UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

BEFORE ADMINISTRATIVE JUDGES
James L. Kelley, Chairman
Dr. A. Dixon Callihan
Dr. Richard F. Foster

In the Matter of	ASLBP Docket No. 81-463-01OL
DUKE POWER COMPANY, et al.	(Commission Docket No. 50-413-OL and 50-414-OL)
(Catawba Nuclear Station, Units 1 and 2)	March 5, 1982

MEMORANDUM AND ORDER
(Reflecting Decisions Made Following Prehearing Conference)

On January 12 and 13, 1982, the Board conducted a prehearing conference in York, South Carolina, pursuant to 10 CFR 2.751a. The primary purpose of the conference was to consider pending petitions for intervention and contentions filed in support of those petitions.

Admission of Parties. Petitions to intervene had been filed by four organizations and by the State of South Carolina. Three of the petitioning organizations appeared and participated in the conference: Carolina Environmental Study Group ("CESG"), represented by its President, Mr. Jesse L. Riley; Palmetto Alliance ("Palmetto"), represented by counsel, Mr. Robert Guild; and Charlotte-Mecklenburg Environmental Coalition

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("CMEC"), represented by its Chairman, Mr. Henry A. Presler. The standing of these organizations is described in their petitions and is not disputed by the Applicants[1/] or the Regulatory Staff. In its response to the CMEC petition, the Staff had raised a question about Mr. Presler's authority to represent that organization. At the conference, Mr. Presler served copies of authorizing affidavits from representatives of constituent organizations of CMEC, thus laying the Staff's question to rest.

A petition for intervention is to be granted if it establishes standing and pleads at least one litigable contention with reasonable specificity. 10 CFR 2.714; Philadelphia Electric Co. (Peach Bottom Atomic Power Station), 8 AEC 13, 20 (1974). As discussed hereafter, each of the three organizations appearing at the conference put forward one or more contentions which we find admissible, or at least conditionally admissible. Accordingly, the Board orders CESG, Palmetto and CMEC admitted as parties to this proceeding. In addition, the petition of the State of South Carolina to intervene as an interested State pursuant to 10 CFR 2.715(c) is granted. The State was represented at the hearing by Mr. Richard P. Wilson, an Assistant Attorney General. However, the State did not participate actively, nor did it file any separate contentions.

The fourth petitioning organization, Safe Energy Alliance of Charlotte, North Carolina, did not file contentions in support of its initial petition and, although served with notice, did not appear at the

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1/ Duke Power Co. is the lead Applicant in this proceeding. It also acts as agent for the other owners of the facility, North Carolina Municipal Power Agency Number 1, North Carolina Electric Membership Corporation, and Saluda River Electric Cooperative, Inc.

prehearing conference. Mr. Presler of CMEC filed an affidavit from an officer of Safe Energy Alliance stating that CMEC would represent the interests of the Alliance in the proceeding. As stated on the record, in these circumstances the Board considers the separate Safe Energy Alliance petition as having been withdrawn. Tr. 3-4. Alternatively, that petition is denied for want of prosecution.

Specificity of Contentions and Available Information. The three petitioning organizations filed a total of fifty-two contentions.[2/] The Applicants and the Staff separately oppose admission of forty-seven of these contentions. Because the Applicants and the Staff largely disagree about the handful of contentions they would admit, all but two of the Intervenors' fifty-two proposed contentions are opposed by the Applicants, the Staff, or (in most cases) by both. We are admitting half of the Intervenors' proposed contentions, in whole or in part. However, only one of these contentions is bei g admitted unconditionally. Twenty-five contentions are being admitted subject to certain specified conditions.

2/ CMEC filed 4 contentions, Palmetto 29, and CESG 19. Palmetto also filed an additional 19 contentions identical to CESG's 19. CESG labeled 3 other paragraphs as "contentions" (numbered 4, 7 and 14) which we view as legal argument and procedural requests. CESG's paragraphs 7 and 14 are pertinent here; they request that the prehearing conference (which we take to mean this conference held pursuant to 10 CFR 2.751a) not be held until 90 days after the Staff's environmental impact statement and safety evaluation report are available. They argue that it is "essential to permit CESG ... to take into consideration Staff's views in regard to environmental ... matters" in framing contentions. While we find substantial merit in this argument, we believe that the 90-day guideline in 2.751a and the Commission's "Statement of Policy on Conduct of Licensing Proceedings" (46 Fed. Reg. 28533) indicate the need to get the proceeding started earlier, as we are doing here. However, by granting conditional admission to contentions that now may be unduly vague only because certain documents are presently unavailable, we are being responsive to the very real problem CESG raises. CESG's paragraph 4 speaks to certain legal issues we find it unnecessary to reach.

By far the most frequent basis for objection by both the Applicants and the Staff is an alleged lack of specificity in the contention. In some cases, we find this objection to be well taken. But in others where we also find a lack of specificity, we nevertheless reject that objection at this stage of the proceeding because of the limited information presently available to the Intervenors. Because of the importance in these rulings of the concept of specificity in contentions, a few words about that subject are in order before we turn to the individual contentions before us.

Section 714(b) of the Commission's Rules of Practice (10 CFR 2.714(b)) requires that "the bases for each contention [be] set forth with reasonable specificity." It is not enough, for example, merely to allege that aspects of an applicant's plans will not comply with Commission regulations. A contention must include a reasonably specific articulation of its rationale -- e.g., why the applicant's plans fall short of certain safety requirements, or will have a particular detrimental effect on the environment. This specificity requirement serves several purposes. It facilitates board determinations whether contentions are litigable. For example, a contention is to be excluded if it is, in substance, an impermissible attack on a Commission rule, or if it is not within the scope of the proceeding. See Philadelphia Electric Co., supra at 20.

Another purpose of specificity in contentions is "to help assure that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against." Philadelphia

Electric Co., supra at 20 (emphasis added). However, this language does not imply a high standard of specificity at this early stage of the proceeding. As discussed below (at page 13) the purpose of revising and refining contentions at tne final prehearing conference is to make the issues for hearing more specific in the light of completed discovery. Reflecting this aspect of the process, most preparation for hearing takes place after the final prehearing conference.

The specificity requirement is a perfectly reasonable one, so long as the factual information necessary for specificity is available to an intervenor. Unfortunately, because of the way the hearing process is structured that is often not the case, particularly in the early stages of tne proceeding. Under the rules, a petitioner for intervention in an operating license case like this one must file at least some contentions before tne first prehearing conference, which the rules contemplate will take place a few montns after the application is noticed for hearing. At that time, the applicant's final safety analysis report ("FSAR") (or at least most of it) and environmental report ("ER") are available to petitioners for intervention. However, a number of other potentially important documents usually are not then available, most notably the Staff's Safety Evaluation Report ("SER") and draft environmental impact statement and the report of the Advisory Committee on Reactor Safeguards. In addition, certain of the applicant's documents, such as emergency plans, may not be available.

That is the situation here. Of the key documents just mentioned, only the Applicants' FSAR (most of it) and Environmental Report are now available for public inspection. The Staff's SER and impact statement,

most of the off-site emergency plans and portions of the FSAR have not yet been written. In addition, the Applicants' security plan, while in existence, is being withheld pursuant to Commission regulations. 10 CFR 73.21.

The Applicants and the Staff nevertheless argue that the Intervenors should be required to plead all of their contentions with reasonable specificity by the first prehearing conference, even contentions in areas like emergency planning, where the documents necessary for informed pleading are not yet available. The Applicants contend that:

> [W]hen Palmetto Alliance seeks to put in issue a matter which arguably is not covered in Applicants' filings, it is incumbent on it to specify precisely the nature of its allegation and provide in detail the bases for it. ... The Commission's procedures contemplate, and require, adequate contentions to be framed on the basis of information available to petitioners at the time the notice of hearing is published. Absence of documents which are not available until the NRC Staff completes its review of an application is not good cause for failing to provide adequate specification of, or basis for, a contention, or for reserving the right to raise a contention at a later time.3/

The Staff, in substance, concurs.4/ The Applicants and the Staff concede, as they must, that an intervenor may file a contention later, pursuant to 10 CFR 2.714(b), based on information disclosed in a document first becoming available at a later date. But there's a catch.5/ In their view, such "late" contentions would have to surmount all of the

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3/ Applicants' Response to Palmetto Contentions, pp. 8-9.

4/ Staff Response to Contentions, p. 8, note 14. See also Tr. 110-114, 215, 231, 322-323.

5/ For a similar catch, see Heller, Catch 22, p. 47 (Dell ed.).

hurdles applicable to contentions filed late for other (and usually less justifiable) reasons.6/

The Board believes that the Applicants' and Staff's stated position on this question is (1) not required by the rules as written or by prior decisions, (2) unreasonable, and (3) probably in conflict with governing statutes. As to the first point, the rules as written do not explicitly require that all contentions be filed before the first prehearing conference, subject only to a highly restricted right to file a "late" contention later.7/ And the cases cited by the Applicants and Staff have held only that some (by inference, at least one) contentions should be pled by that time. See Wisconsin Electric Power Co. (Koshkonong Nuclear Plant), 8 AEC 928; Northern States Power Co. (Prairie Island Plant), 6 AEC 188, aff'd, BPI v. AEC, 502 F.2d 424 (C.A.D.C. 1974). Those cases emphasized the "wealth" of information available at the early stages of the proceeding in the applicant's FSAR and environmental report, the assumption being that at least some contentions could be gleaned from these typically

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6/ Section 2.714(a) erects five separate hurdles to "nontimely" contentions, only one of which (good cause) would presumably be surmounted by a showing of new information. In the main, these criteria are inappropriate for application to a contention that is "late" for reasons wholly beyond the intervenor's control. For example, the last criterion concerns the extent to which the contention will "broaden the issues or delay the proceeding." An issue based on new information will almost necessarily broaden the issues and it may well delay the proceeding. But the responsibility for those effects must be borne by the applicant or the Staff for producing a "late" informational document.

7/ A literal reading of the last sentence of 10 CFR 2.714(b) arguably leads to that conclusion. As we demonstrate, however, other compelling considerations require a different conclusion. We should, in addition, read section 2.714(b) in the light of our duty under 10 CFR 2.718 "to conduct a fair ... hearing."

voluminous documents. But none of those cases focused on the situation that concerns us here -- i.e., forcing an intervenor to plead specific contentions in an area, such as emergency planning, where the relevant information simply is not yet available. Apparently in recognition of the unfairness in such a squeeze play, it has not been uncommon for licensing boards to admit vague contentions conditionally, subject to later specification, or to defer rulings on some contentions until the necessary documentation is available. See, e.g., Commonwealth Edison Co. (Byron Nuclear Power Station), Memorandum and Order of December 19, 1980, p. 13; Commonwealth Edison Co. (Quad Cities Station), Order of October 27, 1981, p. 4. The Appeal Board's very recent decision in Tennessee Valley Authority (Browns Ferry Nuclear Plant), ALAB-664, confirms that licensing boards have discretion to defer rulings where a document (such as a draft environmental impact statement) is needed in order to assess a contention.

The unreasonableness of the Applicants' and Staff's position has been suggested by the preceding discussion and is perhaps best illustrated by an example from this case. The off-site emergency plans for counties and municipalities near the facility are being prepared, but are not yet complete. Tr. 110-112. The regulations plainly contemplate that the adequacy of such plans, in their specific details, can be contested by intervenors. 10 CFR 50.47(a). At this juncture, possibly in reaction to the Applicants' and Staff's position that it must plead all of its contentions now, and not having any idea what those plans will contain, Palmetto tenders two broadly-worded emergency planning contentions, to

which the Applicants and Staff then object as lacking in "specificity." Placing the cart squarely before the horse, the Applicants argue that Palmetto should be required to express its "concerns" now, that it "should know if they have a concern" before the emergency plans are even prepared. Tr. 112.

There are several practical reasons to reject this argument. In the first place, it is very difficult to express concrete concerns about emergency planning in the abstract, without reference to specific emergency plans. It is probably a waste of time for all concerned, including this Board, for intervenors to develop "concerns" that emergency planners, working independently, may be fully addressing. The sensible approach is for a potential intervenor first to study proposed emergency plans, and then to decide whether he finds flaws in them which he may wish to contest.

Moreover, forcing intervenors to shoot in the dark may encourage fabrication of artificial, frivolous and perhaps even spurious contentions, because by necessity they are based on little more than imagination.[8/] From its quite different perspective, the applicant may have no incentive to facilitate the early completion of all emergency plans. This is so because, under the Applicants' and Staff's theory we are rejecting, if emergency planning or any other aspect of a nuclear power

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8/ For example, in the Diablo Canyon case, the intervenors eventually gained access to the facility's security plan on the basis of a prior contention that the facility was "vulnerable to sabotage not only from land, but from sea." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant), 5 NRC 1398, 1400 (1977). We suspect that the Diablo intervenors had no prior knowledge about the security plan and that this contention was made up out of whole cloth.

plant application is simply delayed until after the first prehearing conference, defects may be effectively insulated from scrutiny in the hearing process. Such a result seems inconsistent with the hearing requirements of the Atomic Energy Act. 42 U.S.C. 2239.

Indeed, we think that the Applicants' and Staff's position on the specificity question is, as they would have us apply it here, of very questionable legality not only under the Atomic Energy Act (as to safety issues), but also the National Environmental Policy Act (NEPA) (as to environmental issues). Section 189(a) of the Atomic Energy Act provides for a hearing upon the request of an interested person in certain kinds of licensings, including operating license proceedings. To be sure, the courts have held that this right is not absolute, that it may be conditioned, for example, upon the filing of contentions prior to discovery. BPI v. AEC, 502 F.2d 424 (C.A.D.C. 1974). However, the BPI decision did not discuss and apparently assumed that information requisite to formulation of contentions was available in that case. Where, as in this case, much of the necessary information is not yet available, a court might well hold that section 189(a) requires an equivalent opportunity to frame a contention promptly following the availability of the information. If that were not allowed, the exercise of the right to a hearing would be impermissibly hindered, or virtually foreclosed, by an unreasonable procedural requirement.

