWA. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-331, 3 NRC 771 (1976).

For the purposes of appeal, partial initial decisions which decide a major segment of a case or terminate a party's right to participate, are final Licensing Board actions on the issues decided. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 684 (1983). See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981).

5.8.11 Other Licensing Actions

When a Licensing Board, during the course of an operating license hearing, grants a Part 70 license to transport and store fuel assemblies, the decision is not interlocutory and is immediately appealable as of right. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74 (1976).

When a Licensing Board's ruling removes any possible adjudicatory impediments to the issuance of a Part 70 license, the ruling is immediately appealable. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 45 n.1 (1984), citing, Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 648 n.1 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-854, 24 NRC 783, 787 (1986) (a Licensing Board's dismissal by summary disposition of an intervenor's contention dealing with fuel loading and precriticality testing may be challenged in connection with the intervenor's challenge of the order authorizing issuance of the license).

5.8.12 Rulings on Civil Penalties

In a civil penalty case, an order by the Administrative Law Judge affirming the Director of Inspection and Enforcement's order imposing civil penalties on a licensee, but at the same time granting a request for a hearing to present facts to support mitigation of the amount of the penalty, is not appealable under 10 CFR § 2.762 because it is premature. An appeal at this point is foreclosed by 10 CFR § 2.730(f). Section 2.730(f) is a rule of general applicability governing civil penalty proceedings to the same extent as it does licensing proceedings. Pittsburgh-Des Moines Steel Co., ALAB-441, 6 NRC 725 (1977).

5.8.13 Evidentiary Rulings

While all evidentiary rulings are ultimately subject to appeal at the end of the proceeding, not all such rulings are worthy of appeal. Some procedural and evidentiary errors almost invariably occur in lengthy hearings where the presiding officer must rule quickly. Only serious errors affecting substantial rights and which might have influenced improperly the outcome of the hearing merit the hearing merit exception and briefing on appeal. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 836 (1974).

Evidentiary exclusions must affect a substantial right, and the substance of the evidence must be made known by way of an offer of proof or be otherwise apparent, before the exclusions can be considered errors. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 697-98 n.14 (1982).

For a discussion of the procedure necessary to preserve evidentiary rulings for appeal, see Section 3.11.4.

5.8.14 Director's Decision on Show Cause Petition

The Appeal Board normally lacks jurisdiction to entertain motions seeking review only of actions of the Director of Nuclear Reactor Regulation; the Commission itself is the forum for such review. See 10 CFR § 2.206(c). Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-466, 7 NRC 457 (1978).

5.8.15 Findings of Fact

There is no right to an administrative appeal on every factual finding. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 n.5 (1978).

5.9 Perfecting Appeals

Normally, Appeal Boards will not review or pass upon specific rulings (e.g., rulings with respect to contentions) in the absence of a properly perfected appeal by the injured party. Washington Public Power Supply System (Nuclear Projects No. 1 & No. 4), ALAB-265, 1 NRC 374 n.1 (1975); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 848-849 (1974). An appeal is perfected by the filing of a notice of appeal with respect to the order or ruling as to which an appeal is sought.

While the Commission does not require the same precision in the filings of laymen that is demanded of lawyers, any party wishing to challenge some particular Licensing Board action must at least identify the order in question, indicate that he is appealing from it, and give some reason why he thinks it is erroneous. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978).

5.9.1 General Requirements for Appeals from Initial Decision

The general requirements for an appeal from an initial decision are set out in 10 CFR § 2.762. Section § 2.762(a) provides that such appeal is to be filed within ten days after service of the initial decision. A brief in support of the appeal is to be filed within 30 days (40 days in the case of the Staff). 10 CFR § 2.762(a).

5.10 Briefs on Appeal

5.10.1 Necessity of Brief

In any appeal, the filing of a brief in support of the appeal is mandatory. The appellant's failure to file such a brief will result in dismissal of the entire appeal, and this rule applies even if the appellant is acting pro se. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 485 n.2 (1986). Under prior practice where an appeal was taken by the filing of exceptions, all exceptions were to be briefed and exceptions not briefed normally were disregarded by the Appeal Board in its consideration of the appeal. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 315 (1978); Florida Power & Light Co. (St. Lucie Nuclear Plant, Unit 2), ALAB-435, 6 NRC 541 (1977); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 621 n.1 (1976); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-355, 3 NRC 830, 832 n.3

(1976); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 382-383 (1974); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957 (1974); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1083 n.2 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-761, 20 NRC 819, 824 n.4 (1984).

Intervenors have a responsibility to structure their participation so that it is meaningful and alerts the agency to the intervenors' position and contentions. Salem, supra, 14 NRC at 50, citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978). Even parties who participate in NRC licensing proceedings pro se have an obligation to familiarize themselves with proper briefing format and with the Commission's Rules of Practice. Salem, supra, 14 NRC at 50, n.7.

5.10.2 Time for Submittal of Brief

10 CFR § 2.762 provides that briefs supporting an appeal must be filed within 30 days (40 days for the Staff) after filing the notice of appeal.

The time limits imposed in 10 CFR § 2.762(a) for filing briefs refer to the date upon which the appeal was actually filed and not to when the appeal was originally due to be filed prior to a time extension. Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977).

It is not necessary for a party to bring to the Appeal Board's attention the fact that its adversary has not met prescribed time limits. Nor as a general rule will any useful purpose be served by filing a motion seeking to have an appeal dismissed because the appellant's brief was a few days late; the mailing of a brief on a Sunday or Monday which was due for filing the prior Friday does not constitute substantial noncompliance within the meaning of 10 CFR § 2.762(e) [now § 2.762(f)], which would warrant dismissal, absent unique circumstances. Wolf Creek, supra.

If unable to meet the deadline for filing a brief in support of its appeal of a Licensing Board's decision, a party is duty-bound to seek an extension of time sufficiently in advance of the deadline to enable an Appeal Board to act seasonably upon the application. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 10 NRC 554, 555 (1979).

In the event of some late arising unforeseen development, a party may tender a document belatedly. As a rule, such a

filing must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reasons for the lateness, but also why a motion for a time extension could not have been seasonably submitted, irrespective of the extent of the lateness. Wolf Creek, ALAB-424, supra. Apparently, however, the written explanation for the tardiness may be waived by the Appeal Board if, at a later date, the Board and parties are provided with an explanation which the Board finds to be satisfactory. Id. at 126.

5.10.2.1 Time Extensions for Brief

Motions to extend the time for briefing are not favored. In any event, such motions should be filed in such a manner as to reach the Appeal Board at least one day before the period sought to be extended expires. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-117, 6 AEC 261 (1973); Boston Edison Co. (Pilgrim Nuclear Station), ALAB-74, 5 AEC 308 (1972). An extension of briefing time which results in the rescheduling of an already calendared oral argument will not be granted absent extraordinary circumstances. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-144, 6 AEC 628 (1973).

5.10.2.2 Supplementary Briefs

A supplementary brief will not be accepted unless requested by the Appeal Board or accompanied by a motion for leave to file which sets forth reasons for the out-of-time filing. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-115, 6 AEC 257 (1973).

Material tendered by a party without leave of the Appeal Board, after oral argument has been held and an appeal has been submitted for decision, constitutes improper supplemental argument. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 321-22 (1981).

5.10.3 Contents of Brief

The general requirements for the form of the brief in support of an appeal are set forth in 10 CFR § 2.762. Any brief which in form or content is not in substantial compliance with these requirements may be stricken either on motion of a party or on the Commission's own motion. 10 CFR § 2.762(g). For example, an appendix to a reply brief containing a lengthy legal argument will be stricken when the appendix is simply an attempt to exceed the page limitations set by the Appeal Board. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3; Perry Nuclear Power Plant, Units 1 and 2), ALAB-430, 6 NRC 457 (1977).

An issue which is not addressed in an appellate brief is considered to be waived, even though the issue may have been raised before the Licensing Board. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 n.18 (1986).

Although the Commission's Rules of Practice do not specifically require that a brief include a statement of the facts of the case, those facts relevant to the appeal should be set forth. An Appeal Board has indicated that it would dismiss an appeal if the failure to include a statement of facts were not corrected. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640 (1977). The statement of facts set forth in the brief on appeal should include an exposition of that portion of the procedural history of the case related to the issue or issues presented by the appeal. Public Service Electric and Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769, 771 n.2 (1977).

The brief must contain sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issue raised on appeal. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397 (1976); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986). A brief which does not contain such information is tantamount to an abandonment of the issue. Id.; Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381 n.88 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 496 n.30 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533-34 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 805 (1986); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n.42 (1987). See also Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1619 (1984). At a minimum, briefs must identify the particular error addressed and the precise portions of the record relied upon in support of the assertion of error. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 338 n.4 (1983), citing, 10 CFR § 2.762(a); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982) and Public Service Electric and Gas Co. (Salem Nuclear Generating

Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981), aff'd sub nom., Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 537 (1986). This is particularly true where the Licensing Board rendered its rulings from the bench and did not issue a detailed written opinion. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 702-03 n.27 (1985).

10 CFR § 2.762 requires that a brief clearly identify the errors of fact or law that are the subject of the appeal and specify the precise portion of the record relied on in support of the assertion of error. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 66 n.16 (1985); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 793 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-543 n.58 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 809 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 464 (1987), remanded on other grounds, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988). Claims of error that are without substance or are inadequately briefed will not be considered on appeal. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 481 (1982), citing, Salem, supra, 14 NRC at 49-50. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 280 (1987); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 132 (1987). Bald allegations made on appeal of supposedly erroneous Licensing Board evidentiary rulings may be properly dismissed for inadequate briefing. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985). See 10 CFR § 2.762(d).

An appeal may be dismissed when inadequate briefs make its arguments impossible to resolve. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Co. of Oklahoma (Black Fox

Station, Units 1 and 2), ALAB-573, 10 NRC 775, 787 (1979); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 413 (1976). See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986).

A brief that merely indicates reliance on previously filed proposed findings, without meaningful argument addressing the Licensing Board's disposition of issues, is of little value in appellate review. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 348 n.7 (1983), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 71 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 547 n.74 (1986). See Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 131 (1987).

Lay representatives generally are not held to the same standard for appellate briefs that is expected of lawyers. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 n.7 (1981). Nonetheless, NRC litigants appearing pro se or through lay representatives are in no way relieved by that status of any obligation to familiarize themselves with the Commission's rules. To the contrary, all individuals and organizations electing to become parties to NRC licensing proceedings can fairly be expected both to obtain access to a copy of the rules and refer to it as the occasion arises. Susquehanna, supra, 16 NRC at 956, citing, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979). All parties appearing in NRC proceedings, whether represented by counsel or a lay representative, have an affirmative obligation to avoid any false coloring of the facts. Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 n.6 (1986).

A party's brief must (1) specify the precise portion of the record relied upon in support of the assertion of error, and (2) relate to matters raised in the party's proposed findings

of fact and conclusions of law. An Appeal Board will not ordinarily entertain arguments raised for the first time on appeal, absent a serious, substantive issue. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 955-56, 956 n.6 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 906-907 (1982).

All factual assertions in the brief must be supported by references to specific portions of the record. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 2), ALAB-159, 6 AEC 1001 (1973); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 211 (1986). All references to the record should appear in the appellate brief itself; it is inappropriate to incorporate into the brief by reference a document purporting to furnish the requisite citations. Kansas Gas & Electric Company (Wolf Creek Generating Plant, Unit 1), ALAB-424, 6 NRC 122, 127 (1977). Incorporation by reference in the brief of exceptions without any supporting record references or other authority violates both the letter and spirit of 10 CFR § 2.762. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92 (1977); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n.42 (1987). A letter incorporating by reference a brief and proposed findings and conclusions filed with the Licensing Board does not satisfy the requirements for a brief on exceptions. Public Service Electric and Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769 (1977).

Documents appended to an appellate brief will be stricken where they constitute an unauthorized attempt to supplement the record. However, if the documents were newly discovered evidence and tended to show that significant testimony in the record was false, the Appeal Board might be sympathetic to a motion to reopen the hearing. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3); (Perry Nuclear Power Plant, Units 1 & 2), ALAB-430, 6 NRC 451 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 n.51 (1985), citing, Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 36 (1981).

Personal attacks on opposing counsel are not to be made in appellate briefs, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 837-838

(1974), and briefs which carry out personal attacks in an abrasive manner upon Licensing Board members will be stricken. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-121, 6 AEC 319 (1973).

10 CFR § 2.762 has been amended to set a 70-page limit on appellate briefs. 10 CFR § 2.762(e). Established page limitations may not be exceeded without leave and may not be circumvented by use of "appendices" to the brief, Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-430, 6 NRC 457 (1977), although Section 2.762(e) does permit a request for enlargement of the page limitation on a showing of good cause filed at least seven days before the date on which the brief is due. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-827, 23 NRC 9, 11 n.3 (1986).

Briefs longer than 10 pages must contain a table of contents with page references and a table of authorities with page references to citations of authority. 10 CFR § 2.762(d). The appellant's brief must contain a statement of the case with applicable procedural history. Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 & 2), ALAB-394, 5 NRC 769 (1977); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-388, 5 NRC 640 (1977).

A permitted reply to an answer should only reply to opposing briefs and not raise new matters. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 243 n.4 (1980).

5.10.3.1 Opposing Briefs

Briefs in opposition to the appeal should concentrate on the appellant's brief, not on the exceptions which had been filed. See Illinois Power Co. (Clinton Power Station, Units 1 & 2), ALAB-340, 4 NRC 27, 52 n.39 (1976).

Reply briefs are due within 30 days of filing and service of the appellant's brief, or, in the case of the Staff, within 40 days. 10 CFR § 2.762(c). If service of appellant's brief is made by mail, add 5 days to these time periods. 10 CFR § 2.710.

5.10.4 Amicus Curiae Briefs

10 CFR § 2.715 has been amended to allow a nonparty to file a brief amicus curiae with regard to matters before the Appeal Board or the Commission. The nonparty must submit a motion seeking leave to file the brief, and acceptance of the brief is a matter of discretion with the Appeal Board or Commission. 10 CFR § 2.715(d).

The opportunity of a nonparty to participate as amicus curiae has been extended to Licensing Board proceedings. A U.S. Senator lacked authorization under his State's laws to represent his State in NRC proceedings. However, in the belief that the Senator could contribute to the resolution of issues before the Licensing Board, the Appeal Board authorized the Senator to file amicus curiae briefs or to present oral arguments on any legal or factual issue raised by the parties to the proceeding or the evidentiary record. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987).

5.11 Oral Argument

If not requested by a party, oral arguments are scheduled by an Appeal Board when one or more members of the Board have questions of the parties. See 10 CFR § 2.763; Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982). All parties are expected to be present or represented at oral argument unless specifically excused by the Board. Such attendance is one of the responsibilities of all parties when they participate in Commission adjudicatory proceedings. Point Beach, 15 NRC at 279.

