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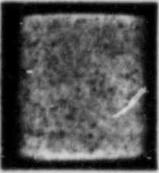

# INDEXES TO NUCLEAR REGULATORY COMMISSION ISSUANCES

January-June 1982



U. S. NUCLEAR REGULATORY COMMISSION

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Vol. 15

Index 2

**INDEXES TO  
NUCLEAR REGULATORY  
COMMISSION ISSUANCES**

January-June 1982

**U. S. NUCLEAR REGULATORY COMMISSION**

## Foreword

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

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

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

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

### 1. Case Name Index

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

### 2. Digests and Headers

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

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

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

### 3. Legal Citations Index

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

The references to cases, regulations, statutes, and others are generally followed by phrases that show the application of the citation in the particular issuance. These phrases are followed by the issuance number and the full text reference.

### 4. Subject Index

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

### 5. Facility Index

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

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## DIGESTS

### ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

CLI-82-1 PACIFIC GAS AND ELECTRIC COMPANY (LABLO CANYON NUCLEAR POWER PLANT, UNITS 1 & 2), Docket Nos. 50-275-OL, 50-323-OL; OPERATING LICENSE; February 10, 1982; STATEMENT OF THE COMMISSION

A The Commission directs the staff to issue a Notice of Violation with regard to certain material false statements made by applicant at a November 3, 1981 meeting with staff concerning applicant's review of a report by its consultant addressing an ongoing seismic reverification program for the plant.

CLI-82-2 KERR-McGEE CORPORATION (WEST CHICAGO RARE EARTH FACILITY), Docket No. 40-2061; MATERIALS LICENSE AMENDMENT; February 11, 1982; ORDER

A The Commission denies petitions requesting a formal adjudicatory hearing on a materials license amendment (granted September 28, 1981) permitting licensee to demolish certain buildings on its West Chicago site and receive for temporary onsite storage a small quantity of thorium ore mill tailings.

B The Commission is required to issue a notice of proposed action, or notice of opportunity for hearing, only with respect to an application for a facility license, an application for a license to receive radioactive waste for commercial disposal, an application to amend such licenses where significant hazards considerations are involved, or an application for "any other license or amendment as to which the Commission determines that an opportunity for public hearing should be afforded." 10 CFR 2.105(a).

C The Commission has no duty under its regulations to issue a notice of hearing under 10 CFR 2.104 unless (1) a hearing is mandated in even an uncontested case by either section 189a of the Atomic Energy Act, or 10 CFR Chapter 1; (2) it has issued a notice of proposed action or notice of opportunity for hearing under 10 CFR 2.105 and a party has responded to the notice; or (3) the Commission determines that the public interest requires a hearing. 10 CFR 2.104.

D Section 189a of the Atomic Energy Act does not require the formal, trial-type hearing specified by §554 of the Administrative Procedure Act for every single Commission licensing proceeding. In the case of materials licenses, the Commission has the legal latitude to use informal procedures sufficient to fully apprise it of the concerns of a party challenging the licensing action and to provide an adequate record for determining their validity.

E Even in licensing cases where section 189a requires a trial-type hearing, a person requesting a hearing must make some threshold showing that a hearing would be necessary to resolve opposing and supported factual assertions.

F Constitutional due process is not violated in a materials license amendment proceeding where an opposing party has adequate opportunity to present and support its objections; the factual issues involved are of a technical nature; questions of credibility or veracity are not raised; that party is represented by experienced counsel; and additional procedures are unlikely to aid the fact-finding process or result in a better record for agency review, but rather would create an increased government burden.

G Under NRC regulations, an environmental impact statement (EIS) or a negative declaration that an EIS will not be prepared, with an environmental impact appraisal supporting that determination, need not be prepared if a license amendment is considered by the agency to be nonsubstantive or insignificant from the standpoint of environmental impact. 10 CFR 51.5(d)(4).

H An agency may authorize an individual, sufficiently distinct portion of an agency plan without awaiting the completion of a comprehensive environmental impact statement on the plan so long as the environmental treatment under NEPA of the individual portion is adequate and approval of the individual portion does not commit the agency to approval of other portions of the plan. *Kleppe v. Sierra Club*, 427 U.S. 390, 407 n.16, 414 n.26 (1976); see *Peshlak v. Duncan*, 476 F. Supp. 1247, 1260 (D.D.C. 1979); *Conservation Law Foundation v. GSA*, 427 F. Supp. 1359, 1374 (D.R.I. 1977).

I The potential for an action by a state or local regulatory authority that will affect a facility seeking an NRC license normally is not sufficient reason for the Commission to stay its licensing action pending the outcome of any proceeding to impose additional requirements. See *Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, ALAB-189, 7 AEC

DIGESTS

ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

- 410, 412 (1972). Rather, it is the prerogative of the other governmental entity asserting jurisdiction to take whatever measures it deems appropriate to enforce its regulatory authority. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977).
- CLI-82-3 PROTECTION OF UNCLASSIFIED SAFEGUARDS INFORMATION (10 CFR PARTS 2, 50, 70 AND 73) (45 FR 85459); SPECIAL PROCEEDING; March 2, 1982; ORDER
- A The Commission denies a petition requesting reconsideration of rules issued pursuant to Section 147 of the Atomic Energy Act (46 Fed. Reg. 51718 (October 22, 1981)), and immediate suspension of two of them — one prohibiting the unprotected telecommunications of safeguards information except in emergency situations and the other mandating the use of a GSA approved security container for the storage of such information in areas that do not have protected or controlled access. The Commission rejects petitioners' claim that the new rules will require the purchase of "secure" communication equipment or GSA approved containers and explains how the rules requirements can generally be met without the use of such equipment.
- CLI-82-4 UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), Docket No. 50-537 (exemption request under 10 CFR 50.12); CONSTRUCTION PERMIT; March 16, 1982; ORDER
- A The Commission denies the Department of Energy's request for an exemption under 10 CFR 50.12 for authority to conduct site preparation activities for the Clinch River Breeder Reactor prior to the issuance of a construction permit or Limited Work Authorization.
- CLI-82-5 PACIFIC GAS AND ELECTRIC COMPANY (STANISLAUS NUCLEAR PROJECT, UNIT 1), Docket No. P-564-A (Antitrust); ANTI-TRUST PROCEEDING; March 17, 1982; ORDER
- A The Commission deems a "Notice of Prematurity and Advice of Withdrawal" filed by the applicant in this antitrust proceeding to be a request for permission to withdraw, and refers the matter to the Licensing Board for consideration and decision under the Commission's rule governing withdrawal of license applications (10 CFR 2.107(a)).
- B An application for a construction permit may be submitted in three parts, one of which shall include any antitrust information required by 10 CFR 50.33a, 10 CFR 2.101(a)(5).
- C The purpose of the Commission's rule providing for early filing of antitrust information is to enable utilities to obtain formal, binding resolution of antitrust issues prior to the need to begin construction. Such information must be considered part of an application; if there is no application, there can be no formal proceeding and no binding adjudication. See Section 105(c), Atomic Energy Act of 1954, as amended, 42 USC 2135(c).
- CLI-82-6 METROPOLITAN EDISON COMPANY (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), Docket No. 50-289; SPECIAL PROCEEDING; March 30, 1982; MEMORANDUM AND ORDER
- A The Commission, pursuant to a mandate from the Court of Appeals for the District of Columbia Circuit, issues a statement of the reasons for its determination that psychological health is not cognizable under the Atomic Energy Act.
- B The Commission's authority under the Atomic Energy Act to protect the public health and safety is limited to the "special hazards of radioactivity." *New Hampshire v. AEC*, 406 F.2d 170, 173-175 (1st Cir. 1969), cert. denied, 395 U.S. 962 (1969). It does not extend to protection against psychological stress, which is not a physical risk associated with radioactivity.
- C Even if it could be determined that the Commission has the authority under the Atomic Energy Act to consider psychological health, the legislative history makes it clear that the Commission is not required to consider such issues, and strong policy considerations argue against the Commission's doing so.
- CLI-82-7 PACIFIC GAS AND ELECTRIC COMPANY (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2), Docket Nos. 50-275 OL, 50-323 OL (Security); OPERATING LICENSE; April 22, 1982; ORDER
- A The Commission denies two petitions for review of an Appeal Board decision (ALAB-653 (restricted), 14 NRC 629 (1981)), in this operating license proceeding concerning the physical security plan for this facility. The Commission also decides it will not, contrary to earlier indication (CLI-81-22, 14 NRC 598, 600 (1981)), undertake review of the Appeal Board's interpretation of the word "several" as used in 10 CFR 73.1(a)(1)(i) describing a design basis threat; the Commission states its belief that the design basis threat should nonetheless be reevaluated, and announces that it will handle such reevaluation generically.

## DIGESTS

### ISSUANCES OF THE NUCLEAR REGULATORY COMMISSION

CLI-82-8 UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), Docket No. 50-537 (Exemption request under 10 CFR 50.12); SPECIAL PROCEEDING; May 18, 1982; ORDER

A The Commission, by evenly divided vote, denies reconsideration of the Department of Energy's request for an exemption under 10 CFR 50.12 for authority to conduct site preparation activities for the Clinch River Breeder Reactor prior to the issuance of a Construction Permit. Commissioner Asseltine issues a separate statement explaining his reasons for not recusing himself from any Commission reconsideration of the exemption request.

B A majority vote of the Commission is necessary to take the affirmative action of reconsideration of a prior Commission decision.

CLI-82-8A UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), Docket Nos. 50-537 (Exemption request under 10 CFR 50.12); SPECIAL PROCEEDING; May 17, 1982; MEMORANDUM TO THE PARTIES

CLI-82-9 HOUSTON LIGHTING AND POWER COMPANY (SOUTH TEXAS PROJECT, UNITS 1 & 2), Docket Nos. 50-498 OL, 50-499 OL; RECUSAL PROCEEDING; June 18, 1982; MEMORANDUM AND ORDER

A Upon review of an Appeal Board decision (ALAB-672, 15 NRC 677 (1982)) disqualifying a member of the Licensing Board from further participation in this proceeding, the Commission, by majority vote, reinstates the member to the Board. The Commission finds that disqualification is neither required by law nor as a matter of policy in the circumstances involved.

B In the federal courts, disqualifying bias or prejudice of a trial judge must generally stem from an extra-judicial source. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). The same standard applies to presiding officers in administrative proceedings. *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974).

C Preliminary assessments, made on the record, during the course of an adjudicatory proceeding — based solely upon application of the decision-maker's judgment to material properly before him in the proceeding — do not compel disqualification as a matter of law. *Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 and 2)*, CLI-73-8, 6 AEC 169, 170 (1973). See also *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

D Even under objective standard for recusal such as applies to federal judges under 26 U.S.C. §455(a) (which requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"), the requirement for recusal is limited to extra-judicial conduct. See e.g., *In re International Business Machines Corporation*, 618 F.2d 923, 929 (2d Cir. 1980).

CLI-82-10 SOUTH CAROLINA ELECTRIC AND GAS COMPANY, et al., (VIRGIL C. SUMMER NUCLEAR STATION, UNIT 1), Docket No. 50-395OL; OPERATING LICENSE; June 22, 1982; ORDER

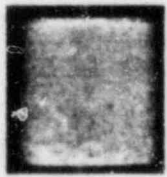
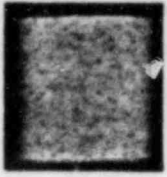
A The Commission, by 3-1 vote, declines to review an Appeal Board memorandum (ALAB-663, 14 NRC 1140 (1981)), in which the Board set out the reasons for its previous order denying a petition for directed certification filed by the NRC staff seeking interlocutory review of a determination by the Licensing Board to invoke the assistance of several independent consultants on certain seismic issues raised in this operating license proceeding.

CLI-82-11 SOUTHERN CALIFORNIA EDISON COMPANY (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), Docket Nos. 50-361-OL, 50-362-OL; OPERATING LICENSE; June 29, 1982; MEMORANDUM AND ORDER

A The Commission denies the intervenors' application for stay of the low power operating license for Unit 2 of the plant filed by the intervenors following denial of their earlier stay request by the Appeal Board.

B The ability to conduct cross-examination in an adjudication is not such a fundamental right that its denial constitutes prejudicial error per se.

C The "right" to file proposed findings of fact in an adjudication is not unlawfully abridged unless there was prejudicial error in refusing to admit the evidence that would have been the subject of the findings.



## DIGESTS

### ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

#### ALAB-664 TENNESSEE VALLEY AUTHORITY (BROWNS FERRY NUCLEAR PLANT, UNITS 1, 2 AND 3), Docket Nos. 50-259 OL, 50-260 OL, 50-296 OL; OPERATING LICENSE AMENDMENT; January 6, 1982; DECISION

- A** In this proceeding to amend the Browns Ferry operating license to permit onsite storage of low-level radioactive waste for a five-year period, the Appeal Board vacates the Licensing Board's October 2, 1981 decision, LBP-81-40, 14 NRC 828, denying certain petitions for intervention and associated requests for hearing. The Appeal Board reinstates the petitions and requests for hearing, and remands the proceeding to the Licensing Board with directions to rule on the petitions and requests after receipt of the staff's environmental assessment of the proposed amendments because it cannot yet be determined whether a litigable contention has been raised.
- B** In the instance of a segmented non-federal waste disposal plan, the Commission may confine its scrutiny to the portion of the plan for which approval is sought so long as (1) that portion has independent utility; and (2) as a result, the approval does not unduly circumscribe the Commission's ability to withhold approval of subsequent portions of the overall plan at a later stage. Duke Power Co. (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307 (1981).
- C** Economic cost of waste disposal is an element to be considered in determining the issue of independent utility of a segmented portion of an overall waste storage plan. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155 (1978).
- D** A licensee which is a federal agency has environmental responsibilities under NEPA which are separate and may be different from those of the Commission. Duke Power Co. (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 312 (1981). If a petitioner wishes to challenge such a licensee's compliance with its separate environmental responsibilities, it must do so in another forum.
- E** Substantial delay in providing prospective intervenors with materials requested under the Freedom of Information Act may constitute good cause for the late filing of contentions premised on the belatedly disclosed information.

#### ALAB-665 FLORIDA POWER & LIGHT COMPANY (ST. LUCIE PLANT, UNIT NO. 2), Docket No. 50-389A; ANTITRUST PROCEEDING; January 29, 1982; DECISION

- A** The Appeal Board affirms a Licensing Board order (LBP-81-28, 14 NRC 333 (1981), as modified, LBP-81-41, 14 NRC 839 (1981)), denying a late intervention petition in this antitrust proceeding on the application for construction permit for the St. Lucie 2 plant, for failure to explain how the activities under the license for the plant will have an anticompetitive effect on petitioner's electric generating facility.
- B** The antitrust review undertaken by the Commission in licensing the construction of a nuclear power plant is, by statute, to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws . . ." Section 105c(5) of the Atomic Energy Act of 1954, 42 U.S.C. 2135c(5). This means that the licensed activities must play some active role in creating or maintaining the anticompetitive situation. Put another way, the nuclear power plant must be an actor, an influence, on the anticompetitive scene.
- C** The Commission's writ to enforce the antitrust laws does not run to the electric industry generally. Neither does it reach all actions by utilities that generate electricity with nuclear-powered facilities. Rather, Congress authorized the Commission to condition nuclear power plant licenses on antitrust grounds only where necessary to insure that the activities so licensed would neither create nor maintain situations inconsistent with the antitrust laws. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 756 (1978).
- D** The preservation and encouragement of competition in the electric power industry through "fair access to nuclear power" is the principal motivating consideration underlying Section 105c of the Atomic Energy Act. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 757 (1978).

## DIGESTS

### ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

E The Commission's regulations make clear that an antitrust intervention petition must first describe a situation inconsistent with the antitrust laws; second, a description of a situation inconsistent with the antitrust laws — however well pleaded — accompanied by a mere paraphrase of the statutory language alleging that the situation described therein would be created or maintained by the activities under the license, would be deficient; and third, identify the specific relief sought and whether, how and the extent to which the request fails to be satisfied by the license conditions proposed by the Attorney General. *Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1)*, ALAB-279, 1 NRC 559, 574-75 (1975).