NEPA requires that environmental questions be open for consideration "to the fullest extent possible" throughout the agency review process, including the hearing process. NEPA, Section 102. In the landmark Calvert

Cliffs decision, the court invalidated several provisions of the AEC's original implementing rules, viewing the agency's "crabbed interpretation of NEPA" as "a mockery of the Act." Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109 (C.A.D.C. 1971). Among the nullified rules was one which barred licensing boards from considering environmental questions unless they were raised by a party. The court viewed the rule as an unnecessary and therefore illegal restriction on the "fullest possible" consideration of the environment. Similarly in the present context it could be forcefully argued that a "rule" requiring the pleading of all NEPA contentions before the Staff's impact statement is even written is an unnecessary and therefore impermissible restriction on agency consideration of the environment, yet another "crabbed interpretation of NEPA."9/

In light of the foregoing considerations, the Board rejects the argument that we should disallow a proposed contention for lack of specificity if a document likely to provide the necessary specifics is not yet available. In this case, such documents include the Staff's Safety Evaluation Report and draft environmental impact statement, portions of the Applicants' FSAR yet to be supplied, and the off-site emergency plans for

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9/ The Applicants' and Staff's position here is more questionable legally than the rule struck down by the Calvert Cliffs' court. That position undercuts the right of an adversary party to raise litigable issues about the Staff's impact statement, the traditional and most commonly-used means of testing a statement. Calvert Cliffs imposed on licensing boards a NEPA requirement to raise environmental issues sua sponte, a much less significant way of testing an impact statement than through adversary contentions.

the counties and municipalities near the plant.[10/] As discussed contention-by-contention hereafter, contentions that may be addressed in one of those documents will, if they are otherwise acceptable, be admitted conditionally despite a present lack of specificity. The intervenor advancing such a contention will be required to review the relevant document promptly after it becomes available, and to then either abandon or revise the contention to meet the specificity requirements of 10 CFR 2.714(b). Revised contentions are to be filed within 30 days following receipt of the relevant document.[11/] The adequacy of any revised contentions will be judged by the general principles applicable to contentions, including specificity. However, the additional criteria normally applied to late contentions under 10 CFR 2.714(a)(1)(i)-(v) will not be applied to contentions revised pursuant to this paragraph; their "lateness" is entirely beyond the control of the sponsoring intervenor.

What we have just said applies only to contentions for which little or no information has been supplied by the Applicants in their FSAR or Environmental Report. If substantial relevant information has been supplied and referenced in the Applicants' opposition pleading, the contention will be judged for specificity now and rejected if found unduly vague. However, should a document containing new information or analysis on the subject become available later, the Intervenor may within 30 days

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10/ The security plan for the facility stands on a somewhat different footing and is treated separately at pp. 37-38, below.

11/ We are admitting a few somewhat vague contentions on the condition that they will be revised and made more specific following discovery. Discovery on these contentions is to be completed within 90 days of this Memorandum and Order, and revised contentions are to be submitted within 30 days thereafter.

file a revised contention based upon it. Again, the criteria of 10 CFR 2.714(a)(1)(i)-(v) will not be applied to such a contention. Debatable questions about whether information or analysis is "new" will generally be resolved in the Intervenor's favor.

Specificity Through Discovery. An additional consideration affects the level of specificity required at this initial stage of the proceeding. Our admission of contentions will be followed by an extended period of discovery, during which the intervenors can learn additional factual details about their areas of concern. The principal functional purpose of contentions at this juncture is to place some reasonable limits on discovery. Boards have recognized that those discovery limits can, without prejudice to the hearing process, be more broad and general than the revised contentions that can be developed after discovery and which will ultimately structure the hearing. See, e.g., Southern California Edison Co. (San Onofre Nuclear Generating Station), Partial Initial Decision, slip op., pp. 10-12. The rule prescribing a final prehearing conference after the close of discovery (10 CFR 2.752) explicitly contemplates amending the "pleadings" and clarification of the "issues." For these reasons, we now apply less stringent standards of specificity than we will apply at the final prehearing conference.

Contentions Admitted.

CMEC Contentions 1-4 are admitted, subject to the following conditions:

(1) Should these contentions go to hearing, the focus will be on the Staff's impact statement, not the Applicants' Environmental Report, because the substantive NEPA obligation is discharged through the impact statement. Accordingly, CMEC shall review the Staff's draft environmental impact statement promptly after it becomes available and revise these contentions, as appropriate, in the light of that statement.

(2) CMEC Contention 1 is revised to read as amended on page 2 of the "NRC Staff Response to Reworded Contention 1," dated February 22, 1982. Mr. Presler's proposed revised version of CMEC Contention 1, dated February 1, 1982, is withdrawn. CMEC Contention 3 is revised to read as agreed to by the parties and as set forth in the CMEC "Further Proposal" pleading dated February 22, 1982. The Staff's objection to the reference in Contention 3 to Contention 2 is overruled.

(3) The Commission's Black Fox decision generally authorizes litigation of contentions about the long-term health effects of radiation, the thrust of Contention 4. See Public Service Co. of Oklahoma (Black Fox Station), 12 NRC 264 (1980). In view of the Applicants' stipulation to this contention, we are not inclined to reject it at this juncture in spite of its lack of specificity. However, this contention shall be made more specific or withdrawn after the Staff's draft impact statement is available.

Palmetto Contention 27 is admitted unconditionally.

The following Palmetto contentions are admitted conditionally, in whole or in part, subject to the specified conditions:

Palmetto 1: This contention about long-term health effects is similar to CMEC Contention 4. It is somewhat more specific in referencing the work of particular researchers, but it still falls short in that regard. It might, for example, specify the respects in which the BEIR III report and the Commission's food chain analyses are allegedly deficient. It is admitted conditionally, subject to further specification following availability of the draft environmental impact statement.

The Applicants specifically object to the part of this contention which focuses on health effects from the uranium fuel cycle, viewing it as an attack on the values established by rule in Table S-3. This argument is answered by footnote 1 to Table S-3, which states in pertinent part:

> Table S-3 does not include health effects from the effluents described in the Table. ... These issues may be the subject of litigation in the individual licensing proceedings.

Palmetto 2: This Contention faults the Applicants and the Staff for failing to assess the impacts of accidents beyond the design basis of the facility. This contention is premature. Pursuant to the Commission's Statement of Interim Policy, 45 Fed. Reg. 40101, the Staff will be assessing the impacts of such accidents in its environmental impact statement. The Staff's draft impact statement should explicitly address the concerns being raised in this contention or explain why they need not be addressed.

The Staff's "special circumstances" argument at pp. 10-11 of its response seems to assume that consideration of the effects of serious accidents need only be included in an impact statement for a facility that meets that test. While that was once the rule under certain Commission adjudicatory decisions (see Public Service Co. of Oklahoma (Black Fox

Station), 11 NRC 433 (1980)), those decisions have now been superseded by the Statement of Interim Policy under which all final impact statements issued after June 9, 1980 are to include such consideration.[12/] The special circumstances test applies only to plants under construction where particular design changes might be warranted. We make no judgment here about whether such changes are warranted for Catawba because we are ruling on a contention that does not call for design changes, only "assessment of impacts." As it does on other contested issues in an operating license proceeding, the Licensing Board will rule in the first instance on whether the impact statement's consideration of accidents pursuant to the Policy Statement is adequate.

The Policy Statement calls for discussion of severe accidents in applicants' environmental reports filed after July 1, 1980. Since the report for Catawba was filed prior to that date, no such discussion is necessary. Accordingly, this contention is admitted, subject to striking "The Applicants" from the first sentence and to the condition that it will be revised and made more specific in light of the draft impact statement; otherwise, it shall be withdrawn.

Palmetto 3 and 4: These contentions question the adequacy of emergency plans for the facility in various respects. As drafted, they are extremely vague. However, they are vague because the emergency plans for the counties and municipalities near the plant have not yet been prepared. In these circumstances, about all an intervenor can do is express very

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12/ The Commission's words are that the Staff should "initiate treatments of accident considerations ... in its ongoing NEPA reviews, i.e., for any proceeding at a licensing stage where [an FES] has not yet been issued. Id. at 40103.

general concerns. The most he should be required to do at this point is express an interest in the subject. These contentions are admitted, subject to their revision for specificity promptly following the availability of the pertinent plans. Revised contentions in this area need not be restricted to the subjects referred to in these contentions.

Palmetto 6, 7 and 18: These contentions, as drafted, are at best only marginally acceptable from the standpoint of specificity. However, they are being admitted conditionally because they concern the actual safety of construction and operation of the Catawba plant, issues that are at the core of our responsibilities as an operating license board. There were indications at the conference that some further specification of these contentions could be made now. Tr. 118, 176-177. These contentions can be explored in discovery and we expect the intervenors to make them more specific, or to withdraw them, following discovery.

Palmetto 8: This contention questions the qualifications of reactor operators and shift supervisors for Catawba because of an alleged lack of relevant operating experience. This contention is sufficiently specific and would be allowable but for our concern whether it may constitute an impermissible attack on a Commission rule. The information about qualifications contained in Section 13.1 of the FSAR does not speak directly to the allegation in this contention that the operators and supervisors for Catawba lack sufficient "hands on" experience with large PWR's. The Applicants' pleading argues (at p. 17) that there is a pending rulemaking on this subject which precludes this contention, and refers to SECY-81-84. No rulemaking has been initiated as a result of that Staff proposal; the matter is presently under study. Therefore, that proposal does not bar this contention. However, we desire the parties' views on

whether the present rules in 10 CFR Part 55, particularly sections 55.11 and 55.24, bar this contention.

In addition, certain requirements relating to operator qualifications have been imposed as part of the Three Mile Island Action Plan in NUREG-0737. Clarification Item I.A.2.1. Pursuant to the Commission's Guidance Statement of December 16, 1980, the sufficiency of TMI requirements may be contested by intervenors in licensing cases, suggesting that the present contention is allowable. However, certain of these TMI requirements were subsequently proposed in rule form, including certain experience requirements for senior reactor operators. 10 CFR 50.34 (f)(1)(ii). See Licensing Requirements for Pending Operating License Applications, Proposed Rule, 46 Fed. Reg. 26491. We desire the views of the parties on whether these rather convoluted developments have the effect of barring litigation of Palmetto's Contention 8. These views should be served by March 26, 1982. In the meantime, this contention is admitted conditionally, subject to reconsideration in light of the parties' further views.

Palmetto 10: This contention seeks consideration of the economic costs of severe (so-called "Class 9") accidents. As noted above with respect to Contention 2, consideration of such accidents will be included in the Staff's draft impact statement including, in the words of the Interim Policy Statement, "socioeconomic impacts that might be associated with emergency measures during or following an accident." This contention is admitted, subject to its being revised or withdrawn following availability of the draft impact statement.

Palmetto 14, 15, 16, 17 and 38 (CESG 11): These five contentions all relate in one way or another to the expansion of the spent fuel storage

pool at Catawba since the construction permit was issued and to the consequent possibility that the Applicants may later store spent fuel from other Duke facilities (such as McGuire and Oconee) at Catawba. These contentions raise questions about the safety and environmental acceptability of transportation of spent fuel to Catawba and its storage there, under both normal and accident conditions.

We can rule out certain aspects of these spent fuel contentions at this point. We are disallowing Contention 14 because, as we read it, it seeks to avoid application of the Table S-4 values about transportation impacts solely on the ground that the spent fuel would be destined for the Catawba storage pool, instead of the hypothetical reprocessing plant referred to in the Table S-4 rule (10 CFR 51.20(g)(1)). The contention does not postulate why the impacts of transporting to these different types of destinations would be different. We think they would be substantially the same and therefore that the Table S-4 values would apply.

Palmetto 17 would require consideration of the Applicants' provisions for caretaking of the spent fuel following the expiration of any Catawba operating license. This proceeding concerns the operation of the Catawba Station. This contention lies beyond its scope and is rejected. Moreover, the issue is generic within the nuclear power industry and is currently subject to Commission rulemaking. The Appeal Board has accordingly ruled that litigation of this topic would constitute a collateral attack on the rulemaking. Public Service Electric and Gas Co. (Salem Nuclear Generating Station), 14 NRC 43, 68-69 (1981).

The first two sentences of Palmetto 38 (CESG 11) are in the nature of legal argument about the expansion of the fuel pool. The last sentence

seeks to raise a safety issue (albeit an unclear issue) about the consequences of enlarging the pool. We are rejecting Contention 38 as a separate issue. However, the substance of the matters sought to be raised in the last sentence may be raised under the broader spent fuel contentions we are conditionally admitting, as explained hereafter.

From what we know now about the Applicants' plans for the Catawba spent fuel pool, we tentatively believe that consideration of the safety and environmental aspects of transporting and storing fuel there from other Duke facilities would be appropriate in this proceeding. However, we need additional information and the views of the parties on certain issues before we can make final rulings on contentions in this area. These questions are prompted by the following considerations.

Applicants state in their application (at pp. 11-12):

> Applicants further request such additional source, special nuclear and by-product material licenses as may be necessary or appropriate ... for authority to store irradiated fuel from other facilities. ... Duke has no present plans to utilize this storage alternative but, rather, considers it prudent planning to have this storage as one of the alternatives available.

The application apparently does not request explicit authority to transport (as distinguished from authority to store) spent fuel from other Duke facilities to Catawba.

The jurisdiction of a licensing board is normally established by the notice of opportunity for hearing and the subsequent notice of establishment of the board. See Pacific Gas and Electric Co. (Diablo Canyon Plant), 3 NRC 73, 74, note 1 (1976). Here, those notices refer only to the operating licenses for Catawba. There is no explicit reference to

materials licenses for storage and transportation of fuel from other Duke facilities.

Duke's plans for handling of spent fuel, including the "Cascade Plan," were the subject of extended discussion in Duke Power Co. (Amendment to Materials License), 12 NRC 459, 469-72 (1980), rev'd, 14 NRC 307 (1981). There, environmental analysis was carried out for only a small part of the larger plan, and an "assessment" was deemed sufficient. However, if we are being asked to authorize comparatively more extensive shipment and storage of fuel, inclusion of this subject in the environmental impact statement for the operating licenses may be necessary.

In light of the foregoing considerations and information available to them, the Applicants and the Staff are to address the following questions; the Intervenors are free to comment on such of these questions as they choose:

1. Applicants only to answer. What are Duke's plans with reference to storing fuel from other Duke facilities at Catawba. Be more specific than in the quoted sentence from the application. Describe the "Cascade Plan"; what is its present status?

2. What licensing authority is Duke presently seeking to transport or store spent fuel from other facilities to or at Catawba? What additional authority does it intend to seek? Does Duke intend to secure now, in connection with the operating licenses for Catawba, all of the authority it needs to transport and store spent fuel at Catawba from other facilities to the capacity of the Catawba storage pool?