5.11.1 Failure to Appear for Oral Argument

If for sufficient reason a party cannot attend an oral argument, it should request that the appeal be submitted on briefs. Any such request, however, must be adequately supported. A bare declaration of inadequate financial resources is clearly deficient. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982).

Failure to advise the Appeal Board of an intent not to appear at oral argument already calendared is discourteous and unprofessional and may result in dismissal of the appeal. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-337, 4 NRC 7 (1976).

5.11.2 Grounds for Postponement of Oral Argument

Postponement of an already calendared oral argument for conflict reasons will be granted only upon a motion setting out:

(1) the date the conflict developed;

(2) the efforts made to resolve it;

(3) the availability of alternate counsel;

(4) public and private interest considerations;

(5) the positions of the other parties;

(6) the proposed alternate date.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-165, 6 AEC 1145 (1973).

A party's inadequate resources to attend oral argument, properly substantiated, may justify dispensing with oral argument. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982).

5.11.3 Oral Argument by Nonparties

Under 10 CFR § 2.715(d), a person who is not a party to a proceeding may be permitted to present oral argument to the Appeal Board or the Commission. A motion to participate in the oral argument must be filed and non-party participation is at the discretion of the Appeal Board or the Commission.

5.12 Actions Similar to Appeals

5.12.1 Motions to Reconsider

Licensing Boards have the inherent power to entertain and grant a motion to reconsider an initial decision. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975).

Similarly, Appeal Boards will entertain a petition for reconsideration. When such a petition is filed, no other party need respond absent a request by the Appeal Board to do so. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-166, 6 AEC 1148, 1150 n.7 (1973). The practice followed by the Appeal Board, that it is unnecessary for a party to respond to a motion for reconsideration unless specifically requested to do so by the Board, is also applicable to requests for clarification of a prior decision. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-544, 9 NRC 630, 631 (1979).

The Appeal Board has indicated that a motion to it to reconsider a prior decision will be denied where the Appeal Board is left with the conviction that what confronts it is not in reality an elaboration upon, or refinement of, arguments previously advanced, but instead, is an entirely new thesis. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977).

Motions to reconsider an order must be grounded upon a concrete showing, through appropriate affidavits rather than counsel's rhetoric, of potential harm to the inspection and investigation functions relevant to a case. Commonwealth

Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25-26 (1983).

Motions for reconsideration are for the purpose of pointing out an error the Board has made. Unless the Board has relied on an unexpected ground, new factual evidence and new arguments are not relevant in such a motion. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

The Commission's refusal to hear a discretionary appeal does not cut off the Appeal Board's right to reconsider a question in an appeal which is still pending before the Appeal Board. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 260 (1978).

Where a party petitioning the Court of Appeals for review of a decision of the agency also petitions the agency to reconsider its decision, and the Federal court stays its review pending the agency's disposition of the motion to reconsider; the Hobbs Act does not preclude the agency's reconsideration of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 259 (1978).

An Appeal Board may not reconsider a matter after it has lost jurisdiction. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-226 (1980).

5.12.2 Interlocutory Reviews

With the exception of an appeal by a petitioner from a total denial of its petition to intervene or an appeal by another party on the question whether the petition should have been wholly denied (10 CFR § 2.714a), there is no right to appeal any interlocutory ruling by a Licensing Board to an Appeal Board. 10 CFR § 2.730(f); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 597 (1983); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 280 (1987).

Thus, for example, a Licensing Board's rulings limiting contentions or discovery or requiring consolidation are not immediately appealable, though such rulings may be reviewed later by deferring appeals on them until the end of the case. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976). In the same vein see Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981). See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-906, 28 NRC 615, 618

(1988) (a Licensing Board denied a motion to add new bases to a previously admitted contention). Similarly, interlocutory appeals from Licensing Board rulings made during the course of a proceeding, such as the denial of a motion to dismiss the proceeding, are forbidden. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-433, 6 NRC 469 (1977).

The fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the longstanding articulated Commission policy generally disfavoring such review. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983). See 10 CFR § 2.730(f).

The prohibition against interlocutory appeals set forth in 10 CFR § 2.730(f) is a rule of general applicability. It applies to an interlocutory ruling of the Administrative Law Judge with respect to civil penalties just as it applies to rulings in licensing proceedings. Pittsburgh-Des Moines Steel Co., ALAB-441, 6 NRC 725 (1977).

It applies as well to an intervenor's "appeal" of a Licensing Board order rescinding any earlier orders or issuances granting procedural assistance to intervenors, following the suspension of the operation of 10 CFR § 2.750(c) upon which the assistance program was based. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-625, 13 NRC 13 (1981).

It is not the Appeal Board's role to monitor the numerous interlocutory rulings made by Licensing Boards. Thus, interlocutory appeals of such rulings rarely will be entertained. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978).

Although interlocutory appeals are generally not permitted as a matter of right under the Rules of Practice, 10 CFR § 2.730(f), the Appeal Board may, as a matter of discretion, elect to entertain matters normally subject to appellate review at the end of a case when (and if) an appeal is taken from the Licensing Board's final decision, 10 CFR § 2.718(i) and § 2.785(b)(1). Discretionary review is granted only sparingly and only when a Licensing Board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by a later appeal or (b) affects the basic structure of the proceeding in a pervasive or unusual manner. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Pennsylvania Power & Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-593, 11 NRC 761 (1980);

United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 474, 475 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-737, 18 NRC 168, 171 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 20-21 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-21, 28 NRC 170, 173-75 (1988). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987). Interlocutory appellate review of Licensing Board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 n.7 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975).

Although generally precluding interlocutory appeals, 10 CFR § 2.730(f), does allow a Licensing Board to refer a ruling to an Appeal Board. The Appeal Board need not, however, accept the referral. In deciding whether to do so, the Appeal Board applies essentially the same test as it utilizes in acting upon directed certification requests filed under 10 CFR § 2.718(i). Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 n.6 (1983); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 475 (1985).

The Commission's 1981 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456, does not call for a marked relaxation of the standard that the discretionary review of interlocutory Licensing Board rulings authorized by 10 CFR §§ 2.730(f) and 2.718(i) should be undertaken only in the most compelling circumstances. Rather, it simply exhorts the Licensing Boards to put before the Appeal Board legal or policy questions that, in their judgment, are "significant" and require prompt appellate resolution. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984). The language regarding directed certification in § V(f)(4) of Appendix A to the Rules of Practice, like the Commission's Policy Statement, does not relax the standards for directed certification. Id. at 1583-84. The fact that an evidentiary ruling involves a matter that may be novel or important does not alter the strict standards for directed certification. Id. at 1583.

The fact that the error of a Licensing Board may lead to delay and increased expense is not a controlling consideration in favor of interlocutory review. Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n.11 (1983), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113-14 (1982).

The mere commitment of resources to a hearing that may later turn out to have been unnecessary does not justify interlocutory review of a Licensing Board scheduling order. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987).

In the absence of a potential for truly exceptional delay or expense, the risk that a Licensing Board's interlocutory ruling may eventually be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed by that board and the parties to the proceeding. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984), citing, Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 600 (1985).

A Licensing Board's decision to admit a contention which will require the Staff to perform further statutory required review does not result in unusual delay or expense which justifies referral of the Board's decision for interlocutory review. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 257-258 n.19 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982), rev'd in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

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. Interlocutory determinations may not be brought before the Appeal Board as a matter of right until the Board below has rendered a reviewable decision. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1100 (1984).

5.12.2.1 Directed Certification of Questions for Interlocutory Review

The Commission's rules do not allow the Appeal Board to entertain interlocutory appeals, 10 CFR § 2.730(f). In extraordinary circumstances, however, the Appeal Board can

review interlocutory rulings by a petition for directed certification pursuant to 10 CFR § 2.718(i). Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 437 (1979); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-62, 16 NRC 565, 567 (1982), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 20 and n.7 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 67-68 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987).

An Appeal Board's decision on a request for directed certification is usually based on its evaluation of the party's petition. However, in unusual circumstances, the Board may also schedule oral argument. Shoreham, supra, 25 NRC at 136-37 and n.28.

Although the Rules of Practice do not specify any time limit for the filing of a petition for directed certification, a party should file the petition promptly after the interlocutory ruling has been issued. The promptness of a filing is determined by the circumstances of each particular case. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 76 (1987). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-884, 27 NRC 56, 57-58 (1988).

Despite the general prohibition against interlocutory review, the regulations provide that a party may ask a Licensing Board to certify a question to the Appeal Board without ruling on it. 10 CFR § 2.718(i). The regulations also allow a party to request that a Licensing Board refer a ruling on a motion to the Appeal Board under 10 CFR § 2.730(f). The Appeal Board has construed Section 2.718 as giving any party the right to seek interlocutory review by filing a petition for "directed certification" to the Appeal Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 482-483 (1973).

A party seeking certification under Section 2.718(i) must, at a minimum, establish that a referral under 10 CFR § 2.730(f) would have been proper -- i.e., that a failure to resolve the problem will cause the public interest to suffer or will result in unusual delay and expense. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976); Toledo Edison Co. (Davis Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 483 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16

NRC 1649, 1652-53 (1982). However, the added delay and expense occasioned by the admission of a contention -- even if erroneous -- does not alone distinguish the case so as to warrant interlocutory review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982). The fact that applicants will be unable to recoup the time and financial expense needed to litigate late-filed contentions is a factor that is present when any contention is admitted and thus does not provide the type of unusual delay that warrants interlocutory Appeal Board review. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1758 n.7 (1982), citing, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982).

Discretionary interlocutory review will be granted by the Appeal Board only when 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. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Perry, supra, 15 NRC at 1110; Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-62, 16 NRC 565, 568 (1982), citing, Marble Hill, supra, 5 NRC at 1192; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-762, 19 NRC 565, 568 (1984); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 599 n.12 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 49-50 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 420 (1987); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 73 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 261 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 269 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1

and 2), ALAB-896, 28 NRC 27, 31 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 437 (1989). A ruling that does no more than admit a contention has a low potential for meeting that standard. Perry, supra, 16 NRC at 1756, citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474 (1985), rev'd, CLI-86-8, 23 NRC 241 (1986). See also dissent of Commissioner Asselstine in Braidwood, supra, 23 NRC at 253-55. A Licensing Board has certified for interlocutory review its rulings on the admissibility of contentions in an emergency plan exercise proceeding because of the unusual nature of the time requirements in such proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 8-9 (1989).

Whether review should be undertaken on "certification" or by referral before the end of the case turns on whether failure to address the issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure of the proceeding in some pervasive or unusual manner. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982), citing, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-21, 28 NRC 170, 173-75 (1988).

The fact that an interlocutory Licensing Board ruling may be wrong does not per se justify directed certification. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

Some cases have delineated, to a certain extent, the requirements for directed certification as to specific issues and under particular circumstances. In this vein:

(1) Directed certification will not be granted unless the Licensing Board below had a reasonable opportunity to consider the question as to which certification is sought. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727, 729 (1975). See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613, 618-619, rev'd in part sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

(2) While it may not always be dispositive, one factor favoring directed certification is that the question or order for which certification is sought is one which "must be reviewed now or not at all." Kansas Gas &

Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 413 (1976), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981).

(3) A mere conflict between Licensing Boards on a particular question does not mean that directed certification as to that question will automatically be granted. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-371, 5 NRC 409 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 484-485 (1975). Unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a "final" Licensing Board decision. Perry, supra, ALAB-675, 15 NRC at 1112-1113. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 263 (1988).

(4) An Appeal Board has granted directed certification of a Licensing Board's denial of an intervenor's motion to correct the official transcript of a prehearing conference. The Appeal Board found that interlocutory review was warranted because of doubts that the transcript could be corrected at the end of the hearing. Without a complete and accurate transcript, the intervenor would suffer serious and irreparable injury because its ability to challenge the Licensing Board's rulings through an appeal would be compromised. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 50, 51 (1986).

(5) The Appeal Board does not favor certification on the question as to whether a contention should have been admitted into the proceeding. Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, reconsid. den., ALAB-330, 3 NRC 613, rev'd in part sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987). A Board's rejection of an interested State's sole contention is not appropriate for directed certification when the issues presented by the State are also raised by the contentions of intervenors in the proceeding. Seabrook, supra, 23 NRC at 592-593. The admission by a Licensing Board of more late-filed than timely contentions does not, in and of itself, affect the basic structure of a licensing proceeding in a pervasive or unusual manner warranting interlocutory Appeal Board review. If the late-filed contentions have been admitted by the Board in accordance with 10 CFR

§ 2.714, it cannot be said that the Board's rulings have affected the case in a pervasive or unusual manner. Rather, the Board will have acted in furtherance of the Commission's own rules. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982). The basic structure of an ongoing proceeding is not changed by the simple admission of a contention which is based on a Licensing Board ruling that: (1) is important or novel; or (2) may conflict with case law, policy, or Commission regulations. Thus, the Appeal Board denied directed certification of a Licensing Board ruling which admitted the intervenor's revised quality assurance contention. The applicant argued that the Licensing Board erred in giving the intervenor the opportunity to conduct discovery in order to revise and resubmit the quality assurance contention which had been rejected earlier for lack of specificity. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474 and nn. 16-17 (1985), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984) and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1112-13 (1982).

(6) Certification will not be directed to review rulings on objections to interrogatories. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-318, 3 NRC 186 (1976). Nor will certification be directed to review orders rejecting objections to discovery on grounds of privilege. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-300, 2 NRC 752, 769 (1975). In this vein, the Appeal Board has refused to review a discovery ruling referred to it by a Licensing Board where the Board below did not explain why it believed Appeal Board involvement was necessary, where the losing party had not indicated that it was unduly burdened by the ruling, and where the ruling was not novel. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-438, 6 NRC 638 (1977). The aggrieved party must make a strong showing that the impact of the discovery order upon that party or upon the public interest is indeed "unusual." Midland, supra. Discovery rulings rarely meet the test for discretionary interlocutory review. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 381 (1984). See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 74 (1987).

(7) As to rulings on evidence, certification will not be granted, absent exceptional circumstances, on questions of what evidence or how evidence will be admitted. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976); Power Authority of the State of New York (Green County Nuclear Power Plant), ALAB-439, 6 NRC 640 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84 (1981). In fact, the Appeal Board is generally disinclined to direct certification on rulings involving "garden-variety" evidentiary matters. See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-353, 4 NRC 381 (1976). In Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-393, 5 NRC 767, 768 (1977), the Appeal Board reiterated that certification will not be granted to allow consideration of interlocutory evidentiary rulings, stating that, "it is simply not our role to monitor these matters on a day-to-day basis; were we to do so, 'we would have little time for anything else.'" (citations omitted). An Appeal Board will be particularly reluctant to grant a request for directed certification where the question for which certification has been sought involves the scheduling of hearings or the timing and admissibility of evidence. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 475 (1982), citing, Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99-100 (1976). Adverse evidentiary rulings may turn out to have little, if any evidentiary effect on a Licensing Board's ultimate substantive decision. Therefore, determinations regarding what evidence should be admitted rarely, if ever, have a pervasive or unusual effect on the structure of a proceeding so as to warrant interlocutory intercession by an Appeal Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984).