F The most critical requirement of an antitrust intervention petition is an explanation of how the activities under the license would create or maintain an anticompetitive situation. *Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3)*, CLI-73-25, 6 AEC 619, 621 (1973).

ALAB-666 WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), Docket Nos. 50-266 OLA, 50-301 OLA; OPERATING LICENSE AMENDMENT; February 12, 1982; MEMORANDUM AND ORDER

A The Appeal Board grants intervenor's motion in this operating license amendment proceeding to dispense with oral argument and to submit the appeal on briefs.

B A party seeking relief should timely file a written motion served on all parties in accordance with the Commission's Rules of Practice. Such motion, *inter alia*, "shall state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits or other evidence relied on . . ." 10 CFR 2.730(b).

C A party which, for sufficient reason, cannot attend an oral argument should request that the appeal be submitted on briefs. Any such request, however, must be adequately supported.

D If not requested by a party, oral arguments are scheduled by an Appeal Board when one or more members of the Board have questions of the parties. See 10 CFR 2.763.

E All parties in Commission proceedings are expected to be present or represented at oral argument unless specifically excused by the Board. See *Camps v. C&P Telephone Co.*, No. 80-1799, slip opinion at 15, n. 59 (D.C. Cir. December 31, 1981). Such attendance is one of the responsibilities of parties when they participate in Commission adjudicatory proceedings.

ALAB-667 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (SEABROOK STATION, UNITS 1 AND 2), Docket Nos. 50-443, 50-444; CONSTRUCTION PERMIT; March 3, 1982; DECISION ON REMAND

A Upon remand from the Commission in this construction permit proceeding, the Appeal Board, after receiving additional evidence on the intervenor's methodology for determining the appropriate Safe Shutdown Earthquake (SSE) for the plant and on the staff's methodology for correlating vibratory ground motion with the Safe Shutdown Earthquake, reaffirms its earlier determinations on the SSE for the plant and associated maximum vibratory ground motion; ALAB-422, 6 NRC 33, 54-63 (1977), and ALAB-561, 10 NRC 410, 436-a et seq. (1979).

B 10 CFR Part 100, Appendix A, requires that the seismic design of a nuclear power facility take account of the maximum effective vibratory acceleration which might accompany the determined Safe Shutdown Earthquake for that facility. Appendix A is concerned solely with ground motion which might have an effect on the facility's safety-related structures and components.

C Technical issues discussed include Seismic design criteria: Safe Shutdown Earthquake, measurement of earthquake size (intensity vs. magnitude), prediction of earthquake intensity/frequency, formulation of seismic response spectrum, maximum vibratory ground motion (acceleration).

ALAB-668 DUKE POWER COMPANY (PERKINS NUCLEAR STATION, UNITS 1, 2 AND 3), Docket Nos. STN 50-488, STN 50-489, STN 50-490; CONSTRUCTION PERMIT; March 24, 1982; MEMORANDUM AND ORDER

A In response to a motion filed by the applicant with both the Licensing and Appeal Boards for (1) leave to withdraw without prejudice its application for construction permits and (2) termination as moot of the still ongoing proceeding on that application, the Appeal Board defers to the Licensing Board to pass upon the motion in the first instance, and vacates on the ground of mootness three partial initial decisions in this construction permit proceeding (LBP-78-25, 8 NRC 87 (1978); LBP-78-34, 8 NRC 470 (1978); LBP-80-9, 11 NRC 310 (1980)).

B Where a motion for leave to withdraw a license application has been filed with both an appeal and a licensing board, it is for the licensing board, if portions of the proceeding remain before it, to pass upon the motion in the first instance.



## DIGESTS

### ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

ALAB-669 DUKE POWER COMPANY (WILLIAM B. MCGUIRE NUCLEAR STATION, UNITS 1 AND 2), Docket Nos. 50-369 OL, 50-370 OL; OPERATING LICENSE; March 30, 1982; DECISION

- A Acting on an intervenor's appeal from two decisions of the Licensing Board (LBP-79-13, 9 NRC 489 (1979); LBP-81-13, 13 NRC 652)), which in combination authorized the issuance of operating licenses for the facility, the Appeal Board affirms those decisions to the extent consistent with its opinion. The Appeal Board makes additional findings to those of the Licensing Board and concludes that the facility's hydrogen mitigation and control system can be operated without endangering the public health and safety during the interim period in which the applicant and the Commission continue to explore the adequacy of the system in place and possible long-term alternatives.
- B A Licensing Board's role in an operating license proceeding is limited to resolving matters that are raised either by the parties or by the Board sua sponte. All other matters that must be considered prior to the issuance of the requested operating license are the responsibility of the Director of Nuclear Reactor Regulation alone. 10 CFR 2.760a; Consolidated Edison Co. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976).
- C Neither the standards set in the Commission's regulations pertaining to hydrogen control (10 CFR 50.44) nor the assumptions upon which they are based are subject to challenge in an adjudication unless the Commission specifically authorizes it. 10 CFR 2.758.
- D In the NRC adjudicatory system, no less than in any other, the directives of superior tribunals must be given effect whether or not the subordinate tribunal agrees with them. Cf. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1150 (1981).
- E It is well-settled that, in order to obtain a reopening of an evidentiary record, a party must establish, inter alia, the existence of newly discovered evidence having a material bearing upon the proper result in the proceeding. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978), and cases cited.
- F An Appeal Board, like other appellate tribunals, has no obligation to rule on every discrete point adjudicated below, so long as it is able to render a decision on other grounds that effectively dispose of the appeal. See, e.g., Asphalt Roofing Manufacturers Association v. ICC, 567 F.2d 994, 1002 (D.C. Cir. 1977). See also Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 329 fn. 32 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-625, 13 NRC 13, 14 (1981).
- G A licensing board has an ironclad obligation to explain its reasons for finding that a witness' background is inadequate to meet the qualifications of an expert in particular technical areas. See e.g., Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-429, 6 NRC 229, 237 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977), affirmed, CLI-78-1, 7 NRC 1 (1978), affirmed sub nom. New England Coalition on Nuclear Power v. NRC, 582 F.2d 87 (1st Cir. 1978).
- H Where the Licensing Board has not explained its reasons, the Appeal Board may nonetheless avoid a remand if the path the Licensing Board followed in ruling on a matter is sufficiently discernible on the record. See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974).
- I In the absence of a Commission rule expressly stating the standard for judging whether a prospective witness qualifies as an expert, the standard incorporated in Federal Rule of Evidence 702 may be applied; that rule allows a witness qualified by "knowledge, skill, experience, training, or education" to testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."
- J Hearsay evidence is generally admissible in NRC proceedings. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411-12 (1976). Thus, the question of whether evidence falls within an exception to the hearsay rule is beside the point in such proceedings. Instead, the admissibility of evidence in NRC adjudication is governed by 10 CFR 2.743(c), which provides that "[o]nly relevant, material and reliable evidence which is not unduly repetitious will be admitted."
- K Documents consisting of technical analyses, conclusions and opinions on various aspects of the matter of hydrogen generation and control in nuclear power reactors are the type of evidence that calls for sponsorship by an expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents. Cf. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 332-33 (1972) (citing Dolcin v. FTC, 219 F.2d 742, 748 (D.C. Cir. 1954), certiorari denied, 348 U.S. 981 (1955)).

## DIGESTS

### ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- L Reports of the Advisory Committee on Reactor Safeguards (ACRS) cannot be admitted into evidence for the truth of the matter stated therein because ACRS members are generally not subject to examination as witnesses. Arkansas Power and Light Co. (Arkansas Nuclear One Unit 2), ALAB-94, 6 AEC 25, 32 (1973).
- M A subpoena request must establish the "general relevance of the testimony . . . sought" to the issues involved. 10 CFR 2.720(a).
- N An appeal in a licensing proceeding can be decided only on the basis of the Licensing Board record — not on the basis of unsubstantiated references to developments purportedly occurring after the record was closed. If changed circumstances or new evidence exists, a party may seek to reopen the record. Cf. ICC v. Jersey City, 322 U.S. 503, 514 (1944). Exceptions to a licensing board's decision, taken without an offer of record support, will be stricken. 10 CFR 2.762(a), (e).
- O Claims of error that are without substance or are inadequately briefed will not be considered on appeal. See Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981).
- P Technical issues discussed include: Hydrogen generation from a LOCA; Hydrogen combustion; hydrogen control; emergency hydrogen control systems; ice condenser containments; containment pressure limits; computer codes: MARCH, CLASIX.
- ALAB-670 CONSUMERS POWER COMPANY (PALISADES NUCLEAR POWER FACILITY), Docket No. 50-255 SP; SPECIAL PROCEEDING; March 31, 1982; DECISION
- A The Appeal Board reverses a Licensing Board's order, LBP-81-26, 14 NRC 247 (1981), denying the request of a labor union representing the plant's control room operators for a hearing on an NRC enforcement order restricting, inter alia, overtime work by the operators, and remands the case to the Licensing Board for further proceedings.
- B The Commission has broad discretion to provide hearings or permit intervention in cases where the avenues of public participation are not available as a matter of right. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442 (1980). The Commission has generally empowered its adjudicatory boards with the same discretion to allow intervention in licensing and enforcement cases.
- C For purposes of ruling on an appeal from the denial of a hearing petition, all material allegations of the intervenor's petition generally must be accepted as true.
- ALAB-671 HOUSTON LIGHTING AND POWER COMPANY (ALLENS CREEK NUCLEAR GENERATING STATION, UNIT 1), Docket No. 50-466 CP; CONSTRUCTION PERMIT; March 31, 1982; DECISION
- A The Appeal Board affirms the Licensing Board's denial of an untimely intervention petition (January 12, 1982 memorandum and order (unpublished)), on two independent grounds: (1) the Licensing Board's decision was free of material error and (2) the sole issue the petition raises, that of the applicant's financial qualifications, is not cognizable in this construction permit proceeding under 10 CFR 2.104(b)(1) (as amended by 47 Fed. Reg. 13750, 13753 (March 31, 1982)).
- B A licensing board must consider the five factors set forth in 10 CFR 2.714(a) in deciding whether to accept a late petition to intervene.
- C The constitutional requirement for a "case or controversy" under Article III does not apply to NRC licensing proceedings. Edlow International Co., CLI-76-6, 3 NRC 563, 569-70 (1976).
- D It is the ability to contribute sound evidence — rather than asserted legal skills — that is of significance in considering a late-filed petition to intervene under 10 CFR 2.714(a).
- ALAB-672 HOUSTON LIGHTING & POWER COMPANY, et al. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), Docket Nos. 50-498 OL, 50-499 OL; OPERATING LICENSE; April 21, 1982; MEMORANDUM
- A The Appeal Board issues a memorandum explicating the reasons for its unpublished order (April 15, 1982) requiring that another member of the Licensing Board panel be designated to replace a technical member of the Licensing Board in this operating license proceeding.
- B A party leveling a charge as serious as that of bias against a licensing board or its members has a manifest obligation to be most particular in establishing the foundation for the charge. Duquesne Light Co. (Beaver Valley Power Station, Units 1 and 2), ALAB-172, 7 AEC 42, 43 (1974).
- C An express and ironclad requirement of 10 CFR 2.704(c) is that recusal motions "be supported by affidavits setting forth the alleged grounds for disqualification." Beaver Valley, supra, 7 AEC at 43 fn. 2; Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), ALAB-497, 8 NRC 312, 313-14 (1978). The movant must refrain from sweeping and unsubstantiated assertions.
- D An administrative trier of fact is subject to disqualification for the appearance of bias or prejudice of the factual issues as well as for actual bias or prejudice. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 64-65 (1973).

## DIGESTS

### ISSUANCES OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARDS

- E A motion seeking the recusal of a member of the Commission or of an appeal board from further participation in an adjudicatory proceeding is to be determined by that individual rather than by the full Commission or board. *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-80-6, 11 NRC 411 (1980) (Commissioner); *id.*, CLI-80-9, 11 NRC 436, 437 (1980) (Appeal Board member).
- ALAB-673 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (SAN ONOFRÉ NUCLEAR GENERATING STATION, UNITS 2 AND 3), Docket Nos. 50-361 OL, 50-362 OL; OPERATING LICENSE; April 26, 1982; DECISION
- A The Appeal Board denies intervenors' motion for a stay pending appeal of the Licensing Board's partial initial decision (LBP-82-3, 15 NRC 61 (1982)) which authorized the issuance of a low-power operating license for Unit 2 of this facility.
- B The determination whether to grant a stay pending appeal is governed by 10 CFR 2.788(e) which codifies the criteria established in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). See also *Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-437, 6 NRC 630 (1977); *Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1)*, ALAB-192, 7 AEC 420 (1974).
- C The doctrines of res judicata and collateral estoppel are generally applicable to NRC proceedings. *Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2)*, ALAB-182, 7 AEC 210, 212-16, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974); *Houston Lighting & Power Co. (South Texas Project Units 1 and 2)*, LBP-79-27, 10 NRC 563, 566 (1979), *aff'd* ALAB-575, 11 NRC 14 (1980). See also *Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3)*, ALAB-378, 5 NRC 557, 563 (1977).
- D The judicial doctrines of res judicata, collateral estoppel and privity provide the appropriate bases for determining when concededly different persons or groups should be treated as already having had their day in court. The "privity" concept requires legal accountability between groups or virtual representation of one group by the other. See generally *Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84, 95 (5th Cir.), cert. denied, 434 U.S. 832 (1977). See also *United States v. Trochee-Carson*, 649 F.2d 1286, 1303 (9th Cir. 1981); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980); *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978); *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1233 (2d Cir.), cert. denied, 434 U.S. 903 (1977).
- E The Commission may place limitations upon the issues that may be litigated at the operating license stage by either (1) entirely eliminating certain issues from operating license consideration on the ground that they are suited for examination only at the earlier construction permit stage, (see 47 Fed. Reg. 12940 (March 26, 1982)) or, short of that, (2) providing by rule that any issues which were or could have been raised by a party to the construction permit proceeding will not be entertained at the operating license stage except upon a showing of "changed circumstances" or "newly discovered evidence." Commission practice presently applies conventional res judicata and collateral estoppel principles in determining the litigability of such issues at the operating license stage.
- F In general, error may not be predicated upon a ruling which excludes evidence unless a substantial right is affected, and the substance of the evidence is made known by way of an offer of proof or is otherwise apparent. Fed. R. Evid. 103. See generally *United States v. Vitale*, 596 F.2d 688, 689 (5th Cir. 1979), cert. denied, 444 U.S. 868 (1980); *United States v. Callahan*, 551 F.2d 733, 738 (6th Cir. 1977); *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 226 n.4 (1st Cir. 1976). See also 1 Weinstein's Evidence ¶ 103[3], at 103-27 (1981); 21 Wright & Graham, *Federal Practice & Procedure* §5040 (1977), at 209.
- G In deciding whether to allow continued operation of a plant during the pendency of a reopened hearing, the standard to be applied is whether the continued operation of the plant over the period required to complete the additional proceedings will be consistent with the requirement that there be reasonable assurance that the public health and safety not be endangered. See 10 CFR 2.104(c)(3); 10 CFR 50.57(a)(3). If not, the facility cannot be allowed to continue to operate. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2)*, ALAB-486, 8 NRC 9, 46 (1978).
- ALAB-674 CONSUMERS POWER COMPANY (MIDLAND PLANT, UNITS 1 & 2), Docket Nos. 50-329 OM & OL, 50-330 OM & OL; CONSTRUCTION PERMIT MODIFICATION, OPERATING LICENSE; May 5, 1982; MEMORANDUM AND ORDER
- A The Appeal Board summarily affirms, on an alternative ground, the Licensing Board's order (LBP-82-28, 15 NRC 759 (April 12, 1982)) denying an intervenor's request to halt further construction of the Midland facility pending resolution of the potential effects on the plant of an electromagnetic pulse (EMP) ostensibly generated from the high altitude detonation of a nuclear weapon.
- B A licensing board for an operating license proceeding is limited to resolving matters that are raised therein as legitimate contentions by the parties or by the board sua sponte. 10 CFR 2.760a;

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Consolidated Edison Co. of New York (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976).

C A licensing board for an operating license proceeding does not have general jurisdiction over the already authorized ongoing construction of the plant for which an operating license application is pending, and it cannot suspend the previously issued construction permit.