3. Does this Board presently have jurisdiction over applications to store or transport spent fuel from other facilities? If not, could it and/or should it be given such jurisdiction?

4. Does the Applicants' environmental report include an adequate discussion of any plans to store or transport spent fuel from other facilities at Catawba?

5. Staff only to answer. Does the Staff intend to include in its draft impact statement discussion of transportation of spent fuel from other facilities to Catawba and its storage there? If so, why? If not, why not?

Responses and any comments on these questions shall be mailed by March 26, 1982.

Palmetto 15 concerns the environmental costs of both the transportation of spent fuel to Catawba from other Duke nuclear plants and its storage in the used-fuel pool. This contention is admitted conditionally, provided the words "Away From Reactor (AFR)" are stricken from the first paragraph and "as an AFR" are stricken from the third paragraph. The Applicants' request that "may" be substituted for "intend to," also in the third paragraph, is denied. This is an Intervenor's contention and it is free to allege any intention it thinks it can prove.

Palmetto 16 is similar to 15, except that it refers to the public health and safety aspects of used fuel storage and transportation at Catawba. This contention is also conditionally admitted.

Contentions 15 and 16 are being admitted conditionally at this juncture. The Board will consider revision of these contentions in light of the information we receive in response to our questions.

Palmetto 21: This generally-worded contention charges the Applicants with failure to develop certain procedures required by NUREG-0737 in response to the Three Mile Island accident. The Applicants respond that they have submitted certain analyses to the Commission Staff and that the Staff is currently evaluating certain "emergency procedures." However, the section of the FSAR referenced by the Applicants (Section 1.9) says only that they are "in the process of developing new procedures." It does not say what those procedures are. In these circumstances, the Intervenors cannot be faulted for filing a non-specific contention. This contention is admitted conditionally. The Applicants are directed to supply to Palmetto a copy of their proposed procedures for complying with these TMI requirements, now or as soon as they are available. Palmetto is thereafter required to provide a revised and acceptably specific contention or to withdraw this contention.

Palmetto 22: This contention concerns two matters. The first is an alleged absence of sufficient instrumentation to detect inadequate core cooling. This part of the contention is denied. Section 1.9 (pp. 10-11) of the FSAR contains a description of such instrumentation and Palmetto does not specify any deficiencies in this description or even refer to it. The final sentence of the contention addresses the interaction of human factors and efficiency of operation. This part is admitted conditionally pending availability to Palmetto of the review of the control room design

by the Applicants (Section 1.9-(3) of the FSAR). Thereafter the contention will be withdrawn or be stated in more detail.

Palmetto 24: This contention about the ability of the small owners of the facility to produce the funds necessary to operate it safely is admitted, subject to deletion of the next to the last sentence beginning with the phrase "An accident with ...." As pointed out by the Staff, Commission regulations on financial qualifications do not require applicants to demonstrate capability to absorb the costs of severe accidents. The Staff's argument that the contention is not sufficiently specific is not well taken. The Applicants' attempt to equate this contention with CESG's Contention 22 fails; the latter contention (which we are rejecting) does not refer to the possible financial vulnerabilities of small owners.

Palmetto 25: This contention about costs of decommissioning is similar to the prior contention; it is admitted subject to deletion of the last paragraph, and subject to further specification following discovery.

Palmetto 26: It is unclear to the Board whether or to what extent the South Carolina Department of Health and Environmental Control will be responsible for monitoring the operational effects of Catawba, either as a matter of Commission safety regulations or as a factor in the environmental cost/benefit analysis. Various aspects of monitoring activities are discussed in detail in Chapter 6 of the Environmental Report, including a brief description of a pre-operational monitoring program by the South Carolina Department of Health and Environmental Control. Because this contention is not tied in with this discussion and

is objectionable on specificity grounds, it is disallowed, with one possible exception. The contention also refers to the State agency's "responsibilities in the event of an emergency." Because the off-site emergency plans are not yet available, we do not know what role the agency may play in an emergency. Accordingly, this limited aspect of the contention is admitted conditionally, until those plans are available and pending its revision or withdrawal.

CESG Contentions 8, 9, 13 and 16 and 17[13/] are admitted, in whole or in part, subject to the following conditions:

CESG 8 (Palmetto 35): The first sentence of this emergency planning contention is premature because the ten mile plume exposure pathway emergency planning zone has not yet been drawn by State and local officials. This portion of this contention is admitted, subject to the Intervenor's reviewing the State and local plans when they are available as to the appropriateness of that EPZ boundary. The second sentence alleges that a "radius of 30 miles should be the basis for emergency planning." We read this to mean that the plume exposure pathway EPZ prescribed in the rule as "about ten miles" should be expanded to 30 miles in the circumstances of this case. This is an impermissible attack on the Commission's rule (10 CFR 50.47(c)(2)). Should the Intervenors wish to pursue this matter, the proper course would be to file appropriate papers

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13/ These same contentions are also advanced by Palmetto as their contentions numbered 35, 36, 40, 42 and 43. These Palmetto contentions are also admitted, subject, of course, to the same conditions.

seeking a waiver of the ten-mile feature of the rule, pursuant to 10 CFR 2.758.

CESG 9: The first sentence of this contention is similar to Palmetto Contention 2; both seek consideration of serious accidents in the Staff's environmental impact statement. This contention is admitted conditionally, subject to its being revised or withdrawn in light of the draft environmental impact statement's discussion of serious accidents. We do not, by this conditional admission, necessarily endorse the need to consider the entire spectrum of PWR accidents; the scope of the Staff's obligation is basically contained in the Commission's Policy Statement. The second sentence of this contention is rejected. The abilities of local officials to cope with the consequences of serious accidents would be more appropriately explored in the emergency planning context. New contentions concerning the functions and capabilities of local officials can be submitted promptly after the local area plans become available.

CESG 13: This contention alleging irregularities in welding practices is similar to Palmetto Contentions 6, 7 and 18. It is admitted conditionally, subject to further specification, or withdrawal, following discovery. The conference transcript indicates that further specificity could be provided. Tr. 348-350.

CESG 16: This contention is similar to parts of Palmetto Contention 22. It is quite vague as drafted. However, it is being admitted conditionally, subject to further specification or withdrawal after the Applicants have supplied to CESG a copy of the control room design review promised in Section 1.9-1(3) of the FSAR.

CESG 17: This contention lacks specificity in that it fails to state how an infestation of the Asiatic clam Corbicula might affect the performance of the cooling tower system and why such an effect should be of health and safety concern or impact the environment. The potential for Corbicula infestation was brought out in the FES (p. 2-36) at the construction permit stage. However, the Applicants do not refer in their pleading to any discussion of Corbicula in their FSAR or ER. In these circumstances, we admit this contention conditionally, subject to clarification of the issue and much greater specificity following discovery.

Palmetto Contentions Rejected.

Palmetto 5: This diffuse contention expresses a generalized concern about serious accidents at Catawba. It questions the use of the Reactor Safety Study in accident analyses, and contends that serious accidents (presumably at reactors generally) are "plainly credible" after Three Mile Island. This proposed contention falls short of specificity requirements, whatever standard one applies. There is no nexus of any kind, direct or indirect, between the very generalized concerns being expressed and the specific licensing actions we are considering. The possibility of accidents at a particular reactor can only be meaningfully analyzed with reference to specific scenarios and the design of that particular facility. Were Palmetto to postulate a specific serious and credible accident scenario at Catawba, we might accept a contention based upon it. Cf.

Public Service Co. of Oklahoma (Black Fox Station), 11 NRC 433 (1980). In the absence of such a credible scenario, this contention must be rejected.

Palmetto 9 and 31 (CESG 2): These contentions address an explosive hydrogen-oxygen reaction produced within the reactor containment following a loss-of-coolant accident. As held in Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, these contentions are denied because the issue is being addressed in the rulemaking process. As recently as December 23, 1981 (46 Fed. Reg. 62281), the Commission published a proposed rule for comment. It is recognized, however, that hydrogen issues may be litigated in individual licensing proceedings provided the challenger postulates a credible scenario for a loss-of-coolant accident producing hydrogen. Absent such a scenario and in view of the pending rulemaking, these contentions are rejected.

Palmetto 11: This contention seeks to inject increased costs of construction into the environmental cost/benefit analysis at the operating license stage. The second sentence makes it clear that it is an attempt to reopen the cost/benefit analysis conducted at the construction permit stage. While construction costs can be significant at the construction permit stage when it comes to choosing among alternatives, they are usually irrelevant at the operating license stage. In the first place, costs of construction of all power plants have risen sharply in the past several years. The costs of the benefits associated with building a plant have also risen. No claim is made that the costs of construction of Catawba have risen any faster than those of other nuclear plants, or of other goods and services in the economy. More fundamentally, the attempt to inject

increased costs into the cost/benefit equation at the operating license stage simply comes too late. Even assuming that the costs of construction of Catawba have gone up an inordinate amount, the fact remains that those funds have already been spent or are committed at this late stage of construction. Thus there is no practical point in considering such "sunk" costs now. Cf. Public Service Co. of New Hampshire (Seabrook Station), 5 NRC 503, 530-536 (1977).

Palmetto 12: This contention states that capital-intensive forms of energy (presumably including nuclear power plants) place added burdens on a tight capital market and increase interest rates in the economy as a whole. This may or may not be true. However, exploration of this broad economic thesis is far beyond the relatively narrow scope of this proceeding. The argument would be more appropriately put to an economic committee of the Congress.

Palmetto 13: This contention about the effect of Catawba on the area labor market is also beyond the scope of this operating licensing proceeding. We are concerned with whether the Catawba nuclear power plants meet the safety rules of the NRC and whether their benefits will outweigh the environmental costs of operation. We are not concerned, at least at this juncture, with the number of jobs Catawba creates, either as a construction project or as an operating facility, and, by comparison, how many jobs investments in conservation might have created had Catawba not been built.

Palmetto 19 and 45 (CESG 19): These contentions address the Catawba Emergency Core Cooling System. 10 CFR Part 50, Appendix K. Palmetto 19

first alleges that the expected performance of the system has not been correctly predicted and in support cites what are described as published criticisms of the methodology embodied in the analysis put forth in the Commission's Reactor Safety Study (WASH-1400). Additionally, Palmetto 19 together with Palmetto 45 and CESG 19 allude in an unclear manner to a part of the reactor and allege that part is so poorly supported as to, in the limit of complete support failure, result in blockage of ports provided for entrance of emergency cooling water for the reactor core. The contention is so unclearly stated, even in the oral presentation (Tr. 179 ff, 362), as to preclude identification of the item of equipment under discussion. Therefore, both as a challenge to Commission regulations for emergency core cooling and as a collection of unclear statements lacking specifics on equipment, these contentions are rejected.

Palmetto 20: This contention postulates that occupational radiation exposures will not be as-low-as-reasonably-achievable (ALARA) because certain equipment (specifically the steam generator, the reactor vessel and neutron shield bolting) will require extensive repairs and because the FSAR does not adequately consider occupational exposure from various other occurrences that are not specifically described.

This contention is disallowed because it fails to provide any reasonably specific basis for the assertion that ALARA requirements of 10 CFR 20.1 will not be met. The Applicants have set forth in Section 12.1 of the FSAR their program for "(e)nsuring that occupational radiation exposures are as low as reasonably achievable (ALARA)." The contention, however, does not question this program or any part of it. Speculation

that large collective doses of radiation might be received by repairmen at some future time because of the premature failure of equipment is not grounds for a showing that ALARA principles were ignored.

The Commission has under development, but has not yet published, a proposed rule concerned specifically with occupational ALARA. Should Palmetto Alliance wish to pursue the subject matter of this contention, participation in the making of the proposed occupational ALARA rule would be an appropriate avenue.

Palmetto 28: This contention seeks to raise "ATWS" (Anticipated Transients Without Scram) issues into this individual licensing proceeding. The thrust of the allegation is that the Applicants have failed to demonstrate that the risk from an ATWS event is such that there is a reasonable assurance that the Catawba plant can be operated prior to the completion of the Commission's pending rulemaking on that subject. The Applicants in this case do not have the burden of making any such demonstration. The Commission has made these determinations, as stated in its recently initiated rulemaking:

> The Commission believes that the likelihood of severe consequences arising from an ATWS event during the two to four year period required to implement a rule is acceptably small. ... On the basis of these considerations, the Commission believes that there is reasonable assurance of safety for continued operation until implementation of a rule is complete. 46 Fed. Reg. 57521.

It is clear from the quoted language that the Commission wishes to confine these generic issues to the generic rulemaking context. The Catawba facility will, of course, be subject to the outcome of the ATWS rulemaking.

Palmetto 29: Alluding to problems that have cropped up at other nuclear power stations, Palmetto Alliance asserts that the Applicants should go back to the drawing board and try to ferret out as yet unrecognized interactions of systems, particularly the control systems and plant dynamics, that could have impacts on health and safety of the general public. Palmetto Alliance makes no attempt to establish a nexus between the undefined systems interaction problems encountered at other reactors and Catawba, to identify the specific systems of concern, or to postulate the kind of impact that might endanger the safety and health of the general public. Consequently, this contention is much too vague to be admitted and is disallowed.

CESG Contentions Rejected.

CESG 1 (Palmetto 30): This contention seeks to inject the question of "need-for-power" into the proceeding. Such a contention is barred by a new rule, which provides in pertinent part that --

> Presiding officers shall not admit contentions proffered by any party concerning need for power or alternative energy sources for the proposed plant in operating license hearings. 10 CFR 51.53(c).

The supplementary information statements accompanying the proposed and final rules explicitly recognize that an exception to the rule may be

sought upon a showing of special circumstances pursuant to 10 CFR 2.758. 46 Fed. Reg. 51776; 47 Fed. Reg.____.14/

CESG 3 (Palmetto 32): This contention addresses the alleged inadequacy of the risk analysis by the Staff of operation and decommissioning of the Catawba station, and of the transport and storage of radionuclides produced there. The contention introduces a concept of "totality of risks" which purports to be a single number as a measure of a projected life-of-the-station effect on the public. Tr. 314-316. The contention does not include sufficient description of that concept to establish the feasibility of its determination. Even so, this is basically a generic issue. Whereas the contention is claimed to be site specific, completely absent are delineations of those characterics of this site which bear upon the analyses and cause them, in some special manner, to entail investigation to a depth beyond that usually required by existing regulations. Accordingly the Board rejects this contention for lack of specificity.