(8) The Appeal Board has denied certification under 10 CFR § 2.718(i) and rejected the Staff's position that a Licensing Board's ruling denying summary disposition of a part of a contention unwarrantedly expanded the scope of the issues and that the resulting necessity of trying these issues would cause unnecessary expense and delay. The Appeal Board found that the "immediate and irreparable harm" and "pervasive effect on the basic structure of the proceeding" alleged by the Staff in such

a case was no different than that involved any time a litigant must go to hearing. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981). The mere expansion of issues rarely, if ever, affects the basic structure of a proceeding in a pervasive or unusual way so as to warrant interlocutory review by an Appeal Board. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 262-63 (1988).

The Appeal Board's directed certification authority will be exercised "most sparingly." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697, 698 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978).

While a lack of participation below may not absolutely foreclose grant of a request for directed certification in all circumstances, it does increase the movant's already heavy burden of demonstrating that the Board's intercession is necessary. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 175-76 (1983).

An argument that future litigation may be required does not satisfy the test for directed certification. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 176 n.12 (1983).

Opposition to a directed certification petition should include some discussion of petitioner's claim of Licensing Board error. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374 n.3 (1983), citing, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

Failure of a party to address the standards for directed certification in responding to a motion seeking such review may be construed as a waiver of any argument regarding the propriety of directed certification. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 n.7 (1984). Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

5.12.2.1.1 Effect of Subsequent Developments on Motion to Certify

Developments occurring subsequent to the filing of a motion for directed certification to the Appeal Board may strip the question brought of an essential ingredient and, therefore, constitute grounds for denial of the motion. Northern States

Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-419, 6 NRC 3, 6 (1977).

When reviewing a motion for directed certification, an Appeal Board will not consider events which occurred subsequent to the issuance of the challenged Licensing Board ruling. A party which seeks to rely upon such events must first seek appropriate relief from the Licensing Board. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-889, 27 NRC 265, 271 (1988).

5.12.2.1.2 Effect of Directed Certification on Uncertified Issues

The pendency of review by the Appeal Board pursuant to certification does not automatically result in a stay of hearings on independent questions not intimately connected with the issue certified. See Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417 (1977).

5.12.3 Application to Commission for a Stay After Appeal Board's Denial of Stay

Where a party's request for a stay is denied by the Appeal Board, the party may apply to the Commission for a stay under 10 CFR § 2.788(a), (h). This, rather than a petition for review under 10 CFR § 2.786(b), is the appropriate route. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), CLI-78-3, 7 NRC 307, 308 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 30 n.44 (1978). Thus, while such a request to the Commission may have the appearance of an appeal, it is not treated as such.

The application for a stay and an appeal from the Appeal Board's decision denying a stay will be denied when intervenors do not make a strong showing that they are likely to prevail on the merits or that they will be irreparably harmed pending appeal of the Licensing Board's decision. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982).

5.13 Appeals from Orders, Rulings, Initial Decisions, Partial Initial Decisions

Prior to recent changes in the regulations, the vehicle for an appeal of any order, ruling or decision was the filing of exceptions. An appeal is now taken by the filing of a notice of appeal pursuant to 10 CFR § 2.762.

An appeal should be filed only where a party is aggrieved by, or dissatisfied with, the action taken below and invokes appellate jurisdiction to change the result. An appeal is unnecessary and

inappropriate when a party seeks to appeal a decision whose ultimate result is in that party's favor. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 202 (1978); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958, 959-60 (1982), citing, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-478, 7 NRC 772, 773 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 n.1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, 1177, affirmed, CLI-75-1, 1 NRC 1 (1975); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973).

5.13.1 Time for Filing Appeals

5.13.1.1 Appeals from initial and Partial Initial Decisions

Parties aggrieved by an initial decision or a partial decision must file and brief their appeals within the time limits set out in 10 CFR § 2.762. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-274, 1 NRC 497, 498 (1975). Failure to file an appeal in a timely manner amounts to a waiver of the appeal. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 392-93 (1974). The same rule applies to partial initial decisions and a party must file its appeal therefrom without waiting for the Licensing Board's disposition of the remainder of the proceeding. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-195, 7 AEC 455, 456 n.2 (1974).

5.13.1.2 Variation in Time Limits on Appeals

Only an Appeal Board may vary the time for taking appeals from that set out in 10 CFR § 2.762; Licensing Boards have no power to do so. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975).

Of course, mere agreement of the parties to extend the time for the filing of an appeal is not sufficient to show good cause for such a time extension. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-154, 6 AEC 827 (1973).

5.13.2 Briefs on Appeal

Briefs in support of an appeal must be filed under 10 CFR § 2.762. Failure to file a brief can result in dismissal of the appeal. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975). Those aspects of an appeal not addressed by the supporting brief may be disregarded by the Appeal Board. Midland, supra; Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957 (1974).

When an intervenor is represented by counsel, an Appeal Board has no obligation to piece together or to restructure vague references in its brief in order to make intervenor's arguments for it. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 51 (1981), aff'd sub nom., Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3rd Cir. 1982).

Briefs in support of appeals must specify the precise portion of the record relied upon in support of the assertion of error. 10 CFR § 2.762(a) (now 10 CFR § 2.762(d)); Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 424 (1980).

5.13.3 Effect of Failure to File Proposed Findings

The Appeal Board is not required to review an appeal where no proposed findings and rulings were filed by the appellant on the issue with respect to which the appeal is taken. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-280, 2 NRC 3, 4 n.2 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 864 (1974). But see Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 21, 23 (1983).

5.13.4 Motions to Strike Appeal

A party may file a motion to strike an appeal or brief which is not in substantial compliance with the provisions of 10 CFR § 2.762. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122 (1977); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-409, 5 NRC 1391, 1396-1397 (1977). Such a motion is also appropriate to exclude improper or scandalous appeals. Hartsville, supra, 5 NRC at 1391. A motion to strike an appeal is not appropriate, however, where an assessment of its validity requires more than minimal scrutiny of the underlying record. Id.

5.14 Certification to the Commission

Pursuant to 10 CFR § 2.785(d), an Appeal Board may certify to the Commission any major or novel question of policy, law or procedure which is properly before the Appeal Board. Such certification may be at the Appeal Board's discretion or at Commission direction. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 285 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-908, 28 NRC 626, 631, 635 (1988).

The Appeal Board should exercise its authority to certify questions to the Commission sparingly. Absent a compelling reason, the Appeal Board will decline certification. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-421, 6 NRC 25, 27 (1977). The same is true for the Licensing Board. Consolidated Edison Co. of N.Y., Power Authority of the State of N.Y. (Indian Point, Unit 2; Indian Point, Unit 3), LBP-82-23, 15 NRC 647, 650 (1982).

Certification by the Appeal Board to the Commission is proper in a case involving novel Staff action that presents a major policy question relevant to a pending application, where Appeal Board members have diverging views, and the procedural rules preclude the parties themselves from petitioning for Commission review because the matter came before the Appeal Board itself on certification. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-500, 8 NRC 323, 325 (1978).

The Commission's Rules of Practice contemplate that requests for relief from Licensing Board actions (for example, in matters such as discovery) be delegated to the Appeal Board, which functions as the Commission's delegate for these matters. 10 CFR § 2.785.

Absent extraordinary circumstances warranting Commission involvement, request for interlocutory review of Licensing Board rulings and other relief should be directed to the Appeal Board rather than to the Commission. 10 CFR §§ 2.730(f), 2.785. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), CLI-80-17, 11 NRC 678 (1980). In the context of initial review of Licensing Board actions, then, a certification to the Commission would go first to the Appeal Board under the specific delegation of 10 CFR § 2.785(b)(1). Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), LBP-80-29, 12 NRC 581, 591 (1980).

Referral directly to the Commission by the Licensing Board will not be granted absent a strong reason for bypassing the Appeal Board. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691 (1981).

A motion for directed certification of an interlocutory Licensing Board ruling directly to the Commission will not be granted where the Licensing Board has no need to go back to the Commission for guidance. Additionally, as with motions to Appeal Boards for directed certification, such a motion will not be granted unless the ruling either (1) threatens the movant with immediate and serious impact which as a practical matter cannot be alleviated by later appeal, or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-29, 26 NRC 302, 312 (1987), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

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is entitled to a decision in its favor as a matter of law. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984), citing, 10 CFR § 2.749(d).

6.1.4.4 Matters Considered in Hearings on License Amendments

In considering an amendment to transfer part ownership of a facility, a Licensing Board held that questions concerning the legality of transferring some ownership interest in advance of the Commission action on the amendment was outside its jurisdiction and should be pursued under the provisions of 10 CFR Part 2, Subpart B (dealing with enforcement) instead. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978). The same Licensing Board also ruled that issues to be considered in such a transfer of ownership proceeding do not include questions of the financial qualifications of the original applicant or the technical qualification of any of the applicants. Enrico Fermi, supra, 7 NRC at 392.

With regard to environmental considerations in a proceeding on an application for license amendment, a Licensing Board should not:

> ...embark broadly upon a fresh assessment of the environmental issues which have already been thoroughly considered and which were decided in the initial decision. Rather, the Board's role in the environmental sphere will be limited to assuring itself that the ultimate NEPA conclusions reached in the initial decision are not significantly affected by such new developments ....

Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 393 (1978), citing, Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 415 (1975).

A license amendment that does not involve, or result in, environmental impacts other than those previously considered and evaluated in prior initial decisions for the facility in question does not require the preparation and issuance of either an environmental impact statement or environmental impact appraisal and negative declaration pursuant to 10 CFR § 51.5(b) and (c). Portland General Electric Company (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 744-45 (1978), aff'd, ALAB-534, 9 NRC 287 (1979). For example, the need for power is not a cognizable issue in a license amendment proceeding where it has been addressed in previous construction permit and operating license proceedings. Trojan, supra, 9 NRC at 289, cited in Florida Power and Light Co. (Turkey Point

Nuclear Generating Plant, Units 3 and 4), LBP-81-14, 13 NRC 677, 698 n.49 (1981).

Where health and safety issues were evaluated during the operating license proceeding, a Licensing Board will not admit a contention which provides no new information or other basis for reevaluating the previous findings as a result of the proposed amendment. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 466 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988).

A Licensing Board lacks jurisdiction to consider an intervenor's contentions which challenge the NRC Staff's "no significant hazards consideration" determination under 10 CFR § 50.91. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 844 (1987), citing, 10 CFR § 50.58(b)(6), aff'd in part on other grounds, ALAB-869, 26 NRC 13 (1987), reconsid. denied on other grounds, ALAB-876, 26 NRC 277 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 457 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 499-500 (1989). Nor can a Licensing Board review the immediate effectiveness of a license amendment issued on the basis of a "no significant hazards consideration" after the Staff has completed all the steps required for the issuance of the amendment. However, the Board has authority to review such an amendment if the Staff fails to perform the environmental review required by 10 CFR § 51.25 prior to the issuance of the amendment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 153-56 (1988).

6.1.5 Primary Jurisdiction in Appeal Board to Consider License Amendment in Special Hearing

Although the usual procedure for amending an existing license involves a licensee's applying for the proposed amendment pursuant to 10 CFR § 50.90, this is not the sole and exclusive means for obtaining an amendment. For example, where the Commission orders a special hearing on particular issues before the Appeal Board, the licensee may seek, and the Appeal Board has jurisdiction to issue, an amendment to the license as long as the modification sought bears directly on the questions addressed in the hearing. In such a situation, the licensee need not follow the usual procedure for filing an application for an amendment under 10 CFR § 50.90. Consolidated Edison Co. of N.Y. (Indian Point Station, Units 1, 2 & 3), ALAB-357, 4 NRC 542 (1976), aff'd, CLI-77-2, 5 NRC 13 (1977). Moreover, the Appeal Board's authority to modify license conditions in such an instance is not limited by the inadequacies of the materials submitted by the parties; the

Board may take such action as the public interest warrants. Id.

6.1.6 Facility Changes Without License Amendments

10 CFR § 50.59(a)(1) provides that changes may be made to a production or utilization facility without prior NRC approval where such changes do not involve an unreviewed safety question, as defined in Section 50.59(a)(2), or a change in technical specifications. The determination as to whether a proposed change requires prior NRC approval under Section 50.59 apparently rests with the licensee in the first instance.

Where a hearing on a proposed license amendment was pending and the licensee embarked on "preparatory work" related to the proposed amendment without prior authorization, the presiding Licensing Board denied an intervenor's request for a cease and desist order with regard to such work on the grounds that there was no showing that such work posed any immediate danger to the public health and safety or violated NEPA and that such work was done entirely at the licensee's risk. Portland General Electric Co. (Trojan Nuclear Plant), LBP-77-69, 5 NRC 1179, 1184 (1977). Subsequently, the Appeal Board indicated that the intervenor's complaint in this regard might more appropriately have been directed, in the first instance, to the Staff under 10 CFR § 2.206, rather than to the Licensing Board. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-451, 6 NRC 889, 891 n.3 (1977).

6.2 Amendments to License/Permit Applications

Three years after the Licensing Board sanctioned a limited work authorization (LWA) and before the applicant had proceeded with any construction activity, applicant indicated it wanted to amend its construction permit application to focus only on site suitability issues. The Appeal Board "vacate[d] without prejudice" the decisions of the Licensing Board sanctioning the LWA, and remanded the case for proceedings deemed appropriate by the Licensing Board upon formal receipt of an early site approval application. Delmarva Power & Light Co. (Summit Power Station, Units 1 and 2), ALAB-516, 9 NRC 5 (1979).

6.3 Antitrust Considerations

Section 105(c)(6) of the Atomic Energy Act of 1954 indicates that nothing in the Act was intended to relieve any person from complying with the federal antitrust laws. This section does not authorize the NRC to institute antitrust proceedings against licensees, but does permit the Commission to impose conditions in a license as

needed to ensure that activities under the license will not contribute to the creation or maintenance of an anticompetitive situation. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), LBP-77-7, 5 NRC 452 (1977). Note that reactors licensed as research and development facilities under Section 104(b) of the Atomic Energy Act prior to the 1970 antitrust amendments are excluded from antitrust review. Florida Power & Light Co. (St. Lucie Plant, Unit 1; Turkey Point Plant, Units 3 & 4), ALAB-428, 6 NRC 221, 225 (1977); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331 (1976).