D An intervenor in an operating license proceeding who seeks to halt already authorized plant construction should file a petition under 10 CFR 2.206 with the appropriate Commission official.

ALAB-675 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), Docket Nos. 50-440 OL, 50-441 OL; OPERATING LICENSE; May 17, 1982; MEMORANDUM AND ORDER

A The Appeal Board denies the applicants' motion, pursuant to directed certification under 10 CFR 2.718(i) and 2.785(b)(1), for interlocutory review of the Licensing Board's order (LBP-82-15, 15 NRC 555 (1982)) restating and admitting an intervenor's hydrogen control contention in this operating license proceeding.

B Review of an interlocutory licensing board ruling via directed certification is discretionary and granted infrequently. A party invoking review by this means must demonstrate that the board's action "either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980), and cases cited.

C A licensing board ruling may conflict with Commission case law, policy, or regulations or otherwise may be in error, but, unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a "final" licensing board decision.

D The added delay and expense occasioned by the admission of a contention — even if erroneous — does not in and of itself warrant interlocutory review.

E Notwithstanding certain ongoing rulemakings and the decision in Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974), Commission guidance in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980) [TMI-1 Restart], permits the litigation of hydrogen control in individual licensing proceedings where there is a credible loss-of-coolant accident scenario for the generation of hydrogen. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 464 (1982).

ALAB-676 VIRGINIA ELECTRIC AND POWER COMPANY (NORTH ANNA NUCLEAR POWER STATION, UNITS 1 AND 2), Docket Nos. 50-338 OL, 50-339 OL; OPERATING LICENSE; May 26, 1982; DECISION

A Upon its sua sponte review in this operating license proceeding of the unresolved generic safety issue of danger to internal plant safety-related components from missiles caused by the breaking of turbine discs, the Appeal Board finds that full power operation of the plant's two units will not pose an undue risk to the public health and safety, provided that (1) the applicant's current inspection procedures pertaining to overspeed detection and control of the turbines are maintained, and (2) the turbine discs are subjected to ultrasonic inspection at specified intervals.

B Technical issues discussed include: Internally generated turbine missiles; brittle or ductile cracking; intergranular stress corrosion cracking; critical crack size; turbine inspection intervals and techniques.

ALAB-677 TENNESSEE VALLEY AUTHORITY (BROWNS FERRY NUCLEAR PLANT, UNITS 1, 2 AND 3), Docket Nos. 50-259 OL, 50-260 OL, 50-296 OL; OPERATING LICENSE; June 10, 1982; MEMORANDUM

A The Appeal Board issues a memorandum re-emphasizing its need to be advised by the parties of all significant developments that may bear on decisions in pending proceedings. The memorandum is prompted by the failure of the parties to advise the Board in a timely fashion of material changes in the evidence.

B Parties in Commission proceedings have an absolute obligation to alert adjudicatory bodies directly regarding (i) new information that is relevant and material to the matter being adjudicated; (ii) modifications and rescissions of important evidentiary submissions; and (iii) outdated or incorrect information on which the board may rely. Cf. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

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ALAB-678 COMMONWEALTH EDISON COMPANY (BYRON NUCLEAR POWER STATION, UNITS 1 AND 2), Docket Nos. 50-454 OL, 50-455 OL; OPERATING LICENSE; June 17, 1982; DECISION

- A The Appeal Board reverses a Licensing Board decision (LBP-81-52, 14 NRC 901 (1981), reconsideration denied, LBP-82-5, 15 NRC 209 (1982)) that dismissed intervenor from this operating license proceeding for deliberately and willfully refusing to comply with its discovery order. The Appeal Board decides that dismissal is too severe a sanction to impose in the circumstances and replaces it with a less severe sanction.
- B The sanction of dismissal from an NRC licensing proceeding is to be reserved for the most severe instances of a participant's failure to meet its obligations. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).
- C In selecting a sanction, licensing boards are to consider "the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances." Boards should attempt to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance. *Ibid.*
- D An operating license may not issue unless and until the NRC staff makes the findings specified in 10 CFR 50.57 — including the ultimate finding that such issuance "will not be inimical to \* \* \* the health and safety of the public." As to those aspects of reactor operation not considered in an adjudicatory proceeding (if one is conducted), it is the staff's duty to insure the existence of an adequate basis for each of the requisite Section 50.57 determinations. *South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981), affirmed sub nom. Fairfield United Action v. Nuclear Regulatory Commission, No. 81-2042 (D.C. Cir., April 28, 1982).*
- E Answers to interrogatories should be complete in themselves; the interrogating party should not need to sift through documents or other materials to obtain a complete answer. 4A Moore's Federal Practice §33.25(1) at 33-129-130 (2d ed. 1981). A broad statement that the information sought by an interrogatory is to be found in a mass of documents is also insufficient. *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc., 64 F.R.D. 459, 463 (S.D.N.Y. 1974).* Instead, a party must specify precisely which documents cited contain the desired information. *Martin v. Easton Publishing Co., 85 F.R.D. 312, 315 (E.D. Pa. 1980).* See also *Nagler v. Admiral Corp., 167 F. Supp. 413 (S.D.N.Y. 1958).* Where an interrogatory seeks the names of expected expert witnesses, the nature of their testimony, and the substance of their opinions, the responding party may not stop at merely identifying its experts; it must provide all the information requested. See *Bates v. Firestone Tire & Rubber Co., 83 F.R.D. 535, 538, 539 (D.C.S. 1979).*

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LBP-82-1 CONSOLIDATED EDISON COMPANY (INDIAN POINT STATION, UNIT NO. 2), Docket No. 50-247-OLA; OPERATING LICENSE AMENDMENT; January 4, 1982; MEMORANDUM AND ORDER

- A Licensing Board denies untimely petition to intervene and request for hearing regarding Licensee's application to expand the capacity of the spent fuel pool.
- B A tardy Petitioner to intervene may not show good cause for its untimely filing by asserting a belief that its concerns would be addressed in another proceeding.
- C The Federal Register Act (44 USC §1508) provides that publication of a notice in the Federal Register shall constitute notice to all persons residing in the United States.

LBP-82-1A CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (PERRY NUCLEAR POWER PLANT, UNITS 1 & 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; January 6, 1982; MEMORANDUM AND ORDER

- A The Board decides that in the absence of specific contrary directions from the Commission, a contention should not be dismissed from a proceeding merely because a Commission rulemaking proceeding is pending. Consequently, a contention concerning a method to mitigate an anticipated transient without scram (ATWS) should not be dismissed because of a pending rulemaking on that general subject. This type of contention is not considered to be subject to a principle assertedly established with respect to radioactive waste disposal contentions, that such issues are generic and should not be considered in individual proceedings.
- B Contentions need not be dismissed merely because there is a pending rulemaking on the same subject unless the Commission has specifically directed that they be dismissed. No such direction has been issued concerning contentions regarding ATWS.

LBP-82-2 WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; January 7, 1982; SUPPLEMENTARY ORDER

- A The ASLB issues an order which supplements its earlier order of December 21, 1981 (LBP-81-62) 14 NRC 1747 (1981), by adopting a protective order covering the release to the intervenor of allegedly proprietary material that it previously found should be released.
- B The Board denies requests for discovery and an evidentiary hearing concerning allegations that the intervenor cannot be trusted to receive the information under protective order. It balances the nature of the allegations against the nature of the allegedly proprietary material and concludes that the discovery and hearing are not warranted.
- C Other issues raised in a motion for reconsideration filed by Westinghouse Electric Corporation, appearing specially in support of the proprietary nature of its sleeving report, are left for decision on a subsequent occasion. The Board also schedules an evidentiary hearing concerning the allegations that material in the Westinghouse sleeving report is proprietary. It establishes procedures for the fair and expeditious conduct of that hearing.
- D Pursuant to 10 CFR §2.718, Boards may issue a wide variety of procedural orders that are neither expressly authorized nor prohibited by the rules. They may permit intervenors to contend that allegedly proprietary submissions should be released to the public. They may also authorize discovery or an evidentiary hearing that are not relevant to the contentions but are relevant to an important pending procedural issue, such as the trustworthiness of a party to receive allegedly proprietary material.
- E However, discovery and hearings not related to contentions are of limited availability. They may be granted, on motion, if it can be shown that the procedure sought would serve a sufficiently important purpose to justify the associated delay and cost.
- F Intervenors who have been admitted as parties may litigate issues concerning the alleged proprietary nature of submitted documents and may receive, under protective order, relevant information that has been withheld from the public but is relevant to determining the proprietary nature of submissions.

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G Discovery that is not related to contentions may be authorized, on motion, under the general authority of the Board; however, it is not authorized explicitly by the rules. The moving party must carry the burden of demonstrating that the information sought is sufficiently important to justify the delay in the proceeding. On balance, discovery may not be had concerning a single instance of the alleged untrustworthiness of an intervenor to receive proprietary documents when the allegation is of limited seriousness and the information which would be released pursuant to protective order has very limited competitive value.

H A party is not entitled to an evidentiary hearing on a question of the alleged untrustworthiness of an intervenor unless the issues to be tried are sufficiently serious, in light of the material which may be released to the intervenor under protective order, to justify the delay and expense of such a hearing.

I A party may be permitted to file a trial plan with the Board, without showing specific aspects of it to another party, if the secrecy is shown to be necessary to effective litigation. However, the trial plan will be released to the other party after it is used. Similarly, cross-examination plans may be required to be filed with the Board for subsequent release to parties.

J The Board considered a form of protective order suggested to it by an interested participant and modified and issued that order, attaching it as an appendix.

K Under special circumstances, the Board may adopt a protective order governing the release to a party of information contained in an allegedly proprietary affidavit filed in support of the proprietary nature of another document.

LBP-82-3 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), Docket Nos. 50-361-OL, 50-362-OL; CONSTRUCTION PERMIT; January 11, 1982; PARTIAL INITIAL DECISION

A In a Partial Initial Decision, the Licensing Board rules that the seismic design basis for Units 2 and 3 of the facility provides a reasonable assurance of safety against earthquake hazards. The Board also determines that the current state of emergency preparedness is adequate to authorize issuance of a low-power (5% of rated power) license.

B The comprehensive investigatory obligations concerning site seismicity set forth in various provisions of 10 CFR Part 100, Appendix A, apply only to applicants for construction permits. Applicants for operating licenses have an "update" obligation under 10 CFR 50.34(b)(1). This requires them to perform such further investigations as may be necessitated by discoveries of new information following issuance of the construction permit to ensure the safety of the facility.

C Evidence that could have been introduced at the contested construction permit proceeding and which was known to the parties and Licensing Board at that time is excluded from operating license proceeding on that basis.

D Exclusion is enforced despite the fact that the party offering the evidence was not a party to the prior proceeding and the issue to which it relates was not actually litigated and decided. These departures from traditional elements of common-law res judicata and collateral estoppel are justified on the basis of unique aspects of the Commission's public interest licensing scheme.

E Otherwise admissible evidence can be excluded altogether if it lacks any significant probative value.

F 10 CFR 2.714(b) requires that the bases of contentions be set forth with "reasonable specificity." When a contention is put forward for the first time late in the proceeding after discovery is closed, specificity requirements are quite stringent because discovery is not available as a means of refining the contention.

G A licensing board has discretion to decline to reopen the record if it appears that reopening is unlikely to affect the result.

H In the absence of explicit guidance from the Commission, a licensing board should determine upon an application for a low-power license whether the comparative risks involved in low-power versus full-power operations are equivalent, considering the nature of the activities involved and the state of emergency preparedness.

I Most appropriate criteria for emergency plans in the low power context is whether the onsite plans meet full power requirements (ignoring any deficiencies relevant only to full power), plus the ability to communicate with offsite authorities. No advance offsite planning is required.

J Technical issues discussed include: Safe Shutdown Earthquake— Controlling Geologic Feature, Slip Rate Method, Fault Length Method; Strong Ground Motion— Empirical Analysis, Theoretical Modeling, Development of Design Spectrum, Saturation of Seismic Waves, Focusing of Seismic Waves, Risk Analysis of Low-Power Operations.

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**LBP-82-4 MAINE YANKEE ATOMIC POWER COMPANY (MAINE YANKEE ATOMIC POWER STATION), Docket No. 50-309-OLA; OPERATING LICENSE AMENDMENT; January 22, 1982; MEMORANDUM AND ORDER**

- A The Licensing Board denies a petition for leave to intervene filed almost two years after the date of the original notice of opportunity for intervention and over five months after the filing date set forth in the supplemental notice of opportunity for intervention. Petitioner's request to make a limited appearance is granted.
- B In order to gain admission into a proceeding a late intervention petitioner must address five pertinent factors in 10 CFR §2.714(e)(1), and affirmatively demonstrate that on balance, they favor such admission.
- C The Commission's Rules of Practice (10 CFR §2.714) require that a petition for leave to intervene "shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding."
- D Under 10 CFR §2.714(b), an intervention petition must include the bases for each contention set forth with reasonable specificity. Contentions must be sufficiently detailed and specific to demonstrate that the issues raised are admissible and that further inquiry is warranted, and to put the other parties on notice as to what they will have to defend against or oppose.

**LBP-82-5 COMMONWEALTH EDISON COMPANY (BYRON STATION, UNITS 1 AND 2), Docket Nos. STN-50-454-OLA, STN-50-455-OLA; OPERATING LICENSE AMENDMENT; January 27, 1982; MEMORANDUM AND ORDER**

- A The Licensing Board denies Intervenor's motion for reconsideration of the Board's order dismissing Intervenor as a party for failure to comply with orders requiring discovery.
- B Discovery in Licensing Board proceedings "shall relate only to those matters in controversy" which have been identified by the presiding officer. 10 CFR §2.740(b)(1). Interrogatories propounded to the NRC Staff by Intervenor, the Rockford League of Women Voters (League), were not pending and unanswered as of the date of the Board's dismissal of the League as an intervening party for failure to make discovery, where such interrogatories had been filed more than 9 months prior to the Board's order ruling on the admissibility of the League's revised contentions, and directing the commencement of formal discovery.
- C The mere filing of a motion for reconsideration does not stay in any way the order to which it is directed, nor render it less than final. Consequently, the pendency of Applicant's motion for reconsideration of the Board's ruling on the admissibility of contentions did not excuse the League's failure to respond to Applicant's interrogatories, particularly since a subsequent Board order directing the League to furnish the requested discovery promptly also denied Applicant's motion for reconsideration.
- D The extensive ramifications of Intervenor's involvement in discovery, hearings, motions, correspondence and disputes in a contemporaneous state proceeding could not be used to exculpate its persistent defiance of the Board's orders, particularly where its involvement in the state proceeding was never brought to the attention of the Board as a matter affecting the Board's management or scheduling of the instant proceeding.
- E Counsel's allegations of professional and personal problems as excuses for Intervenor's failure to provide discovery did not justify reconsideration of the Board's imposition of sanctions for such failure, where such allegations were expressly dealt with in the Board's order compelling discovery.
- F In light of Intervenor's deliberate and willful refusal to provide the evidentiary bases for its admitted contentions, despite the clear mandates of the Board's orders requiring discovery, the League could not challenge the imposition of the sanction of dismissal by arguing that other NRC cases involved lesser penalties.

**LBP-82-5A WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; January 28, 1982; MEMORANDUM AND ORDER**

- A The Board upheld, after reconsideration, its previous decision concerning the release to the public of a portion of an allegedly proprietary affidavit that had been submitted in support of the confidentiality of other documents.
- B The Board rules that it is appropriate for it to address issues concerning the confidentiality of a portion of its record, regardless of whether the issue was raised by a party. Such an action is in response to a "proposal" that a document be treated as proprietary and is not a prohibited *sua sponte* action of the Board.
- C For an affidavit to be exempt from the Board's general authority to rule on proposals concerning the withholding of information from the public, that affidavit must meet the regulatory requirement that it have "appropriate markings". When the plain language of the regulation requires "appropriate markings", an alleged tradition by which Staff has accepted the proprietary nature of



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affidavits when only a portion of the affidavits is proprietary is not relevant to the correct interpretation of the regulation.

