UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Charles Bechhoefer, Chairman
Dr. Frederick P. Cowan
Dr. Jerry Harbour

In the Matter of	Docket Nos. 50-329 OM 50-330 OM
CONSUMERS POWER COMPANY	Docket Nos. 50-329 OL 50-330 OL
(Midland Plant, Units 1 and 2)	
	August 14, 1982

PREHEARING CONFERENCE ORDER
(Ruling Upon New Contentions and
Memorializing Other Determinations
Reached at Prehearing Conference)

On August 12-13, 1982, the Licensing Board conducted a prehearing conference in Midland, Michigan.1/ During the conference, we heard oral argument and ruled on various newly submitted contentions in the OL portion of this proceeding. We also announced several rulings respecting previously submitted contentions, and we discussed with the parties future schedules in the OL and OM proceedings. Following is a summary of these discussions and rulings.

1/ The conference was tentatively scheduled in our Memorandum and Order (Reopening Record on QA Matters and Establishing Schedule for Prehearing Conference and Discovery) dated July 7, 1982 and was formally announced by a Notice of Prehearing Conference, dated July 28, 1982 (published at 47 Fed. Reg. 33574, August 3, 1982).

I. New Contentions

A. Introduction

By our Special Prehearing Conference Order, dated February 23, 1979, we issued our first ruling on contentions in this operating license proceeding. We admitted three contentions submitted by Ms. Mary Sinclair and accepted 24 for discovery purposes, with the expectation that they would later be rewritten or withdrawn. We also admitted one contention submitted by Mr. Wendell H. Marshall (which was identical to one of Ms. Sinclair's contentions) and set forth criteria for the possible later acceptance of another of Mr. Marshall's contentions. Finally, we left open the opportunity for the filing of additional contentions based on new information in subsequently issued Staff documents, such as the Draft and Final Environmental Statements (DES, FES) and the Safety Evaluation Report (SER).

Our next ruling on contentions appeared in our Prehearing Conference Order dated October 24, 1980. There we accepted several soils-settlement contentions advanced by Ms. Barbara Stamiris or Ms. Sharon Warren[2/] in the proceeding stemming from the December 6, 1979 Order Modifying Construction Permits (OM proceeding). Because the soils-related contentions advanced by Ms. Sinclair and Mr. Marshall in the OL proceeding involved some of the same factual circumstances as were raised by the accepted contentions in the OM proceeding, we granted the Applicant's motion to consolidate the

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2/ Ms. Warren subsequently withdrew as an intervenor but made a limited appearance statement (Tr. 1026-1033).

OM proceeding with those issues relating to soil conditions and plant fill materials raised in the OL proceeding.

During a prehearing conference on April 27, 1981, the Board discussed with the parties the standards for raising contentions based on the accident at the Three Mile Island Unit 2 facility (TMI). In response to a Staff motion, we issued a Memorandum and Order dated June 12, 1981, which defined the conditions under which proposed new TMI-related contentions would be evaluated.

The Staff issued its DES in February, 1982 and its SER on May 11, 1982. (Subsequently, on July 13, 1982, the Staff served Supplement 1 to its SER on the Board and parties, and on July 30, 1982 it issued its FES.) Upon being advised of the imminent issuance of the SER, the Board conducted a telephone conference call on May 5, 1982 and established schedules for filing new or rewritten contentions, responses thereto and for further discovery. See Memorandum and Order dated May 7, 1982, as modified by our Memorandum and Order dated June 28, 1982 and further modified by our Memorandum and Order dated July 7, 1982.

On June 18, 1982, Ms. Sinclair submitted 12 new contentions and Ms. Stamiris submitted 29 new contentions. As a result of an NRC-Staff initiated telephone conference call on June 25, 1982 (see Memorandum and Order dated June 28, 1982), Ms. Sinclair and Ms. Stamiris each supplemented their filings with statements justifying the late filing of their new contentions. (Ms. Sinclair filed an undated document which we received on July 1, 1982. Ms. Stamiris' filing was dated July 9, 1982.) Ms. Stamiris also filed 21 revised and consolidated new contentions which, we understand,

supersede the 29 contentions which she previously filed. On July 23, 1982, Ms. Sinclair filed two additional new contentions, and on August 3 and 6, 1982, respectively, she filed two more. At the prehearing conference, Ms. Sinclair presented a revised statement of her new contentions which withdrew 7 out of 16 of them and restated certain of the others. At the conference, Ms. Stamiris also revised her contentions and reduced their number to 7.

On July 26, 1982, the Applicant submitted responses to Ms. Sinclair's 12 new contentions filed on June 18, 1982 and to Ms. Stamiris' 21 new contentions.3/ The Applicant opposed all of those contentions for one reason or another. On August 2, 1982, the Applicant responded to Ms. Sinclair's first two additional contentions; it opposed the admission of one of them and requested additional time (until the prehearing conference) to respond to the other. (We granted that request. Tr. 8126.) At the conference, the Applicant responded to all of Ms. Sinclair's revised new contentions. It opposed all of them.

The staff filed responses to Ms. Sinclair's 12 contentions on July 21, 1982 and to Ms. Stamiris' contentions on July 28, 1982.4/ It

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3/ The Applicant's July 26, 1982 response to Ms. Sinclair's 12 new contentions was untimely--even counting time from the date (July 1) when we received Ms. Sinclair's statement of good cause (rather than from the date (June 18) when the contentions were filed). See 10 C.F.R. §§ 2.714(c), 2.730(c). The Applicant's response provided no explanation for the untimeliness. When asked about this matter at the prehearing conference, the Applicant explained that it had read our Memorandum and Order of June 28, 1982 as permitting it to count time from the latest date (July 9) when Ms. Sinclair could have submitted her contentions (Tr. 8118). We agreed to accept the Applicant's response but also not to reject Ms. Sinclair's latest filings for timeliness reasons (Tr. 8120).