The standard to be employed by the NRC is whether there is a "reasonable probability" that a situation inconsistent with the antitrust laws and the policies underlying those laws would be created or maintained by the unconditioned licensing of the facility. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-77-24, 5 NRC 804 (1977). The Commission's statutory obligation, pursuant to Section 105(c), is not limited to investigation of the effects of construction and operation of the facility to be licensed, but rather includes an evaluation of the relationship of the specific nuclear facility to the applicant's total system or power pool. Id. This threshold determination as to whether a situation inconsistent with the antitrust laws could arise from issuance of the proposed license does not involve balancing public interest factors such as public benefits from the activity in question, public convenience and necessity, or the desirability of competition. Only after the Commission determines that an anticompetitive situation exists or is likely to develop under a proposed license are such other factors considered. In exceptional cases, the NRC may issue the license, despite the possibility of an anticompetitive situation, if it determines that, on balance, issuance of the license would be in the public interest. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 632-633 (1977).

Under Section 105c of the Atomic Energy Act of 1954, a hearing on whether authorizing construction of a nuclear power facility "would create or maintain a situation inconsistent with the antitrust laws" is called for if the Attorney General so recommends or an interested party requests one and files a timely petition to intervene. When an antitrust hearing is convened, a permit to construct the project may not be awarded without the parties' consent until the proceedings are completed. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 10 (1977).

One of the policies reflected in Section 105c of the Atomic Energy Act is that a government-developed monopoly -- like nuclear power electricity generation -- should not be used to contravene the policies of the antitrust laws. Section 105c is a mechanism to allow smaller utilities, municipals and cooperatives access to the licensing process to pursue their interests in the event that larger utility applicants might use a government license to create or maintain an anticompetitive market position. Florida Power & Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 946 (1978).

When the Attorney General recommends an antitrust hearing on a license for a commercial nuclear facility, the NRC is required to conduct one. This is the clear implication of Section 105(c)(5) of the Atomic Energy Act. Where such a hearing is held, the Attorney General or his designee may participate as a party in connection with the subject matter of his advice. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-78-5, 7 NRC 397, 398 (1978); Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) and Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-560, 10 NRC 265, 272 (1979).

In dealing with antitrust issues, the NRC's role is something more than that of a neutral forum for economic disputes between private parties. If an antitrust hearing is convened, it should encompass all significant antitrust implications of the license, not merely the complaints of private intervenors. If no one performs this function, the NRC Staff should assure that a complete picture is presented to Licensing Boards. Florida Power & Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 949 (1978).

The antitrust review undertaken by the Commission in licensing the construction of a nuclear power plant is, by statute, to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws...." Section 105c(5) of the Atomic Energy Act of 1954, 42 U.S.C. 2135c(5). This means that the licensed activities must play some active role in creating or maintaining the anticompetitive situation. Put another way, the nuclear power plant must be an actor, an influence, on the anticompetitive scene. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-665, 15 NRC 22, 32 (1982).

Where a license is found to create or maintain a situation inconsistent with the antitrust laws, the Commission may impose corrective conditions on the license rather than withhold it. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LDP-78-13, 7 NRC 583, 597 (1978).

Only the NRC is empowered to make the initial determination under Section 105(c) whether activities under the license would create or maintain a situation inconsistent with the antitrust laws, and if so what license conditions should be required as a remedy. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LDP-79-27, 10 NRC 563, 574 (1979).

In order to conduct a Section 105(c) proceeding, it is not necessary to establish a violation of the antitrust laws. Any violation of the antitrust laws also meets the less rigorous standard of Section 105(c) which is inconsistency with the antitrust laws. South Texas, supra, 10 NRC at 570.

NRC statutory responsibilities under Section 105(c) cannot be impaired or limited by a State agency. South Texas, supra, 10 NRC at 577.

The legislative history and language of the Public Utilities Regulatory Policies Act of 1978 clearly establish that the act was not intended to divest NRC of its antitrust jurisdiction. South Texas, supra, 10 NRC at 577.

Once the U.S. Attorney General has withdrawn from a proceeding and permission has been granted to the remaining intervenors to withdraw, the Board no longer has jurisdiction to entertain an antitrust proceeding under the provisions of the Atomic Energy Act. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), LBP-82-21, 15 NRC 639, 640-641 (1982).

6.3.1 Consideration of Antitrust Matters After the Construction Permit Stage

The NRC antitrust responsibility does not extend over the full life of a licensed facility but is limited to two procedural stages -- the construction permit stage and the operating license stage. This limitation on NRC jurisdiction extends to the Director of Nuclear Reactor Regulation as well as to the rest of the NRC. Florida Power & Light Co. (St. Lucie Plant, Unit 1; Turkey Point Plant, Units 3 & 4), ALAB-428, 6 NRC 221, 226-227 (1977). For reactors which have undergone antitrust review in connection with a construction permit application pursuant to Section 105(c) of the Atomic Energy Act, paragraph (c)(2) of that section governs the question of antitrust review at the operating license stage. Antitrust issues may only be pursued at this stage if a finding is made that the licensee's activities have significantly changed subsequent to the construction permit review. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1310 (1977). Where a construction permit antitrust proceeding is under way, the antitrust provisions of the Atomic Energy Act effectively preclude the Commission from instituting a second antitrust hearing in conjunction with an operating license application for the plant. Florida Power and Light Co. (St. Lucie Plant, Unit No. 2), ALAB-661, 14 NRC 1117, 1122 (1981). Where, subsequent to issuance of a construction permit and to termination of the jurisdiction of the Licensing Board which considered the application, new contractual arrangements give rise to antitrust contentions, such contentions cannot be resolved by the original Licensing Board. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582 (1977). The Commission's regulations indicate that the new antitrust concerns should be raised at the operating license stage. The Commission Staff could also initiate show cause proceedings requiring the licensee to demonstrate why antitrust conditions should not be imposed in an amendment to the construction permit. Id. Where the petitioner who raises the antitrust contentions is a co-licensee, 10 CFR § 50.90 permits the petitioner to seek an amendment to the construction permit which would impose antitrust considerations. Id.

1, 2 and 3), ALAB-677, 15 NRC 1387, 1394 (1982); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1210 n.11 (1983).

Parties and counsel must adhere to the highest standards in disclosing all relevant factual information to the Licensing Board. Material facts must be affirmatively disclosed. If counsel have any doubt whether they have a duty to disclose certain facts, they must disclose. An externality such as a threatened lawsuit does not relieve a party of its duty to disclose relevant information and its other duties to the Board. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1778, 1795 (1981); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1210 n.11 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1092 n.8 (1984); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 624 n.9 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986).

If a licensee or applicant has a reasonable doubt concerning the materiality of information in relation to its Board notification obligation or duties under Section 186 of the Atomic Energy Act, 42 U.S.C. § 2236a, the information should be disclosed for the Board to decide its true worth. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984), citing, McGuire, supra, 6 AEC at 625 n.15; and Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 914 (1982), review declined, CLI-83-2, 17 NRC 69 (1983); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-85-6, 21 NRC 447, 461 (1985); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560 (1986).

Before submitting information to the Board pursuant to its notification obligations, a licensee or applicant is entitled to a reasonable period of time for internal review of the documents under consideration. However, an obvious exception exists for information that could have an immediate effect on matters currently being pursued at hearing, or that disclose possible serious safety or environmental problems requiring immediate attention. An applicant or licensee is obliged to report the latter to the NRC Staff without delay in accordance with numerous regulatory requirements. See, e.g., 10 CFR § 50.72. Three Mile Island, supra, 19 NRC at 1359 n.8.

The routine submittal of informational copies of technical materials to a Board is not sufficient to fulfill a party's obligation to notify the Board of material changes in significant matters relevant to the proceeding. Long Island

Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1539 n.23 (1984).

If a Board notification is to serve its intended purpose, it must contain an exposition adequate to allow a ready appreciation of (1) the precise nature of the addressed issue and (2) the extent to which the issue might have a bearing upon the particular facility before the Board. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1114 n.59 (1983), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 710 (1979); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1092 n.8 (1984).

The untimely provision of significant information is an important measure of a licensee's character, particularly if it is found to constitute a material false statement. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 198 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

An applicant's failure to notify a board of significant information may reflect a deficiency in character or competence if such failure is a deliberate breach of a clearly defined duty, a pattern of conduct to that effect, or an indication of bad faith. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 625-626 (1986).

6.6 Early Site Review Procedures

Part 2 of the Commission's regulations has been amended to provide for adjudicatory early site reviews. See 10 CFR § 2.101(a-1), §§ 2.600-2.606. The early site review procedures, which differ from those set forth in Subpart A of 10 CFR Part 52 and Appendix Q to 10 CFR Part 52 (formerly, 10 CFR Part 50), allow for the early issuance of a partial initial decision on site suitability matters.

Early site review regulations provide for a detailed review of site suitability matters by the Staff, an adjudicatory hearing directed toward the site suitability issues proposed by the applicant, and the issuance by a Licensing Board of an early partial decision on site suitability issues. A partial decision on site suitability is not a sufficient basis for the issuance of a construction permit or for a limited work authorization. Neither of these steps can be taken without further action, which includes the full review required by Section 102(2) of the National Environmental Policy Act of 1969, as amended (NEPA), and by 10 CFR Part 51, which implements NEPA. Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223 (1979).

required to provide only reasonable estimates of decommissioning costs and a reasonable assurance of availability of funding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 584-86 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989), second motion for reconsideration denied, CLI-89-7, 29 NRC 395 (1989).

6.9 Generic Issues

A generic issue may be defined as one which is applicable to the industry as a whole (e.g., GESMO) or to all reactors or facilities or to all reactors or facilities of a certain type. Current regulations do not deal specifically with generic issues or the manner in which they are to be addressed.

6.9.1 Consideration of Generic Issues in Licensing Proceedings

As a general rule, a true generic issue should not be considered in individual licensing proceedings but should be handled in rulemaking. See, e.g., Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-128, 6 AEC 399, 400, 401 (1973); Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 55-56 (1973). The Commission had indicated at least that generic safety questions should be resolved in rulemaking proceedings whenever possible. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814-815, clarified, CLI-74-43, 8 AEC 826 (1974). An appellate court has indicated that generic proceedings "are a more efficient forum in which to develop issues without needless repetition and potential for delay." Natural Resources Defense Council v. NRC, 547 F.2d 633 (D.C. Cir. 1976), rev'd and remanded, 435 U.S. 519 (1978), on remand, 685 F.2d 459 (D.C. Cir. 1982), rev'd, 462 U.S. 87 (1983). To the same effect, see Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977). Nevertheless, it appears that generic issues may properly be considered in individual adjudicatory proceedings in certain circumstances.

For example, an Appeal Board has held that Licensing Boards should not accept, in individual licensing cases, any contentions which are or are about to become the subject of general rulemaking but apparently may accept so-called "generic issues" which are not (or are not about to become) the subjects of rulemaking. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-8, 23 NRC 182, 185-86 (1986). Moreover, if an issue is already the subject of regulations, the publication of new proposed rules does not necessarily suspend the effectiveness of the existing rules. Contentions under these circumstances need not be dismissed

unless the Commission has specifically directed that they be dismissed during pendency of the rulemaking procedure. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-1A, 15 NRC 43, 45 (1982); South Texas, supra, 23 NRC at 186. The basic criterion is safety and whether there is a substantial safety reason for litigating the generic issue as the rulemaking progresses. In some cases, such litigation probably should be allowed if it appears that the facility in question may be licensed to operate before the rulemaking can be completed. In such a case, litigation may be necessary as a predicate for required safety findings. In other cases, however, it may become apparent that the rulemaking will be completed well before the facility can be licensed to operate. In that kind of case there would normally be no safety justification for litigating the generic issues, and strong resource management reasons not to litigate. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1809 (1982).

In an operating license proceeding, where a hearing is to be held to consider other issues, Licensing Boards are enjoined, in the absence of issues raised by a party, to determine whether the Staff's resolution of various generic safety issues applicable to the reactor in question is "'at least plausible and...if proven to be of substance ...adequate to justify operation.'" Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 311 (1979). See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-5, 23 NRC 89, 90 (1986).

A Licensing Board must refrain from scrutinizing the substance of particular explanations in the Safety Evaluation Report (SER) justifying operation of a plant prior to the resolution of an unresolved generic safety issue. The Board should only look to see whether the generic issue has been taken into account in a manner that is at least plausible and that, if proven to be of substance, would be adequate to justify operation. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1559 (1982), citing, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978).

As a matter of policy, most evidentiary hearings in NRC proceedings are conducted in the general vicinity of the site of the facility involved. In generic matters, however, when the hearing encompasses distinct, geographically separated facilities and no relationship exists between the highly technical questions to be heard and the particular features of those facilities or their sites, the governing consideration in determining the place of hearing should be the convenience of the participants in the hearing. Philadelphia Electric Co.

A separate environmental impact statement is not required for a Special Nuclear Material (SNM) license. When an environmental impact statement has been done for an operating license application, including the delivery of fuel, there is no need for each component to be analyzed separately on the assumption that a plant may never be licensed to operate. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-38, 18 NRC 61, 65 (1983).

A supplemental Environmental Impact Statement (EIS) or an Environmental Impact Appraisal (EIA) does not have to be prepared prior to the granting of authorization for issuance of a low-power license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 634 (1983).

When the environmental effects of full-term, full-power operation have already been evaluated in an EIS, a licensing action for limited operation under a 10 CFR § 50.57(c) license that would result in lesser impacts need not be accompanied by an additional impact statement or an impact appraisal. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226 (1981), and ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983).

It is well-established NEPA law that separate environmental statements are not required for intermediate, implementing steps such as the issuance of a low-power license where an EIS has been prepared for the entire proposed action and there have been no significant changed circumstances. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1326 (1984), on certification from, ALAB-769, 19 NRC 995 (1984). See Environmental Defense Fund, Inc. v. Andrus, 619 F.2d 1368, 1377 (1980).

The principle stated in the Shoreham and Diablo Canyon cases, supra, is applicable even where an applicant may begin low-power operation and it is uncertain whether the applicant will ever receive a full-power license. In Shoreham, the fact that recent court decisions in effect supported the refusal by the State and local governments to participate in the development of emergency plans was determined not to be a significant change of circumstances which would require the preparation of a supplemental environmental impact statement to assess the costs and benefits of low-power operation. Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1589 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 258-59 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 418-19 (1989).

Environmental review of the storage of spent fuel in reactor facility storage pools for at least 30 years beyond the expiration of reactor operating licenses is not required based upon the Commission's generic determination that such storage will not result in significant environmental impacts. Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 580 (1988), citing, 10 CFR § 51.23.