CESG 5 (Palmetto 33): This contention alleges that the construction permit cost/benefit analysis has become defective and that the power to be produced by Catawba will be more expensive than a number of alternatives. This contention is also barred by the Commission's new rule (quoted in the discussion of CESG 1), which bars consideration of non-nuclear alternatives at the operating license stage.

14/ Our rulings on CESG Contentions 1, 5 and 12 are deferred and are to be effective upon the effectiveness of the new rule. That will occur 30 days following its publication in the Federal Register pursuant to 5 U.S.C. 553(d).

CESG 6 (Palmetto 34): This contention represents yet another attempt to inject costs for Catawba and a resulting unfavorable cost/benefit ratio into this operating license proceeding. It also attempts to bring in need-for-power by claiming that earnings from Catawba will be "undeserved" because the facility is "unneeded." These issues are not relevant to the narrow focus of the cost/benefit analysis at the operating license stage.

CESG 10 (Palmetto 37): This contention calls for an "adequate crisis relocation plan" as a part of emergency planning. The phrase is not defined in the contention but it was made clear by CESG at the prehearing conference that "crisis relocation" means an area to which people could be moved permanently in the event of a nuclear disaster. Tr. 341. The Commission's emergency planning rules do not require establishment of such a permanent facility. Accordingly, this contention is an impermissible attack on the rules.

CESG 12 (Palmetto 39): This contention alleges that since the construction permit the Applicants have embarked upon a variety of programs designed to decrease load growth. The implication is that these actions have reduced need for power. As noted in discussion of CESG 1, however, the Commission's new rule bars consideration of need for power from operating license proceedings.

CESG 15 (Palmetto 41): This contention seeks to litigate the possible effects of an electromagnetic pulse (EMP) on Catawba. It is disallowed. An electromagnetic pulse of the type described by petitioners is generally postulated to result from the detonation of a nuclear weapon at high altitude as an act of war. Petitioners do not contend otherwise or suggest how an EMP affecting the Catawba plant could be produced by other than a

hostile act. Consequently we view this contention as an impermissible challenge to Commission regulation 10 CFR 50.13 and concur with the action taken on a similar contention by the Licensing Board for the Perry facility. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant), 14 NRC 842. See Siegel v. AEC, 400 F.2d, 778 (C.A.D.C. 1968).

CESG 18 (Palmetto 44): This contention is disallowed for lack of the requisite specificity. There is no claim that components of the Catawba reactors do not meet reference temperature requirements. Section 5.3.1.5 of the FSAR and Tables 5.3.1-4 and -5 show how the Catawba pressure vessels will comply with the fracture toughness requirements of 10 CFR Part 50, Appendix G. The contention makes no reference to this showing. Moreover, no link is established between temperature and "reactor embrittlement." Finally, even assuming there is a problem at the Oconee Unit, the contention does not link Oconee with Catawba. In sum, this contention does not contain a sufficiently clear statement to put the Applicant and Staff on notice of the crux of the Intervenor's concern.

CESG 20 (Palmetto 46): Petitioners are concerned that the drinking water of communities downstream from Lake Wylie will become contaminated by radioactive materials accidentally released from Catawba. The release of concern is postulated to result from "an accident such as happened at Oconee," or from "---any one of a variety of as yet unencountered operational errors." The Oconee reactor is of a substantially different design than Catawba and the unsupported assertion that a similar accident could occur at Catawba is, at best, very tenuous. We note that the FSAR includes detailed discussions of the proposed Catawba liquid radwaste system, including analyses of possible accidents and their effects. See

Sections 3.5, 5.2, 11.2 and 15.7. This contention should, at the least, reflect an awareness of these discussions. The vagueness of this contention provides no basis for arguments about the source or nature of the radioactive materials, how they might reach Lake Wylie, or on the magnitude of the additional exposure that might ensue to people downstream who drink the water. Consequently, this contention does not meet the requirements of 10 CFR 2.714(b) and is disallowed.

CESG Contention 21 (Palmetto 47): This contention asserts that the Applicants' Environmental Report is deficient in respect to the consideration of some radioactive sources and to the water exposure pathway. The Commission's Staff is very explicit about the content of environmental reports. Section 3.5.1 of Reg. Guide 4.2 (NUREG-0099) specifies the source terms (including tritium) that are to be included. Section 5.2.1 of Reg. Guide 4.2 specifies the exposure pathways (including water) that must, as a minimum, be covered. Further, Reg. Guide 1.109 provides detailed guidance for the calculation of radiation doses from both liquid and atmospheric pathways.

In this instance, Intervenors have had an opportunity to study the Environmental Report which is the particular document in contention. This document does, in fact, contain the type of information alleged to be missing. See Sections 3.5.1.1.4, 5.2.4.1, 5.2.4.2. If some specific sections or tables of the report are believed to be deficient the contention should have specifically identified them. This contention is disallowed for lack of specificity.

The Commission fulfills its obligations under the National Environmental Policy Act, in part, by the issuance of its own environmental

assessment and environmental statements. Environmental reports prepared by applicants (sometimes found to be deficient) are major source documents used by the Commission's Staff. When the Staff's draft environmental statement for Catawba is issued, Intervenors will have an opportunity to study it and to submit comments about any item of concern, including source terms, environmental pathways, and health effects. However, any additional contentions on this subject will have to be based on new information.

Contention 22 (Palmetto 48): The first sentence of this contention about dilution of ownership refers to "responsibility and liability," but it does not say for what. We have admitted Palmetto Contention 24, which addresses the ability of the small owners to produce the funds needed to operate the plant. This contention may overlap that contention, but it seems to add nothing of substance.[15/] The remainder of this contention must also be disallowed because it does not raise any issue properly cognizable in an operating license proceeding. The NRC is not concerned with whether purchasers of nuclear generating capacity enter into unfavorable agreements.

The Security Plan.

Palmetto Contention 23 alleges in general terms that the Applicants have not developed and demonstrated an adequate security plan. The contention does not point to any particular deficiencies presumably because, as the Applicants point out, "the security plan is protected under the Commission's regulations (10 CFR 2.790), and is not available for

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15/ We will consider later on whether allowance of substantially similar contentions by two or more intervenors should lead to consolidation of their presentations on that contention.

inspection." Applicants' Response, p. 78. The Applicants go on to argue that Palmetto nevertheless "must frame [a sufficiently specific] contention on information available to it," this despite the fact that, by hypothesis, no information about the plan is available. We reject that argument.

In the instances of unavailable information discussed so far, we expected the problem to be resolved later when the relevant documents become publicly available. Here, however, unless ordered by the Board, the Catawba security plan will remain unavailable to the Intervenors.

Because an intervenor cannot reasonably be required to advance specific contentions about a security plan he has never seen, and because Palmetto has expressed a formal interest in the Catawba plan, we believe we could at this juncture order the Applicants to grant Palmetto access to that plan. We could now find that disclosure of the plans is "necessary to a proper decision in the proceeding." 10 CFR 2.744(e), as recently amended, 46 Fed. Reg. 51718, 51723. However, we are uncertain whether Palmetto is fully aware of the procedural complexities and costs associated with pursuing security plan issues under the Commission's case law and new regulations. For one thing, we would condition a disclosure order on Palmetto having obtained the services of a qualified security plan expert. Beyond that, access would be conditioned as to time, place, note-taking, and the like. A copy of the protective order entered in the Diablo Canyon case is enclosed as illustrative of these restrictions. A copy of the new security plan regulations is also enclosed.

A logical next step, then, is for Palmetto to consider the matter further and inform us, within ten days of receipt of this Order, whether it wishes to gain access to the Catawba security plan, subject to the kinds of

conditions we have indicated. If it wishes to proceed, we will then hear from the other parties and consider what further procedures are appropriate.

Service of Documents.

During the prehearing conference Palmetto complained that they had had only limited access to the Applicants' FSAR and Environmental Report and that their ability to formulate contentions had been significantly hampered. Palmetto anticipated that they would have further difficulties of that nature unless documents yet to come -- particularly amendments to FSAR -- were served upon them. The Applicants rejected these complaints. Without attempting to resolve these disagreements, the Board suggested that Palmetto make a motion that henceforth the Intervenors be served with copies of all relevant documents generated by the Applicants and the Staff in connection with this operating license proceeding. This would include, most significantly, amendments to the FSAR, other formal technical exchanges between the Applicants and Staff, emergency plans generated by State and local authorities, the draft and final environmental impact statements, and the Staff's Safety Evaluation Report, as supplemented.

The Board believes that it would not significantly burden either the Staff or the Applicants to serve a copy of the papers they generate in the future on the Intervenors. This is suggested by the fact that the Staff and some applicants have provided such service in some past cases. In the case of a particularly bulky document which the Applicants or the Staff believe will not be viewed as important by the Intervenors, the Applicants or Staff may seek the permission of the Board Chairman to serve only one copy of the document on one lead intervenor. In such a case, the

Intervenors would be expected to consult with one another and to share access to that document. With that narrow exception, however, the Board grants Palmetto's motion for service of documents on all intervenors in this case.

Discovery and Schedule for Further Proceedings.

Discovery is to commence as of the date of this Order. The scope of discovery is to be confined to the contentions we have admitted either conditionally or unconditionally.

The following filing dates are established by this Order:

Page of Order	Matter	Filing Date
12	Discovery on Contentions 6, 7, 18 and 25 (Palmetto) and 13 and 17 (CESG)	June 3 (for last answers to interrogatories)
12	Revisions of above contentions	July 6
12	Revisions of contentions presently non-specific for lack of information	30 days after receipt of relevant document
12	New contentions based on new information	30 days after receipt of information
21	Information and comments on spent fuel questions	March 26
17	Comments on operator qualifications questions	March 26
38	Whether Palmetto wishes to pursue their security plan contention	10 days after receipt of this Order

The schedule for other matters will be considered and established by the Board following receipt of scheduling suggestions from the parties, as discussed at the Prehearing Conference. Tr. 372-73.

Orders of this kind are governed by 10 CFR 2.751a(d), which provides in pertinent part that --

> Objections to the order may be filed by a party within five (5) days after service of the order, except that the regulatory staff may file objections to such order within ten (10) days after service. The board may revise the order in the light of the objections presented and, as permitted by § 2.718(i), may certify for determination to the Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, such matters raised in the objections as it deems appropriate. The order shall control the subsequent course of the proceeding unless modified for good cause.

In view of the number and complexity of contentions in this case, the Applicants and the Intervenors may mail their objections to this Memorandum and Order no later than March 26, 1982. Any Staff objections shall be mailed by April 2, 1982.

THE ATOMIC SAFETY AND LICENSING BOARD

James L. Kelley

James L. Kelley, Chairman
ADMINISTRATIVE JUDGE

Dr. A. Dixon Callihan
ADMINISTRATIVE JUDGE

Richard F. Foster by JLK

Dr. Richard F. Foster
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 5th day of March, 1982.

Enclosures:
1. Diablo Canyon protective order
2. Recent NRC regulations on security plans

anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.

6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.

7. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.

8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.

9. Expose corruption wherever discovered.

10. Uphold these principles, ever conscious that public office is a public trust.

Signed this 6th day of October, 1981, at Bethesda, Maryland.

For The Nuclear Regulatory Commission.

William J. Dircks,

Executive Director for Operations.

[FR Doc. 81-30631 Filed 10-21-81; 8:45 am]

BILLING CODE 7590-01-M

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10 CFR Parts 2, 50, 70, and 73

Protection of Unclassified Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations to require NRC licensees and other persons to protect unclassified safeguards information against unauthorized disclosure. The rule establishes requirements and sets forth conditions to be applied by NRC licensees and other persons for the protection of unclassified Safeguards Information for operating power reactors, spent fuel shipments, and activities involving formula quantities of strategic special nuclear material.

EFFECTIVE DATE: October 22, 1981 for §§ 2.744(e), 2.790(d)(1), 73.2 (jj) and (ll), and 73.21 (a), (b) and (c)(1). All remaining sections will be effective on January 20, 1982.

FOR FURTHER INFORMATION CONTACT: Mr. Donald J. Kasun, Physical Security Licensing Branch, Division of Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Phone 301-427-4010.

SUPPLEMENTARY INFORMATION:

Background

On December 29, 1980, the Nuclear Regulatory Commission published for comment a proposed rule that would prohibit the unauthorized disclosure of certain safeguards information by NRC licensees or other persons (45 FR 85459). The proposed rule was published in response to the provisions of a new section 147, SAFEGUARDS INFORMATION of the Atomic Energy Act, as amended. Public comment on the proposed rule was received from forty-five groups and organizations as follows:

Power Reactor Licensees	19
Fuel cycle licensees	6
Nuclear service companies	7
States	5
Law firms	3
Associations	2
Other government agencies	2
Private citizens	1

There were no comments received from public interest groups or organizations.

Extensive revisions have been made to the rule as a result of the comments received. The most significant revisions include:

Excluding from the scope of the rule activities involving less than a formula quantity of strategic special nuclear material (except for spent fuel shipments).

Deleting limit of error of inventory difference (LEID) information from the rule.

Adding guard qualification and training plans as items considered to be Safeguards Information (those portions that disclose facility safeguards features).

Deeming information protection systems used by State and local police force adequate to meet regulatory requirements.

Rephrasing § 2.790(d)(1).

Not requiring the marking of documents more than one year old stored by licensee contractors. Such documents would be marked if and when taken from storage for use.

A. *Discussion of Comments Resulting in Changes to Proposed Rule*

(1) *Reduction in the Scope of Application*—A number of commenters suggested that physical protection information for facilities that possess only special nuclear material of low strategic significance (Category III) be deleted from the rule considering the small potential hazard of such materials. Commenters also suggested that this type of information when in the hands of the NRC be withheld from public disclosure as commercially valuable (proprietary) information.

The Commission agrees with both points. The original determination of scope was based on the assumption that appropriate information pertinent to all facilities and special nuclear materials required to be protected under 10 CFR Part 73 should be included in the proposed rule. Upon further review the Commission has concluded that applicability should be more closely related to the "significant adverse effect on the health and safety" standard contained in Section 147 of the Atomic Energy Act, as amended. Accordingly, the scope of the rule has been reduced to apply only to those facilities, nuclear materials, or transport activities for which there exists significant potential for harm to the public health and safety if the nuclear materials or facilities involved are intentionally misused or damaged. Therefore, Safeguards Information is limited to information regarding the physical protection of:

All activities involving formula quantities of strategic special nuclear material, both irradiated and unirradiated (most of the physical protection information for activities involving a formula quantity of *unirradiated* strategic special nuclear material would be classified as National Security Information under 10 CFR Part 95),

Operating power reactors, and

Spent fuel shipments (but not routes and quantities).