- D In addition, the Board rules that legal argument may not appropriately be withheld from the public merely because it is inserted in an affidavit, a portion of which may contain some proprietary information.
- E The Board clarifies its earlier ruling so that it would not be interpreted to suggest that Westinghouse Corporation had been morally culpable in claiming confidentiality for an entire affidavit, only a portion of which contained proprietary information. It also apologizes for unnecessarily castigating Westinghouse about lack of concern for the public's right to know.
- F Affidavits supporting the proprietary nature of other documents can be withheld from the public only if they have "appropriate markings". An entire affidavit may not be withheld because a portion is proprietary. The Board may review an initial Staff determination concerning the proprietary nature of a document to determine whether the review has addressed the regulatory criteria for withholding.
- G A party may not withhold legal arguments from the public by inserting those arguments into an affidavit that contains some proprietary information.
- H A Board decision to review a proposal concerning the withholding of a portion of the record from the public is an appropriate exercise of Board authority and is not subject to the sua sponte limitation on Board authority.
- I Parties should not impugn one another's integrity without first submitting supporting evidence.
- J Regulations should be interpreted by examining the meaning of the words contained in the regulations. Unless there is some ambiguity in the words, practices in implementing the regulations are not relevant to their correct interpretation.

#### LBP-82-6 WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; February 2, 1982; MEMORANDUM AND ORDER

- A The Board decides that an intervenor need not specify particular portions of an allegedly proprietary document that it wants released to the public, nor need it provide reasons for release of portions to the public, providing that it has specified with reasonable particularity which sections it wants released and has provided its overall reasons for release. The issue arose with respect to the possible release to the public of safety tests which were claimed to be proprietary and entitled to be withheld from the public.
- B The Board also decided that it has the discretion to decide confidentiality issues regardless of whether they have been raised by a party, providing that it finds the staff determination of confidentiality issues to be unsatisfactory.
- C When a Board has reached a determination of a motion in the course of an on-the-record hearing, it need not reconsider that determination in response to an untimely motion but it may, in its discretion, decide to reconsider on a showing that it has made an egregious error.
- D An intervenor's burden in specifying portions of allegedly proprietary documents for release to the public is analogous to the burden of a person requesting information pursuant to the Freedom of Information Act. Generally, the burden is on the person wishing to withhold information and not on the requester.
- E The Board may, pursuant to the general powers of a presiding officer, decide whether or not portions of the record should be withheld from the public. It is not necessary that an intervenor raise this issue. However, it is not always appropriate for the Board to act when the issue has not been raised. Whether or not it should act depends in part on whether it finds the staff's review satisfactory. The Board's authority to consider substantive issues is limited by the sua sponte rule, but the same limitation does not apply to its consideration of confidentiality issues under standards set forth in 10 CFR §2.790.

#### 50-155 CONSUMERS POWER COMPANY (BIG ROCK POINT PLANT), Docket No. 50-155 (Spent Fuel Pool Amendment); OPERATING LICENSE AMENDMENT; February 5, 1982; MEMORANDUM AND ORDER

- A Summary disposition is denied with respect to a contention that the chain reaction constant ( $K_{eff}$ ) in a spent fuel pool may exceed standards generally applied by the Commission's staff. The principal error alleged to have been committed by applicant and staff in their calculations was failure to allow for boiling of the fuel pool at temperatures of up to 247°F, which may occur at the bottom of the pool, where the water is under pressure because of the column of water above it.
- B Technical issues discussed include: Fuel Pool Boiling; Chain Reaction Constant in Spent Fuel Pool;  $K_{eff}$  in Spent Fuel Pool.

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LBP-82-7A METROPOLITAN EDISON COMPANY (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), Docket No. 50-289 (Restart) (Reopened Proceeding); SPECIAL PROCEEDING; February 5, 1982; MEMORANDUM AND ORDER

- A The Licensing Board denies NRC Staff Motion for Review of Special Master's ruling with respect to "Staff attitude".
- B Special Master's order inquiring into the NRC Staff's attitude in administering NRC operator license examinations was not concerned with attitude qua attitude, but with the resources committed and care taken in administering the examinations. Such considerations are relevant to the reopened proceeding concerning cheating on the TMI-1 operators' license examinations.
- C Interlocutory review of the Special Master's order was inappropriate in any event under the standards of Public Service Co. of Indiana (Marble Hill, Units 1 and 2), ALAB-405, 5 NRC 1190-92 (1977). The Staff already had prepared and presented testimony on NRC Staff attitude, so that any "immediate and serious irreparable impact" was no longer threatened but a fait accompli; and Staff failed to show that this matter had affected the proceeding improperly in a pervasive and unusual manner. The issue was either moot or perishingly moot by time of filing.

LBP-82-8 CONSUMERS POWER COMPANY (BIG ROCK POINT PLANT), Docket No. 50-155-OLA (Spent Fuel Pool Amendment); OPERATING LICENSE AMENDMENT; February 19, 1982; MEMORANDUM AND ORDER

- A The Board completes acting on Applicant and Staff motions for summary disposition of contentions. The most important issues to survive these motions are: (1) a contention that the expanded spent fuel pool would have a chain reaction constant  $K_{eff}$  that exceeds 0.95, the level generally permitted by Commission practice; (2) a contention that the safety of the reactor is compromised by a SAC, low-level bombing practice run that is 11.5 miles from the plant; (3) some issues relating to a contention that the fuel pool, which is located within the containment building, would not be safe during a core-damage (TMI-2 type) incident in which radiation inhibited entry into the containment for an extended period of time; (4) some issues relating to the reliability of Staff and Applicant analyses of the level of radiation to be emitted from the pool; (5) whether workers would receive radiation doses that are "as low as reasonably achievable" (ALARA) while installing the new spent fuel racks; and (6) whether there would be sufficient makeup water available following a caskdrop incident or a seismic incident in which the overhead crane might drop into the pool.
- B Summary disposition is granted with respect to contentions that the expansion of the fuel pool would induce unacceptable routine and accidental releases of radioactive materials, that small or medium-sized leaks in the spent fuel pool would cause environmental hazards, that there would be unacceptable corrosion of the pool and its components, and that fuel could escape the racks and remain undiscovered for a substantial period of time. Two Board questions, relating to the performance of certain specified valves and to the possibility of an Oyster Creek-type incident, also are dismissed.
- C In addition, the Board rules that certain late-filed affidavits should be received into evidence and it announces that it will convene a telephone conference for scheduling matters.
- D The Board discusses the conflicting objectives which must be accommodated in deciding a summary disposition motion.
- E The Board reinterprets some contentions to raise issues that were uncovered through discovery and that were not strictly within the contentions as initially worded.
- F The Board found good cause for late filing of three affidavits because the delay in filing did not cause any corresponding delay in the work of the Board and because Intervenor had demonstrated their seriousness and their ability to analyze complex issues in a helpful manner.
- G Technical issues discussed include: Chain reaction constant in spent fuel pool,  $K_{eff}$  in spent fuel pool, Criticality excursions in spent fuel pool, Zirconium/steam reactions, Radiolysis of steam facilitates reaction with zirconium, Aircraft-crash risk, As low as is reasonably achievable, Biological surveys, Corrosion (spent fuel pool), Dose calculations, Caskdrop incident (spent fuel pool), Expansion and operation of spent fuel pool, Emissions from spent fuel pool, Spent fuel storage rack installation, Intergranular stress corrosion cracking (spent fuel pool), Spent fuel pool boiling, Boiling temperature in spent fuel pool, Occupational radiation dosage to workers engaged in modification to spent fuel pool, Safety of spent fuel pool located inside the containment, Health Physics Program, Radiological and bioaccumulation monitoring, Release of radioactive materials in effluents (spent fuel pool), Spent Fuel Pool (availability of makeup water), Use of radwaste system to reduce radiation in spent fuel pool.

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LBP-82-9 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2), Docket Nos. 50-440-OL, 50-441-OL; SPECIAL PROCEEDING; February 19, 1982; MEMORANDUM

A The Board announces procedures to make its trip to the General Electric Control Room simulator near Tulsa, Oklahoma, as informative as possible. It expresses an interest in being informed about the General Electric Nuclenet 1000 Control Room, and it explains that its interest in being informed relates to the possibility that it may subsequently raise a sua sponte issue concerning control room reliability.

B  $\Delta$  Board may seek information which will help it to decide whether or not to raise a sua sponte issue.

LBP-82-10 WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; February 19, 1982; MEMORANDUM AND ORDER

A Failure to respond fully and in good faith after the Board orders a response to interrogatories may result in adverse findings of fact. However, the Board need not yet decide whether to make adverse findings in this proceeding, in which a special summary disposition procedure was adopted. That procedure places the burden of going forward on summary disposition on the Intervenor. The effect of adopting that procedure may be to alleviate some of Applicant's difficulties if there have been incomplete responses to interrogatories about Intervenor's case.

B The Board need not act on a motion for a continuance that is not yet ripe. Should Intervenor subsequently find, nearer to the conclusion of this case, that important information about steam generator tube repair is being assembled but has not yet been made available, a motion for continuance may then be appropriate.

C A change in plans concerning whether or not to conduct a full scale sleeving repair project in one of Applicant's units is not a reason to dismiss a portion of the requested amendment.

D Once a Board has required a response to interrogatories, Intervenor may not effectively limit its obligation to comply with the Board's order by using limiting language in its response.

E Although failure to comply with a Board order to respond to interrogatories may result in adverse findings of fact, the Board need not decide what adverse findings to adopt until action is necessary. When another procedure has been adopted requiring Intervenor to shoulder the burden of going forward on a motion for summary disposition, it may be appropriate to await Intervenor's filing on summary disposition, before deciding whether or not to impose sanctions for failure to respond to interrogatories pursuant to a Board order. Sanctions only will be appropriate if failure to respond prejudices Applicant in the preparation of its case.

F The Board required Intervenor to file a Motion Concerning Litigable Issues, by which the burden of going forward on summary disposition was placed on the Intervenor. However, Applicant and Staff will have to respond and Intervenor will reply. Thereafter, the standard for summary disposition will be the same as required under the rules.

G This special procedure was appropriate because time pressures had caused the Board to apply a lax standard for admission of contentions, depriving Applicants of full notice of the contentions in the proceeding, and because Applicants had already shown substantial grounds for summary disposition of all contentions in the course of a hearing that had already been completed.

H Although it is appropriate to admit contentions more freely than ordinary practice permits because of time pressures on a proceeding, the extraordinary freeness in admitting contentions should be terminated when the time pressures are reduced because Applicant has changed its operational plans.

LBP-82-11 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (PERRY NUCLEAR POWER PLANT, UNITS 1 & 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; February 26, 1982; MEMORANDUM AND ORDER

A A motion to admit two late contentions is denied. One contention relates to the disposal of nuclear waste and the other to the need for magnesium oxide bricks beneath the reactor vessel.

B The principal reason for rejecting the nuclear waste contention is that Boards are explicitly barred from considering such a contention by the Commission. The reasons for rejecting the magnesium oxide bricks contention are that the appearance of a newspaper article is not sufficient grounds for the late-filing of a contention about matters that have been known for a long time and that intervenors had not demonstrated that they could contribute to this issue because their filing did not discuss any of the technical problems related to MgO<sub>2</sub> bricks and did not relate the need for the bricks to any specific characteristics of the Perry plant.

C The appearance of a newspaper article is not sufficient grounds for the late-filing of a contention about matters that have been known for a long time. Furthermore, in deciding whether to admit a late contention, adverse weight may be given to intervenors' failure to show any mastery of

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relevant technical materials and failure to show the relevance of their contention to the particular characteristics of the plant involved in a licensing proceeding.

- D Boards may not exercise jurisdiction over contentions if those contentions are the subject of a pending rulemaking and the Commission has explicitly barred Board consideration of the subject of the contention.
- E Technical issues discussed include: Waste disposal; Magnesium oxide bricks; Core catcher.
- LBP-82-12 WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; February 26, 1982; MEMORANDUM AND ORDER
- A A Board decision whether or not to withhold from the public a portion of its record pursuant to a proposal that the information be treated as confidential does not create a sua sponte issue requiring formal notification of the Commission.
- B Boards have the authority pursuant to 10 CFR §2.718 to regulate a hearing in a "fair and impartial" manner. They are authorized, pursuant to this authority, to consider whether or not it is appropriate to withhold a portion of their record from the public pursuant to a proposal that the information be treated as proprietary. Exercise of this authority does not give rise to a sua sponte issue requiring notification of the Commission.
- C When a Board has already completed action on a procedural matter and no further obligation has been imposed on a party, it is not appropriate to notify the Commission of the initiation of a sua sponte matter. Such a notification would not avoid delay or serve any other purpose of the Commission's rule that it be notified of the pendency of a sua sponte issue.
- D Board questions related to admitted contentions do not create sua sponte matters requiring notification of the Commission. That the Board gives advance notification to a party that related questions may be asked does not convert those questions into sua sponte issues requiring notification of the Commission.
- LBP-82-12A CONSOLIDATED EDISON COMPANY OF NEW YORK (INDIAN POINT, UNIT NO. 2), POWER AUTHORITY OF THE STATE OF NEW YORK (INDIAN POINT, UNIT NO. 3), Docket Nos. 50-247-SP, 50-286-SP; SPECIAL PROCEEDING; March 1, 1982; MEMORANDUM AND ORDER
- A The Licensing Board grants intervention petitioner's motion to permit petitioner's representatives to observe the emergency planning exercise scheduled for the Indian Point facility.
- B Where the granting of petitioner's motion would likely result in refinement authority of the Licensing Board to entertain the motion was established by and focusing of contentions relating to emergency planning, the authority of the Licensing Board to entertain the motion was established by the provisions of 10 CFR 2.718(e) which describes the powers of presiding officers generally, or by the Commission memorandum and order that constituted the Board and directed it to investigate, inter alia, questions related to emergency planning.
- C Given the Licensing Board's mandate from the Commission to investigate emergency planning issues related to the Indian Point facility, and the fact that the emergency planning exercises that were the subject of petitioner's motion were scheduled to take place within two (2) days, the Licensing Board was not required to adhere strictly to the provisions of the Rules of Practice governing the timing of discovery when to do so would frustrate the announced purpose of the hearing and where no party would be seriously disadvantaged by expediting the action. Accordingly, the Licensing Board would entertain petitioner's motion though petitioner had not yet been admitted as a party, no contentions had yet been admitted in the proceeding, and the 30-day period for response to the motion had not elapsed.
- D Although licensees did not allege facts sufficient to support the grant to them of a protective order, the Board would not permit an "unbridled inspection" of licensees' plant, and would impose conditions upon petitioner's observation of the emergency planning exercises sufficient to keep the operation free of anything that might constitute interference.
- LBP-82-12B CONSOLIDATED EDISON COMPANY OF NEW YORK (INDIAN POINT, UNIT NO. 2), POWER AUTHORITY OF THE STATE OF NEW YORK (INDIAN POINT, UNIT NO. 3), Docket Nos. 50-247-SP, 50-286-SP; SPECIAL PROCEEDING; March 2, 1982; MEMORANDUM AND ORDER
- A The Licensing Board denies licensees' request for a stay and for certification to the Commission of the Board's order permitting intervention petitioner's representatives to observe emergency planning exercises at licensees' plant, but grants licensees' request for referral of the order to the Commission under the discretionary interlocutory appeal provisions of the Rules of Practice.
- B Where it was unmistakably clear that the adequacy of emergency planning for the Indian Point facility was an issue to be fully investigated in the proceeding, and where, in the opinion of the Board, the observations of potential intervenors as to emergency planning exercises scheduled for the next day

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would be useful to the Board in its deliberations, the Board would deny licensees' request for stay and certification to the Commission of its order permitting such observations, since to grant the request would render the issue moot.

- C Where the emergency planning exercises that were the subject of the Board's order permitting observation by representatives of intervention petitioner were scheduled to take place the next day, the Board would grant licensees' request for referral of the order to the Commission pursuant to the discretionary interlocutory appeals provisions of the Rules of Practice (10 CFR 2.730(f)) because of the need for a prompt decision.

LBP-82-13 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (PERRY NUCLEAR POWER PLANT, UNITS 1 & 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; March 2, 1982; MEMORANDUM AND ORDER

- A The Licensing Board denies intervenor's request for a stay of proceedings, treating the request as a motion for continuance.