An environmental impact statement need not be prepared with respect to the expansion of the capacity of a spent fuel pool if the environmental impact appraisal prepared for the project had an adequate basis for concluding that the expansion of a spent fuel pool would not cause any significant environmental impact. Consumers Power Co. (Big Rock Point Plant), LBP-82-78, 16 NRC 1107 (1982).

When a licensee seeks to withdraw an application to expand its existing low-level waste burial site, the granting of the request to withdraw does not amount to a major Federal action requiring a NEPA review. This is true even though, absent an expansion, the site will not have the capacity to accept additional low-level waste. Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 161-163 (1980).

It must at least be determined that there is significant new information before the need for a supplemental environmental statement can arise. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 49 (1983), citing, Warm Spring Task Force v. Gribble, 621 F.2d 1017, 1023-36 (9th Cir. 1981).

A supplemental environmental statement need not necessarily be prepared and circulated even if there is new information. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 49-50 (1983), citing, California v. Watt, 683 F.2d 1253, 1268 (9th Cir. 1982). See 40 CFR § 1502.9(c).

6.15.1.2 Scope of EIS

The scope of the environmental statement or appraisal must be at least as broad as the scope of the action being taken. Duke Power Company (Oconee/McGuire), LBP-80-28, 12 NRC 459, 473 (1980).

An agency may authorize an individual, sufficiently distinct portion of an agency plan without awaiting the completion of a comprehensive environmental impact statement on the plan so long as the environmental treatment under NEPA of the individual portion is adequate and approval of the individual portion does not commit the agency to approval of other portions of the plan. Kerr-McGee Corporation (West Chicago

Rare Earths Facility), CLI-82-2, 15 NRC 232, 265 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983); Peshlakai v. Duncan, 476 F. Supp. 1247, 1260 (D.D.C. 1979); and Conservation Law Foundation v. GSA, 427 F. Supp. 1369, 1374 (D.R.I. 1977).

In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), the U.S. Supreme Court embraced the doctrine that environmental impact statements need not discuss the environmental effects of alternatives which are "deemed only remote and speculative possibilities." The same has been held with respect to remote and speculative environmental impacts of the proposed project itself. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75 (1981); Public Service Electric & Gas Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38 (1979); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-705, 16 NRC 1733, 1744 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), quoting NRDC v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696-97 & n.12 (1985). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287, 293-94 (1987). Moot or farfetched alternatives need not be considered under NEPA. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1992 (1982), citing, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Natural Resources Defense Council v. Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).

The scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-685 (1981), citing, Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981).

When major Federal actions are involved, if related activities taken abroad have a significant effect within the U.S., those effects are within NEPA's ambit. However, remote and speculative possibilities need not be considered under NEPA. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-562, 10 NRC 437, 446 (1979).

6.15.2 Role of EIS

A NEPA analysis of the Government's proposed licensing of private activities is necessarily more narrow than a NEPA analysis of proposed activities which the Government will conduct itself. The former analysis should consider issues which could preclude issuance of the license or which could be affected by license conditions. Kleppe v. Sierra Club, 427 U.S. 390 (1976). It should focus on the proposal submitted by the private party rather than on broader concepts. It must consider other alternatives, however, even if the agency itself is not empowered to order that those alternatives be undertaken. Were there no distinction in NEPA standards between those for approval of private actions and those for Federal actions, NEPA would, in effect, become directly applicable to private parties. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

The impact statement does not simply "accompany" an agency recommendation for action in the sense of having some independent significance in isolation from the deliberative process. Rather, the impact statement is an integral part of the Commission's decision. It forms as much a vital part of the NRC's decisional record as anything else, such that for reactor licensing, for example, the agency's decision would be fundamentally flawed without it. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 275 (1980).

Where an applicant has submitted a specific proposal, the statutory language of NEPA's Section 102(2)(C) only requires that an environmental impact statement be prepared in conjunction with that specific proposal, providing the Staff with a "specific action of the known dimensions" to evaluate. A single approval of a plan does not commit the agency to subsequent approvals; should contemplated actions later reach the stage of actual proposals, the environmental effects of the existing project can be considered when preparing the comprehensive statement on the cumulative impact of the proposals. Offshore Power Systems (Floating Nuclear Power Plants), LBP-79-15, 9 NRC 653, 658-660 (1979).

6.15.3 Circumstances Requiring Redrafting of Final Environmental Statement (FES)

In certain instances, an FES may be so defective as to require redrafting, recirculation for comment and reissuance in final form. Possible defects which could render an FES inadequate are numerous and are set out in a long series of NEPA cases in the Federal Courts. See, e.g., Brooks v. Volpe, 350 F. Supp. 269 (W.D. Wash. 1972) (FES inadequate when it

costs do not tip the balance against the plant and that there is reasonable assurance that an applicant can pay for them. Susquehanna, supra, 9 NRC at 314.

6.15.6.1.1 Cost of Withdrawing Farmland from Production

(SEE 3.7.3.5.1)

6.15.6.1.2 Socioeconomic Costs as Affected by Increased Employment and Taxes from Proposed Facility

Increased employment and tax revenue cannot be included on the benefit side in striking the ultimate NEPA cost-benefit balance for a particular plant. But the presence of such factors can certainly be taken into account in weighing the potential extent of the socioeconomic impact which the plant might have upon local communities. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 509 n.58 (1978).

6.15.7 Consideration of Class 9 Accidents in an Environmental Impact Statement

The ECCS Final Acceptance Criteria as set forth in 10 CFR § 50.46 and Appendix K to 10 CFR Part 50 assume that ECCS will operate during an accident. On the other hand, Class 9 accidents postulate the failure of the ECCS. Thus, on its face, consideration of Class 9 accidents would appear to be a challenge to the Commission's regulations. However, the Commission has squarely held that the regulations do not preclude the use of inconsistent assumptions about ECCS failure for other purposes. Thus, the prohibition of challenges to the regulations in adjudicatory proceedings does not preclude the consideration of Class 9 accidents and a failure of ECCS related thereto in environmental impact statements and proceedings thereon. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but not land based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

In proceedings instituted prior to June, 1980, serious (Class 9) accidents need be considered only upon a showing of "special circumstances." Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 529

(1982); 45 Fed. Reg. 40101 (June 13, 1980). The subsequent Commission requirement that NEPA analysis include consideration of Class 9 accidents (45 Fed. Reg. 40101) cannot be equated with a health and safety requirement. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1664 (1982). The fact that a nuclear power plant is located near an earthquake fault and in an area of known seismic activity does not constitute a special circumstance. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 826-828 (1984), affirming in part (full power license for Unit 1), LBP-82-70, 16 NRC 756 (1982). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795-796 (1983).

Absent new and significant safety information, Licensing Boards may not act on proposals concerning Class 9 accidents in operating reactors. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 870 (1986), citing, 50 Fed. Reg. 32,144, 32,144-45 (August 8, 1985). Licensing Boards may not admit contentions which seek safety measures to mitigate or control the consequences of Class 9 accidents in operating reactors. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 846-47 (1987), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 30-31 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440, 443-45, 445 (1988), reconsidered, LBP-89-6, 29 NRC 127, 132-35 (1989). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 54 (1989), aff'd on other grounds, ALAB-915, 29 NRC 427 (1989). However, pursuant to their NEPA responsibilities, Licensing Boards may consider the risks of such accidents. Vermont Yankee, supra, 25 NRC at 854-55, aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 31 n.28 (1987), reconsid. denied, ALAB-876, 26 NRC 277, 285 (1987). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-89-6, 29 NRC 127, 132-35 (1989), citing, Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988) and the NRC Severe Accident Policy Statement, 50 Fed. Reg. 32138 (Aug. 8, 1985).

In Diablo Canyon and Vermont Yankee, supra, the licensees applied for license amendments which would permit the expansion of each facility's spent fuel pool storage capacity. The intervenors submitted contentions, based on hypothetical accident scenarios, and requested the preparation of environmental impact statements. The Appeal Board rejected the contentions after determining that the hypothetical accident scenarios were based on remote and speculative events, and thus were Class 9 or beyond design-basis accidents which could not provide a proper basis for admission of the contentions.

Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 956 n.7 (1982), citing, 10 CFR § 50.40(d); 10 CFR § 50.57; Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 44 (1978), remanded on other grounds sub nom., Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979).

Licensing Boards lack the power to direct the Staff in the performance of its independent responsibilities and, under the Commission's regulatory scheme, Boards cannot direct the Staff to suspend review of an application, preparation of an environmental impact statement or work, studies or analyses being conducted or planned as part of the Staff's evaluation of an application. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 278-79 (1978).

The Staff produces, among other documents, the Safety Evaluation Report (SER) and the Draft and Final Environmental Statements (DES and FES). The studies and analyses which result in these reports are made independently by the Staff, and Licensing Boards have no rule or authority in their preparation. The Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-56, 18 NRC 45, 48-49 (1983), citing, New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 865 n.52 (1984); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985), citing, Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

Although the establishment of a local public document room is an independent Staff function, the presiding officer in an informal proceeding has directed the Staff to establish such a room in order to comply with the requirements of proposed regulations which had been made applicable to the proceeding. However, the presiding officer acknowledged that he lacked the authority to specify the details of the room's operation. Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-88-5, 27 NRC 241, 243-44 & n.1 (1988).

Although the Licensing Boards and the NRC Staff have independent responsibilities, they are "partners" in implementation of the Commission's policy that decisionmaking should be "both sound and timely," and thus they must coordinate

their operations in order to achieve this goal. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 203 (1978).

In an operating license proceeding (with the exception of certain NEPA issues), the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor thus is free to challenge directly an unresolved generic safety issue by filing a proper contention but it may not proceed on the basis of allegations that the Staff has somehow failed in its performance. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985).

The general rule that the applicant carries the burden of proof in licensing proceedings does not apply with regard to alternate site considerations. For alternate sites, the burden of proof is on the Staff and the applicant's evidence in this regard cannot substitute for an inadequate analysis by the Staff. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 794 (1978).

The Staff plays a key role in assessing an applicant's qualifications. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 34 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

The Staff is assumed to be fair and capable of judging a matter on its merits. Nuclear Engineering Co., Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989), aff'd on other grounds, ALAB-918, 29 NRC 473 (1989).

When conducting its review of the issues, the Staff should acknowledge differences of opinion among Staff members and give full consideration to views which differ from the official Staff position. Such discussion can often contribute to a more effective treatment and resolution of the issues. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-803, 21 NRC 575, 580-582 n.6 (1985).

An early appraisal of an applicant's capability does not foreclose the Staff from later altering its conclusions. Such an early appraisal would aid the public and the Commission in seeing whether a hearing is warranted. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 33-34 (1980), reconsidered, ALAB-

581, 11 NRC 233 (1980), modified, CLI-80-12, 11 NRC 514 (1980).

6.16.1.1 Staff Demands on Applicant or Licensee

While the Commission, through the Regulatory Staff, has a continuing duty and responsibility under the Atomic Energy Act of 1954 to assure that applicants and licensees comply with the applicable requirements, Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 627 (1973), the Staff may not require an applicant to do more than the regulations require without a hearing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Power Station), ALAB-191, 7 AEC 431, 445, 447 n.32 (1974).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but not land based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

6.16.1.2 Staff Witnesses

Except in extraordinary circumstances, a Licensing Board may not compel the Staff to furnish a particular named individual to testify - i.e., the Staff may select its own witnesses. 10 CFR § 2.720(h)(2)(i). However, once a certain individual has appeared as a Staff witness, he may be recalled and compelled to testify further. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 391 (1974). A Board may require Staff witnesses to update their previous testimony on a relevant issue in light of new analyses and information which have been developed on the same subject. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1094-1095 n.13 (1984).

The Commission's rules provide that the Executive Director for Operations generally determines which Staff witnesses shall present testimony. An adjudicatory board may nevertheless order other NRC personnel to appear upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-715, 17 NRC 102, 104-05 (1983), citing, 10 CFR § 2.720(h)(2)(i); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 500-501 (1985) (Mere disagreement among NRC Staff members is not an exceptional circumstance); Carolina Power and Light Co. and North Carolina

Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986). See generally, Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980).

6.16.1.3 Post Hearing Resolution of Outstanding Matters by the Staff

As a general proposition, issues should be dealt with in the hearings and not left over for later, and possibly more informal, resolution. The post hearing approach should be employed sparingly and only in clear cases, for example, where minor procedural deficiencies are involved. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103 (1983), citing, Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951 n.8, 952 (1974); accord, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 736-37 (1975); Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 210 (1984), rev'd on other grounds, ALAB-793, 20 NRC 1591, 1627 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494 (1986).

On the other hand, with respect to emergency planning, the Licensing Board may accept predictive findings and post hearing verification of the formulation and implementation of emergency plans. Byron, supra, 19 NRC at 212, 251-52, citing, Waterford, supra, 17 NRC at 1103-04; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1600, 1601 (1985); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494-95 (1986).

Completion of the minor details of emergency plans are a proper subject for post hearing resolution by the NRC Staff. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61-62 (1984), citing, Waterford, supra, 17 NRC 1076.

A Licensing Board may refer minor matters which in no way pertain to the basic findings necessary for issuance of a license to the Staff for post hearing resolution. Such referral should be used sparingly, however. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951-52 (1974); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984). Since delegation of open

matters to the Staff is a practice frowned upon by the Commission and the Appeal Board, a Licensing Board properly decided to delay issuing a construction permit until it had reviewed a loan guarantee from REA rather than delegating that responsibility to the Staff for post hearing resolution. Marble Hill, supra.

A Licensing Board has delegated to the Staff responsibility for reviewing and approving changes to a licensee's plan for the design and operation of an on-site waste burial project. The Board believed that such a delegation was appropriate where the Board had developed a full and complete hearing record, resolved every litigated issue, and reviewed the project plan which the licensee had developed, at the Board's request, to summarize and consolidate its testimony during the hearing concerning the project. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-87-11, 25 NRC 287, 298 (1987).

The mere pendency of confirmatory Staff analyses regarding litigated issues does not automatically foreclose Board resolution of those issues. The question is whether the Board has adequate information, prior to the completion of the Staff analyses, on which to base its decision. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1171 (1984).

In order to conduct an expeditious hearing, without having to wait for the completion of confirmatory tests by a licensee and analysis of the test results by the Staff, a Licensing Board may decide to conduct a hearing on all matters ripe for adjudication and to grant an intervenor an opportunity to request an additional hearing limited to matters, within the scope of the admitted contentions, which arise subsequent to the closing of the record. The intervenor must be given timely access to all pertinent information developed by the licensee and the Staff after the close of the hearing with respect to the confirmatory tests. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 560-61 (1986), citing, Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-73-35, 6 AEC 861, 865 (1973), aff'd, ALAB-226, 8 AEC 381, 400 (1974). Although the intervenor will not be required to meet the usual standards for reopening a record, the intervenor must indicate in the motion to reopen that the new test data and analyses are so significant as to change the result of the prior hearing. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-17, 23 NRC 792, 797 (1986).