4/ These responses were filed in accordance with the schedule requested by the Staff and approved by us during the telephone conference call on July 2, 1982. See Memorandum and Order dated July 7, 1982.

had no objection to the admission of two of Ms. Sinclair's and portions of two of Ms. Stamiris' new contentions. (Both of those contentions of Ms. Sinclair were later withdrawn. (Tr. 8106).) It recommended that we defer action on another of Ms. Sinclair's contentions. At the prehearing conference, the Staff responded to all of Ms. Sinclair's revised contentions; it had no objection to three of them (subject to certain rewriting). The Staff also had no objection to another of Ms. Stamiris' contentions submitted at the prehearing conference.

At the prehearing conference we also inquired as to Ms. Sinclair's and Ms. Stamiris' responses to the points raised by the Applicant and NRC Staff, as well as to questions advanced by us. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979). For the reasons which follow, we admit six of Ms. Sinclair's new contentions and portions of three of Ms. Stamiris' contentions and reject the others.

B. Standards for Evaluating New Contentions

For contentions to be admissible in a proceeding such as this one, they must meet the requirements of 10 C.F.R. § 2.714(b). Specifically, they must have their bases set forth "with reasonable specificity." In addition, where (as here) the contentions are filed after 15 days prior to the special prehearing conference (which in this case was held in December, 1978), those contentions are considered as late-filed and may be admitted only upon a balancing of the five factors listed in 10 C.F.R. § 2.714(a)(1), viz:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

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

See, e.g, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508 (March 31, 1982).

We interpret 10 C.F.R. §§ 2.714(b) and (a)(1) as providing that, in balancing these factors, we must look at each of one of them. Where "good cause" for failure to file on time (factor 1) has not been demonstrated, a contention may still be accepted, but the burden of justifying acceptance of a late contention on the basis of the other factors is considerably greater. Nuclear Fuel Services, Inc. (West Valley

Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Conversely, a showing of good cause for lateness may nevertheless result in denial of a contention "where assessment of the other factors weighs against the petitioner." Id.

For example, newly arising information has long been recognized as providing "good cause" for acceptance of a late contention. Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 574 (1980), appeal dismissed, ALAB-595, 11 NRC 860 (1980). Nonetheless, before admitting a contention based on new information, we must balance the other factors, such as the intervenor's ability to contribute to the record on the contention and the likelihood and effects of delay should the contention be admitted.5/

In balancing these other factors, however, we are not required to give the same weight to each one of them. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895

5/ One Licensing Board has recently taken the position that the five criteria for late-filed contentions are inappropriate for application to a contention that is "late" for reasons wholly beyond an intervenor's control. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566, 571-72 and fn. 6 (March 5, 1982); id., LBP-82-50, 15 NRC ___ (June 30, 1982). It has referred its ruling in that regard to the Appeal Board, which has not yet responded. While we recognize the forcefulness of the policy considerations advanced by the Catawba Licensing Board in support of that ruling, we believe that certain of the criteria--particularly the intervenor's ability to contribute to the record--are meaningful at a late stage of a proceeding. In any event, pending further direction from the Appeal Board, we regard ourselves as bound by our reading of Commission rules as described in the body of this opinion, and accordingly we are balancing all five factors in ruling upon the new contentions before us.

(1981). We regard as highly important the intervenor's ability to contribute to the development of a sound record on a particular contention. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-80-24, 12 NRC 231, 237 (1980); accord, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976). We also are giving significant weight to the potential delay, if any, which might ensue from admitting a particular contention. Summer, ALAB-642, supra, 13 NRC at 887-91. In that connection, with respect to those new contentions which we are approving, we are delivering this Order to the parties at the conclusion of the prehearing conference so that the 15-day period for filing discovery requests on those contentions (which we established by our Memorandum and Order of May 7, 1982, at p. 3) can begin to run at that time (obviating any delay resulting from service by mail).

In ruling upon contentions arising from the TMI accident, and the Commission's regulatory response to that accident, we also must take into account the Statement of Policy on that subject issued by the Commission on December 18, 1980. CLI-80-42, 12 NRC 654. There, the Commission described the extensive regulatory requirements being imposed on various facilities, and the extensive review effort by the NRC Staff which had been undertaken and was continuing, in response to the TMI event. The Policy Statement stressed that

> where the time for filing contentions has expired in a given case, no new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 C.F.R. 2.714(a)(1). The Commission expects adherence to its regulations in this regard [emphasis supplied].

12 NRC 661.

To implement that Policy Statement in this proceeding, we issued an Order permitting intervenors to file TMI-related contentions based on information then available by July 31, 1981. Memorandum and Order dated June 12, 1981. No TMI contentions were filed by the specified date--or, indeed, prior to June 18, 1982. In ruling upon the TMI contentions which are now before us, we are giving substantial weight, in balancing the five factors, to the intervenors' failure to adhere to the filing requirements for such contentions which we established in our June 12, 1981 ruling. We note that Licensing and Appeal Boards have rejected TMI contentions as untimely even though they were filed long before the July 31, 1981 date which we established in this proceeding. Zimmer, LBP-80-24, supra, 12 NRC at 237 (contentions filed in July, 1980); Summer, ALAB-642, supra, 13 NRC at 884, 887 (contentions filed in March, 1981).