B While an allegation of serious construction deficiencies might properly be the subject of a discovery request, it does not provide a basis for continuing the proceeding.

- C It is the responsibility of the Licensing Board to adjudicate contentions raised by the parties and important safety and environmental issues raised by the Board sua sponte, pursuant to Commission regulations. The Board will not decide whether construction complies with all legal requirements unless that issue is raised by an admitted contention or incorporated within a sua sponte issue.

LBP-82-14 GENERAL ELECTRIC COMPANY (GE MORRIS OPERATION SPENT FUEL STORAGE FACILITY), Docket Nos. 70-1308, & 72-1 SP; OPERATING LICENSE RENEWAL; March 2, 1982; DECISION AND ORDER

- A The Licensing Board grants Applicant's motion for summary disposition of all remaining contentions.

B In order to grant a motion for summary disposition, the record before the Board must demonstrate clearly that there is no possibility that a litigable issue of fact exists. Any doubt as to whether the parties should have been permitted or required to proceed further would have required a denial of the motion.

LBP-82-15 CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (PERRY NUCLEAR POWER PLANT, UNITS 1 & 2), Docket Nos. 50-440-OL, 50-441-OL; OPERATING LICENSE; March 3, 1982; MEMORANDUM AND ORDER

- A The Licensing Board rules on intervenor's request to admit additional contentions and to expand the scope of previously admitted contentions.

B Intervenor's allegation that it learned of an issue through a recently published newspaper article does not constitute a showing of good cause for the late-filing of a contention where intervenor has not shown that the newspaper article reflects any new research or previously unavailable insights, has not established any nexus between the issue and the Perry facility, and has not demonstrated any competence to assist the Board in resolving the issue.

- C A contention presenting a generic issue is not admissible when intervenor fails to demonstrate any specific nexus between the issue and the facility that is the subject of the proceeding.

D Because recent Commission statements contained in a proposed rule and a proposed policy statement, though tentative, suggest that the requirements for the control of accident-generated hydrogen might be made more stringent in the future, the Licensing Board may consider admissible a contention raising issues related to hydrogen generation, even though a contrary rule, or no rule might ultimately be enacted. To wait for the final rule would risk delay in the issuance of a license.

- E Intervenor's motion to enlarge a previously admitted contention was not ripe for decision where the contention, as admitted, was sufficiently broad to permit discovery of all relevant information, and intervenor would have the opportunity later to present any new material obtained through discovery either in a response to a motion for summary disposition or as the basis for a new contention.

LBP-82-16 DUKE POWER COMPANY, et al. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), Docket Nos. 50-413-OL, 50-414-OL; ASLBP Docket No. 81-463-01-OL; OPERATING LICENSE; March 5, 1982; MEMORANDUM AND ORDER

- A The Licensing Board rules on pending petitions for intervention and contentions filed in support of those petitions.

B The requirement of the Commission's Rules of Practice that the basis for each contention be set forth with reasonable specificity facilitates Board determinations whether contentions are litigable, and helps assure that other parties are sufficiently put on notice that they will know at least generally what they will have to defend against. These purposes do not imply that a high standard of specificity for contentions is required at so early a stage of the proceeding as the initial prehearing conference. The principal function of contentions at this juncture is to place some reasonable limits on discovery, and

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this may be accomplished with contentions more broad and general than the revised contentions that can be developed after discovery and that will, after the final prehearing conference, structure the hearing.

C Where, at the time of the first prehearing conference, key documents such as the Commission Staff's Safety Evaluation Report, its Environmental Impact Statement, most of the off-site emergency plans and portions of the Applicant's Final Safety Analysis Report had not yet been written, the argument that intervenors must plead all contentions with reasonable specificity prior to the conference, and that further contentions based on information disclosed in subsequently available documents must be subjected to the restrictive standards for admissibility of late-filed contentions, was unreasonable and not required by the Commission's Rules of Practice as written or by prior decisions.

D The Commission's regulations plainly contemplate that the adequacy of off-site emergency plans for counties and municipalities near the facility that is the subject of the proceeding can be contested in their specific details by intervenors. 10 CFR 50.47(a).

E Where the documents likely to provide the necessary specifics for the formulation of contentions were not yet available, the Board would not disallow proposed contentions for lack of specificity but would admit such contentions conditionally, subject to the requirement that intervenors advancing such contentions review the relevant documents promptly after they become available and, within 30 days thereafter, submit revised contentions meeting the specificity requirements of the Rules of Practice, or else abandon the contentions.

F The adequacy of any revised contentions based upon documents filed subsequent to the initial prehearing conference would be judged by the general principles applicable to contentions, including specificity. However, since the "lateness" of such contentions would be entirely beyond the control of the sponsoring intervenor, the additional criteria normally applied to late contentions under the Rules of Practice would not be applied.

G Because intervenor could not reasonably be required to advance specific contentions about a security plan it had never seen, and because it had expressed a formal interest in the plan, the Board could order Applicants to grant intervenor access to the plan as necessary to a proper decision in the proceeding. The Board would, however, condition such disclosure order on intervenor's having obtained the services of a qualified security plan expert, and would impose other limitations on access to the plan. Accordingly, the Board would allow intervenor 10 days in which to consider whether it wished to pursue the matter further.

LBP-82-17 TEXAS UTILITIES GENERATING COMPANY, et al. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), Docket Nos. 50-445, 50-446 (Application for Operating License); OPERATING LICENSE; March 5, 1982; ORDER

A The Licensing Board denies intervenor's request that it adopt certain of intervenor's contentions as its own, and grants Applicants' motion for summary disposition of the contentions.

B Where intervenor filed neither an answer opposing Applicants' motion for summary disposition of certain contentions, nor a statement of material facts as to which it contended that there existed a genuine issue to be heard, and where extensive affidavits and statements filed by the Applicants and the Commission Staff in support of the motion demonstrated that no such issue existed, intervenor's request that the Board adopt such contentions as its own would be rejected. If a party has established its entitlement to summary disposition of a contention, it would distort the Commission's regulations to abort this result by permitting an opposing party to withdraw the contentions without prejudice.

C Motions for summary disposition under §2.749 of the Commission's Rules of Practice are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and Federal Court decisions interpreting that rule may be relied upon in NRC proceedings.

LBP-82-18 TEXAS UTILITIES GENERATING COMPANY, et al. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), Docket Nos. 50-445, 50-446 (Application for Operating License); OPERATING LICENSE; March 8, 1982; ORDER

A The Licensing Board denies intervenor's motion for extension of time for discovery.

B In light of the Commission's express direction that licensing boards conduct their proceedings at an expeditious pace consistent with the demands of fairness by setting and adhering to reasonable schedules; and that the special circumstances faced by a participant do not relieve that party of its hearing obligations; intervenor's motion for extension of time for discovery would be rejected where no good cause for that extension had been shown.

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#### LBP-82-19 LONG ISLAND LIGHTING COMPANY (SHOREHAM NUCLEAR POWER STATION UNIT 1), Docket Nos. 50-322-OL, 50-322-CPA; OPERATING LICENSE; March 15, 1982; MEMORANDUM AND ORDER

- A The Licensing Board rules on the admissibility of contentions and confirms establishment of hearing schedule.
- B TMI related issues may be litigated in individual proceedings even if they are not included in the NUREG-0737 list of TMI requirements applicable to new operating licenses provided that the issue to be litigated is not a challenge to the existing regulations. The Commission's Revised Statement of Policy for litigation of TMI issues, CLI-80-42, 12 NRC 654 (1980), broadened the range of TMI issues which could be litigated in individual proceedings to include the requirements contained in NUREG-0737, whether or not those requirements might have been considered challenges to the regulations. The policy statement did not cut back the pre-existing right to litigate issues which do not challenge the regulations just because those issues are not included in NUREG-0737. Pacific Gas and Electric Company (Diablo Canyon, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).
- C The Commission's "Class 9" accident interim policy statement, 45 Fed. Reg. 4010 (June 13, 1980), requires that a probabilistic assessment of environmental risk of accidents previously not considered within the design basis of nuclear power plants be included in Final Environmental Statements (FES) issued after the June 13, 1980 policy statement. However, this does not bar a contention in proceedings in which the FES issued before that date alleging that the Applicant and Staff have not applied an adequate methodology, such as a probabilistic analysis, to analyze the reliability of systems to determine which sequences of accidents should be considered within the design basis of the plant.
- D In the circumstance where a contention is a general inquiry into the plant design systems analysis methodology, with no specification of design examples, it is appropriate to require the intervenor to file and present its direct testimony first, in which intervenor may include a maximum of three design examples to support its allegation of inadequate methodology. The Staff and Applicant will file their responsive testimony after the cross-examination of intervenor's testimony. If the Board finds that the testimony of the parties, including that on any design examples discussed by intervenor's testimony, raises doubts about the methodology applied to the design of the plant, this could require the Applicant and the Staff to go forward with an expanded system-by-system analysis on the record of the proceeding.
- E Where a generic issue has a direct bearing on the safe operation of the individual plant and the ability of that plant to meet present regulations, the issue cannot be put aside for resolution after the issuance of the operating license simply because it is the subject of an uncompleted generic rulemaking proceeding. In the absence of a finding by the Commission that it is acceptable for an individual license to issue while a rulemaking is pending, the board would either have to defer any authorization otherwise justified in the individual case until a determination is reached in the rulemaking proceeding and then factor that determination in, or be able to conclude that such authorization can be granted in the individual case in advance of resolution of the issue on a generic basis. As in instances involving Unresolved Safety Issues, this latter determination could be premised on findings that the problem has been resolved for the individual reactor, or that there is reasonable assurance the problem will be resolved before it has adverse safety implications for the individual reactor, or that alternative means will be available for assuring that lack of resolution of the problem generically would not pose an undue risk from operation of the individual reactor. Cf. Virginia Electric and Power Co. (North Anna, Units 1 and 2), ALAB-491, 8 NRC 245 (1978); Gulf States Utilities Co. (River Bend, Units 1 and 2), ALAB-444, 6 NRC 760, 775 (1977).
- F Although the ATWS issue is pending before the Commission in a rulemaking proceeding, it is permissible to litigate a contention that the measures taken at a facility for the interim period pending completion and implementation of the rulemaking, including operational procedures and operator training, do not provide the level of protection required by the regulations.
- G A governmental agency, in this instance a County, which has elected to participate as a full intervenor on specified contentions does not lose its right to participate as an interested governmental agency on other issues in the case pursuant to 10 CFR §2.715(c). Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-93 (1976). However, such participation must be in accordance with the responsibilities imposed upon a §2.715(c) participant, including timeliness consistent with the need to prevent unfair surprise to the other parties in the proceeding. See Gulf States Utilities Co. (River Bend, Units 1 and 2), ALAB-444, 6 NRC 760, 768-70 (1977).
- H There is flexibility in the emergency planning rule, 10 CFR §50.47.(2), for adjustment of the general approximate 10 and 50 mile Emergency Planning Zone (EPZ) where particular local conditions warrant adjustment. Therefore, contentions that such adjustments must be made due to

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specified local conditions would be admissible. However, contentions seeking a totally new case by case probabilistic accident risk analysis to determine on an ad hoc basis the zones to be established for the plume exposure pathway and ingestion pathway EPZ's are challenges to the rule since they would render meaningless the general specification in the rule of 10 and 50 mile EPZ's.

- I A contention would be admissible which alleges that because of the geography of Long Island, evacuation planning within an approximate 10 mile EPZ may not be adequate because of the impacts of persons outside and to the east of the EPZ choosing to evacuate and having to do so by coming through the EPZ.

LBP-82-19A WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; March 19, 1982; MEMORANDUM AND ORDER

- A The Licensing Board affirms its earlier decision that rescission of a liberal policy toward the admission of contentions was proper once the time pressure that justified the policy was relieved by a change in the applicant's plans. The ruling permits the intervenor to challenge the policy change by showing specific prejudice that has resulted from expectations raised by the institution of the liberal policy.

- B Though a Board may admit a single broad contention in the interest of expedition, its liberal policy toward the admission of contentions may be rescinded when the time pressure justifying it is relieved by a change in applicant's operational plans. Issues already raised under the liberal policy are not retroactively affected by its rescission.

LBP-82-19B CONSUMERS POWER COMPANY (BIG ROCK POINT PLANT), Docket No. 50-155 (Spent Fuel Pool Amendment); SHOW CAUSE PROCEEDING; March 19, 1982; MEMORANDUM AND ORDER

- A The Licensing Board refuses to admit any of 18 late-filed contentions.  
B A summary disposition decision that an allegation presents no genuine issue of fact may preclude admission of a subsequent, late-filed contention based on the same allegation.

- C If an intervenor has special permission to file a contention prior to an extended deadline, it must file the entire contention by that deadline, including the basis for it. If it fails to meet that obligation, it must show good cause for late filing.

- D Because Boards may raise important safety and environmental issues sua sponte they should review even untimely contentions to determine that they do not raise important issues that should be considered sua sponte.

LBP-82-20 METROPOLITAN EDISON COMPANY (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), Docket No. 50-289 (Restart); SPECIAL PROCEEDING; March 23, 1982; MEMORANDUM AND ORDER

- A Pursuant to licensee's motion, the Licensing Board clarifies a provision of its Partial Initial Decision of December 14, 1981, relating to the separation of Three Mile Island Units 1 and 2.

LBP-82-21 FLORIDA POWER & LIGHT COMPANY (ST. LUCIE PLANT, UNIT NO. 2), Docket No. 50-389A; ANTITRUST PROCEEDING; March 24, 1982; MEMORANDUM AND ORDER

- A In light of a comprehensive settlement agreement among the parties, the Licensing Board grants the joint motion of applicant and intervenors to dismiss the proceeding.

- B Once the Attorney General of the United States has withdrawn from the proceeding and permission has been granted to the remaining intervenors to withdraw, the Board no longer has jurisdiction to entertain an antitrust proceeding under the provisions of the Atomic Energy Act.

LBP-82-22 HOUSTON LIGHTING AND POWER COMPANY, et al. (SOUTH TEXAS PROJECT UNITS 1 AND 2), Docket Nos. STN 50-498 OL, STN 50-499 OL; OPERATING LICENSE; March 26, 1982; MEMORANDUM AND ORDER

- A The Licensing Board denies intervenors' request for disclosure by sworn affidavit of the substance of any and all ex parte communications alleged to have occurred as a result of NRC Commissioners' visits to the site of the South Texas facility.

- B Intervenors' request for identification of all persons involved in arranging the visits of NRC Commissioners to the site of the South Texas facility, and for sworn affidavits from each such person, was essentially a request for discovery. As such, it was required to be relevant to some contention or question before the Licensing Board. Because intervenors had not demonstrated that any ex parte contacts actually took place and had alleged no ex parte contacts by the Licensing Board itself, the request was not relevant to the proceeding before the Board and would be denied.



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**LBP-82-23 CONSOLIDATED EDISON COMPANY OF NEW YORK (INDIAN POINT, UNIT 2) POWER AUTHORITY OF THE STATE OF NEW YORK (INDIAN POINT, UNIT 3), Docket Nos. 50-247 SP, 50-286 SP; SPECIAL PROCEEDING; March 29, 1982; MEMORANDUM AND ORDER**

- A** The Licensing Board denies licensees' motion in the alternative for a stay of the Commission's orders governing the proceeding, for dismissal of the proceeding or for certification of issues to the Commission.
- B** Licensing Boards exercise only those powers which the Commission has given them. Where the Commission's only direction to the Licensing Board in this proceeding was to formulate recommendations on the questions posed in the Commission's order, the Commission did not delegate to the Board the power to issue a stay.
- C** Where virtually the same arguments as those contained in licensees' motion had previously been presented to, and rejected by the Commission, a Licensing Board decision reversing the prior decision of the Commission would make a mockery of the Board's obligation to follow Commission precedent.
- D** The Licensing Board's power to certify issues to the Commission is discretionary and is to be exercised sparingly. Where licensees' motion to certify presented no novel questions of policy, law or procedure, and no other compelling reasons for certification, the motion would be denied.