The Licensing Board must determine that the analyses remaining to be performed will merely confirm earlier Staff findings regarding the adequacy of the plant. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2),

LBP-85-37, 22 NRC 434, 436 & n.2, 440 (1985), citing, Consolidated Edison Co. of New York (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951 (1974), which cites, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), CLI-73-4, 6 AEC 6 (1973) (the mechanism of post hearing findings is not to be used to provide a reasonable assurance that a facility can be operated without endangering the health and safety of the public); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814 (1983) (post hearing procedures may be used for confirmatory tests); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-811, 21 NRC 1622 (1985) (once a method of evaluation had been used to confirm that one of two virtually identical units had met the standard of a reasonable assurance of safety, it was acceptable to exclude from hearings the use of the same evaluation method to confirm the adequacy of the second unit).

Staff analyses which are more than merely confirmatory because a further evaluation is necessary to demonstrate compliance with regulatory requirements in light of negative findings of the Licensing Board regarding certain equipment and that relate to contested issues should be retained with the Board's jurisdiction until a satisfactory evaluation is produced. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 79-80 (1986).

At the same time, it is entirely appropriate for the Staff to resolve matters not at issue in an operating license or amendment proceeding. In such proceedings, once a Licensing Board has resolved any contested issues and any issues which it raises sua sponte, the decision as to all other matters which need be considered prior to issuance of an operating license is the responsibility of the Staff alone. Consolidated Edison Co. of N.Y., Inc. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, 209 n.7 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-854, 24 NRC 783, 790-91 (1986). The Licensing Board is neither required nor expected to pass upon all items which the Staff must consider before the operating license is issued. Indian Point, supra, 3 NRC at 190.

6.16.2 Status of Staff Regulatory Guides

Regulatory guides promulgated by the Staff are not regulations, are subject to question in the course of adjudicatory hearings, and, when challenged, are to be regarded merely as the views of one party which cannot serve as evidence of their own validity but must be supported by other sources. Porter County Chapter of the Izaak Walton League of America v. AEC, 633 F.2d 1011 (7th Cir. 1976); Vermont Yankee Nuclear Power

Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 439, rev'd on other gnds., CLI-74-40, 8 AEC 809 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-217, 8 AEC 61, 68 (1974); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 28 n.76 (1974); Consolidated Edison Co. of N.Y., Inc. (Indian Point, Unit 2), ALAB-188, 7 AEC 323, 333 n.42, rev'd in part on other gnds., CLI-74-23, 7 AEC 947 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 174 n.27 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 737 (1985). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 260-61 (1987); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 463-64 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988). Nevertheless, regulatory guides are entitled to considerable prima facie weight. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974), clarified as to other matters, CLI-74-43, 8 AEC 826 (1974).

Nonconformance with regulatory guides or Staff positions does not mean that General Design Criteria (G.D.C.) are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

While it is clear that regulatory guides are not regulations, are not entitled to be treated as such, need not be followed by applicants, and do not purport to represent the only satisfactory method of meeting a specific regulatory requirement, they do provide guidance as to acceptable modes of conforming to specific regulatory requirements. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161, 1169 (1984). Indeed, the Commission itself has indicated that conformance with regulatory guides is likely to result in compliance with specific regulatory requirements, though nonconformance with such guides does not mean noncompliance with the regulations. Petition for Emergency & Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978).

The criteria described in NUREG-0654 regarding emergency plans, referenced in NRC regulations, were intended to serve solely as regulatory guidance, not regulatory requirements. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other

grounds, CLI-83-22, 18 NRC 299 (1983). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 710 (1985); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 367-68 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 487 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 238 (1986); Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 544-45 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988).

In absence of other evidence, adherence to NUREG-0654 may be sufficient to demonstrate compliance with the regulatory requirements of 10 CFR § 50.47(b). However, such adherence is not required, because regulatory guides are not intended to serve as substitutes for regulations. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161 (1984).

6.16.3 Status of Staff Position and Working Papers

Staff position papers have no legal significance for any regulatory purpose and are entitled to less weight than an adopted regulatory guide. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244 (1974). Similarly, an NRC Staff working paper or draft report neither adopted nor sanctioned by the Commission itself has no legal significance for any NRC regulatory purpose. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397 (1976); Consolidated Edison Co. of N.Y., Inc. (Indian Point, Unit 2), ALAB-209, 7 AEC 971, 973 (1974). But see Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 857-60 (1987) (the Licensing Board admitted contentions that questioned the

sufficiency of an applicant's responses to an NRC Staff guidance document which provided guidelines for Staff review of spent fuel pool modification applications), aff'd in part and rev'd in part, ALAB-869, 26 NRC 13, 34 (1987), reconsid. denied, ALAB-876, 26 NRC 277 (1987).

Nonconformance with regulatory guides or Staff positions does not mean that General Design Criteria are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency & Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

6.16.4 Status of Standard Review Plan

Where the applicant used criteria "required" by the Staff's Standard Review Plan (NUREG-75/087, § 2.2.3) in determining the probability of occurrence of a postulated accident, it is not legitimate for the Staff to base its position on a denigration of the process which the Staff itself had promulgated. Public Service Electric and Gas Company, Atlantic City Electric Company (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 29 (1979).

6.16.5 Conduct of NRC Employees

(RESERVED)

6.17 Orders of Licensing and Appeal Boards

6.17.1 Compliance with Board Orders

Compliance with orders of an NRC adjudicatory board is mandatory unless such compliance is excused for good cause. Thus, a party may not disregard a board's direction to file a memorandum without seeking leave of the board after setting forth good cause for requesting such relief. Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 190-91 (1978). Similarly, a party seeking to be excused from participation in a prehearing conference ordered by the board should present its justification in a request presented before the date of the conference. Seabrook, supra, 8 NRC at 191.

A Licensing Board is not expected to sit idly by when parties refuse to comply with its orders. Pursuant to 10 CFR § 2.718, a Licensing Board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. Furthermore, pursuant to 10 CFR § 2.707, the refusal of a party to comply with a Board order relating to its appearance at a proceeding constitutes a default for which

a Licensing Board may make such orders in regard to the failure as are just. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

A party may not simply refuse to comply with a direct Board order, even if it believes the Board decision to have been based upon an erroneous interpretation of the law. A Licensing Board is to be accorded the same respect as a court of law. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1930 and n.5 (1982). See 10 CFR § 2.713(a).

When an issue is admitted into a proceeding in an order of the Board, it becomes part of the law of that case. Parties may use the prior history of a case to interpret ambiguities in a Board order, but no party may challenge the precedential authority of a Board's decision other than in a timely motion for reconsideration. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-18, 17 NRC 501, 504 (1983).

6.18 Precedent and Adherence to Past Agency Practice

Application of the "law of the case" doctrine is a matter of discretion. When an administrative tribunal finds that its declared law is wrong and would work an injustice, it may apply a different rule of law in the interests of settling the case before it correctly. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 260 (1978).

An Appeal Board does not give stare decisis effect to affirmation of Licensing Board conclusions on legal issues not brought to it by way of an appeal. Duke Power Company (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

A determination of fact in an adjudicatory proceeding which is necessarily grounded wholly in a nonadversary presentation is not entitled to be accorded generic effect, even if the determination relates to a seemingly generic matter rather than to some specific aspect of the facility in question. Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 3 & 5), ALAB-485, 7 NRC 986, 988 (1978).

Because the law does not require consistency in treatment of two parties in different circumstances, the Staff does not violate principles of fairness in considering Class 9 accidents in environmental impact statements for floating but not land-based plants. The Staff need only provide a reasonable explanation why the differences justify a departure from past agency practice. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978).

6.19 Pre-Permit Activities

NEPA and the Commission's implementing regulations proscribe environmentally significant construction activities associated with a nuclear plant, including activities beyond the site boundary, without prior Commission approval. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977). A "site" in this context includes land where the proposed plant is to be located and its necessary accouterments, including transmission lines and access ways. Id. The Commission may authorize certain site-related work prior to issuance of a construction permit pursuant to 10 CFR § 50.10(c) and (e). 10 CFR § 50.10(c), which broadly prohibits any substantial action which would adversely affect the environment of the site prior to Commission approval, can clearly be interpreted to bar, for example, road and railway construction leading to the site, at least where substantial clearing and grading is involved. Wolf Creek, supra.

Commission regulations provide means for an applicant to obtain prelicensing authorization to engage in certain specified construction activities. These include obtaining an exemption from licensing requirements under 10 CFR § 50.12, pleading special circumstances under 10 CFR § 2.758, and demonstrating that proposed activities will have only de minimus or "trivial" environmental effects. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293 (1976); Washington Public Power Supply System (Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). In those situations where the Commission does approve offsite (through an LWA or CP) or pre-permit (through an LWA) activities, conditions may be imposed to minimize adverse impacts. Kansas Gas & Electric Co., CLI-77-1, 5 NRC 1 (1977).

The limited work authorization procedure under 10 CFR § 50.10(e)(1) and (2) ("LWA-1") and the 10 CFR § 50.12(b) exemption procedure are independent avenues for applicants to begin site preparation in advance of receiving a construction permit. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 423 (1982).

A request for an exemption from any Commission regulation in 10 CFR Part 50, including the general prohibition on commencement of construction in 10 CFR § 50.10(c), may be granted under 10 CFR § 50.12(a). United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 418 (1982).

The Commission may apply 10 CFR § 50.12 to a first of a kind project. There is no indication in 10 CFR § 50.12 that exemptions for conduct of site preparation activities are to be confined to typical, commercial light water nuclear power reactors. Commission practice has been to consider each exemption request on a case-by-case basis under the applicable criteria in the regulations. There is no

indication in the regulations or past practice that an exemption can be granted only if an LWA-1 can also be granted or only if justified to meet electrical energy needs. Clinch River, supra, CLI-82-23, 16 NRC at 419.

In determining whether to grant an exemption pursuant to 10 CFR § 50.12 to allow pre-permit activities the Commission considers the totality of the circumstances and evaluates the exigency of the circumstances in that overall determination. Exigent circumstances have been found where: (1) further delay would deny the public currently needed benefits that would have been provided by timely completion of the facility but were delayed due to external factors, and would also result in additional otherwise avoidable costs; and (2) no alternative relief has been granted (in part) or is imminent. The Commission will weigh the exigent circumstances offered to justify an exemption against the adverse environmental impacts associated with the proposed activities. Where the environmental impacts of the proposed activities are insignificant, but the potential adverse consequences of delay may be severe and an exemption will mitigate the effects of that delay, the case is strong for granting an exemption that will preserve the option of realizing those benefits in spite of uncertainties in the need for prompt action. United States Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4-6 (1983), citing, Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-22, 7 AEC 938 (1974); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-76-20, NRC 476 (1976); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977).

Use of the exemption authority under 10 CFR § 50.12 has been made available by the Commission only in the presence of exceptional circumstances. A finding of exceptional circumstances is a discretionary administrative finding which governs the availability of an exemption. A reasoned exercise of such discretion should take into account the equities of each situation. These equities include the stage of the facility's life, any financial or economic hardships, any internal inconsistencies in the regulation, the applicant's good-faith effort to comply with the regulation from which the exemption is sought, the public interest in adherence to the Commission's regulations, and the safety significance of the issues involved. These equities do not, however, apply to the requisite findings on public health and safety and common defense and security. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1156 n.3 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1376-1377 (1984). The costs of unusually heavy and protracted litigation may be considered in evaluating financial or economic hardships as an equity in assessing the propriety of an exemption. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1378-1379 (1984).

The public interest criterion for granting an exemption from 10 CFR § 50.10 under 10 CFR § 50.12(b) is a stringent one: exemptions of this sort are to be granted sparingly and only in extraordinary circumstances. Clinch River, supra, 16 NRC at 425, 426, citing, Washington Public Power Supply System (WPPSS Nuclear Power Projects Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977).

6.19.1 Pre-LWA Activity

Unlike authorization of activities under an LWA, pre-LWA activities may be authorized prior to issuance of a partial initial decision on environmental issues. Washington Public Power Supply System (Nuclear Projects 3 & 5), LBP-77-15, 5 NRC 643 (1977). Permission to commence activities preparatory to construction in advance of an LWA can be sought by three different methods. One method is to seek a determination by the Licensing Board that the proposed activities are not barred by 10 CFR § 50.10(c) because their impacts are de minimus (the so-called "trivial impact" standard) or minor and fully redressible.

This is the preferred method when the issues involved are essentially factual. The second method is to proceed in accordance with 10 CFR § 2.758(b) under which a waiver or exemption may be obtained from the Commission if the Board certifies the issue presented in accordance with 10 CFR § 2.758(d). This method should be used when an interpretation or application of a regulation to particular facts is called into question. The third method is to seek an exemption from the Commission under 10 CFR § 50.12. The Commission has stated that this method is extraordinary and emphasized that it should be used sparingly. Washington Public Power Supply System (WPPSS Nuclear Projects 3 & 5), CLI-77-11, 5 NRC 719, 723 (1977).

10 CFR § 50.10(c) permits only that pre-LWA activity with so trivial an impact that it can be safely said that no conceivable harm would have been done to any of the interests sought to be protected by NEPA should the application for the facility ultimately be denied. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-331, 1 NRC 6 (1976), aff'd in part, CLI-77-1, 5 NRC 1 (1977). For purposes of authorization of pre-LWA activity under 10 CFR § 50.10(c), redressibility is a factor to be considered. Where the potential damage from the pre-LWA activity is fully redressible and the applicant is willing to commit to restoration of the site, a Licensing Board can permit the applicant to proceed accordingly. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1 (1977).

The governing standard with regard to pre-LWA activity is "trivial impact," not zero impact. Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 & 2), ALAB-446,

6 NRC 870 (1977), reversing in part, LBP-77-61, 6 NRC 674 (1977). The fact that certain activities would entail the removal of some trees which could not be replaced within a short span of time does not necessarily mean that such activities cannot be conducted prior to issuance of an LWA. Id.

The proscriptions in the Wild and Scenic River Act against any form of assistance by a Federal agency in the construction of a water resource project which might have a direct and adverse impact on a river designated under the Act precludes the granting by a Licensing Board of pre-LWA authority for constructing a proposed sewer line to service a proposed nuclear plant where the nuclear plant itself is considered to be a "water resource project." Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 & 2), LBP-77-61, 6 NRC 674, 678 (1977), rev'd in part, ALAB-446, 6 NRC 870 (1977).