Finally, the proponent of a late contention should affirmatively address the five factors and demonstrate that, on balance, the contention should be admitted. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980). In considering the statements filed by Ms. Stamiris, however, and the contentions themselves, we have taken account in our rulings of the circumstance that she is a pro se intervenor who is not represented by counsel.[6/] As the Appeal Board has stated, "although a totally deficient pleading may not be justified on the basis that it was prepared by a layman without the assistance of counsel, a pro se petitioner is not 'to be held to those standards of clarity and precision to which a

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6/ Ms. Sinclair was represented by counsel at the prehearing conference. Her contentions submitted on June 12, July 23, and August 3 and 6, 1982 were filed pro se, although, to the extent not withdrawn, they were later rewritten and resubmitted.

lawyer might reasonably be expected to adhere.'" Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980), quoting from Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973). Ms. Sinclair and Ms. Stamiris each have some experience in NRC adjudicatory proceedings. Nonetheless, we attempted during the prehearing conference to develop the substance of what the intervenors intended to assert in each proposed contention, as well as in their justifications for late filing, and the contribution which each might be expected to make in developing a sound record on each contention, so that we could understand the significance of the contentions and the statements apart from any technical legal deficiencies from which they might suffer. A fair balancing of the 10 C.F.R. § 2.714(a) factors requires no less!

We turn now to the specific new contentions advanced by Ms. Sinclair or Ms. Stamiris.[7/] Where we regard similar considerations as governing the disposition of more than one contention, we will deal with those contentions together.

7/ Each contention is referred to by the number accorded it in the revised submissions presented at the prehearing conference. We will consider renumbering those new contentions which we are admitting, in order to avoid duplicate numbering of contentions.

C. Sinclair contentions

1. Sinclair contention 1

This contention claims that the Applicant and Staff have failed to analyze the "absolute and incremental effects on the environment" of the nuclear fuel cycle. As its basis, Ms. Sinclair refers to the April 27, 1982 decision of the U.S. Court of Appeals in Natural Resource Defense Council, Inc. v. NRC, __ F.2d ___ (D.C.Cir. Docket Nos. 74-1586, 77-1448, 79-2110, and 79-2131), in which the court found invalid certain portions of Table S-3, under which the Commission has evaluated the environmental impacts of the fuel cycle. Because of this recent decision, the Staff finds "good cause" for the late submission of this contention, and the Applicant does not question its timeliness. But they each question its acceptability on other grounds.

Ms. Sinclair submitted contentions raising similar fuel-cycle questions on a timely basis, early in this proceeding. See contentions 20 and 21 filed October 31, 1978. We rejected those contentions, primarily because they represented an impermissible challenge to the Commission's fuel cycle rule. Special Prehearing Conference Order, dated February 23, 1979, at p. 7. For that reason, we regard this new contention based on a recent decision invalidating in certain respects the fuel cycle rule, as being a reincarnation of the earlier contentions and, hence, timely. Balancing of the five factors is thus not required.

Nonetheless, as the Applicant points out, the recent Court decision is not yet final. At the prehearing conference, we were advised that the Court's mandate has not yet issued (Tr. 8166-67). Technically, therefore, Table S-3 remains in effect. Under these circumstances, we

cannot accept contention 1 at this time, since it technically still constitutes an impermissible challange to Table S-3.

Both the Applicant and NRC Staff opine that the Commission may in the near future issue a policy statement describing how, or whether, Table S-3 (or the Court's recent decision) should be factored into adjudicatory proceedings such as this one. The Staff recommends that we defer ruling on this contention, and we agree that that is the preferable course of action at this time. If the Commission's statement should permit litigation of questions such as are raised by contention 1, we will be prepared (at Ms. Sinclair's request) to consider that contention under the standards enunciated by the Commission. (If a request is made shortly after issuance of the Commission's statement, Ms. Sinclair will not have to demonstrate good cause for the untimely submission of such a contention.)

2. Sinclair contention 2

This contention was claimed to be a restatement of contention 3 which had been submitted by Ms. Sinclair on June 18, 1982, but we agree with the Staff and Applicant that it raised a new issue at the prehearing conference. That issue is failure to analyze operator error, as described in a Brookhaven Laboratory report (NUREG/CR-1979 (or 1879)), and was based on the theory that the accidents described and analyzed in Section 15 of the SER "assume no operator action for at least 15 minutes", and eventual long term proper operator action (SER p. 15-3). The Applicant asserted that it was a TMI-2 contention and therefore untimely, and further that it lacked basis on its face. The Staff objected to the contention as new and stated it had not had enough time to review it. We find that the contention lacks sufficient basis in that we were not given any reason for questioning the thoroughness or validity of the Staff's review of this TMI-2 issue, including description of the accident conditions. See SER, § 15.

Balancing the five factors, we find no good cause for delay until August, 1982 in submitting a contention based on a January, 1981 report. Such a contention could have been submitted prior to the July, 1981 date we set for TMI-2 contentions. Moreover, we have been provided no basis whatsoever for determining whether Ms. Sinclair could make a meaningful contribution to the record on this quite technical question. Furthermore, given the endorsement of the comprehensiveness of the Staff's review of TMI-2 issues by the Commission in its June 1980 policy statement (see pp. 8-9, supra), and absent any indication from Ms. Sinclair of why such review may be inadequate with respect to the

subject matter of this contention, we have no basis for not concluding that in this respect Ms. Sinclair's interests are being adequately protected by the NRC Staff.

Finally, admission of this contention would clearly result in some delay. Although delay caused by actual litigation is not normally a significant ingredient of the balance we must make, we here take account of the Commission's reference in its Policy Statement to the lack of NRC resources to litigate every TMI-2 issue and the absence of any reason for doing so given the comprehensive Staff review already undertaken or planned.

For the foregoing reasons, we reject Sinclair contention 2 as being untimely submitted.