**LBP-82-24 ARMED FORCES RADIOBIOLOGY RESEARCH INSTITUTE (COBALT-60 STORAGE FACILITY), Docket No. 30-6931; MATERIALS LICENSE RENEWAL; March 31, 1982; MEMORANDUM AND ORDER**

- A** The Licensing Board rules that notions of elementary fairness require consideration of an untimely petition to intervene and request for hearing where the late filing may have resulted from petitioner's reliance on NRC Staff representations, but denies the petition for lack of standing.
- B** Pursuant to 10 CFR 30.34, by-product materials licenses are subject to the provisions of the Atomic Energy Act of 1954, as amended, as well as to all valid rules, regulations and orders of the Commission.
- C** By its terms, §2.70 of the Commission's Rules of Practice does not contemplate that the provisions of §2.714 relating to the timeliness of intervention petitions should apply to materials licenses issued pursuant to 10 CFR 2.103 and 10 CFR, Part 30, unless the Commission orders that a hearing be held or determines that an opportunity for a public hearing should be afforded.
- D** Section 2.103 of the Commission's Rules of Practice provides that the Director of Nuclear Reactor Regulation or the Director of Nuclear Materials Safety and Safeguards may issue a license if it finds that the application complies with the requirements of the Atomic Energy Act and the Commission's regulations, and restricts the right to a hearing to an Applicant who has been notified of a denial of the application. Consequently, the issuance of a by-product materials license renewal is not a proceeding under the Atomic Energy Act of 1954, as amended, §189(a), 42 USC 2239(a), and a hearing is not required before the license is renewed.
- E** Where petitioner's counsel alleged that Commission Staff had represented to her that no action would be taken on licensee's application for renewal of its by-product materials license until completion of pending reactor licensing proceedings to which petitioner was a party, and such allegations were not denied by Staff, the action of Staff could be asserted as an estoppel on the issue of the timeliness of petitioner's petition for leave to intervene.
- F** Where petitioner relied to its detriment on Staff's representations, notions of elementary fairness required that its petition to intervene be considered even though it was filed after the issuance of the license renewal to which it pertained.
- G** Although an organization may establish standing through its members, it must allege a potential injury which is particularized to it and not one which is shared in substantially equal measure by all of a large class of citizens.
- H** Since the Cobalt facility that was the subject of this petition did not have the potential for accidental release of fission products, the proximity nexus for establishment of standing in nuclear reactor proceedings was not applicable here. Since petitioner's only allegation of injury to its members was proximity to the Cobalt facility, it failed to establish standing and its petition was denied.

**LBP-82-24A WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR POWER PLANT, UNITS 1 AND 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; March 31, 1982; MEMORANDUM AND ORDER**

- A** The Licensing Board denies a motion to reconsider its previous decision not to certify a sua sponte question to the Commission.
- B** The regulations limiting the Board's authority to raise sua sponte issues restrict its right to consider safety, environmental or defense matters not raised by parties but does not restrict its responsibility to oversee the fairness and efficiency of proceedings and to raise important procedural questions on its own motion.

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- C The Commission's direction to Boards to notify it of sua sponte matters does not create rights in private parties.
- D A Board may raise a procedural question, such as whether a portion of its record should be treated as proprietary or should be released to the public, regardless of whether the full scope of the question has been raised by a party.
- LBP-82-25 CONSOLIDATED EDISON COMPANY OF NEW YORK (INDIAN POINT, UNIT NO. 2), POWER AUTHORITY OF THE STATE OF NEW YORK (INDIAN POINT, UNIT NO. 3) Docket Nos. 50-247-SP, 50-286-SP; SPECIAL PROCEEDING; April 2, 1982; MEMORANDUM AND ORDER
- A The Licensing Board rules on petitions to intervene and request to participate pursuant to 10 CFR §2.715(c).
- B Section 2.715(c) of the Commission's Rules of Practice does not limit licensing boards to the recognition of a sole state representative.
- C The authority of the Licensing Board to admit the Attorney General of the State of New York as a representative of an interested state is not limited by the provisions of a New York State law delegating responsibility for representation of the state to the New York State Energy Office.
- D A Licensing Board may require a representative or agency of an interested state to indicate in advance of the hearing the subject matter on which it wishes to participate, but such a showing is not required for admission pursuant to 10 CFR §2.715(c).
- E A party admitted as an interested state under the provisions of 10 CFR §2.715(c) may not reserve the right to intervene later under §2.714 with full party status. A petition to intervene under the provisions of the latter section must conform to the requirements for late-filed petitions.
- F Where the petition for intervention of the Friends of the Earth was signed by an official of the organization who herself had the requisite personal interests to support an intervention petition, the organization also had standing.
- G The fact that the sole or primary purpose of an organization is to oppose nuclear power in general or the facility the subject of the proceeding in particular is not a basis for denying the organization's petition to intervene.
- H The Union of Concerned Scientists (UCS) was not required to produce an affidavit from one of its members or sponsors specifically authorizing it to represent the interests of that member or sponsor in this proceeding. The organization's opposition to continued operation of the Indian Point plant and its steps taken to effectuate that opposition were clearly germane to UCS's expressed purposes, and the Board could assume that UCS's sponsors in the vicinity of Indian Point were aware of those activities. Accordingly, UCS could be presumed to represent the interests of such sponsors. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402 (1979).
- I Where a non-membership organization has a well-defined purpose which is germane to the proceedings, its sponsors can be considered equivalent to members where they financially support the organization's objectives and have indicated a desire to be represented by the organization. Therefore, where an individual UCS sponsor has standing, this provides a sufficient nexus between the organization and the proceeding to permit representational standing by UCS.
- LBP-82-26 PUGET SOUND POWER & LIGHT CO., et al. (SKAGIT/HANFORD NUCLEAR POWER PROJECT, UNITS 1 AND 2), Docket Nos. 50-522, 50-523; SPECIAL PROCEEDING; April 5, 1982; MEMORANDUM AND ORDER
- A The Licensing Board rules on petitions to intervene.
- B An intervention petitioner, to have standing, must allege some injury that has occurred or will result from the action taken as a result of the proceedings. A mere academic interest in the outcome of the proceedings will not confer standing.
- C The economic concerns of ratepayers of the applicant utilities are not within the "zone of interests" protected by the Atomic Energy Act or NEPA, and such interests do not provide a basis for standing for the representative of the affected ratepayers.
- LBP-82-27 METROPOLITAN EDISON COMPANY (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), Docket No. 50-289 (Restart); SPECIAL PROCEEDING; April 5, 1982; MEMORANDUM AND ORDER MODIFYING AND APPROVING NRC STAFF'S PLAN OF IMPLEMENTATION
- A Licensing Board, having reserved jurisdiction in Partial Initial Decision LBP-81-59, 14 NRC 1211, December 14, 1981, to consider the Staff's plan for implementing the initial decision, after modification and amendment, adopts the Staff's implementation report. OF AUTHORITY
- B Jurisdiction to approve post-decision implementation plan was reserved in view of the fact that the evidentiary record did not permit detailed determination of which considerations require the imposition of rigid license conditions; that the license should not be freighted unnecessarily and too

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rigidly with license conditions; that enforcement involved its own expertise; that the Notice of Hearing (10 NRC 141, 148-49) assigned responsibility to be shared by the Director of Nuclear Reactor Regulation and by the Board to implement the Board's decision; and that to leave the entire enforcement responsibility to the Staff would be an excessive delegation of the Board's responsibilities.

- C An uninvited request to reevaluate the evidentiary record and arrive at a different conclusion made more than two months after the initial decision would, standing alone, be an untimely petition for reconsideration under 10 CFR 2.771 and beyond the Board's jurisdiction.
- D Having retained jurisdiction to approve implementation plan, even though a request for modification of the initial decision could be deemed an untimely petition for reconsideration, it would be pointless for Licensing Board to require the implementation of a condition it no longer supported, and, in any event, the Board's ruling would afford useful guidance to the Appeal Board and Commission on review.
- E Having retained jurisdiction to approve implementation plan, a request to clarify the scope and purpose of a Board-imposed condition in the initial decision is not a petition for reconsideration and is properly within the Board's jurisdiction.

#### LBP-82-28 CONSUMERS POWER COMPANY (MIDLAND PLANT, UNITS 1 AND 2), Docket Nos. 50-329 OM & OL, 50-330 OM & OL; CONSTRUCTION PERMIT MODIFICATION, OPERATING LICENSE; April 12, 1982; MEMORANDUM AND ORDER

- A The Licensing Board denies an intervenor's motion for suspension of construction pending resolution of an assertedly unresolved generic safety issue concerning the potential effects of electromagnetic pulse (EMP) on nuclear power plants.
- B A contention concerning the effect on a nuclear plant of electromagnetic pulses (EMP) possibly resulting from a nuclear detonation at a high altitude cannot be considered in an operating license proceeding, as a result of 10 CFR §50.13, which expressly does not require operating license applicants to provide design features or other measures for protection against the effects of enemy attack or the deployment of weapons incident to national defense activities.

#### LBP-82-29 NORTHERN INDIANA PUBLIC SERVICE COMPANY (BAILY GENERATING STATION, NUCLEAR-1), Docket No. 50-367; CONSTRUCTION PERMIT EXTENSION; April 12, 1982; MEMORANDUM AND ORDER

- A Licensing Board issues proposed order to terminate the proceeding involving an application for extension of the construction permit's construction completion date. The termination would be conditioned upon applicant's implementing a Board-approved site restoration plan under Staff supervision, but not upon applicant's paying intervenor's attorneys' fees and expenses.
- B Board weighs reasons for granting termination conditioned upon implementation of site restoration plan against those for requiring restoration before termination, and proposes immediate, conditional termination.
- C Absent statutory exception, the "American Rule" of not awarding attorneys' fees and expenses is binding upon administrative agencies. *Turner v. FCC*, 514 Fed. 1354 (D.C. Cir. 1975).
- D Even if the Commission has the authority to do so, it has not adopted a policy of awarding attorneys' fees and expenses.
- E The exception to the "American Rule" of not awarding attorneys' fees and expenses embodied in the Federal Rules of Civil Procedure, which permits the award to prevent a duplication of expenses where the dismissal is without prejudice, does not apply to the termination of a construction permit extension proceeding.

#### LBP-82-30 PENNSYLVANIA POWER AND LIGHT COMPANY and ALLEGHENY ELECTRIC COOPERATIVE, INC. (SUSQUEHANNA STEAM ELECTRIC STATION, UNITS 1 AND 2), Docket Nos. 50-387-OL, 50-388-OL; OPERATING LICENSE; April 12, 1982; INITIAL DECISION

- A The Licensing Board issues its Initial Decision, presenting findings of fact and conclusions of law on the matters in controversy and authorizing the issuance of an operating license consistent with the conclusions of the Board. The issuance of a license is made subject to certain conditions which require the Director of Nuclear Reactor Regulation to make findings on several emergency planning matters. The license is also subject to the outcome of radon proceedings pending before the Atomic Safety and Licensing Appeal Board.
- B Technical issues discussed include: Quantities and health effects of isotope, Technetium; need for power; emergency evacuation; stress corrosion cracking; decommissioning; low-level waste storage; health effects of transmission lines; emergency planning; scram discharge volume breaks.

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LBP-82-31 UNITED STATES DEPARTMENT OF ENERGY, PROJECT MANAGEMENT CORPORATION, TENNESSEE VALLEY AUTHORITY (CLINCH RIVER BREEDER REACTOR PLANT), Docket No. 50-537; SPECIAL PROCEEDING; April 14, 1982; ORDER FOLLOWING CONFERENCE WITH PARTIES

A The Licensing Board confirms its rulings made during a conference of counsel for the parties and sets forth a list of contentions admitted for hearing.

LBP-82-32 CONSUMERS POWER COMPANY (BIG ROCK POINT PLANT), Docket No. 50-155; SPENT FUEL POOL AMENDMENT; April 20, 1982; MEMORANDUM AND ORDER

A After the close of discovery, the Board rules that several subcontentions dealing with emergency planning have a basis and should be admitted for hearing. Previously, a broad emergency planning contention had been admitted for purposes of discovery, subject to a requirement that intervenors show further "specificity" before the hearing. The Board found that with respect to several subcontentions the intervenors had met that requirement.

B When a broad emergency planning contention is admitted for purposes of discovery, subject to a requirement that "specificity" be provided prior to a hearing, "specificity" should be interpreted in light of 10 CFR §2.714(b), as meaning that the intervenors must specify their basis for subcontentions admitted for hearing. Whether or not basis has been provided will be determined in light of the complete record, including the opportunity provided during discovery to uncover a basis and including an examination of applicant's response to each subcontention.

C 10 CFR §50.47(c)(2) authorizes the reduction in size of emergency planning zones and ingestion pathways for nuclear power reactors generating less than 250 MW thermal. However, this authorization is on a case-by-case basis, requiring that the Commission determine whether a proposed license amendment, such as the expansion of a spent fuel pool, would affect the appropriateness of continued use of smaller-than-normal emergency zones.

D Although the relative risk imposed by a plant may be considered in the case-by-case determination of whether smaller-than-normal emergency zones may be employed, it is generally the case that emergency planning is undertaken to guard against unlikely events. Since no one can estimate the combined likelihood of individually unlikely events, the Commission has required emergency plans as part of its defense-in-depth concept.

E If a power reactor represents an increased risk to health and safety as the result of a proposed license amendment, then the adequacy of emergency plans to deal with that risk may be examined in a hearing. There is no requirement that there be some special feature of the proposed amendment which affects previously adopted emergency plans.

F Appendix E requires that "protective measures be taken . . . within each EPZ to protect health and safety in the event of an accident." This general requirement permits a board to consider whether an applicant should be required to plan for the early evacuation of children and pregnant women during an emergency.

LBP-82-33 WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; April 22, 1982; MEMORANDUM AND ORDER

A The Board rules that applicant must disclose to the intervenor the names and addresses of temporary employees of its contractor, hired to work on steam generator tube-sleeving demonstration project and applicant also must disclose information on the performance of plugs that had been inserted into degraded tubes. However, the Board also rules that questions related to reactor pressure vessel embrittlement are not relevant to a tube-sleeving proposal and that those questions need not be answered.

B The names and addresses of temporary employees who have worked on a tube sleeving project are relevant to intervenor's quest for information about quality assurance in a tube-sleeving demonstration project. Since applicants have not given any specific reason to fear that intervenors will harass these individuals, their names should be disclosed so that intervenors may seek their voluntary cooperation in providing information to them.

C Information about the performance of plugs inserted into steam generator tubes may be relevant to the performance of sleeves which may be inserted into similar tubes or, in some cases, into the previously plugged tubes. Consequently, interrogatories about plugs must be answered in a license amendment proceeding involving the sleeving of steam generator tubes.

D Interrogatories concerning possible embrittlement of a reactor pressure vessel are not relevant to whether a tube sleeving proposal is safe and such questions need not be answered in a license amendment proceeding concerning a proposal to sleeve steam generator tubes.

E Technical issues discussed include: Reactor pressure vessel embrittlement; steam generator tube sleeving; plugging steam generator tubes; pressure vessel embrittlement.