6.19.2 Limited Work Authorization

Under 10 CFR § 50.10(e), the Commission may authorize certain site-related pre-permit work which is more substantial than that permitted under 10 CFR § 50.10(c). Prior to granting such "limited work authorization" (LWA), the presiding officer in the proceeding must have made certain environmental findings and, in some instances, health and safety findings. See 10 CFR § 50.10(e)(1) through (3). Notice to all parties of the proposed action is necessary. Carolina Power & Light Co. (Shearon-Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-184, 7 AEC 229 (1974).

A limited work authorization allows preliminary construction work to be undertaken at the applicant's risk, pending completion of later hearings covering radiological health and safety issues. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 473 n.1 (1982), citing, 10 CFR § 50.10(e)(1); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 778 (1979).

The cost-benefit analysis which must be performed prior to issuance of an LWA requires a determination as to whether construction of certain site-related facilities should be permitted prior to issuance of a construction permit but subsequent to a determination resulting from a cost-benefit analysis that the plant should be built. The cost-benefit analysis relevant to issuance of an LWA has been handled generically under 10 CFR § 51.52(b). Thus, the cost-benefit balance required for an LWA need not be specifically performed for each LWA. Rather, once a Licensing Board has made all the findings on environmental and site suitability matters required by Section 51.52(b) and (c), the cost-benefit balancing

implicit in those regulations has automatically been satisfied. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-380, 5 NRC 572, 579-80 (1977).

Applicants are not required to have every permit in hand before a Limited Work Authorization can be granted. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 123, 129 (1978).

The Board may conduct a separate hearing and issue a partial decision on issues pursuant to NEPA, general site suitability issues specified by 10 CFR § 50.10(e), and certain other possible issues for a limited work authorization. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), LBP-83-8, 17 NRC 158, 161 (1983), vacated as moot, ALAB-755, 18 NRC 1337 (1983).

Although the LWA and construction permit aspects of the case are simply separate phases of the same proceeding, Licensing Boards have the authority to regulate the course of the proceeding and limit an intervenor's participation to issues in which it is interested. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 492 (1984), citing, 10 CFR §§ 2.718 and 2.714(e) and (f).

6.19.2.1 LWA Status Pending Remand Proceedings

It has been held that, where a partial initial decision on a construction permit is remanded by an Appeal Board to the Licensing Board for further consideration, an outstanding LWA may remain in effect pending resolution of the CP issues provided that little consequential environmental damage will occur in the interim. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-335, 3 NRC 830 (1976). On appeal of this decision, however, the Court of Appeals stayed the effectiveness of the LWA pending alternate site consideration by the Licensing Board on the grounds that it is anomalous to allow construction to take place at one site while the Board is holding further hearings on other sites. Hodder v. NRC, 589 F.2d 1115 (D.C. Cir. 1978).

6.20 Regulations

The proper test of the validity of a regulation is whether its normal and fair interpretation will deny persons their statutory rights. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983), citing, American Trucking Association v. United States, 627 F.2d 1313, 1318-19 (D.C. Cir. 1980).

6.20.1 Compliance with Regulations

All participants in NRC adjudicatory proceedings, whether lawyers or laymen, have an obligation to familiarize themselves with the NRC Rules of Practice. The fact that a party may be a newcomer to NRC proceedings will not excuse that party's noncompliance with the rules. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 467 n.24 (1985), citing, Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980), which quotes, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, 12 NRC 172, 173 n.1 (1980).

Applicants and licensees must, of course, comply with the Commission's regulations, but the Staff may not compel an applicant or licensee to do more than the regulations require without a hearing. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431, 445, 447 n.32 (1974).

The power to grant exemptions from the regulations has not been delegated to Licensing Boards and such Boards, therefore, lack the authority to grant exemptions. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977).

6.20.2 Commission Policy Statements

A Commission policy statement is binding upon the Commission's adjudicatory boards. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1732 n.9 (1982), citing, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 51 (1978), remanded on other grounds sub nom., Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 695 (1985), citing, Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 82-83 (1974).

6.20.3 Regulatory Guides

Staff regulatory guides are not regulations and do not have the force of regulations. When challenged by an applicant or licensee, they are to be regarded merely as the views of one party, although they are entitled to considerable prima facie weight. See Section 6.16.2 and cases cited therein. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 and n.10 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile

Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

In the absence of other evidence, adherence to regulatory guidance may be sufficient to demonstrate compliance with regulatory requirements. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-698, 16 NRC 1290, 1299 (1982) (rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983)), citing, Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406-407 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983). Generally speaking, however, such guidance is treated simply as evidence of legitimate means for complying with regulatory requirements, and the Staff is required to demonstrate the validity of its guidance if it is called into question during the course of litigation. Three Mile Island, supra, 16 NRC at 1299, citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 811 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 737 (1985).

Nonconformance with regulatory guides or Staff positions does not mean that the General Design Criteria (G.D.C.) are not met; applicants are free to select other methods to comply with the G.D.C. The G.D.C. are intended to provide engineering goals rather than precise tests by which reactor safety can be gauged. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978).

Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 616 (1983), citing, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), rev'd in part on other grounds, CLI-83-22, 18 NRC 299 (1983).

While it is clear that regulatory guides are not regulations, are not entitled to be treated as such, need not be followed by applicants, and do not purport to represent the only satisfactory method of meeting a specific regulatory requirement, they do provide guidance as to acceptable modes of conforming to specific regulatory requirements. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977); Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778 (1981). Indeed, the Commission itself has indicated that conformance with regulatory guides is likely to result in compliance with specific regulatory requirements, though, as stated previously, nonconformance

with such guides does not mean noncompliance with the regulations. Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978).

Licensees can be required to show they have taken steps to provide equivalent or better measures than called for in regulatory guides if they do not, in fact, comply with the specific requirements set forth in the guides. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-82-105, 16 NRC 1629, 1631 (1982).

6.20.4 Challenges to Regulations

In Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), Comm'n's Mem. & Order, 2 CCH At. Eng. L. Rep. § 11,578.02 (1969), the Commission recognized the general principle that regulations are not subject to amendment in individual adjudicatory proceedings. Under that ruling, now supplanted by 10 CFR § 2.758, challenges to the regulations would be permitted in only three limited situations:

(1) where the regulation was claimed to be outside the Commission's authority;

(2) where it was claimed that the regulation was not promulgated in accordance with applicable procedural requirements;

(3) in the case of radiological safety standards, where it was claimed that particular standards were not within the broad discretion given to the Commission by the Atomic Energy Act to establish.

The Commission directed Licensing Boards to certify the question of the validity of any challenge to it prior to rendering any initial decision. Thus, the Commission adheres to the fundamental principle of administrative law that its rules are not subject to collateral attack in adjudicatory proceedings. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

No challenge of any kind is permitted, in an adjudicatory proceeding, as to a regulation that is the subject of ongoing rulemaking. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319 (1972); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-57, 4 AEC 946 (1972). In such a situation, the appropriate forum for deciding a challenge is the rulemaking proceeding itself. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-352, 4 NRC 371 (1976).

The assertion of a claim in an adjudicatory proceeding that a regulation is invalid is barred as a matter of law as an attack upon a regulation of the Commission. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 65 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-25, 24 NRC 141, 144 (1986); American Nuclear Corporation (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 709-710 (1986). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 256 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416-17 (1989). Consequently, under current regulations, there can be no challenge of any kind by discovery, proof, argument, or other means except in accord with 10 CFR § 2.758. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 204 (1975); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-82-92, 16 NRC 1376, 1385, aff'd, ALAB-704, 16 NRC 1725 (1982); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 804 n.82 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1104 n.44 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 136, 138 (1986).

Under Section 2.758, the regulation must be challenged by way of a petition requesting a waiver or exception to the regulation on the sole ground of "special circumstances" (i.e., because of special circumstances with respect to the subject matter of the particular proceeding, application of the regulation would not serve the purposes for which the regulation was adopted. 10 CFR § 2.758(b)); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-25, 24 NRC 141, 145 (1986); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16 (1988); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 595 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). Special circumstances are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived. Also, the special circumstances must be such as to undercut the rationale for the rule sought to be waived. Seabrook, CLI-88-10, supra, 28 NRC at 596-97, reconsid. denied, CLI-89-3, 29 NRC 234 (1989). The petition

must be accompanied by an affidavit. Other parties to the proceeding may respond to the petition. If the petition and responses, considered together, do not make a prima facie showing that application of the regulation would not serve the purpose intended, the Licensing Board may not go any further. If a prima facie showing is made, then the issue is to be directly certified to the Commission (not to the Appeal Board - 10 CFR § 2.758(d)) for determination. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 804 n.82 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983); Georgia Power Co. (Vogtle Nuclear Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 890 (1984); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 445 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 256 (1987). A waiver petition should not be certified unless the petition indicates that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), reconsid. denied, CLI-89-3, 29 NRC 234 (1989). In the alternative, any party who asserts that a regulation is invalid may always petition for rulemaking under 10 CFR Part 1, Subpart H (§§ 2.800-2.807).

The provisions of 10 CFR § 2.758 do not entitle a petitioner for a waiver or exception to a regulation to file replies to the responses of other parties to the petition. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324, 326 (1987).

An attack on a Commission regulation is prohibited unless the petitioner can make a prima facie showing of special circumstances such that applying the regulation would not serve the purpose for which it was adopted. The prima facie showing must be made by affidavit. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-83-52A, 18 NRC 265, 270 (1983), citing, 10 CFR § 2.758. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324, 326 (1987).

To make a prima facie showing under 10 CFR § 2.758 for waiving a regulation, a stronger showing than lack of reasonable assurance has to be made. Evidence would have to be presented demonstrating that the facility under review is so different from other projects that the rule would not serve the purposes for which it was adopted. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-49, 18 NRC 239, 240 (1983).

Another Licensing Board has applied a "legally sufficient" standard for the prima facie showing. According to the Board,

the question is whether the petition with its accompanying affidavits as weighed against the responses of the parties presents legally sufficient evidence to justify the waiver or exception from the regulation. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324, 328 (1987). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988).

A request for an exception, based upon claims of costly delays resulting from compliance with a regulation, rather than claims that application of the regulation would not serve the purposes for which the regulation was adopted, is properly filed pursuant to 10 CFR § 50.12 rather than 10 CFR § 2.758. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 444-45 (1985).

A request for an exception is properly filed pursuant to 10 CFR § 50.12, and not 10 CFR § 2.758, when the exception: (1) is not directly related to a contention being litigated in the proceeding; and (2) does not involve safety, environmental, or common defense and security issues serious enough for the Board to raise on its own initiative. Perry, supra, 22 NRC at 445-46.

An Appeal Board has determined that it has the authority to consider a motion for interlocutory review of a Licensing Board's scheduling order involving a Section 2.758 petition. The Board found that the only express limitation on its normal appellate jurisdiction is the requirement, pursuant to footnote 7 of Section 2.758, of directed certification to the Commission of a Licensing Board's determination that a prima facie showing has been established. The Board determined that, except in that specific situation, it could exercise its normal appellate authority, including its authority to consider interlocutory Licensing Board rulings through directed certification. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 67 (1987).

The ECCS Final Acceptance Criteria as set forth in 10 CFR § 50.45 and Appendix K to 10 CFR Part 50 assume that ECCS will operate during an accident. On the other hand, Class 9 accidents postulate the failure of ECCS. Thus, on its face, consideration of Class 9 accidents would appear to be a challenge to the Commission's regulations. However, the Commission has squarely held that the regulations do not preclude the use of inconsistent assumptions about ECCS failure for other purposes. Thus, the prohibition of challenges to the regulations in adjudicatory proceedings does not preclude the consideration of Class 9 accidents and a failure of ECCS related thereto in environmental impact statements and proceedings thereon. Offshore Power Systems

(Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978).

6.20.5 Agency's Interpretation of its Own Regulations

The wording of a regulation generally takes precedence over any contradictory suggestion in its administrative history. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982).

Where NRC interprets its own regulations and where those regulations have long been construed in a given way, the doctrine of stare decisis will govern absent compelling reasons for a different interpretation; the regulations may be modified, if appropriate, through rulemaking procedures. New England Power Co. (NEP Units 1 and 2), Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-390, 5 NRC 733, 741-42 (1977).

6.21 Rulemaking

Rulemaking procedures are covered, in general, in 10 CFR §§ 2.800-2.807, which govern the issuance, amendment and repeal of regulations and public participation therein. It is well established that an agency's decision to use rulemaking or adjudication in dealing with a problem is a matter of discretion. Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778, 800 (1981), citing, NAACP v. FPC, 425 U.S. 662, 668 (1976).

The Commission has authority to determine whether a particular issue shall be decided through rulemaking, through adjudicatory consideration, or by both means. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-118, 16 NRC 2034, 2038 (1982), citing F.P.C. v. Texaco, Inc., 377 U.S. 33, 42-44 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 202 (1955). In the exercise of that authority, the Commission may preclude or limit the adjudicatory consideration of an issue during the pendancy of a rulemaking. Midland, supra, 16 NRC at 2038.

When a matter is involved in rulemaking, the Commission may elect to require an issue which is part of that rulemaking to be heard as part of that rulemaking. Where it does not impose such a requirement, an issue is not barred from being considered in adjudication being conducted at that time. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 584-585 (1982); LBP-82-118, 16 NRC 2034, 2037 (1982).

6.21.1 Rulemaking Distinguished from General Policy Statements

While notice and comment procedures are required for rulemaking, such procedures are not required for issuance of a policy statement by the Commission since policy statements are not rules. Vermont Yankee Nuclear Power Corp.

(Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163 (1976).

6.21.2 Generic Issues and Rulemaking

The Commission has indicated that, as a rule, generic safety questions should be resolved in rulemaking rather than adjudicatory proceedings. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814-15, clarified, CLI-74-43, 8 AEC 826 (1974). In this vein, it has been held that the Commission's use of rulemaking to set ECCS standards is not a violation of due process. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974).

It is within the agency's authority to settle factual issues of a generic nature by means of rulemaking. Minnesota v. NRC, 602 F.2d 412, 416-17 (D.C. Cir. 1979) and Ecology Action v. AEC, 492 F.2d 998, 1002 (2d Cir. 1974), cited in Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778, 802 (1981). An agency's previous use of a case-by-case problem resolution method does not act as a bar to a later effort to resolve generic issues by rulemaking. Pacific Coast European Conference v. United States, 350 F.2d 197, 205-06 (9th Cir.), cert. denied, 382 U.S. 958 (1965), cited in Fire Protection, supra, and the fact that standards addressing generic concerns adopted pursuant to such a rulemaking proceeding affect only a few, or one, licensee(s) does not make the use of rulemaking improper. Hercules, Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1978), cited in Fire Protection, supra.