This separation is generally consistent with the overall NRC Policy of graded safeguards. The activities that remain under the rule (with certain minor exceptions such as non-power reactors) require protection by armed guards, whereas the activities deleted do not. Appropriate paragraphs of § 73.21 have been modified to reflect this scope change. In regard to the second point, the Commission has determined generically that information concerning a licensee's or applicant's material control and accounting or physical security program for special nuclear material, not otherwise covered by specific statutory exemptions, is commercial or financial information for purposes of Freedom of Information Act (5 U.S.C. 552) (FOIA) requests. In order to reduce both the licensee's and the Commission's administrative burden associated with licensees applying for a withholding determination for each item of such information submitted to the NRC under 10 CFR 2.790(b)(1), 10 CFR 2.790(d)(1) has been amended to deem such information confidential commercial information under exemption (4) of the FOIA. This continues in effect present procedures for such information.

Nine commenters supported the retention and/or expansion of § 2.790(d)(1) as an appropriate method

for withholding material control and accounting and physical security information not considered to be Safeguards Information. There were no comments to the contrary.

(2) *Deletion of Limit of Error of Inventory Difference (LEID) Information*—A large number of commenters recommended the deletion of LEID information for low enriched uranium fabrication facilities on the basis that this information would not be very valuable to a diverter attempting to steal material within the limits of a statistical alarm threshold.

The Commission agrees and LEID information has been deleted from the rule (LEID information for activities involving formula quantities of strategic special nuclear material would still be classified under Part 95).

(3) *Addition of Guard Qualification and Training Plans to the Rule*—Ten comments were received on this matter, the most for any item. Commenters stated that guard qualification and training plans contained, among other things, site specific response procedures and descriptions of facility safeguards features. A review of several such plans received by the NRC disclosed that while some plans were so general that they could not be considered Safeguards Information, others contained specific information that should be protected. The rule has been amended to include those *portions* of guard qualification and training plans that disclose site specific features of the physical protection system.

(4) *Grandfathering*—Comments pointed out that certain organizations (e.g. architect/engineering firms) may have very large quantities of old documents that qualify as Safeguards Information but are rarely removed from storage. They suggested that this information be exempted or at least given special consideration. The Commission agrees with this suggestion in part and has amended the rule to require marking of documents more than one year old only when they are removed from storage. Storage, protection and access requirements however, would still apply. Documents containing Safeguards Information located at the operating facility would have to be marked regardless of age.

(5) *"As Built" Drawings*—Some commenters suggested that all revisions of drawings, not just the final, be considered as Safeguards Information. Other commenters suggested that preliminary design and construction drawings be specifically excluded from the rule. The Commission believes there is some merit in both suggestions. Accordingly, the rule has been changed to indicate that any drawing or document that substantially represents the final design of the physical security system would have to be protected. This change eliminates the need to control much of the initial information, such as requests for bids, but still requires protection of documents that are only slightly different from the final version.

(6) *Vital Area Identification and Location*—Several commenters noted that the proposed rule might be interpreted as requiring protection of information already in public documents, such as in the FSAR, specifically in regard to drawings that show locations of safety related equipment. The rule was therefore revised to indicate that only drawings or documents that explicitly identify items of safety-related equipment as vital for purposes of physical protection are required to be protected. (Note that the content of Appendix E has now been incorporated into the text of the rule at paragraph § 73.21(b).) Other than as above, engineering and construction drawings that show the locations of safety-related equipment are not considered Safeguards Information.

(7) *Acceptability of Present Protection Systems*—Several commenters suggested that specific physical protection requirements not be included in the existing rule but that licensee or State standard procedures be accepted instead. The Commission has concluded, based on frequent NRC staff contacts, that State and local police forces protect information in a way that is equivalent to the rule requirements. Accordingly, the rule has been revised to deem State and local police information protection procedures acceptable. In regard to NRC licensees that fall into the scope of the rule, the Commission has concluded that without formal requirements there would be no assurance of uniformity, consistency or an adequate level of protection across the industry. As evidenced by the comments received, there is considerable divergence of opinion as to what constitutes a minimum acceptable level.

(8) *Other Minor Changes*—Based primarily on comments received, additional rule changes have been made to:

Permit Safeguards Information to be transported by any individual authorized access under the rule.

Show that matter other than documents may contain Safeguards Information.

Allow use of ADP systems by contractors of licensees.

Indicate that non-security related orders and procedures for guards need not be protected.

Limit off-site communication information that needs to be protected to communications used for security purposes.

Show that portions of any correspondence that contains Safeguards Information would have to be protected.

Remove from the rule and place in guidance documents many of the detailed requirements relative to marking, transmission, and destruction of documents that contain Safeguards Information.

Note in § 2.744(e) the applicability of criminal sanctions, as well as civil penalties, for violations of Board orders pertaining to Safeguards Information.

B. *Discussion of Comments Not Accepted By the Commission*

(1) *Protection During Agency Proceedings*—The adequacy of proposed 10 CFR 2.744(e) was questioned by law firm commenters representing licensees. The amendment as proposed would confirm a presiding officer's authority to issue appropriate protective orders whenever protected Safeguards Information is required in an adjudicatory hearing. The amendment was seen by the Commission as the minimum restriction needed to protect the health and safety of the public or the common defense and security in the context of adjudicatory hearings pursuant to section 147a of the Atomic Energy Act of 1954, as amended (the Act), and to impose the minimum impairment of procedural rights, as required by section 181 of the Act. The amendment makes it clear that the physical protective measures and need to know standards of proposed § 73.21 would apply to Safeguards Information in adjudicatory hearings.

First, the commenters note correctly, but as a shortcoming, that § 2.744(e) applies only to agency records and not to Safeguards Information possessed only by an applicant, licensee, or contractor. A second objection was that the proposed § 2.774(e) gives relatively weak authority to the licensing boards to prevent disclosure by intervenors and their lawyers. The commenter asserted that some showing of reliability should be required of such persons before Safeguards Information is disclosed. Third, the commenters stated that the proposed regulation gives inadequate guidance to the licensing boards on the kind of protection intervenors should be required to give to Safeguards Information. The commenters suggest that the restrictions used in the Diablo Canyon case be adopted. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant Units 1 and 2)

ALAB-600, 12 NRC 3 (1980). Finally, the commenters suggest that the possibility of criminal sanctions, as well as of civil penalties, be noted for violations of Board orders pertaining to Safeguards Information.

In response to these comments the Commission has made one change to proposed § 2.744(e). That change notes the applicability of criminal sanctions by stating, for the purpose of section 223 of the Act, that any order issued pursuant to § 2.744(e) with respect to Safeguards Information be considered an order issued pursuant to section 161b. of the AE Act. This is in accord with section 147b. of the Act.

The Commission believes the other comments should not be adopted. It was not the intention of the Commission to place any restrictions on discovery by intervenors, or to write any special rules chilling intervenors' rights, such as a screening requirement not applicable to all parties. Not only would such rules be discriminatory, but also would be contrary to sections 181 and 147a of the Act. This Commission cannot presume beforehand that intervenors and their counsel are any-the-less trustworthy than the staff or applicant and their counsel.

The minimum protection required for Safeguards Information is stated in proposed § 73.21. The requirements there apply to intervenors and their counsel as well as to the applicant or licensee. Section 2.744(e) allows a Board to go further, if, in its judgment after hearing all relevant arguments, the circumstances warrant it. This Commission needless to say, has confidence in the ability of its Boards to exercise sound judgment in the exercise of their discretion under § 2.744(e), and therefore at this time declines to write any special rules for the guidance of the Boards as to the extra measures they may require for the protection of Safeguards Information in adjudicatory hearings.

With respect to the protective measures used by the Boards in the Diablo Canyon case and their potential general applicability, the Commission notes that those conditions are involved in a review of the Diablo Canyon hearing by an Atomic Safety and Licensing Appeal Board. The Appeal Panel has informed the Commission that it would like to make some suggestions regarding the handling of Safeguards Information in adjudicatory hearings but feels constrained not to do so until the Diablo Canyon adjudication is finished. The Commission believes that the suggestions of the Appeal Panel will be most useful in determining if restrictions on intervenor's rights of discovery of Safeguards Information should be inserted into the agency's rules as the commenters request.

For this reason also, the Commission will defer to a later time the decision whether it should stipulate any further guidance or rules for how the licensing boards should write protective orders to protect Safeguards Information. At this time the Commission believes that its opinion and those of the Boards provide adequate guidance. See, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI 80-24, 11 NRC 775 (1980), ALAB 410, 5 NRC 1398, (1977); ALAB 580, 11 NRC 227 (1980); ALAB 592, 11 NRC 744 (1980); and ALAB 600, 12 NRC 3 (1980).

One commenter also took the position that proposed § 2.744(e) did not provide adequate protection against undesirable disclosure of physical security plans for nuclear power plants. In his view a protective order and affidavit of nondisclosure would not eliminate the risk of unauthorized disclosure by intervenors who had an ulterior motive of securing the plans for use in sabotaging the plant. This commenter recommended (i) inclusion of rules of decision based upon *Diablo Canyon* for presiding officers to apply in hearings, and (ii) security clearances or a screening program for persons with access to Safeguards Information in hearings, in order to assure trustworthiness and reliability. Both of these recommendations have been discussed above and rejected. In addition, the Commission does not propose to write rules affecting rights of intervenors in adjudicatory hearings based upon a suspicion of ulterior motives in intervening. To do so would be tantamount to writing rules based upon speculation rather than on fact and law. The hearing process already contains screens to separate the genuine intervenor from the spurious. The intervenor must validate both his standing under judicial rules and the merit of his contentions. He is a known and readily identifiable person who openly participates at considerable expense. Intervenors generally make no effort to conceal their opposition to nuclear power, but this does not supply an adequate basis to consider them as potential co-conspirators in plots to sabotage operating power reactors.

In contrast to the above, a third commenter stated that proposed § 2.744(e) was potentially too restrictive of intervenors' rights in that it gave too much authority to the presiding officer. The commenter suggested modification of proposed § 2.744(e) to allow disclosure of Safeguards Information to a party upon a showing by the party of reasonable necessity for disclosure. 10 CFR 2.744(e) as drafted requires a finding by the presiding officer that disclosure is necessary to a proper decision. The presiding officer, as usual, will exercise a rule of reason in applying the standard. The language used accomplishes the same result and is generally consistent with the terminology in § 2.744.

(2) *Trustworthiness Determinations*—A number of commenters disagreed with the absence of a personnel clearance or screening program as a necessary condition for access to Safeguards Information, noting that the traditional requirements for access to sensitive information include both "need-to-know" and trustworthiness determinations. One commenter suggested that persons having access be subjected to the screening program which the Commission has directed be established for power reactor personnel. Another commenter suggested that individuals be required to show sufficient evidence of trustworthiness before being granted access.

The Commission's position on this matter has not changed. In the first place, Section 147 of the Atomic Energy Act contains no provisions regarding trustworthiness determinations on which to base a federal personnel security program (as is set forth in Section 145 for access to Restricted Data). Secondly, the Commission does not believe that there is any reasonable regulatory framework that can be used to establish a licensee administered screening program, considering the wide distribution afforded some Safeguards Information. While the power reactor access authorization program mentioned by one commenter might be used for "clearing" licensee employees and other persons granted unescorted access to the reactor facility, it would not be applicable to engineering firm employees who are never on the site (but who in some cases have total access to the physical protection system design information). Thirdly, the Commission believes that the proper administration of the need-to-know requirement combined with the rule's occupational restrictions will provide an effective information protection program and still satisfy the "minimum restrictions" provisions of section 147a of the Act.

(3) *Unrestricted Use of Telecommunications*—Several commenters suggested that the restrictions on the use of telephone circuits for transmission of Safeguards Information be deleted. Various reasons were given for this change. One

commenter stated that the rule would prevent the licensee from calling for help in a safeguards emergency. This is not so since the regulations make an exception for extraordinary or emergency circumstances. Another commenter contended that the resources needed to intercept unsecured communications exceeded the technical capabilities of the design basis threat. The Commission disagrees with this position and believes that relatively little skill is needed to tap phone lines or eavesdrop on radio conversations. A third commenter noted that the telephone is normally used to transmit shipping information and it would be burdensome to use another method. In this regard, the only shipments covered by the final rule are spent fuel and formula quantities of strategic special nuclear material. (Category I.)

Notifications regarding spent fuel shipments are required to be by mail (See 10 CFR 73.72) except that reporting schedule changes are permitted to be made by phone in the form of time deviations from the original schedule. Information regarding Category I shipments is classified National Security Information under Part 95 and use of unsecured telephone for such information is prohibited.

Another commenter stated that the rule conflicts with the requirements of § 73.71 regarding the telephonic reporting of physical security events. The events for which reporting is required are considered to be extraordinary conditions in themselves and therefore exempt from the restrictions. An explicit statement was added to the rule in this regard. The Commission, after careful consideration, concluded that the restrictions on the use of unsecured telecommunication circuits needs to be retained in the rule to assure that Safeguards Information is not lost or compromised *without the knowledge of the person responsible for its protection*. There is no indication that these restrictions will unduly burden the licensee or the NRC staff during routine licensing matter or transport activities. For example, periodic call-ins required during shipments can be made using prearranged signals or an operating code.

(4) *Restrictions on Use of ADP Systems*—Commenters stated that the meaning of an "ADP system" was not clear, that facilities without on-site capabilities would be excessively burdened, and that the restrictions should be removed. The Commission disagrees noting that the problem regarding unauthorized access to Safeguards Information stored in ADP systems is more severe than with telephone usage. ADP systems located at engineering firms may have in memory large amounts of information on the design of a physical security system. Without restrictions, access to such information potentially could be gained by anyone, authorized or not, who is familiar with the operation and has access to a terminal. Remote terminals could provide an especially easy and unobtrusive means for obtaining selected Safeguards Information. Access to unprotected data lines between facilities could also be used to compromise a physical security system.