3. Sinclair contention 3

This contention questions the adequacy of the analysis of severe accidents appearing in the DES (pp. 5-45 through 5-66), on the basis that it relies on the methodology of the Rasmussen Report (WASH - 1400) and fails to take into account a recent study (NUREG/CR/2497, June 1982) which assertedly demonstrates that the Rasmussen methodology understates the risk of such accidents by a factor of 20. Although set forth as a rewritten version of contention 5, submitted on June 18, 1982, we agree with the Applicant and Staff that the contention is a new one.

The Applicant did not question the timeliness of this contention but claimed that an adequate basis had not been set forth. In particular, it stressed the inaccuracy of the contention's claims, pointing out that the asserted uncertainty factor of 20 fell well within the uncertainty factor range of 10-to-100 given in the FES on page 5-48. We regard this position as essentially going to the merits of the contention. We cannot at this stage of the proceeding resolve the contention on this basis. Allens Creek ALAB-590, supra, 11 NRC at 547-49.

For its part the Staff offered no objection to the timeliness of this contention, but it seeks additional time to respond to its substance. Normally, we would grant that request. But in view of the time constraints facing us and the parties in this proceeding, we have reluctantly elected to rule now on this contention.

We find this contention to have an adequate basis, set forth with sufficient particularly. Based on the publication of the June 1982 study, we find "good cause" for its late submission. We know of no other forum in which Ms. Sinclair can raise this contention

and, since she is the only party asserting it, her interest will not adequately be represented by other parties. Admission of this contention at this time, under the discovery schedule we have already approved, will not significantly delay the proceeding. Finally, bringing the recent NUREG Report into the resolution of this issue will likely contribute to a sound record on this question. Based on all these considerations, we admit this contention.

We note, however, that the contention does not address the process of rebaselining to which the Staff refers in its DES, and how much this rebaselining and incorporation of better data and analytical techniques affects the risks estimated by the Rasmussen methodology. The contention does not compare the asserted increases in risk allegedly demonstrated by the NUREG study to the possible changes in risk calculations achieved through rebaselining and other improvements in data and analytical techniques, set forth in the DES at pp. 5-45 through 5-67. Although these factors bear on the merits of the contention and cannot be considered at this stage of the proceeding, we call the parties' attention to their possible relevance to final resolution of the issue raised by the contention.

4. Sinclair contention 4

We are not accepting this contention and will supplement this Order with an explanation in the near future.

5. Sinclair contention 5

This contention claims that information concerning cooling pond performance and fogging and icing appearing at pp. 4-6 and 5-7 of the DES is derived from a climatic region of the country different from the midwest and, hence, is not applicable to the Midland facility. It asserts that the DES should analyze information from the Dresden, Illinois nuclear facility (or a comparably sized and situated facility) so that N.R.C. and the public can reach an "informed decision" on the adverse effects of the cooling pond.

The Applicant and Staff each assert that the contention is based on 1978 information and, accordingly, could have been submitted earlier. We disagree. The gist of the contention is not the fact that possible erroneous information had been developed but, rather, that the Staff used this information in its environmental analysis of the reactor. That circumstance could not have been predicted in 1978 or discovered prior to the issuance of the Staff's DES. For that reason, we find "good cause" for the late submission of this contention.

In opposing this contention, the Applicant also made certain claims going to the merits. We cannot resolve those claims at this stage. Allens Creek, ALAB-590, supra, 11 NRC at 547-49. In considering them, however, it became apparent to us that there was some confusion among the Applicant, Staff and Ms. Sinclair as to whether western cooling pond data were used in the development of Table 4.1 of the DES (which is the basis for some of the information referenced in this contention). We asked questions at the prehearing conference to clarify this confusion, but the parties were unable to reach agreement either as to what data were used in

developing various conclusions reached in the DES or how those data were factored into the DES analysis. Since we cannot resolve disputes of this type at this stage of the proceeding, we have determined to admit this contention.

In doing so, we find that none of the 2.714(a) factors balance against such admission. One of Mr. Marshall's previously submitted contentions deals with a portion of the subject matter of this contention (fogging and icing); but, since Mr. Marshall has additional time to formulate this contention, we have not yet ruled on its admissibility. This contention should not result in any significant delay. Indeed, if the Applicant's claims as to use of data prove to be correct, the contention may well be a fit candidate for summary disposition pursuant to 10 CFR § 2.749.

6. Sinclair contentions 6, 8, 16

Each of these contentions relates to the QA program insofar as it bears on the heating, ventilating and air conditioning (HVAC) system for the facility and the performance of the subcontractor responsible for that system (the Zack Co.). They are based on a recent (July 26, 1982) affidavit of a former employee of Zack and a report apparently submitted earlier this month to N.R.C. by the Zack Co., pursuant to 10 CFR Part 21, and apparently represent new aspects of questions already being considered in the OM proceeding.

No party objects to contentions 8 and 16, or to the timeliness of contention 6. The Applicant objects to the specificity of contention 6; the Staff offers no objection to that contention, although it recognizes that, following discovery, it might be made more specific in certain respects. The Staff stresses the significance of the allegations and asserts that they should not be ignored in our consideration of QA matters.

We agree, and we admit all three contentions. All of the 10 CFR § 2.714(a) factors favor their admittance. Although the litigation itself could cause some delay, the resolution of these questions is essential prior to any operation of this facility. Ms. Sinclair plans to present testimony of the ex-employee of Zack (and possibly others) and, in so proceeding, will clearly contribute to the development of a sound record.

We note that these contentions directly affect issues to be heard in the OM proceeding but also represent valid issues for the OL proceeding. We currently expect that they will be heard during our consideration of QA issues in the OM proceeding.