Waiver of a Commission rule is not appropriate for a generic issue. The proper approach when a problem affects nuclear reactors generally is to petition the Commission to promulgate an amendment to its rules under 10 CFR § 2.802. If the issue is sufficiently urgent, petitioner may request suspension of the licensing proceeding while the rulemaking is pending. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2). LBP-81-57, 14 NRC 1037, 1038-39 (1981).

6.22 Research Reactors

10 CFR § 50.22 constitutes the Commission's determination that if more than 50% of the use of a reactor is for commercial purposes, that reactor must be licensed under § 103 of the Atomic Energy Act rather than § 104. Section 104 licenses are granted for research and education, while Section 103 licenses are issued for industrial or commercial purposes. The Regents of the University of California (UCLA Research Reactor), LBP-83-24, 17 NRC 666, 670 (1983).

6.23 Disclosure of Information to the Public

10 CFR § 2.790 deals generally with NRC practice and procedure in making NRC records available to the public. 10 CFR Part 9 specifically establishes procedures for implementation of the Freedom of Information (10 CFR §§ 9.3 to 9.16) and Privacy (10 CFR §§ 9.50, 9.51) Acts.

Under 10 CFR § 2.790, hearing boards are delegated the authority and obligation to determine whether proposals of confidentiality filed pursuant to Section 2.790(b)(1) should be granted pursuant to the standards set forth in subsections (b)(2) through (c) of that Section. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-62, 14 NRC 1747, 1755-56 (1981). Pursuant to 10 CFR § 2.718, Boards may issue a wide variety of procedural orders that are neither expressly authorized nor prohibited by the rules. They may permit intervenors to contend that allegedly proprietary submissions should be released to the public. They may also authorize discovery or an evidentiary hearing that is not relevant to the contentions but is relevant to an important pending procedural issue, such as the trustworthiness of a party to receive allegedly proprietary material. However, discovery and hearings not related to contentions are of limited availability. They may be granted, on motion, if it can be shown that the procedure sought would serve a sufficiently important purpose to justify the associated delay and cost. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-2, 15 NRC 48 (1982).

Under Chrysler Corp. v. Brown, 441 U.S. 281, 60 L.Ed.2d 208, 99 S. Ct. 1705 (1979), neither the Privacy Act nor the Freedom of Information Act gives a private individual the right to prevent disclosure of names of individuals where the Licensing Board elects to disclose. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 891 (1981).

In Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-33, 15 NRC 887, 891-892 (1982), the Board ruled that the names and addresses of temporary employees who have worked on a tube-sleeving project are relevant to intervenor's quest for information about quality assurance in a tube-sleeving demonstration project. Since applicants have not given any specific reason to fear that intervenors will harass these individuals, their names should be disclosed so that intervenors may seek their voluntary cooperation in providing information to them.

In the Seabrook offsite emergency planning proceeding, the Licensing Board extended a protective order to withhold from public disclosure the identity of individuals and organizations who had agreed to supply services and facilities which would be needed to implement the applicant's offsite emergency plan. The Board noted the emotionally charged atmosphere surrounding the Seabrook facility, and, in particular, the possibility that opponents of the licensing of Seabrook would invade the

applicant's commercial interests and the suppliers' right to privacy through harassment and intimidation of witnesses in an attempt to improperly influence the licensing process. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-8, 27 NRC 293, 295 (1988).

6.23.1 Freedom of Information Act Disclosure

Under FOIA, a Commission decision to withhold a document from the public must be by majority vote. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-35, 12 NRC 409, 412 (1980).

While FOIA does not establish new government privileges against discovery, the Commission has elected to incorporate the exemptions of the FOIA into its own discovery rules. Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980).

Section 2.790 of the Rules of Practice is the NRC's promulgation in obedience to the Freedom of Information Act. Palisades, supra, 12 NRC at 120.

Section 2.744 of the Rules of Practice provides that a presiding officer may order production of any record exempt under Section 2.790 if its "disclosure is necessary to a proper decision and the document is not reasonably obtainable from another source." This balancing test weighs the need for a proper decision against the interest in privacy. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 892 (1981).

The presiding officer in an informal hearing lacks the authority to review the Staff's procedures or determinations involving FOIA requests for NRC documents. However, the presiding officer may compel the production of certain of the requested documents if they are determined to be necessary for the development of an adequate record in the proceeding. Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-87-28, 26 NRC 297, 299 (1987).

Although 10 CFR § 2.744 by its terms refers only to the production of NRC documents, it also sets the framework for providing protection for NRC Staff testimony where disclosure would have the potential to threaten the public health and safety. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 99 (1983).

The Commission, in adopting the standards of Exemption 5, and the "necessary to a proper decision" as its document privilege standard under 10 CFR § 2.744(d), has adopted traditional work product/executive privilege exemptions from disclosure. Palisades, supra, 12 NRC at 123.

The Government is no less entitled to normal privilege than is any other party in civil litigation. Palisades, supra, 12 NRC at 127.

Any documents in final form memorializing the Director's decision not to issue a notice of violation imposing civil penalties does not fall within Exemption 5. Palisades, supra, 12 NRC at 129.

6.23.2 Privacy Act Disclosure

(RESERVED)

6.23.3 Disclosure of Proprietary Information

10 CFR § 2.790, which deals generally with public inspection of NRC official records, provides exemptions from public inspection in appropriate circumstances. Specifically, Section 2.790(a) establishes that the NRC need not disclose information, including correspondence to and from the NRC regarding issuance, denial, and amendment of a license or permit, where such information involves trade secrets and commercial or financial information obtained from a person as privileged or confidential.

Under 10 CFR § 2.790(b), any person may seek to have a document withheld, in whole or in part, from public disclosure on the grounds that it contains trade secrets or is otherwise proprietary. To do so, he must file an application for withholding accompanied by an affidavit identifying the parts to be withheld and containing a statement of the reasons for withholding. As a basis for withholding, the affidavit must specifically address the factors listed in Section 2.790(b)(4). If the NRC determines that the information is proprietary based on the application, it must then determine whether the right of the public to be fully appraised of the information outweighs the demonstrated concern for protection of the information.

For an affidavit to be exempt from the Board's general authority to rule on proposals concerning the withholding of information from the public, that affidavit must meet the regulatory requirement that it have "appropriate markings". When the plain language of the regulation requires "appropriate markings", an alleged tradition by which Staff has accepted the proprietary nature of affidavits when only a portion of the affidavits is proprietary is not relevant to the correct interpretation of the regulation. In addition, legal argument may not appropriately be withheld from the public merely because it is inserted in an affidavit, a portion of which may contain some proprietary information. Affidavits supporting the proprietary nature of other documents can be withheld from the public only

if they have "appropriate markings". An entire affidavit may not be withheld because a portion is proprietary. The Board may review an initial Staff determination concerning the proprietary nature of a document to determine whether the review has addressed the regulatory criteria for withholding. A party may not withhold legal arguments from the public by inserting those arguments into an affidavit that contains some proprietary information. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-5A, 15 NRC 216 (1982).

6.23.3.1 Protecting Information Where Disclosure is Sought in an Adjudicatory Proceeding

To justify the withholding of information in an adjudicatory proceeding where full disclosure of such information is sought, the person seeking to withhold the information must demonstrate that:

(1) the information is of a type customarily held in confidence by its originator;

(2) the information has, in fact, been held in confidence;

(3) the information is not found in public sources;

(4) there is a rational basis for holding the information in confidence.

Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976).

The Government enjoys a privilege to withhold from disclosure the identity of persons furnishing information about violations of law to officers charged with enforcing the law. Rovario v. United States, 353 U.S. 53, 59 (1957), cited in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981). This applies not only in criminal but also civil cases, In re United States, 565 F.2d 19, 21 (1977), cert. denied sub nom., Bell v. Socialist Workers Party, 436 U.S. 962 (1978), and in Commission proceedings as well, Northern States Power Co. (Monticello Plant, Unit 1), ALAB-16, 4 AEC 435, affirmed by the Commission, 4 AEC 440 (1970); 10 CFR § 2.744(d), § 2.790(a)(7); and is embodied in FOIA, 5 U.S.C. § 552(b)(7)(D). The privilege is not absolute; where an informer's identity is (1) relevant and helpful to the defense of an accused, or (2) essential to a fair determination of a cause (Rovario, supra); it must yield. However, the Appeal Board reversed a Licensing Board's order to the Staff to reveal the names of confidential informants (subject to a protective order) to intervenors as an abuse of discretion, where the Appeal Board found

that the burden to obtain the names of such informants is not met by intervenor's speculation that identification might be of some assistance to them. To require disclosure in such a case would contravene NRC policy in that it might jeopardize the likelihood of receiving similar future reports. South Texas, supra.

For a detailed listing of the factors to be considered by a Licensing Board in determining whether certain documents should be classed as proprietary and withheld from disclosure in an adjudicatory proceeding, see Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, Appendix at 518 (1973) and (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-42, 15 NRC 1307 (1982). If a Licensing Board or an intervenor with a pertinent contention wishes to review data claimed by an applicant to be proprietary, it has a right to do so, albeit under a protective order if necessary. 10 CFR § 2.790(b)(6); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-435, 6 NRC 541, 544 n.12 (1977).

Where a party to a hearing objects to the disclosure of information on the basis that it is proprietary in nature and makes out a prima facie case to that effect, it is proper for an adjudicatory board to issue a protective order and conduct further proceedings in camera. If, upon consideration, the Board determined that the material was not proprietary, it would order the material released for the public record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-15 (1985). See also Commonwealth Edison Co. (Zion Nuclear Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974).

Following issuance of a protective order enabling an intervenor to obtain useful information, a Board can defer ruling on objections concerning the public's right to know until after the merits of the case are considered. If an intervenor has difficulties due to failure to participate in in camera sessions, these cannot affect the Board's ruling on the merits. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-55, 14 NRC 1017 (1981).

Where a demonstration has been made that the rights of association of a member of an intervenor group in the area have been threatened through threats of compulsory legal process to defend contentions, the employment situation in the area is dependent on the nuclear industry, and there is no detriment to applicant's interests by not having the identity of individual members of petitioner organization publicly disclosed, the Licensing Board will issue a protective order to prevent the public disclosure of the names of members of the organizational petitioner. Washington

Public Power Supply System (WPPSS Nuclear Project No. 1). LBP-83-16, 17 NRC 479, 485-486 (1983).

6.23.3.2 Security Plan Information Under 10 CFR § 2.790(d)

Plant security plans are "deemed to be commercial or financial information" pursuant to 10 CFR § 2.790(d). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-80, 16 NRC 1121, 1124 (1982).

In making physical security plan information available to intervenors, Licensing Boards are to follow certain guidelines. Security plans are sensitive and are subject to discovery in Commission adjudicatory proceedings only under certain conditions: (1) the party seeking discovery must demonstrate that the plan or a portion of it is relevant to its contentions; (2) the release of the plan must (in most circumstances) be subject to a protective order; and (3) no witness may review the plan (or any portion of it) without it first being demonstrated that he possesses the technical competence to evaluate it. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980).

Intervenors in Commission proceedings may raise contentions relating to the adequacy of the applicant's proposed physical security arrangements. Shoreham, supra, 16 NRC at 1124.

Commission regulations, 10 CFR § 2.790, contemplate that sensitive information may be turned over to intervenors in NRC proceedings under appropriate protective orders. Shoreham, supra, 16 NRC at 1124.

Release of a security plan to qualified intervenors must be under a protective order and the individuals who review the security plan itself should execute an affidavit of nondisclosure. Diablo Canyon, supra, 11 NRC at 778.

Protective orders may not constitutionally preclude public dissemination of information which is obtained outside the hearing process. A person subject to a protective order, however, is prohibited from using protected information gained through the hearing process to corroborate the accuracy or inaccuracy of outside information. Diablo Canyon, supra, 11 NRC at 778.

6.24 Show Cause Proceedings

Under 10 CFR § 2.202, the NRC Staff is empowered to issue an order to show cause why enforcement action should not be taken when it believes that modification or suspension of a license, or other such enforcement action, is warranted. Under 10 CFR § 2.206, members of the public may request the NRC Staff to issue

such an order to show cause. Consolidated Edison Co. of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3), CLI-83-16, 17 NRC 1006, 1009 (1983). Any person at any time may request the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, or Director, Office of Inspection and Enforcement, as appropriate, to issue a show cause order for suspension, revocation or modification of an operating license or a construction permit. 10 CFR § 2.206, 10 CFR § 2.202 et seq.

The Director of Nuclear Reactor Regulation, upon receipt of a request to initiate an enforcement proceeding, is required to make an inquiry appropriate to the facts asserted. Provided he does not abuse his discretion, he is free to rely on a variety of sources of information, including Staff analyses of generic issues, documents issued by other agencies and the comments of the licensee on the factual allegations. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432, 433 (1978).

In reaching a determination on a show cause petition, the Director need not accord presumptive validity to every assertion of fact, irrespective of the degree of substantiation. Nor is the Director required to convene an adjudicatory proceeding to determine whether an adjudicatory proceeding is warranted. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432 (1978).

The APA, 5 U.S.C 551 et seq., particularly Section 554, and the Commission's regulations, particularly 10 CFR § 2.719, deal specifically with on-the-record adjudication and thus the Staff's participation in a construction permit proceeding does not render it incapable of impartial regulatory action in a subsequent show cause or suspension proceeding where no adjudication has begun. Moreover, in terms of policy, any view which questions the Staff's capabilities in such a situation is contradicted by the structure of nuclear regulation established by the Atomic Energy Act and 20 years experience implementing that statute. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 431, 432 (1978).

The agency alone has power to develop enforcement policy and allocate resources in a way that it believes is best calculated to reach statutory ends. NRC can develop policy that has licensees consent to, rather than contest, enforcement proceedings. A Director may set forth and limit the questions to be considered in a show cause proceeding. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441 (1980).

The Commission has broad discretion to allow intervention where it is not a matter of right. Such intervention will not be granted where conditions have already been imposed on a licensee, and no useful purpose will be served by that intervention. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442-43 (1980).

6.29.3 High-Level Waste Licensing

The procedures for the conduct of the adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are specified in Subpart J of 10 CFR Part 2 (10 CFR §§ 2.1000 - 2.1023). 54 Fed. Reg. 14925 (April 14, 1989). These procedures take precedence over the rules of general applicability in 10 CFR Part 2, Subpart G, although 10 CFR § 2.1000 specifies many of the rules of general applicability which will continue to apply to high-level waste licensing proceedings.

Subpart J provides procedures for the development and operation of the Licensing Support System, an electronic information management system, which will contain the documentary material generated by the participants in the proceeding as well as the NRC orders and decisions related to the proceeding. See 2.11.7, Discovery in High-Level Waste Licensing Proceedings.

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