(5) *Physical Protection Requirements*—Several commenters stated that the storage requirements were too restrictive. Suggested alternatives (to locked-security storage containers) included storage in desks, file cabinets, locked rooms, undesignated or non-GSA approved storage repositories, or anywhere in a controlled access or protected area. The Commission does not agree with the suggested alternatives. The basic objective of the security container is to make more difficult *undiscovered* compromise of Safeguards Information. A steel filing cabinet secured with a locking bar and a GSA approved combination lock, or a GSA approved security container both satisfy this objective. On the other hand, locked file cabinets, desks, and ordinary doors can be entered with little difficulty and without leaving any indication that compromise has occurred. The objection to storing anywhere in a controlled access or protected area is based on the free access this would allow to anyone in these areas. However, the rule has been changed to delete the requirement that the security storage container be in a *locked* room when inside a controlled access or protected area.

Other commenters objected to the requirement for control of Safeguards Information by an individual while in use within a controlled access or protected area. The Commission agrees that some relaxation is warranted on this matter; however, the basic requirement has been left in the rule and guidance has been provided to indicate that under certain conditions the general control exercised over controlled access and protected areas would satisfy the requirement.

One commenter noted that the requirements to keep Safeguards Information in locked security containers would have an adverse impact on the availability of the security force to respond to a threat or a safeguards incident. The Commission does not agree. Documents located within alarm stations and guard houses need not be in locked security containers since they are under direct control of security personnel. Similarly, guard orders and procedures may be posted at access control points provided that the post is continuously manned and the information is located so as to prevent observation by visitors.

(6) *Addition of Other Types of Information*—Several commenters disagreed with the deletion of generic safeguards studies and reports (such as the Sandia Laboratories' *Handbooks on Barrier Technology and Entry Control Systems)* from the scope of the rule and noted that no justification was given for the omission. On this matter the Commission notes that the original legislative proposal prepared by the NRC, and interim versions of the legislation, contained explicit language regarding the protection of "studies, reports, and analyses ——— which concern the safeguarding of nuclear materials or facilities."[1] This provision was deleted from the final version of section 147. In view of this deliberate action by the Congress, the Commission has no choice but to delete these items from the rule.

One commenter suggested that information developed during the course of probabilistic risk assessments be protected under this rule. The Commission, while agreeing that such information might have value to a potential saboteur, has concluded that on balance the public interest is better served if all safety-related studies are available for scrutiny. The question also arises concerning the legality of withholding information under Section 147 that is neither related to a licensee's physical protection program nor produced in response to security considerations.

(7) *Deletions of Certain Types of Information*—One commenter suggested that it would be unlawful to include information regarding off-site response forces, shipment schedules and locations of safehavens in that these items are not "security measures" as set forth in section 147. The Commission disagrees on this point. NRC regulations require licensees to make arrangements with State or local police forces for response to safeguards emergencies. For fixed sites these arrangements are documented and become part of the facility physical security plan. For transport of spent fuel and Category I

[1] Congressional Record—House, H 11334, November 29, 1977.

quantities of highly enriched uranium and plutonium, route surveys are conducted by the NRC staff in order to determine what police response could be expected in an emergency, the location of safe havens, and zones of weak radio-telephone communications. The information gathered is documented and transmitted to the licensee for inclusion in his physical protection plan. In this regard, the U.S. District Court for the District of Columbia has recently upheld the Commission's position that police response capabilities and telephone shortcomings are legitimate items for withholding under section 147 of the Act.[3]

Another commenter stated that it might be impossible to prevent disclosure of certain information regarding local police forces. The Commission agrees in part and the rule has been modified to more accurately reflect the original intent that only details of the forces *committed to respond* to a facility safeguards emergency need be protected.

(8) *Withholding Spent Fuel Route Information*—Two commenters recommended that routes used for spent fuel shipments be withheld until the shipments have been completed. This is not a matter for Commission deliberation. Section 147 contains an explicit statement that "Nothing in this Act shall authorize the Commission to prohibit the public disclosure of information pertaining to the routes and quantities of shipments of——irradiated nuclear reactor fuel."

(9) *Limit Regulations to Parts 2 and 9*—One commenter suggested that the licensed industry be allowed to devise its own methods of protection, that specific requirements be deleted from Part 73, and that Parts 2 and 9 contain directives that Safeguards Information be protected. As is stated elsewhere, the Commission believes that without formal requirements (which are considered to be the minimum restrictions that provide an acceptable level of protection) there would be no assurance of uniformity or consistency. Comments received indicate there is no general agreement in the licensed industry concerning what constitutes a minimum level of protection.

(10) *Other Comments*—Following is a list of other comments on minor matters that were not incorporated into the final rule on the basis of no demonstratable need or benefit:

Show that the licensees are not responsible for compliance by other persons that receive Safeguards Information.

Require records to be kept for any Safeguards Information transmitted off-site.

Require that a list be kept of persons who have a need-to-know.

Note that distribution, reproduction, and destruction of Safeguards Information need not be documented.

Include a document exclusion list in the rule.

Add attorneys to the occupation list contained in § 73.21(c); (not necessary in that attorneys are already included in (c) (i) and (vi)).

Amend the definition of Safeguards Information to add "controlled" before Safeguards Information.

Add a definition for "composite plan."

Limit withholding of information on security system weaknesses to those items severe in nature.

(11) *Comments Regarding Guidance*—A number of comments were received regarding guidance needed to implement the rule. The specific items mentioned by commenters were taken into consideration during the development of the guidance document.

(12) *Cost*—Several commenters stated that the estimated costs for implementing the rule were too low, particularly in regards to storage during the construction phase, protection at licensee contractor facilities, and recurring labor. The Commission has revised its estimates as follows. (A value-impact analyses is available in the Public Document Room.)

Initial costs	Recurring (annual)
Licensees and Nuclear Service Companies (245 Locations)	
$4,000 per location (avg) × 245 locations. Total: $980,500	$2,200 per location (avg) × 245 locations. Total: $531,000
State Governments (40 States)	
Total $24,000	Total $126,000

(13) *Public Announcement*—One commenter noted that some firms who may have Safeguards Information are not part of an information network that would inform them of the existence of this new rule. The Commission agrees that special effort is needed regarding public dissemination of the rule. In addition to the normal practice of publication in the Federal Register and distribution of NRC public announcements the Commission intends to (i) encourage licensees to notify their contractors, suppliers, and local police response forces, (ii) send out a special mailing to nuclear service firms that do business with power reactor licensees, and (iii) invite certain associations to notify their members.

C. *Petition for Rulemaking*

On June 7, 1977, the Northern States Power Company and Wisconsin Electric Power Company petitioned the Nuclear Regulatory Commission to amend 10 CFR 50.34(c) so as to include plant security information within the definition of Restricted Data, or alternatively within the definition of National Security Information, to amend 10 CFR 2.905 so as to assure that discovery of plant security information is subject to the protections of Subpart I to 10 CFR Part 2, to amend Subpart I to 10 CFR Part 2 to explicitly recognize that its protections extend to information not under Commission control, and to delete 10 CFR 2.790(d)(1). The Commission's decision on the petition, in light of the issuance of this rule, will be set forth in a separate Federal Register Notice.

D. *Effective Dates*

The Commission has decided to make §§ 2.744(e), 2.790(d)(1), 73.2(jj) and (ll), and 73.21(a), (b) and (c)(1) effective immediately for good cause pursuant to the exception provided by 5 U.S.C. 553(d)(3). The enumerated sections define the scope of Safeguards Information protected by the rules, identify those persons who are permitted access, set forth certain protections afforded by the Commission to such information, and provide certain protections for physical protection and material control and accounting information not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data. These sections alone impose no new requirements on licensees or other persons outside the agency.

Immediate effectiveness of these sections is warranted to avoid further delay in implementing the Congressional intent in enacting Section 147 of the Atomic Energy Act to provide protection from public disclosure for certain specified types of Safeguards Information. Since the rule also codifies current Commission procedure as to what types of information are protected, immediate effectiveness of those provisions will not adversely affect Commission licensees or others in possession of Safeguards Information.

The remaining provisions of the rule will be effective on January 20, 1981.

E. *Paperwork Reduction Statement*

There are no reporting or recordkeeping requirements contained in this regulation and therefore it is not subject to Office of Management and Budget clearance as required by Pub. L. 96–511.

The promulgation of these amendments would not result in any

[3] *Virginia Sunshine Alliance vs NRC*, Civil Action No. [illegible], February 25, 1981 (Presently under appeal.)

activity that affects the environment. Accordingly, the Commission has determined under the National Environmental Quality guidelines and the criteria of 10 CFR 51.5(d) that neither an environmental impact statement nor environmental impact appraisal to support a negative declaration for the proposed amendments to Title 10 is required.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended and sections 552 and 553 of Title 5 of the United States Code, the following amendments to Title 10, Chapter I, Code of Federal Regulations, Parts 2, 50, 70, and 73, are published as a document subject to codification.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161p and 181, Pub. L. 83–703, 68 Stat. 950 and 953 (42 U.S.C. 2201(p) and 2231); sec. 191, as amended, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, as amended, Pub. L. 93–438, 88 Stat. 1242 (42 U.S.C. 5841) (5 U.S.C. 552), unless otherwise noted. Sections 2.200–2.206 also issued under sec. 186, Pub. L. 83–703, 68 Stat. 955 (42 U.S.C. 2236) and sec. 206, Pub. L. 93–438, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600–2.606 also issued under 5 U.S.C. 553. Section 2.609 also issued under 5 U.S.C. 553 and sec. 29, as amended, Pub. L. 85–256, 71 Stat. 579, and Pub. L. 95–209, 91 Stat. 1483 (42 U.S.C. 2039).

2. Section 2.744 is amended by adding a new paragraph § 2.744(e) to read as follows:

§ 2.744 Production of NRC records and documents.

* * * * *

(e) In the case of requested documents and records (including Safeguards Information referred to in sections 147 and 181 of the Atomic Energy Act, as amended) exempt from disclosure under § 2.790, but whose disclosure is found by the presiding officer to be necessary to a proper decision in the proceeding, any order to the Executive Director for Operations to produce the document or records (or any other order issued ordering production of the document or records) may contain such protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the dissemination to parties in the proceeding, to interested States and other governmental entities participating pursuant to § 2.715(c), and to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a party other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the presiding officer for violation of an order issued pursuant to this paragraph, violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

* * * * *

3. Section 2.790 is amended by revising paragraph (d)(1) as follows:

§ 2.790 Public inspections, exemptions, requests for withholding.

* * * * *

(d) * * *

(1) Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection or material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data.

* * * * *

PART 50—LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

4. The authority citation for Part 50 is revised to read as follows:

Authority: Secs. 103, 104, 161, 182, 183, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2239); Secs. 201, 202, 206, 88 Stat. 1243, 1244, 1246 (42 U.S.C. 5841, 5842, 5846), unless otherwise noted. Section 50.78 also issued under Sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under Sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Sections 50.100–50.102 issued under Sec. 186, 68 Stat. 955 (42 U.S.C. 2236). For the purposes of Sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), § 50.54(i) issued under sec. 161i, 68 Stat. 949 (42 U.S.C. 2201(i)), §§ 50.70, 50.71, and 50.78 issued under Sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)) and the Laws referred to in Appendices.

5. Section 50.34 is amended by adding a new paragraph (e) to read as follows:

§ 50.34 Contents of applications; technical information.

* * * * *

(e) Each applicant for a license to operate a production or utilization facility, who prepares a physical security plan, a safeguards contingency plan, or a guard qualification and training plan, shall protect the plans and other related Safeguards Information against unauthorized disclosure in accordance with the requirements of § 73.21 of this chapter, as appropriate.

6. Section 50.54 is amended by adding a new paragraph (v) to read as follows:

§ 50.54 Conditions of licenses.

* * * * * *

(v) Each licensee subject to the requirements of Part 73 of this chapter shall ensure that physical security, safeguards contingency and guard qualification and training plans and other related Safeguards Information are protected against unauthorized disclosure in accordance with the requirements of § 73.21 of this chapter, as appropriate.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

7. The authority citation for Part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, as amended, 948, as amended, 953, as amended, 954 (42 U.S.C. 2071, 2073, 2201, 2232, 2233); Secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846) unless otherwise noted.

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 70.3, 70.19(c), 70.21(c), 70.22 (a), (b), (d)–(k), 70.24 (a) and (b), 70.32(a) (3), (5), and (i), 70.36, 70.39 (b) and (c), 70.41(a), 70.42(a) and (c), 70.56, are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 70.20a(d), 70.32(a)(6), (c), (d), (e), and (g), 70.35, 70.51(c)–(g), 70.56, 70.57(b) and (d), 70.58(a)–(g)(3) and (h)–(j) are issued under sec. 161, 68 Stat. 949, as amended (42 U.S.C. 2201(i)), and §§ 70.32(h), 70.51(b) and (i), 70.52, 70.53, 70.54, 70.55, 70.58(g)(4), (k) and (l), 70.59, are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

8. Section 70.22 is amended by adding a new paragraph (l) after paragraph (k) to read as follows:

§ 70.22 Contents of applications.

* * * * *

(l) Each applicant for a license to possess, use, transport, or deliver to a carrier for transport formula quantities of strategic special nuclear material

who prepares a physical security, safeguards contingency, or guard qualification and training plan shall protect these plans and other related Safeguards Information against unauthorized disclosure in accordance with the requirements of § 73.21 of this chapter.

9. Section 70.32 is amended by adding a new paragraph (j) to read as follows:

§ 70.32 Conditions of licenses.