7. Sinclair contention 7

This contention alleges that the useful life of the plant will be considerably shortened as a result of the effects of low doses of radiation on polymer cable insulation and jacketing and the synergism effects of radiation and temperature. As a basis, it cites information appearing in the June, 1982 issue of Industrial Research and Development, which reported on a Sandia Laboratories study contained in a draft of NUREG/CR-2156, dated June, 1981.

The Staff offered no objection to this contention. The Applicant did not object to its timeliness, and it conceded that it may be relevant to equipment qualification testing. But it claimed we are barred from hearing this issue because equipment qualification methods including synergistic effects and aging are the subject of a current rulemaking. 47 Fed. Reg. 28363 (June 30, 1982).

We disagree with that conclusion. When a matter is involved in rulemaking, the Commission may elect to require an issue which is part of that rulemaking to be heard as part of that rulemaking. Where it does not impose such a requirement, an issue is not barred from being considered in adjudications being conducted at that time.

The rulemaking notice in question makes no reference to the hearing of equipment qualification issues in licensing adjudications. That rulemaking was in fact initiated by the Commission decision in Petition For Emergency and Remedial Action, CLI-80-21, 11 NRC 707 (1980). There the Commission put into effect as an interim requirement more definitive criteria for environmental qualification of safety-related electrical equipment, set forth in certain DOR guidelines (November, 1979),

NUREG-0588 (July, 1981), and Reg. Guide 1.89. 11 NRC at 711. It ordered that compliance dates for operating reactors be established through rulemaking. The Staff initiated such rulemaking in early 1982. 47 Fed. Reg. 2876 (January 20, 1982). Later, the Commission extended the compliance dates for operating reactors through the June 30, 1982 notice cited by the Applicant.

Thus, in our view, the rulemaking in question seeks to establish an implementation schedule and to codify the Commission's standards in this area, which were established on an interim basis by CLI-80-21. Even if rulemaking had the generic effect on adjudication ascribed to it by the Applicant, this rulemaking could not preclude litigation of a contention questioning an Applicant's compliance with the interim requirements.

We read contention 7 in that manner. We note that NUREG-0588 mandates that synergistic effects be taken into account (p. 15, item 4 (3); pp. II-43 to II-45), and that the contention asserts that as a result of the Sandia study, the effects of synergism have not been adequately taken into account. As so read, contention 7 is acceptably specific. We also find that it was submitted in a reasonably timely fashion and, absent its acceptance, may not be factored into the safety review of this facility. It now appears that Ms. Sinclair will be represented by counsel and that she will attempt to obtain expert assistance if possible. She is thus likely to assist in the development of a sound record. Nor, in view of its admission at this time, is any significant delay likely to ensue. We accordingly admit this contention. (In accepting this contention, we are deleting the first sentence which, we find, is relevant only to an earlier version of the contention.)

D. Stamiris contentions

Barbara Stamiris has been admitted to the OM proceeding and, by virtue of the consolidation of the OM proceeding with issues in the OL proceeding relating to soil conditions and plant fill materials, she is recognized as a party in the OL proceeding to participate with respect to all matters relative to the soil settlement questions which are litigated in the OL proceeding. Prehearing Conference Order dated October 24, 1980, at p. 14. On March 28, 1982, Ms. Stamiris filed a petition for leave to intervene in the OL proceeding. As a result of her previous status as a party for soil settlement questions, the Applicant and Staff treated her petition as one to expand her participation in the OL proceeding.

Whether we regard Ms. Stamiris as a late intervenor in the OL proceeding or as an existing intervenor with late-filed contentions (in the same sense as Ms. Sinclair's newly filed contentions), the standards for evaluating the acceptability of those contentions are the same -- i.e., those appearing in 10 C.F.R. § 2.714(a)(1). See 10 C.F.R. § 2.714(a)(3) and (b). We therefore will evaluate each of Ms. Stamiris' contentions under the same standards as those under which we have considered Ms. Sinclair's contentions.

Ms. Stamiris filed a more comprehensive statement of good cause for delay then did Ms. Sinclair, but it too is quite sparse in regard to certain of the factors. Although we must balance the factors with respect to each contention, some general observations are in order.

One of Ms. Stamiris' prime justifications for late intervention is her asserted disillusionment with the review undertaken by the Staff, as

evidenced by the DES and SER. Whether or not justified -- and we have serious doubts that it is -- that reason cannot serve as an acceptable justification for late filing. A party or potential party cannot sit back and watch the performance of another party (including the Staff) and then, if dissatisfied, be granted the right to come in late or have late-filed contentions accepted. Summer, ALAB-642, supra, 13 NRC at 887, fn.4; Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644-45 (1977). Accordingly, we are giving no weight whatsoever to this reason for late filing.

We turn now to Ms. Stamiris' contentions.

1. Stamiris contention 1

This contention challenges the "economic cost benefit analysis" in the DES on four different grounds (examples a through d). (We are reviewing this contention in terms of the descriptions of examples a through d as submitted on July 9, 1982, as proposed contention 3.) The Staff offers no objection to example 1.b but opposes the others; the Applicant opposes the entire contention.

Example 1.a claims that the cost-benefit analysis fails to consider $3.39 billion construction costs. As the Staff points out, however, those costs are considered at the construction permit, not the operating license stage of review. In a recent rulemaking (which ruled out consideration of need for power and alternative energy source issues in OL proceedings), the Commission noted that factors such as increased financial costs since the construction permit review should generally not be considered at the OL stage since such factors would be unlikely to tip the cost-benefit balance against issuing an operating license. 47 Fed. Reg. 12940, 12942 (March 26, 1982). Furthermore, as the Applicant points out, "sunk costs" are as a matter of law not appropriately considered in an operating license cost-benefit balance. Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 534 (1977). ("Money spent is spent.")