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- LBP-82-34 CONSOLIDATED EDISON COMPANY OF NEW YORK (INDIAN POINT, UNIT NO. 2), POWER AUTHORITY OF THE STATE OF NEW YORK (INDIAN POINT, UNIT NO. 3) Docket Nos. 50-247-SP, 50-286-SP; SPECIAL PROCEEDING; April 27, 1982; MEMORANDUM AND ORDER
- A The Licensing Board sets forth the final formulation of all contentions to be litigated in this investigative proceeding along with the final intervenor assignments with respect to those contentions, and a schedule for discovery and hearing.
- LBP-82-34A METROPOLITAN EDISON COMPANY (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), Docket No. 50-289 (Restart); SPECIAL PROCEEDING; April 26, 1982; MEMORANDUM AND ORDER
- A Licensing Board denies intervenors' motions to reopen evidentiary record after conducting preliminary hearing to determine whether previously issued initial decision would be materially affected by the proffered evidence.
- B A motion to reopen the evidentiary record because of previously undiscovered conclusions of an NRC Staff inspection group must establish the existence of differing technical bases for the conclusions. The conclusions alone would be an insufficient evidentiary proffer to justify reopening of the record.
- LBP-82-34B METROPOLITAN EDISON COMPANY (THREE MILE ISLAND NUCLEAR STATION, UNIT NO. 1), Docket No. 50-289 (Restart) (Reopened Proceeding); SPECIAL PROCEEDING; April 28, 1982; REPORT OF THE SPECIAL MASTER
- A The Special Master, who was appointed by the Licensing Board to conduct a supplementary proceeding on issues connected with cheating on examinations, reports his conclusions and recommendations to the Licensing Board. The conclusions and recommendations concern actions by individuals, by the Licensee, and by the NRC Staff. With respect to individuals, the Special Master recommends that the Licensee not be permitted to use certain individuals to operate TMI, and that the Commission consider recommending criminal prosecution of certain other individuals. With respect to the Licensee, the Special Master finds that the Licensee did not encourage, condone, participate in, or know of the cheating by individual operators when that cheating occurred; however, the Special Master finds that the Licensee failed to review the NRC examination in good faith, that the overall integrity of the Licensee's operations staff was inadequate, that the Licensee was responsible for conditions which caused cheating to occur, that the Licensee's response to the cheating was inadequate, and that the Licensee's training program was inadequate. With respect to the NRC Staff, the Special Master found that the NRC examination was inadequately proctored and graded, that the content of the NRC examination was inadequate, and that the NRC Staff's investigation was adequate with respect to some of the cheating but inadequate with respect to other cheating. The Special Master recommends that the Commission take steps to assure itself that the NRC examination does in fact test the type of knowledge which reactor operators should have.
- LBP-82-35 CONSUMERS POWER COMPANY (MIDLAND PLANT, UNITS 1 AND 2), Docket Nos. 50-329 OM & OL, 50-330 OM & OL; CONSTRUCTION PERMIT MODIFICATION, OPERATING LICENSE; April 30, 1982; MEMORANDUM AND ORDER
- A The Licensing Board imposes, on an interim basis, certain conditions governing soils-related construction activities. The conditions, which are to remain in effect pending issuance by the Board of a Partial Initial Decision, require that Consumers Power Co. obtain NRC Staff approval before commencing certain activities and that, with limited exceptions, those activities be governed by a Staff-approved quality assurance program.
- B Under normal circumstances, the holder of a construction permit may engage in construction activities in accordance with the principal architectural and engineering criteria and environmental commitments set forth in the application for the facility and the construction-permit hearing record, without seeking prior approval of the NRC Staff.
- C When a construction permit holder undertakes construction activities, it does so at its own risk; the construction is subject to Commission approval before an operating license may be granted. 10 CFR §50.57.
- D Technical issue discussed is quality assurance.
- LBP-82-36 NUCLEAR FUEL SERVICES, INC., AND NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY (WESTERN NEW YORK NUCLEAR SERVICE CENTER), Docket No. 50-201 OLA; OPERATING LICENSE AMENDMENT; April 30, 1982; MEMORANDUM AND ORDER
- A The Licensing Board rules on two independent hearing requests on license amendment No. 31. The Board grants the motion of Nuclear Fuel Services, Inc. to withdraw its request for hearing, concluding that even though subsequently issued license amendment No. 32 clearly affected the same subject matter as license amendment No. 31, the Board's exercise of its power to modify amendment

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No. 32, pursuant to 10 CFR §2.717(b) was unnecessary on these facts. The Board also denies the hearing request of Dr. Irwin D. J. Bross, in its entirety, concluding that under the West Valley Demonstration Project Act, the Commission lacks the subject matter jurisdiction to consider those issues related to the Department of Energy's conduct of the West Valley Project which Dr. Bross seeks to litigate.

B Pursuant to 10 CFR §2.717(b), a licensing board may modify, as appropriate for purposes of pending proceeding, any order or action of staff related to the proceeding's subject matter (Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Station), LBP-79-24, 10 NRC 226, 229-230 (1979).

C A license amendment which grants a co-licensee precisely the relief which it seeks as a party to a pending adjudicatory proceeding deprives that party of standing to assert its claims in the adjudicatory proceeding. Such a licensing amendment is integrally related to the subject matter of the pending adjudicatory proceeding and may be modified by the Licensing Board hearing that proceeding, as it deems appropriate.

D Where it has been held that 10 CFR §2.717(b) applies, a notice of hearing relating to a licensing amendment need not be explicitly expanded as a prerequisite to the licensing board in that case exerting jurisdiction over a subsequent license amendment related to the same subject matter as the earlier proceeding.

E In determining hearing and intervention rights under section 189(a) of the Atomic Energy Act of 1954, the Commission will apply judicial concepts of standing. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980).

F To have "standing" in a court, one must allege both an interest arguably within the zone of interests protected by the statute and an injury that either has occurred or would arguably result from the action complained of. Under this "injury in fact" test, a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976).

G The NRC lacks subject matter jurisdiction to consider the conduct of the West Valley Demonstration Project by the Department of Energy in formal licensing proceedings. Pursuant to Section 2(c) of the West Valley Demonstration Project Act, Pub. L. No. 96-368, 94 Stat. 1347 (1980), NRC's review of the Department of Energy's conduct of the demonstration project is to be conducted on an informal basis.

H Section 202 of the Energy Reorganization Act of 1974 specifically limits NRC jurisdiction over DOE-operated high-level radioactive waste storage facilities to those which will be operated on a "long-term" basis, meaning "tens to hundreds of years."

I While DOE's conduct of the West Valley Demonstration Project itself may not be the subject of formal NRC licensing proceedings, DOE's conduct of the subsequent decontamination and decommissioning of the West Valley facility may be subject to full NRC regulation and licensing requirements. West Valley Demonstration Project Act, §2(a)(5), Pub. L. No. 96-368, 94 Stat. 1347 (1980).

**LBP-82-37 NORTHERN INDIANA PUBLIC SERVICE COMPANY (BAILLY GENERATING STATION, NUCLEAR-1), Docket No. 50-367; CONSTRUCTION PERMIT EXTENSION; May 6, 1982; MEMORANDUM AND ORDER**

A The Licensing Board issues a final order terminating this construction permit extension proceeding. The Board modifies its proposed order (LBP-82-29, 15 NRC 762) by assigning the NRC Staff a greater role as independent reviewer of the implementation of the site restoration plan, and by allowing the parties more frequent inspections of the site restoration, the presence of experts at inspections and testing at inspections.

**LBP-82-38 HOUSTON LIGHTING & POWER COMPANY, et al. (SOUTH TEXAS PROJECT, UNITS 1 AND 2), Docket Nos. 50-498A, 50-499A; TEXAS UTILITIES GENERATING COMPANY, et al. (COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2), Docket Nos. 50-445A, 50-446A; ANTITRUST PROCEEDING; May 6, 1982; MEMORANDUM AND ORDER**

A The Administrative Law Judge approves a settlement of all outstanding antitrust issues and dismisses the proceeding.

B Where no party to an antitrust proceeding opposes a settlement proposal, consisting of the attachment of agreed conditions to operating licenses, the settlement will be approved as being fair and reasonable and in the public interest.

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**LBP-82-39 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), Docket Nos. 50-361-OL, 50-362-OL; OPERATING LICENSE; May 14, 1982; INITIAL DECISION**

- A** This Initial decision decides the emergency planning issues, the only issues remaining in this case, largely in the Applicants' favor. The Director of Nuclear Reactor Regulation is being authorized to issue full-power licenses for San Onofre Units 2 and 3, subject to certain conditions. The conditions relate to deficiencies in emergency planning for San Onofre, deficiencies that could prove significant if not remedied over the term of the license, but which, if corrected prior to or during the initial phase of full-power operations, would not pose a danger to public health or safety. The Licensing Board retains jurisdiction over an issue concerning arrangements for medical services in order to review and determine the adequacy of remedial actions the Applicants are being directed to take in that area.
- B** In determining the boundaries of the plume exposure pathway emergency planning zone pursuant to 10 CFR 50.47(c)(2) local officials may consider local conditions on the basis of personal judgment; they are not required to commission special studies of local conditions. On the other hand, if a special study of local conditions is commissioned, for example, by the Applicants, local officials may take the results of such a study into account.
- C** Offsite emergency response organizations are required by 10 CFR 50.47(b)(12) to develop and stand ready to implement arrangements for medical services for members of the public in the plume exposure pathway emergency planning zone who may be injured in a serious reactor accident. This conclusion is required by the clear balance of relevant considerations, including the language of the regulation, the historical context of its adoption, consistency of interpretation among commercial facilities, and available evidence of need.
- D** A Federal Emergency Management Agency finding with respect to an offsite plan carries with it a rebuttable presumption of correctness, whether labelled a "final" or "interim" finding. However, such a presumption would have the effect of deciding a contested issue only in the absence of persuasive contrary evidence.
- E** It is not necessary to resolve all contested matters on the record and subject cross-examination. Certain matters may be left for post-hearing resolution by the Staff if the result is not likely to be affected by on-the-record procedures, including cross-examination.

**LBP-82-40 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), Docket Nos. 50-361-OL, 50-362-OL; OPERATING LICENSE; May 25, 1982; ORDER**

**LBP-82-41 LONG ISLAND LIGHTING COMPANY (SHOREHAM NUCLEAR POWER STATION, UNIT 1), Docket No. 50-322-CPA; CONSTRUCTION PERMIT EXTENSION; May 14, 1982; MEMORANDUM AND ORDER RULING ON SOC'S CONSTRUCTION PERMIT EXTENSION CONTENTIONS AND REQUEST FOR HEARING OF SHOREHAM OPPONENTS COALITION**

- A** Ruling on proposed contentions in a construction permit extension proceeding, the Licensing Board determines that the Shoreham Opponents Coalition has failed to raise one contention litigable in such a proceeding and therefore denies that group's request for hearing.
- B** Pursuant to Section 185 of the Atomic Energy Act, 42 U.S.C. §2235, and 10 CFR §50.55(b) of the Commission's regulations, should construction of a nuclear facility not be completed by the date prescribed in the construction permit, the construction permit shall expire, and all rights thereunder be forfeited, unless the Commission extends the completion date for good cause shown.
- C** To be litigable within the context of a construction permit extension proceeding, a licensing board must find that an issue both: (1) arose from the reasons assigned by the applicant in justification of its request for a construction permit extension or evolve naturally from the extension; and (2) could not appropriately abide the event of the operating license hearing. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980).
- D** Issues which neither arise from the reasons assigned by the applicant in justification of its request for a construction permit extension nor evolve naturally from the extension may not be litigated in a construction permit extension proceeding. The exclusive remedy available in such a situation is to file a request for the issuance of a show cause order, pursuant to 10 CFR §2.202, seeking to modify, suspend or revoke a license, or for other appropriate relief, pursuant to 10 CFR §2.206. The fact that a party has already exhausted its 10 CFR §2.206 remedy does not provide a basis for that party to claim that its concerns must be litigated in the context of a construction permit extension proceeding if they would not have been otherwise litigable in such a proceeding under the standards enunciated in Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980).
- E** Contentions related to financial qualification are no longer litigable in NRC licensing proceedings. The Commission has eliminated all requirements for financial qualifications review and

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findings for electric utilities that are applying for construction permits or operating licenses for production or utilization facilities. See 47 Fed. Reg. 13750 (March 31, 1982).  
LBP-82-42 WISCONSIN ELECTRIC POWER COMPANY (POINT BEACH NUCLEAR PLANT, UNITS 1 AND 2), Docket Nos. 50-266-OLA, 50-301-OLA; OPERATING LICENSE AMENDMENT; May 26, 1982; MEMORANDUM AND ORDER

- A This decision resolves intervenor's claim that each of the Westinghouse tube-sleeving tests that were filed in this proceeding should be released to the public, despite a claim by Westinghouse that these tests are proprietary. The Board determined that the tests, which were part of the basis for its decision to license a tube-sleeving demonstration program, are proprietary; however, §2.790(b)(5) requires that proprietary information be released to the public if the Board considers the public interest in learning the basis for Commission decisions to be more important than the "demonstrated concern for protection of a competitive position."
- B Application of the required balancing test causes the Board to release to the public only a few of the Westinghouse tests. Tests (and test results) that have been performed by Westinghouse's competitors and that do not reveal the nature of the underlying proprietary sleeving process, should be released. Tests that are not performed by Westinghouse's competitors should not be released because release would reveal the dimensions of the Westinghouse testing program. Tests from which inferences can be drawn about the nature of the sleeving process also should not be released because of Westinghouse's interest in preserving the proprietary nature of its sleeving process.
- C The Board also rules that the balance required to be struck under §2.790(b)(5) may shift with time and that its decision should not prevent the release of these documents in response to a Freedom of Information Act (FOIA) Request filed two years from the date of issuance of its decision. It rules that such an FOIA request should be decided by application of the balancing test in §2.790(b)(5), as interpreted in this decision.
- D 10 CFR §2.790 requires that proprietary information should be released to the public if the public interest in being informed is found to be more important than "the demonstrated concern for protection of a competitive position."
- E The Board may review whether or not it is appropriate to withhold from the public information contained in its record and claimed to be proprietary. The information may be released pursuant to 10 CFR §2.790.
- F Section 2.790(b)(5), which provides a balancing test governing the possible release to the public of proprietary information, should be accorded its fair and natural meaning. Judicial precedent does not require a restricted application of the balancing test.
- G A decision that proprietary information should be withheld from the public should not be given effect for an indeterminate period of time. The Board should use its judgment to decide the length of time over which its decision should have effect; after that time, the agency should reach fresh decisions if there are Freedom of Information Act requests for the documents.
- H 10 CFR §2.790(b)(5), which establishes a balancing test for the release of proprietary information in the public interest, is a valid regulation pursuant to authority granted to the Commission under the Atomic Energy Act of 1954.
- I There is a long legal tradition supporting respect for proprietary interests and for the right of a proprietor to protect its secrets from public disclosure. Failure to protect such interests may adversely affect incentive to develop improved safety technology for nuclear reactors, and may make it more difficult for the Commission to collect important data.
- J There is a long legal tradition supporting the right of the public to know the basis for judicial and agency action. The public's right to know is a basic concept of democratic government, related in part to the need for an adjudicator to expose possible mistakes to public scrutiny and to publish information as a symbol of responsibility to the public.
- K When allegedly proprietary information is filed in a Commission proceeding, it should be accompanied by a full statement of the reasons why the submitter wishes the information to be withheld from the public. The statement should be sufficient in itself to be the basis for a decision whether to grant the request for confidentiality.
- L Licensing Boards which decide that proprietary information should be released to the public should fashion their order so as to permit an appeal to be filed before the information must be released.
- M It is not appropriate to restrict a proprietor from voluntarily releasing to the public some or all of the information which it has claimed to be confidential and has asked to have withheld from the public. A proprietor may dispose of its information as it may see fit.



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LBP-82-43 CONSUMERS POWER COMPANY (PALISADES NUCLEAR POWER FACILITY), Docket No. 50-255-SP; SPECIAL PROCEEDING; May 28, 1982; MEMORANDUM AND ORDER APPROVING JOINT MOTION TO TERMINATE PROCEEDING

A The Administrative Law Judge grants the joint motion of the Union and Staff to terminate this proceeding in light of the fact that restrictions on overtime work of licensed operators ordered by the Director of Inspection and Enforcement have been rescinded by the Administrator of NRC Region III.

LBP-82-43A PHILADELPHIA ELECTRIC COMPANY (LIMERICK GENERATING STATION, UNITS 1 AND 2), Docket Nos. 50-352 OL, 50-353 OL; OPERATING LICENSE; June 1, 1982; SPECIAL PREHEARING CONFERENCE ORDER

A In a prehearing conference order, a Licensing Board determines standing to intervene and admissibility of contentions in an operating license proceeding.

B Petitioners for intervention must set forth in their petitions their interest in the proceeding, the reasons why they should be permitted to intervene, and the specific aspects of the subject matter as to which intervention is sought.

C Intervention as a matter of right is governed by current judicial concepts of standing. The intervention petition must disclose injury in fact and an interest arguably within the zone of interests protected by the statute. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612-13 (1976).

D To be granted intervenor status, a petitioner must advance at least one admissible contention.

E An alleged injury to health and safety may satisfy the requirement of injury in fact although it is shared equally by all those residing near the reactor.