* * * * *

(j) Each licensee who possesses a formula quantity of strategic special nuclear material, or who transports, or delivers to a carrier for transport, a formula quantity of strategic special nuclear material or more than 100 grams of irradiated reactor fuel shall ensure that physical security, safeguards contingency, and guard qualification and training plans and other related Safeguards Information are protected against unauthorized disclosure in accordance with the requirements of § 73.21 of this chapter.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

10. The authority citation for Part 73 is revised to read as follows:

Authority: Secs. 53, 147, 161b, 161i, 161o, Pub. L. 83–703, 68 Stat. 930, 948–950, as amended. Pub. L. 85–507, 72 Stat. 327, Pub. L. 88–489, Stat. 602, Pub. L. 93–377, 88 Stat. 475, Pub. L. 95–295, 94 Stat. 780, (42 U.S.C. 2073, 2201, 2167); sec. 201, Pub. L. 93–438, 88 Stat. 1242, 1243, as amended, Pub. L. 94–79, 89 Stat. 413 (42 U.S.C. 5841). For the purposes of sec. 223, 68 Stat. 958, as amended, 42 U.S.C. 2273, § 73.55 is issued under sec. 161b, 68 Stat. 948, as amended, 42 U.S.C. 2201(b); §§ 73.20, 73.24, 73.25, 73.26, 73.27, 73.37, 73.40, 73.45, 73.46, 73.50, 73.55, and 73.67 are issued under sec. 161i, 68 Stat. 949, as amended, 42 U.S.C. 2201(i); and §§ 73.20(c)(i), 73.24(b)(i), 73.26(b)(3), (h)(6), (i)(6), and (k)(4), 73.27 (a) and (b), 73.40(b) and (d), 73.46(g)(6), and (h)(2), 73.50(g)(2), (3)(iii)(B) and (h), 73.55(h)(2), and (4)(iii)(B), 73.70, 73.71, and 73.72 are issued under sec. 161o, 68 Stat. 950, as amended, 42 U.S.C. 2201(o).

11. Section 73.1 is amended by adding a new paragraph (b)(7) to read as follows:

§ 73.1 Purpose and scope.

* * * * *

(b) * * *

(7) This part prescribes requirements for the protection of Safeguards Information in the hands of any person, whether or not a licensee of the Commission, who produces, receives, or acquires Safeguards Information.

* * * * *

12. Section 73.2 is amended by adding new paragraphs (jj), (kk), (ll) and (mm) to read as follows:

§ 73.2 Definitions.

* * * * *

(jj) "Safeguards Information" means information not otherwise classified as National Security Information or Restricted Data which specifically identifies a licensee's or applicant's detailed, (1) security measures for the physical protection of special nuclear material, or (2) security measures for the physical protection and location of certain plant equipment vital to the safety of production or utilization facilities.

(kk) "Need to know" means a determination by a person having responsibility for protecting Safeguards Information that a proposed recipient's access to Safeguards Information is necessary in the performance of official, contractual, or licensee duties of employment.

(ll) "Person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission or the Department of Energy (DOE), (except that the DOE shall be considered a person to the extent that its facilities are subject to the licensing and related regulatory authority of the Commission pursuant to section 202 of the Energy Reorganization Act of 1974 and sections 104, 105, and 202 of the Uranium Mill Tailings Radiation Control Act of 1978), any state or political subdivision of a state, or any political subdivision of any government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

(mm) "Security Storage Container" includes any of the following repositories: (1) For storage in a building located within a protected or controlled access area, a steel filing cabinet equipped with a steel locking bar and a three position, changeable combination, GSA approved padlock; (2) A security filing cabinet that bears a Test Certification Label on the side of the locking drawer, or interior plate, and is marked, "General Services Administration Approved Security Container" on the exterior of the top drawer or door; (3) A bank safe-deposit box; and (4) Other repositories which in the judgement of the NRC, would provide comparable physical protection.

13. A new § 73.21 is added to read as follows:

§ 73.21 Requirements for the protection of safeguards information.

(a) *General performance requirement.* Each licensee who (1) possesses a formula quantity of strategic special nuclear material, or (2) is authorized to operate a nuclear power reactor, or (3) transports, or delivers to a carrier for transport, a formula quantity of strategic special nuclear material or more than 100 grams of irradiated reactor fuel, and each person who produces, receives, or acquires Safeguards Information shall ensure that Safeguards Information is protected against unauthorized disclosure. To meet this general performance requirement, licensees and persons subject to this section shall establish and maintain an information protection system that includes the measures specified in paragraphs (b) through (i) of this section. Information protection procedures employed by State and local police forces are deemed to meet these requirements.

(b) *Information to be protected.* The specific types of information, documents, and reports that shall be protected are as follows:

(1) *Physical Protection at Fixed Sites.* Information not otherwise classified as Restricted Data or National Security Information relating to the protection of facilities that possess formula quantities of strategic special nuclear material, and power reactors. Specifically: (i) The composite physical security plan for the nuclear facility or site.

(ii) Site specific drawings, diagrams, sketches, or maps that substantially represent the final design features of the physical protection system.

(iii) Details of alarm system layouts showing location of intrusion detection devices, alarm assessment equipment, alarm system wiring, emergency power sources, and duress alarms.

(iv) Written physical security orders and procedures for members of the security organization, duress codes, and patrol schedules.

(v) Details of the on-site and off-site communications systems that are used for security purposes.

(vi) Lock combinations and mechanical key design.

(vii) Documents and other matter that contain lists or locations of certain safety-related equipment explicity identified in the documents as vital for purposes of physical protection, as contained in physical security plans, safeguards contingency plans, or plant specific safeguards analyses for production or utilization facilities.

(viii) The composite safeguards contingency plan for the facility or site.

(ix) Those portions of the facility guard qualification and training plan which disclose features of the physical security system or response procedures.

(x) Response plans to specific threats detailing size, disposition, response

times, and armament of responding forces.

(xi) Size, armament, and disposition of on-site reserve forces.

(xii) Size, identity, armament, and arrival times of off-site forces committed to respond to safeguards emergencies.

(2) *Physical protection in transit.* Information not otherwise classified as Restricted Data or National Security Information relative to the protection of shipments of formula quantities of strategic special nuclear material and spent fuel. Specifically: (i) The composite transportation physical security plan.

(ii) Schedules and itineraries for specific shipments. (Routes and quantities for shipments of spent fuel are not withheld from public disclosure. Schedules for spent fuel shipments may be released 10 days after the last shipment of a current series.)

(iii) Details of vehicle immobilization features, intrusion alarm devices, and communication systems.

(iv) Arrangements with and capabilities of local police response forces, and locations of safe havens.

(v) Details regarding limitations of radio-telephone communications.

(vi) Procedures for response to safeguards emergencies.

(3) *Inspections, audits and evaluations.* Information not otherwise classified as National Security Information or Restricted Data relating to safeguards inspections and reports. Specifically:

(i) Portions of safeguards inspection reports, evaluations, audits, or investigations that contain details of a licensee's or applicant's physical security system or that disclose uncorrected defects, weaknesses, or vulnerabilities in the system. Information regarding defects, weaknesses or vulnerabilities may be releases after corrections have been made. Reports of investigations may be released after the investigation has been completed, unless withheld pursuant to other authorities, e.g., the Freedom of Information Act (5 U.S.C. 552).

(4) *Correspondence.* Portions of correspondence insofar as they contain Safeguards Information specifically defined in paragraphs (b)(1) through (b)(3) of this paragraph.

(c) *Access to Safeguards Information.* (1) Except as the Commission may otherwise authorize, no person may have access to Safeguards Information unless the person has an established "need to know" for the information and is:

(i) An employee, agent, or contractor of an applicant, a licensee, the Commission, or the United States Government;

(ii) A member of a duly authorized commmittee of the Congress;

(iii) The Governor of a State or designated representatives;

(iv) A representative of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who has been certified by the NRC;

(v) A member of a state or local law enforcement authority that is responsible for responding to requests for assistance during safeguards emergencies; or

(vi) An individual to whom disclosure is ordered pursuant to § 2.744(e) of this chapter.

(2) Except as the Commission may otherwise authorize, no person may disclose Safeguards Information to any other person except as set forth in paragraph (c)(1) of this section.

(d) *Protection while in use or storage.* (1) While in use, matter containing Safeguards Information shall be under the control of an authorized individual.

(2) While unattended, Safeguards Information shall be stored in a locked security storage container. Knowledge of lock combinations protecting Safeguards Information shall be limited to a minimum number of personnel for operating purposes who have a "need to know" and are otherwise authorized access to Safeguards Information in accordance with the provisions of this section.

(e) *Preparation and marking of documents.* Each document or other matter that contains Safeguards Information as defined in paragraph (b) in this section shall be marked "Safeguards Information" in a conspicuous manner to indicate the presence of protected information (portion marking is not required for the specific items of information set forth in paragraph § 73.21(b) other than guard qualification and training plans and correspondence to and from the NRC). Documents and other matter containing Safeguards Information in the hands of contractors and agents of licensees that were produced more than one year prior to the effective date of this amendment need not be marked unless they are removed from storage containers for use.

(f) *Reproduction and destruction of matter containing Safeguards Information.* (1) Safeguards Information may be reproduced to the minimum extent necessary consistent with need without permission of the originator.

(2) Documents or other matter containing Safeguards Information may be destroyed by any method that assures complete destruction of the Safeguards Information they contain.

(g) *External transmission of documents and material.* (1) Documents or other matter containing Safeguards Information, when transmitted outside an authorized place of use or storage, shall be packaged to preclude disclosure of the presence of protected information.

(2) Safeguards Information may be transported by messenger-courier, United States first class, registered, express, or certified mail, or by any individual authorized access pursuant to § 73.21(c).

(3) Except under emergency or extraordinary conditions, Safeguards Information shall be transmitted only by protected telecommunications circuits (including facsimile) approved by the NRC. Physical security events required to be reported pursuant to § 73.71 are considered to be extraordinary conditions.

(h) *Use of automatic data processing (ADP) systems.* Safeguards Information may be processed or produced on an ADP system provided that the system is self-contained within the licensee's or his contractor's facility and requires the use of an entry code for access to stored information. Other systems may be used if approved for security by the NRC.

(i) *Removal from Safeguards Information category.* Documents originally containing Safeguards Information shall be removed from the Safeguards Information category whenever the information no longer meets the criteria contained in this section.

14. Section 73.80 is revised to read as follows:

§ 73.80 Violations.

An injunction or other court order may be obtained prohibiting any violation of any provision of the Atomic Energy Act of 1954, as amended, or any regulation or order issued thereunder. A court order may be obtained for the payment of a civil penalty imposed pursuant to section 234 of the Act for violation of section 53, 57, 62, 63, 81, 82, 101, 103, 104, 107, 109, or 147 of the Act, or section 206 of the Energy Reorganization Act of 1974, or any rule, regulation, or order issued thereunder, or any term, condition, or limitation of any license issued thereunder, or for any violation for which a license may be revoked under section 186 of the Act. Any person who willfully violates any provision of the Act or any regulation or order issued thereunder may be guilty of a crime and, upon conviction, may be

punished by fine or imprisonment or both, as provided by law.

Dated at Washington, D.C. this 19th day of October, 1981.

For the U.S. Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 81-30630 Filed 10-20-81; 8:45 am]

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. W. Reed Johnson
Thomas S. Moore

In the Matter of	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 OL 50-323 OL
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	

PROTECTIVE ORDER ON SECURITY PLAN INFORMATION

Counsel and witnesses for Intervenor San Luis Obispo Mothers for Peace (Intervenor) who have executed an Affidavit of Non-Disclosure, in the form attached, shall be permitted access to "protected information"*/ upon the following conditions:

1. Only Intervenor's counsel and Intervenor's experts who have been qualified in accordance with the requirements of our decision in Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398 (1977), and our Order of February 25, 1980 in this proceeding, may have access to protected information on a "need to know" basis.

*/ As used in this order, "protected information" has the same meaning as used in the Affidavit of Non-Disclosure, annexed hereto.

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2. Counsel and experts who receive any protected information (including transcripts of in camera hearings, filed testimony or any other document that reveals protected information) shall maintain its confidentiality as required by the annexed Affidavit of Non-Disclosure, the terms of which are hereby incorporated into this protective order.

3. Counsel and experts who receive any protective information shall use it solely for the purpose of participation in matters directly pertaining to this security plan hearing and any further proceedings in this case directly involving security matters, and for no other purposes.

4. Counsel and experts shall keep a record of all protected information in their possession and shall account for and deliver that information to the Commission official designated by this Board in accordance with the Affidavit of Non-Disclosure that they have executed.

5. In addition to the requirements specified in the Affidavit of Non-Disclosure, all papers filed in this proceeding (including testimony) that contain any protected information shall be segregated and:

(a) served on lead counsel and the members of this Board only;

(b) served in a heavy, opaque inner envelope bearing the name of the addressee and the statement "PRIVATE.

TO BE OPENED BY ADDRESSEE ONLY." Addressees shall take all necessary precautions to ensure that they alone will open envelopes so marked.

6. Counsel, experts or any other individual who has reason to suspect that documents containing protected information may have been lost or misplaced (for example, because an expected paper has not been received) or that protected information has otherwise become available to unauthorized persons shall notify this Board promptly of those suspicions and the reasons for them.

It is so ORDERED.

FOR THE APPEAL BOARD

Richard S. Salzman, Chairman

Done at San Luis Obispo, California,
this 3rd day of April, 1980.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 OL 50-323 OL
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	

AFFIDAVIT OF NON-DISCLOSURE

I, _____, being duly sworn, state:

1. As used in this Affidavit of Non-Disclosure,

(a) "Protected information" is (1) any form of the physical security plan for the licensee's Diablo canyon Nuclear Power Plant, Units 1 and 2; or (2) any information dealing with or describing details of that plan.

(b) An "authorized person" is (1) an employee of the Nuclear Regulatory Commission entitled to access to protected information; (2) a person who, at the invitation of the Atomic Safety and Licensing Appeal Board ("Appeal Board"), has executed a copy of this affidavit; or (3) a person employed by Pacific Gas and Electric Company, the licensee, and authorized by it in accordance with Commission regulations to have access to protected information.

2. I shall not disclose protected information to anyone except an authorized person, unless that information has previously been disclosed in the public record of this proceeding. I will safeguard protected

information in written form (including any portions of transcripts of *in camera* hearings, filed testimony or any other documents that contain such information), so that it remains at all times under the control of an authorized person and is not disclosed to anyone else.

3. I will not reproduce any protected information by any means without the Appeal Board's express approval or direction. So long as I possess protected information, I shall continue to take these precautions until further order of the Appeal Board.

4. I shall similarly safeguard and hold in confidence any data, notes, or copies of protected information and all other papers which contain any protected information by means of the following:

(a) my use of the protected information will be made at a facility in San Francisco to be made available by Pacific Gas and Electric Company.

(b) I will keep and safeguard all such material in a safe to be obtained by intervenors at Pacific Gas and Electric Company's expense, after consultation with Pacific Gas and Electric Company and to be located at all times at the above designated location.

(c) Any secretarial work performed at my request or under my supervision will be performed at the above location by one secretary of intervenor's designation. Intervenors shall furnish Pacific Gas and Electric Company, the Board and Staff an appropriate resume of the secretary's background and experience.