Accordingly, we reject contention 1.a. Although we do not rely on the following considerations, we call Ms. Stamiris' attention to the Applicant's discussion of the merits of contention 1.a, which points out that Ms. Stamiris may well have misconstrued the effect on the cost-benefit balance if the $3.39 billion in construction costs were factored into the analysis. We also note that the Applicant explained at the prehearing

conference the manner in which construction costs were in fact accounted for in the environmental cost-benefit analysis at the OL stage of review (Tr. 8386-88, 8392).

Example 1.b questions the validity of the cost-benefit analysis on the basis of underestimation of decommissioning costs. As support, Ms. Stamiris cites sharply higher costs previously estimated by Consumers for the decommissioning of its Big Rock Point and Palisades facilities. The Staff offers no objection to our acceptance of this portion of contention 1; it points out that it did not question the timeliness of contention 1 because the contention stemmed from information in the DES.

The Applicant objects to the timeliness of this contention, claiming that the information both on its proposed decommissioning costs and the costs of Big Rock Point and Palisades was available as early as 1980 (Tr. 8405, 8409). We reject that claim. The gist of this contention is that the analysis in the DES is insufficient. The DES is a Staff document which may or may not rely on data submitted by the Applicant to perform its cost-benefit analysis. We agree with the Staff that the timeliness of this contention should be judged on the basis of availability of the DES (Tr. 8407).

The Applicant's other challenge to this portion of contention 1 is based on its differing interpretation of figures cited by Ms. Stamiris. We cannot resolve that dispute on a factual question at this stage of the proceeding. Allens Creek, ALAB-590, supra, 11 NRC at 547-49. Moreover, our preliminary review of the figures cited by the Applicant and Ms. Stamiris gives us some doubt as to the validity of any of them.

Balancing the five timeliness factors, we find that this contention is based on information in the recently issued DES and that there is therefore "good cause" for its late submission. We also find that there is no other forum in which the effect of decommissioning on the environmental cost-benefit balance (as distinguished from the cost of decommissioning for rate-making purposes) could be raised; since no other party has raised a comparable contention in this proceeding, Ms. Stamiris' interest in resolving this question will not adequately be represented by others. Based on her significant contribution to the record in the soils hearings, and the likelihood that differences in the decommissioning costs between the three Consumers facilities can likely be illuminated without extensive reliance on technical expertise, we believe that Ms. Stamiris will likely make a significant contribution to a sound record on this matter. Indeed, litigation of the contention will at least permit us to have the apparent discrepancies in various figures clarified. Finally, we see no substantial delay resulting from admission of this contention. Discovery will have to be undertaken in accordance with the schedule we earlier approved and will commence upon issuance of this Order.

We balance the five factors in 10 C.F.R. § 2.714(a)(1) in favor of admitting the contention. Since we cannot give credit to the Applicant's assertions on the merits of the contention, we admit the contention.

Example 1.c alleges, on the basis of a statement in the SER, that because of a faulty circumferential weld on the reactor pressure vessel, the operating life of Unit 1 will be reduced, thereby invalidating the cost-benefit analysis required by NEPA. (The circumferential weld

was also the subject of Sinclair contention 32, which was accepted for discovery purposes by our February 27, 1979 Special Prehearing Conference Order, and Sinclair contention 10, filed June 18, 1982, but dropped in favor of Stamiris contention 1.c during the prehearing conference.) Neither the Applicant nor Staff challenges the timeliness of this contention.

Both the Applicant and Staff point to additional information on the same page of the SER relied upon by Ms. Stamiris (p. C-10) which, they claim, demonstrates that Consumers is taking adequate steps to ensure operation of Unit 1 beyond the predicted 50 ft.-lb. end of life test of the weld. The Applicant, therefore, claims that the contention should be rejected for failure to state any reasonable basis, whereas the Staff merely states that a contention should not be admitted which recites a problem but ignores the solution to that problem which is set forth on the same page of the SER.

These responses cannot be credited for two reasons. First, they seek to have us decide disputed facts on the merits, a course of action which is impermissible at this stage of the proceeding. Allens Creek, ALAB-590, supra, 11 NRC at 547-49.

More important, however, as set forth in the FSAR (Section 5.3.3.8), the Applicant's proposed solution is based on techniques not yet developed. Also, the Applicant and Staff ignore the fact that the SER apparently gives two inconsistent values for the effective full power years (EFPY) predicted for this weldment (9 EFPY on p. 5-19 and "at least 15.1 EFPY" on p. C-10) before degradation to the 50 ft.-lb. Charpy test level is reached. Further, for unexplained reasons, adequate samples of this weld (WF 70) section were not availble to meet requirements for

surveillance testing, and discrepancies also exist (between the SER, p. 5-19, and the FSAR section 5.3.1.6.1.3) in the flux properties ascribed to the substitute surveillance sample (WF 209) and the actual beltline material (WF 70). Therefore, the record is insufficient for determining the correct end-of-life (EOL) value for this weldment for the purpose of a cost-benefit analysis, and possibly for meeting the requirements of Appendices G and H of 10 C.F.R. Part 50.