F It is within the Licensing Board's discretion to grant intervention although a petitioner has failed to satisfy requirements for intervention as a matter of right. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976).

G For an organization to have standing, it must show injury either to its organizational interests or to the interests of members who have authorized it to act for them. If it depends on injury to its members' interests, the organization must provide the identity of at least one injured member, a description of the injury, and an authorization for the organization to represent the member in the proceeding. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB 535, 9 NRC 377, 390-96 (1976).

H The possibility that a Licensing Board would require or approve of surveillance of those opposed to a nuclear power plant as a condition for granting an operating license is so speculative that it will not satisfy the requirement of injury in fact.

I An injury to First Amendment rights due to Licensing Board approval of surveillance of opponents of nuclear power would be within the zone of interests of the statutes involved in nuclear licensing proceedings.

J Residence 120 miles from a nuclear plant coupled with intermittent visits within 50 miles of the site does not establish an interest sufficient for intervention as a matter of right.

K Allegations of injury resulting from radon emissions attributable to milling and mining operations over a thousand miles from petitioner's residence are insufficient to establish standing.

L A contention concerning the health effects of radon emissions will be admitted only if the Licensing Board is provided the documented opinion of one or more qualified authorities that the incremental effects of fuel-cycle related emissions will be greater than those determined by the Appeal Board in its consolidated radon proceeding. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-654, 14 NRC 632, 635 (1981).

M Interested local governmental representatives may participate in hearings without submitting contentions. They may raise, in a timely manner and with sufficient specificity and detail to permit evidentiary determinations, issues which concern them. They need not take a position on such issues.

N NEPA does not mandate that environmental issues considered in the construction permit proceeding be considered again in the operating license proceedings, absent new information.

O Reconsideration at the operating license stage of matters considered under NEPA at the construction permit stage is not necessitated by intervening amendments to the National Historic Preservation Act and the Endangered Species Act unless the amendments change the environmental impact of the action.

P The rule of reason which applies to NEPA means that underlying scientific data and inferences drawn from it through the exercise of expert scientific evaluation may be adopted by the NRC from the NEPA review done by another federal agency. The NRC must exercise independent judgment with respect to conclusions about environmental impacts based on interpretation of such basis facts.

Q The portion of a water supply system utilized solely by a local government agency need not be considered by NRC in its environmental review. However, all impacts of jointly utilized parts of the system must be considered by NRC unless a rational method can be developed for determining which

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- impacts are attributable solely to the plant. Parts of the system utilized solely by the plant must be considered by NRC.
- R A Licensing Board does not have jurisdiction to consider in an operating license proceeding the environmental impacts of construction, but it does have jurisdiction to consider the operational environmental impacts of construction changes.
- S A Licensing Board has jurisdiction to consider contentions concerning a probabilistic risk assessment when the NRC staff uses that assessment in its review of an application.
- LBP-82-44 THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UCLA RESEARCH REACTOR), Docket No. 50-142 OL; OPERATING LICENSE RENEWAL; June 4, 1982; MEMORANDUM AND ORDER
- A Without objection, Licensing Board admits the City of Santa Monica as a participant pursuant to 10 CFR §2.715(c).
- B Participants in NRC adjudications under §2.715(c) are entitled to discovery.
- C Participants in NRC adjudications under §2.715(c) who are admitted after the time for filing petitions to intervene under §2.714 must take the proceeding as they find it.
- LBP-82-45 ARIZONA PUBLIC SERVICE COMPANY, et al. (PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2 AND 3), Docket Nos. STN-50-528-OL, STN-50-529-OL, STN-50-530-OL; OPERATING LICENSE; June 4, 1982; MEMORANDUM AND ORDER
- A The Licensing Board denies the Intervenor's motion of May 14, 1982, asking the Board to reconsider its ruling of April 27, 1982, as to the inadmissibility of the effects of the pending Federal District Court suit filed by the Pima-Maricopa Indian Community on the Applicants' source of water and the legality of Applicants' contract for effluent.
- B The ruling of the D.C. Circuit in *Natural Resources Defense Council v. NRC*, No. 74-1586 (D.C. Cir. April 27, 1982), does not require the Licensing Board to consider, in its NEPA balancing, legal uncertainties which may in the future produce environmental effects.
- LBP-82-46 SOUTHERN CALIFORNIA EDISON COMPANY, et al. (SAN ONOFRE NUCLEAR GENERATING STATION, UNITS 2 AND 3), Docket Nos. 50-361-OL, 50-362-OL; OPERATING LICENSE; June 16, 1982; MEMORANDUM AND ORDER
- A The Licensing Board reviews submissions of the parties concerning siren alert system and declines to reopen the record for further hearings on adequacy of the siren system. The Board determines that adequate alternate arrangements for alerting the public can be made in any areas of siren deficiency.
- B Reopening for further hearings is within the Board's discretion and need not be done absent a showing that the outcome of the proceeding might be affected.
- LBP-82-47 THE CINCINNATI GAS & ELECTRIC COMPANY, et al. (WM. H. ZIMMER NUCLEAR POWER STATION, UNIT 1), Docket No. 50-358; SPECIAL PROCEEDING; June 21, 1982; MEMORANDUM AND ORDER
- A Ruling upon a motion for discovery sanctions after Applicants' attorney terminated the deposition of a panel of witnesses before an Intervenor's attorney had completed his questions, the Licensing Board denies requests for a stay of the proceedings pending completion of the deposition and for a protective order restraining Applicants' attorney from similar conduct in the future as being moot and concludes that it lacks the power to assess costs against Applicants' attorney, even though such relief would appear to be appropriate, based upon these facts, in a Federal District Court.
- B The Commission's policy precluding funding of intervenors does not preclude an award of costs or attorneys' fees against a party, where such costs or fees are not to be paid out of NRC funds.
- C The procedure for conducting a deposition under NRC practice is governed by 10 CFR §2.740a(d), which is adapted from Rule 30(c) of the Federal Rules of Civil Procedure.
- D While the Federal Rules of Civil Procedure are not themselves directly applicable to practice before the Commission, judicial interpretations of a Federal rule can serve as guidance for interpreting a similar or analogous NRC discovery rule.
- E Pursuant to 5 U.S.C. §552(a)(2)(c), unpublished agency decisions may not be given precedential effect against persons who were not parties to such decisions, unless those persons can be shown to have had actual knowledge of such decisions.
- F Having selected some, but not all, of the discovery provisions set out in the Federal Rules of Civil Procedure, the Commission did not intend for the unselected Federal Rules to control its proceedings. *General Electric Company (General Electric Test Reactor)*, LBP-78-33, 8 NRC 465 (1978); *Detroit Edison Company, et al. (Enrico Fermi Atomic Power Plant, Unit 2)*, LBP-78-37, 8 NRC 575, 581 (1978).
- G While 10 CFR §2.707 invests broad discretion to enter such orders "as are just" with respect to a default by a party, it specifically contemplates, with respect to discovery, that such orders are to be entered upon the failure of a party to comply with an earlier order.

## DIGESTS

### ISSUANCES OF THE ATOMIC SAFETY AND LICENSING BOARDS

**LBP-82-48 THE CINCINNATI GAS & ELECTRIC COMPANY, et al. (WM. H. ZIMMER NUCLEAR POWER STATION, UNIT 1), Docket No. 50-358; OPERATING LICENSE; June 21, 1982; INITIAL DECISION**

- A** Issuing its initial decision in this operating license proceeding, the Licensing Board resolves all current Board raised questions and health and safety contentions in favor of Applicants and orders that conditions be placed on Applicants' license with respect to certain off-site emergency planning matters. The Board also holds that further proceedings are necessary with respect to school evacuation and that no operating license will be issued prior to FEMA's filing of at least those of its findings that relate to admitted contentions, the Staff's issuance of its supplement to the Safety Evaluation Report on those findings, and the parties being given a reasonable opportunity to comment. The Board retains jurisdiction to rule on an outstanding motion to admit late-filed quality assurance contentions.
- B** Pursuant to 10 CFR §2.760a and Appendix A to 10 CFR Part 2, Section VIII, the Board in an operating license proceeding is called upon to decide only those issues in controversy among the parties, and any serious safety, environmental, or common defense and security matters raised by the Board.
- C** Pursuant to 10 CFR §2.754(a), contentions as to which an intervenor submits no proposed findings may be deemed to have been abandoned.
- D** When clear courses of corrective action are present, deficiencies identified in an emergency plan may be dealt with by means of a license condition. With such conditions in place, findings of reasonable assurance on the state of emergency planning can be made.
- E** The mechanism of post-hearing resolution through the use of licensing conditions should be used sparingly and only in clear cases. In doubtful cases, such matters should be resolved in an adversary framework prior to the issuance of licenses, reopening hearings if necessary.
- F** A radiological emergency response plan is not invalid solely because it relies for its implementation upon referenced standard operating procedures, not included in the plan itself. Pursuant to NUREG-0654, there is no single format for an emergency response plan, so long as it meets all applicable criteria. The plans themselves should be as concise as possible with supporting materials incorporated by reference.
- G** Pursuant to 10 CFR §50.47(c)(2), the exact size and configuration of the EPZ surrounding a particular nuclear power reactor shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes and jurisdictional boundaries. Absent evidence that conditions such as those enumerated in 10 CFR §50.47(c)(2) require otherwise, the EPZ should generally be about 10 miles in diameter.
- H** The evacuation plan is not inadequate or incapable of implementation solely because locations preferable to those selected by the plan for the establishment of relocation centers exist. Those locations selected must themselves be shown to fail to comply with regulatory requirements before the establishment of relocation centers at preferable locations could be ordered.
- I** Litigation of the adequacy of the public notification system need not abide the testing of that system. This is common practice in nuclear licensing. Any deficiencies revealed by operational tests must be corrected prior to operation.
- J** 10 CFR Part 50, Appendix I; 10 CFR Part 50, Appendix I (Cost-Benefit Balance); welds on cable tray transition fittings; fire insulation matters for cable trays.

**LBP-82-49 OFFSHORE POWER SYSTEMS (MANUFACTURING LICENSE FOR FLOATING NUCLEAR POWER PLANTS), Docket No. STN 50-437 ML; MANUFACTURING LICENSE; June 30, 1982; INITIAL DECISION**

- A** The Licensing Board's Initial Decision authorizes the Director of Nuclear Reactor Regulation to issue a manufacturing license, subject to a condition, to Offshore Power Systems for the manufacturing by the end of 1999 of eight standardized floating nuclear plants at its manufacturing facility located on Blount Island, in Jacksonville, Florida.
- B** The Board did not conduct a complete de novo independent review of uncontested health and safety, and environmental matters. With respect to its Findings of Fact on uncontested matters, as authorized by the Rules of Practice and pursuant to decisions of the Appeal Board, the Licensing Board relied upon the testimony of the Applicant and the Staff, and the conclusion of the Advisory Committee on Reactor Safeguards, and it decided that the Staff's review had been adequate to support such findings. 10 CFR Part 2, Appendix A, V(F)(1); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 A.C. 331, 335 (1973); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 774 n. 26 (1977).
- C** Technical issues discussed include: Transmission lines; corrosion; protection during transportation of radioactive material; aircraft crash risk; probability of postulated LNG tanker accident which could affect the plant; turbine missiles; marine entrainment and impingement; effects of thermal discharge; discharge structure; dredging program; impact of plant upon tourism; abnormal

**DIGESTS**

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occurrences; low level radiation releases; fire protection measures; consideration of generic safety questions in safety evaluation report; financial qualifications; technical qualifications.  
LBP-82-50 DUKE POWER COMPANY, et al. (CATAWBA NUCLEAR STATION, UNITS 1 AND 2), Docket Nos. 50-413, 50-414; SPECIAL PROCEEDING; June 30, 1982; MEMORANDUM AND ORDER

- A The Licensing Board overrules certain objections to its prehearing conference order and certifies certain questions concerning specificity of contentions to the Appeal Board.

## DIGESTS

### DIRECTORS' DECISIONS

- DD-82-1 PETITION REQUESTING "CLOSEDOWN (OF) ALL SUSPECT REACTORS" PENDING RESOLUTION OF ALL PRESSURIZED-THERMAL-SHOCK NON-CONSERVATISMS, SPECIAL PROCEEDING; March 31, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206
- A The Director of Nuclear Reactor Regulation denies a petition under 10 CFR 2.206 which requested that all reactors potentially subject to pressurized thermal shock be shut down until all areas of nonconservatism in the analysis of the pressurized thermal shock issue are resolved.
- B Technical issues discussed include the potential role of seismic loads, hydrodynamic loads and vibratory loads in analysis of pressurized thermal shock.
- DD-82-2 FLORIDA POWER & LIGHT CO. (TURKEY POINT POWER PLANT, UNIT NOS. 3 & 4), Docket Nos. 50-250, 50-251 (10 CFR 2.206); OPERATING LICENSE AMENDMENT; May 5, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206
- A The Director of Nuclear Reactor Regulation denies a petition under 10 CFR 2.206 that requested suspension of license amendments authorizing steam generator repairs.
- B A potential party to agency proceedings must act affirmatively to protect his rights to participate in a proceeding. He may not await the outcome of the proceeding and only then attempt to take part in the process by invoking 10 CFR 2.206 or 10 CFR 2.802.
- DD-82-3 ROCHESTER GAS AND ELECTRIC CORPORATION (R. E. GINNA NUCLEAR POWER PLANT), Docket No. 50-244 (10 CFR 2.206); SPECIAL PROCEEDING; May 22, 1982; DIRECTOR'S DECISION UNDER 10 CFR SECTION 2.206
- A The Director of Nuclear Reactor Regulation grants in part and denies in part a petition under 10 CFR 2.206. The petition was granted insofar as it requested a review of various safety issues to ensure that necessary actions to protect public health and safety were taken prior to resumed operation of the reactor. The petition's request for a formal order to require such a review and to prevent restart of the reactor was denied.
- B The Director of NRR declined to formally order suspension of an operating license when such action was unnecessary to ensure that the licensee did not resume plant operation pending staff review and approval of resumed operation.
- DD-82-4 BOSTON EDISON COMPANY (PILGRIM NUCLEAR STATION), Docket No. 50-293 (10 CFR 2.206); SPECIAL PROCEEDING; May 28, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206
- A The Director of the Office of Inspection and Enforcement denies a petition submitted by the Commonwealth of Massachusetts Executive Office of Energy Resources, requesting that moneys from a fine imposed on, and collected from the Boston Edison Company be turned over to it for use in a conservation/weatherization program.
- B The Commission's authority, limited primarily to areas of the public health and safety in regard to radiological concerns, is not so extensive as to permit the Commission to grant Massachusetts' request.
- C Penalties imposed and collected by the Nuclear Regulatory Commission must be turned over to the U.S. Treasury.
- DD-82-5 CONSUMERS POWER COMPANY (BIG ROCK POINT PLANT), Docket No. 50-155 (10 CFR 2.206); SPECIAL PROCEEDING; June 15, 1982; DIRECTOR'S DECISION UNDER 10 CFR SECTION 2.206
- A The Director of Nuclear Reactor Regulation denies a petition under 10 CFR 2.206 to suspend plant operations because of insufficient capacity in the spent fuel pool to allow complete defueling of the reactor.

**DIGESTS**  
**DIRECTORS' DECISIONS**

DD-82-6 WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WNP NOS. 4 & 5), Docket Nos. 50-509, 50-513 (10 CFR 2.206); SPECIAL PROCEEDING; June 16, 1982; DIRECTOR'S DECISION UNDER 10 CFR 2.206

- A The Director of Nuclear Reactor Regulation denies two petitions filed by the Coalition for Safe Power which requested, respectively, revocation of the construction permit for WNP No. 4 on the basis of a material false statement and revocation of the construction permits for WNP Nos. 4 and 5 on the basis of WPPSS' termination of its participation in the projects.
- B Omission of specific reference to financial constraints in application for extension of a construction permit did not constitute a material false statement in view of circumstances surrounding the application.
- C The Director declined to initiate proceedings to revoke construction permits for cancelled facilities where the licensee intended to retain the permits in hopes of finding a new owner and where enforcement action was not required to abate some hazard to public health and safety.

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