(d) Necessary typing and reproduction equipment will be furnished by Pacific Gas and Electric Company.

(e) All intervenor mailings involving protected information shall be made from the facility furnished by Pacific Gas and Electric Co.

5. If I prepare papers containing protected information in order to participate in further proceedings in this case, I will assure that any secretary or other individual who must receive protected information in order to help me prepare those papers has executed an affidavit like this one and has agreed to abide by its terms. Copies of any such affidavit will be filed with the Appeal Board before I reveal any protected information to any such person.

6. I shall use protected information only for the purpose of preparation for this proceeding or any further proceedings in this case dealing with security plan issues, and for no other purpose.

7. I shall keep a record of all protected information in my possession, including any copies of that information made by or for me. At the conclusion of this proceeding, I shall account to the Appeal Board or to a Commission employee designated by that Board for all the papers or other materials containing protected information in my possession and deliver them as provided herein. When I have finished using the protected information they contain, but in no event later than the conclus ion of this proceeding, I shall deliver those papers and materials to the Appeal Board (or to a Commission employee designated by the Board), together with all notes and data which contain protected information for safekeeping during the lifetime of the plant.

8. I make this agreement with the following understandings: (a) I do not waive any objections that any other person may have to executing an affidavit such as this one; (b) I will not publicly discuss or disclose any protected information that I receive by any means whatever.

Subscribed and sworn to before me this day of April, 1980

Cite as 11 NRC 775 (1980) **CLI-80-24**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

John F. Ahearne, Chairman
Victor Gilinsky
Joseph M. Hendrie
Peter A. Bradford

In the Matter of **Docket No. 50-275 OL**
50-323 OL

PACIFIC GAS AND ELECTRIC COMPANY
(Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2)

June 11, 1980

Acting upon petitions to review ALAB-592 filed by applicant and intervenor, the Commission upholds that part of ALAB-592 requiring that the security plan be made available (under a protective order) to intervenor's counsel and expert witness; rules that a protective order issued by a board may not constitutionally limit public disclosure of information obtained outside the hearing process; and remands the matter to the Appeal Board for decision as to which of two specified procedures should apply to the disclosure of such outside information.

RULES OF PRACTICE: SECURITY PLANS

The adequacy of a nuclear facility's physical security plan may be a proper subject for challenge by intervenors in an operating license proceeding. *Consolidated Edison Company of New York* (Indian Point Station, Unit 2), 7 AEC 947, 949 (1974). Commission regulations contemplate that sensitive information may be turned over to intervenors in the proceeding under appropriate protective orders. 10 CFR 2.790.

RULES OF PRACTICE: SECURITY PLANS

In determining whether, and under what conditions, security plans may be made available to intervenors, boards are to follow the guidelines set forth in ALAB-410 (5 NRC 1398) and ALAB-592 (11 NRC 744).

RULES OF PRACTICE: PROTECTIVE ORDERS

Protective orders may not constitutionally preclude public dissemination of information which is obtained outside of the hearing process. See *Rodgers* v. *United States Steel Corporation*, 536 F.2d 1001, 1007 (3rd Cir. 1976); *International Products Corporation* v. *Koons*, 325 F.2d 403, 408 (2d Cir. 1963); and *In Re Halkin*, 598 F.2d 176, 195, n. 45 (D.C. Cir. 1979).

RULES OF PRACTICE: PROTECTIVE ORDERS

A person subject to a protective order is prohibited from using protected information gained through the hearing process to corroborate the accuracy or inaccuracy of outside information. Moreover, the Commission discourages participants in Commission proceedings from gathering protected information from independent means and publicly disseminating such information.

MEMORANDUM AND ORDER

On April 11, 1980, the Appeal Board issued a Second Prehearing Conference Order (ALAB-592) directing that representatives of intervenor, San Luis Obispo Mothers for Peace, be provided access to a sanitized version of the Diablo Canyon physical security plan. The Board directed that the plan be released to intervenor's counsel and to its expert witness under the terms of a protective order and upon execution by these individuals of an affidavit of non-disclosure. On April 14, 1980 the applicant, Pacific Gas and Electric Company (PG&E) filed a motion with the Commission seeking a stay of the Appeal Board's order and also filed a petition requesting Commission review of the Board's decision to release the plan to the intervenor. PG&E opposes turning over the sanitized physical security plan to the intervenor because it believes that there is inadequate assurance that one of intervenor's counsel will abide by the terms of the affidavit of non-disclosure. On April 21, 1980, the Commission issued an order directing that the sanitized physical security plan not be turned over to the intervenor unless and until the Commission so directed. On April 23, 1980, intervenor filed a motion with the Commission

requesting a stay of the Board's order and pet
review the Board's decision. Intervenor believe
the proposed affidavit of non-disclosure is un
Intervenor filed pleadings opposing PG&E
pleading opposing intervenor's motions; and th
opposing the requests of both PG&E and the in
The Commission has reviewed these pleadi
for review filed by PG&E, and has granted the
the intervenor. Because the Commission has
review, the motions to stay the Appeal Boa
Commission will not rule upon them.

In its petition for review PG&E argues th
would not be made available to petitioners
preventing public disclosure of this sensiti
available to the fewest number of individua
recognizes PG&E's concern, but emphasizes
such proceedings may raise contentions rel
applicant's proposed physical security ar
Commission's regulations, 10 CFR 2.790,
information may be turned over to intervenc
appropriate protective orders.[2] In this pro
ALAB-410, 5 NRC 1398 (1977) and in its S
Order of April 11, 1980 (ALAB-592), has se
under what conditions physical security pla
intervenors. The Commission has reviewed
exception noted below, endorses the guide
Board. We believe that the Board has
interpreting the law and balancing compe
handled the sensitive issues raised by req
Canyon physical security plan wisely.

With respect to the PG&E claim that it
one of intervenor's counsel is likely to abid
order and affidavit of non-disclosure, we
assured the Appeal Board that he will abid
order and the affidavit of non-disclosure.
Supreme Court of California, he must be
demonstrated that he has breached these a
law could be placed in jeopardy. We belie

[1] *Consolidated Edison Company of New York* (Indian
(1974).

[2] The regulations are consistent with the policy set f
Act.

requesting a stay of the Board's order and petitioning the Commission to review the Board's decision. Intervenor believes that one of the provisions of the proposed affidavit of non-disclosure is unconstitutional.

Intervenor filed pleadings opposing PG&E's requests; PG&E filed a pleading opposing intervenor's motions; and the NRC staff filed pleadings opposing the requests of both PG&E and the intervenor.

The Commission has reviewed these pleadings, has denied the petition for review filed by PG&E, and has granted the petition for review filed by the intervenor. Because the Commission has acted upon the petitions for review, the motions to stay the Appeal Board order are moot and the Commission will not rule upon them.

In its petition for review PG&E argues that the physical security plan should not be made available to petitioners because the best method of preventing public disclosure of this sensitive document is to make it available to the fewest number of individuals possible. The Commission recognizes PG&E's concern, but emphasizes that intervenors in Commission proceedings may raise contentions relating to the adequacy of the applicant's proposed physical security arrangements,[1] and that the Commission's regulations, 10 CFR 2.790, contemplate that sensitive information may be turned over to intervenors in NRC proceedings under appropriate protective orders.[2] In this proceeding the Appeal Board in ALAB-410, 5 NRC 1398 (1977) and in its Second Prehearing Conference Order of April 11, 1980 (ALAB-592), has set forth guidelines on when and under what conditions physical security plans may be made available to intervenors. The Commission has reviewed these orders, and with the one exception noted below, endorses the guidelines developed by the Appeal Board. We believe that the Board has done a commendable job of interpreting the law and balancing competing policy interests, and has handled the sensitive issues raised by requests for access to the Diablo Canyon physical security plan wisely.

With respect to the PG&E claim that it is unable to determine whether one of intervenor's counsel is likely to abide by the terms of the protective order and affidavit of non-disclosure, we noted that the individual has assured the Appeal Board that he will abide by the terms of the protective order and the affidavit of non-disclosure. As a member of the Bar of the Supreme Court of California, he must be acutely aware that if it can be demonstrated that he has breached these agreements, his license to practice law could be placed in jeopardy. We believe this possible sanction, plus his

[1] *Consolidated Edison Company of New York* (Indian Point Station, Unit 2), 7 AEC 947, 949 (1974).

[2] The regulations are consistent with the policy set forth in Section 181 of the Atomic Energy Act.

assurances, are sufficient grounds to conclude that the counsel will abide by his commitments. We therefore direct that PG&E make the sanitized version available to the intervenor.

Intervenor challenges a provision of the proposed affidavit of nondisclosure which would prohibit those subject to the protective order and affidavit of non-disclosure from publicly discussing or commenting upon protected information which is obtained (a) outside of the course of the proceeding or (b) which has been publicly disclosed by others. Intervenor argues that this limitation violates the First Amendment of the Constitution.

The Commission agrees with the intervenor. In several recent cases, the courts have made clear that protective orders may not constitutionally preclude public dissemination of information which is obtained outside of the hearing process. See *Rodgers* v. *United States Steel Corporation*, 536 F.2d 1001, 1007 (3rd Cir. 1976); *International Products Corporation* v. *Koons*, 325 F.2d 403, 408 (2d Cir. 1963); and *In Re Halkin*, 598 F.2d 176, 195, n.45 (D.C. Cir. 1979).

In reaching these conclusions the Commission wishes to emphasize two points. First, the affiant making the public disclosure is prohibited from corroborating the accuracy or inaccuracy of the outside information by using protected information gained through the hearing process. Second, the Commission discourages participants in Commission proceedings from gathering protected information from independent means and publicly disseminating such information.

Chairman Ahearne and Commissioner Hendrie believe that before intervenors publicly disseminate protected information gained outside the hearing process they should be required to establish to the satisfaction of the board presiding over the Commission proceeding — in the present case the Appeal Board — that the information was in fact gained outside of the hearing process. Commissioners Gilinsky and Bradford do not believe that the parties should be required to secure prior Appeal Board clearance. They believe that any such clearance procedure is an unconstitutional prior restraint. Because the Commission is divided on this matter it remands the issue back to the Appeal Board and directs the Board based on its own reading of the law to select one of these two options. After making its decision the Appeal Board shall modify the affidavit of non-disclosure so that it conforms with the Board's decision. The Board's decision will not be reviewed by the Commission. As soon as intervenor's counsel and witnesses

... executed a revised affidavit of non-discl...
... version of the physical security plan a...
... ORDERED.[3]

For the C...

SAMUEL...
Secretary...

... Washington, D.C.
... of June 1980.

ADDITIONAL VIEWS OF COMMIS...

... the First Amendment prohibi... protected information o... Such a prohibition c... intervenors in violation of ... Steel Corporation, 536 F.2d ... the Commission amend... discussion of independe... possibility of a prior rest... of Appeal Board clea... that this prior restraint is ... sought to protect not only ... which might or mi... lifted. See Near ...

[illegible]

have executed a revised affidavit of non-disclosure, PG&E is to make the sanitized version of the physical security plan available to these individuals.

It is so ORDERED.[3]

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 11th day of June 1980.

ADDITIONAL VIEWS OF COMMISSIONER BRADFORD

I agree that the First Amendment prohibits an affidavit which forecloses public comment on protected information obtained outside the proceeding or disclosed by others. Such a prohibition constitutes a prior restraint on the speech of the intervenors in violation of the First Amendment. *Rodgers* v. *United States Steel Corporation*, 536 F.2d 1001, 1006 (3rd Cir. 1976). To cure this infirmity, the Commission amends the affidavit to remove the absolute restraint on discussion of independently obtained information, but leaves open the possibility of a prior restraint upon the speech of the intervenors in the form of Appeal Board clearance prior to public comment.

I do not agree that this prior restraint is permissible. It is clear that the First Amendment sought to protect not only against absolute restraints, but also against restraints which might or might not through governmental processes be subsequently lifted. See *Near* v. Minnesota ex rel Olson, 283 U.S. 697 (1931).

Furthermore, this prior restraint would be unreasonable and discriminatory in its application. An examination of such a restraint order reveals the following:

1. The purpose of such a prior restraint order must be to prevent disclosure of features of the security plan. However, our order explicitly recognizes that the possible sanctions flowing from disclosure "are sufficient grounds to conclude that the counsel will abide by his commitments." It is not clear how the proposed restraint will be any more effective than the sanctions already in place.
2. The affidavits need only be signed by the intervenors, not by utility personnel or NRC employees. No showing has been made that the intervenors are inherently less trustworthy than other persons who have

[3]Commissioner Kennedy has recused himself from this proceeding.

seen the plan, yet they are singled out. Utility employees are under no NRC sanction whatsoever from disclosing this information, and they certainly would not be required to come to the Board prior to discussing the plan.[1] Commission staff would face sanctions if they were still with the Commission, but they would not be subject to the proposed prior restraint and would be free to comment upon publicly available information regarding the security plan.

In conclusion, I agree that PG&E should be required to turn over the physical security plan to the intervenor. I would support a protective order which provides for an affidavit prohibiting disclosure of the protected information gained through participation in this proceeding. I would, however, require the same affidavit from other attorneys and witnesses.

[1]It is not enough to argue that the utility is free to release its own proprietary information, for the public health and safety consequences are all that are alleged to justify the measures being taken.

UNITED STATES OF A
NUCLEAR REGULATORY C

COMMISSIONER

John F. Ahearne, C
Victor Gilinsk
Richard T. Kenn
Joseph M. Henc
Peter A. Bradfo

In the Matter of

METROPOLITAN EDISON COMPANY, *et al*
(Three Mile Island Nuclear Station, Unit 2)

Upon consideration of the staff's reco
licensee to commence a controlled purging
atmosphere to remove the remaining radioa
gas, finds that the proposed purging will h
to those living near the facility (as well as
it will result in a long-term reduction in the
in the area; and that there is sufficient need
the containment atmosphere to justify goi
the programmatic impact statement current

MEMORANDUM AN

The Commission has before it a staff re
Metropolitan Edison Company, et al.,
controlled purging of the TMI-2 reactor
remove the remaining radioactive Krypto

Most of the radionuclides originally released into the
to insignificant levels. The dominant remaining radi
which has a 10.7-year half-life. The Environmenta
70,000 curies of Kr-85 are mixed in the containmen
sampling of Kr-85 concentrations.