Because this contention is founded upon information in the recently issued SER and represents a new aspect of information underlying a previously submitted contention, and absent any timeliness objection by the Applicant or Staff, we find "good cause" for its late submission. Where "good cause" for a late filing is demonstrated (as here), the other factors are given lesser weight. We find, however, that admission of this contention will permit us to clarify the confusion in the record which now exists. Also Ms. Stamiris has no other effective means of obtaining resolution of this issue, either in this proceeding or elsewhere. No other party has had a contention admitted on this issue; Sinclair original contention 32 has thus far been accepted for discovery purposes only and, in any event, involves the safety rather than environmental aspects of this weld. Only through Ms. Stamiris' contention will the environmental aspects be litigated. Although admission of this contention could lead to some delay, that delay would not appear likely to be significant.

Balancing the factors of 10 C.F.R. § 2.714(a), we find that the balance strongly favors admission of example 1.c of this contention. We therefore admit it.

Example 1.d challenges the cost-benefit analysis on the basis of the allegedly erroneous rates of growth which it is said to rely on. Although advanced in terms of an ingredient of the cost-benefit analysis, need for power is what this contention is essentially contesting. As both the Applicant and Staff point out, litigation of such issues is precluded by 10 C.F.R § 51.53, as recently amended. See 47 Fed. Reg. 12940 (March 26, 1982). We accordingly reject this contention.

2. Stamiris contention 2

Contention 2 asserts that CPC/NRC internal reporting systems, intended to allow plant workers to raise concerns or criticism about inadequate workmanship or practices, are ineffective because they have resulted in job losses due to QA/QC reporting (Dartey affidavit, June 1982; and Howard affidavit, 7-30-82). Moreover, this contention also asserts that paragraph 4 of the Bechtel "Employee Inventions and Secrecy Agreement" does not allow plant workers to provide information freely to the NRC, further frustrating these reporting systems.

In regard to the portion of this contention dealing with internal reporting systems, the Board notes that Sinclair contention 6 covers the QA deficiencies and other related problems reported in the Howard affidavit. Sinclair contention 6 has been admitted. The Board directs that the first part of Stamiris contention 2, including the references to both of the affidavits, shall be consolidated with Sinclair contention 6 and that Ms. Stamiris shall become a co-sponsor of that contention, assuming she wishes to do so.

In regard to the Bechtel secrecy agreement, both the Staff and Applicant are of the opinion that this was a form used to protect Bechtel's proprietary interests and was not intended to deter furnishing of information to NRC. Ms. Stamiris agreed that she had no specific knowledge that the Bechtel secrecy agreement had in fact been used to interfere with the flow of information to the NRC (Tr. 8430-31). Hence we find no basis for the second part of Stamiris contention 2 and, accordingly, we reject it.

3. Stamiris contention 3

This contention asserts that extensive deficiencies in the procurement system for "proper qualification of equipment" has resulted in unresolved safety deficiencies concerning (1) bolting, (2) HVAC components, and (3) electrical components. It claims that these "EQ procurement deficiencies" are unresolved (SER § 3.11) despite their identification in 1978.

The Applicant opposed this contention on the ground that it consisted of a conglomeration of old problems, without any indication of why Ms. Stamiris feels they are being mishandled, or why they are interrelated. The Staff opposes this contention as untimely, and lacking in basis and specificity.

We agree that, for all of these reasons, the contention cannot be accepted. The reference to "HVAC components" is founded upon the allegations contained in the Howard affidavit; we expect that those allegations will be considered by us in conjunction with Sinclair contention 6. The cited bolting problems arose in 1979-81. There is no showing why the corrective action with respect to reports 82-01 and 82-02 is not adequate; nor, indeed, why they even represent a procurement problem (Tr. 8447), and the EQ problems which are referenced in § 3.11 of the SER are questions which, according to the SER, are being addressed in normal fashion by the Staff. The Staff stated that resolution of the latter problem would be included in an SER supplement (Tr. 8457).

4. Stamiris contention 5

We are not accepting this contention and will supplement this Order with an explanation in the near future.

5. Stamiris contention 6

This contention alleges that the NRC risk assessment (a) is unconservative because lack of sufficiently complete knowledge of the characteristics of the "essentially impervious" clay layer (in the glacial till) casts doubt on its ability to provide a barrier to flow of contaminated groundwater, and (b) it does not consider potential effects of permanent dewatering on groundwater relationships. The contention concludes that because of these alleged shortcomings, public health and safety are jeopardized.

The Applicant did not oppose the contention on grounds of timeliness but pointed out that the DES risk assessment does contain an alternative that assumes that the clay layer is ineffective as a barrier, and environmental effects are still inconsequential (Tr. 8501, 8510); hence the basis for this portion of the contention is incorrect on its face. The Applicant further was unable to ascertain the nature of Ms. Stamaris' concern about effects of permanent dewatering on groundwater relationships, and hence claimed that the second part of the contention lacked any basis whatsoever.

The Staff did not object to the timeliness of this contention but would reject the first part on the same grounds of lack of basis as the Applicant. On the other hand, the Staff had no objection to the second part, provided it was limited to the basis set forth in that example.

Based on her submittal in response to information in the DES, we find Ms. Stamiris had good cause for delay in filing this contention. While we agree with the Staff and Applicant as to the insufficient basis of the first portion of the contention, admission of the second part will contribute to the record on the potential effects of permanent dewatering over a period of decades. Also, Ms. Stamaris has no other means of obtaining resolution of this issue, either in this proceeding or elsewhere; no other

party has raised this issue, and its admission at this stage of the proceeding would not lead to delay.

Balancing the factors of 10 CFR § 2.714(a), we find that the balance favors admission of this contention but limited to the second part, so as to read as follows:

> The NRC risk assessment in the DES does not consider potential effects of permanent dewatering on groundwater relationships.

6. Stamiris contention 7

This contention reads:

> Reactor containment integrity is compromised by the combined effects of:
>
> a. RVP support modification (79-10)
>
> b. Lack of adequate shear reinforcement (81-06) which is uncorrectable
>
> c. Inadequate loading combinations (SER p. 3-21)
>
> d. Failure to postulate containment pipe break effects (SER 3.6.2)
>
> e. NSSS seismic/LOCA deficiencies (80-07)
>
> and the interrelated effect of these unresolved safety issues is not addressed by the NRC in the SER.

The Staff objected to this contention as originally submitted (Stamiris contention 11, filed July 28, 1982) on the grounds that Ms. Stamiris failed to justify late filing and because of its reliance on references to reports which do not supply the particularity required. The Staff reiterated these objections during the prehearing conference (Tr. 8520-22).

The Applicant objected not only to timeliness but questioned the validity of the basis. The Applicant argued that Ms. Stamiris failed to show or define any interconnection between the items other than that they were located in the containment structure. It added that all of the items were, in fact, resolved to the Staff's satisfaction (Tr. 8315-20).

Ms. Stamiris presented her reasons for not being satisfied with the resolution presented for each of the items but was unable to provide a basis for her lack of acceptance other than that they were reanalyzed or resolved through modification or by surveillance as part of the in-service inspection program (Tr. 8323-4).

We agree that the items cited in Stamiris contention 7 are not unresolved issues, and that the methods of resolution proposed are adequately documented in the SER. Ms. Stamiris has provided no reasonable basis for concluding that the issues have not been adequately resolved. Therefore, we reject this contention because it lacks the underlying basis necessary for admitting a contention.

7. Stamiris Contention 8

This contention was first presented at the prehearing conference. It seeks an independent assessment of the plant's design adequacy and construction quality, as recommended in the June 8, 1982 interim report of the Advisory Committee on Reactor Safeguards (ACRS) (SER Supplement 1, Appendix G).

The Staff recommended that we accept this contention (Tr. 8532). The Applicant first expressed some reservations because it was uncertain whether the contention sought only the independent assessment or whether it additionally sought a review by this Board of such assessment (Tr. 8530). After the Board ascertained that Ms. Stamiris did not intend that the contention encompass a Board review of the assessment (Tr. 8534), the Applicant withdrew its objection and did not oppose our accepting the contention (Tr. 8534). It also noted that it had no objection to such an independent assessment (Tr. 8529, 8531) although, when pressed by the Staff, it declined to make any definitive commitment to institute such an assessment (Tr. 8531).

We find "good cause" for advancing this contention at this time, since it is based on a June, 1982 ACRS recommendation. The other factors also balance in favor of admitting this contention. There should be no delay as a result of this admittance since, if the Applicant institutes the independent assessment recommended by the ACRS, this contention would likely become moot. We accordingly admit this contention.

Because of certain assertions in the contention which, the Board is aware, are incorrect (and concerning which the parties were advised (Tr. 8525-26)), we have modified the contention to change the words "imposed by the ASLB in the Houston Power and Light, 50-498 and 50-499 OL proceeding, 4/30/82" to read "accepted by the Applicant in the Houston Power and Light (South Texas) OL proceeding".

II. Rulings Respecting Previously Submitted Contentions

1. Original Sinclair Contention 13

One of the contentions of Ms. Sinclair which we accepted in our February 23, 1979 Special Prehearing Conference Order concerned the financial qualifications of Consumers Power Co. to operate the Midland facility (contention 13). Although the contention was litigable in 1979, the Commission recently amended its rules to eliminate entirely requirements for financial qualifications review for, inter alia, electric ulilities applying for operating licenses. 47 Fed. Reg. 13750 (March 31, 1982). This amendment, which became effective immediately upon publication, is to be applied to ongoing proceedings such as this one, and to issues and contentions therein.

Accordingly, we ruled (sua sponte) at the prehearing conference that Ms. Sinclair's original contention 13 was being dismissed (Tr. 8144).

III. Scheduling

The Board issued the following scheduling orders:

1. In accordance with our Memorandum and Order of May 7, 1982, discovery on newly admitted contentions is to be initiated within 15 days of service of this order. We hand-served this order to parties' representatives on Saturday, August 14, 1982, but we ruled that the 15-day period is to commence on Monday, August 16, 1982.

2. The one exception to the above discovery period is with respect to Sinclair contentions 6, 8 and 16. We left open the discovery period on those contentions and agreed to hold a telephone conference call on Friday, August 20, 1982, to consider that question further.

3. We ruled that the next hearings on soils remedial measures will be held on October 5-8, 1982 and October 19-22, 1982. In connection with these hearings the Staff has committed to mail the supplement to the SER by August 27, and mail any prepared testimony on any items not contained in the SSER by September 24. The Applicant will review the SSER and mail comments and prepared testimony on it by September 24.

4. We granted the Staff's request that responses to the restated (earlier) contentions submitted by Ms. Sinclair at the prehearing conference be filed by September 3, 1982 (in the case of the Applicant) and September 10, 1982 (in the case of the Staff) (Tr. 8149-50).

ORDER

For the reasons set forth in this opinion, it is, this 14th day of August, 1982

ORDERED

1. That the following new contentions of Intervenor Mary P. Sinclair are hereby admitted: 3,5,6,7,8,16

2. That the following contentions submitted by Intervenor Barbara Stamiris are hereby admitted: 1.b, 1.c, 6 (in part), 8

3. That previously accepted contention 13 of Ms. Sinclair is hereby dismissed.

4. That further schedules as set forth in Part III are hereby adopted.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Frederick P. Cowan

Dr. Frederick P. Cowan
ADMINISTRATIVE JUDGE

Jerry Harbour

Dr. Jerry Harbour
ADMINISTRATIVE JUDGE

Issued at Midland, Michigan.