UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Thomas S. Moore, Chairman
Dr. W. Reed Johnson
Dr. Reginald L. Gotchy

In the Matter of	
WISCONSIN ELECTRIC POWER COMPANY	Docket Nos. 50-266 OLA
(Point Beach Nuclear Plant, Unit 1)	

Ms. Kathleen M. Falk, Madison, Wisconsin, for the intervenor, Wisconsin's Environmental Decade.

Mr. Bruce W. Churchill and Ms. Delissa A. Ridgway, Washington, D.C., for the licensee, Wisconsin Electric Power Company.

Mr. Richard G. Bachmann for the Nuclear Regulatory Commission staff.

DECISION

October 1, 1982

(ALAB-696)

In LBP-81-55, 14 NRC 1017 (1981), the Licensing Board authorized the Director of Nuclear Reactor Regulation to issue a license amendment for Wisconsin Electric Power Company's (WE's) Point Beach Unit 1 nuclear plant. This amendment permitted Unit 1 to be returned to service after a refueling outage during which, as a demonstration project, the licensee planned to repair a small number of degraded steam generator tubes by bridging the defective portions of

each tube with a sleeve insert. The plant's technical specifications require that defective tubes be removed from service -- not repaired. Hence, the amendment was necessary for the continued operation of the facility.[1/] The Board's authorization was immediately effective [2/] and no party to the amendment proceeding sought a stay.

We have before us the appeal of intervenor, Wisconsin's Environmental Decade (Decade), from the Licensing Board's order. Although Decade filed numerous exceptions to the Board's decision, its appellate brief adequately addresses only two. First, Decade seems to complain that the "show cause" procedure adopted by the Licensing Board to expedite the proceeding improperly required intervenor to prove its contentions before trial. Second, Decade claims that the Board below erred in denying it a continuance, thereby unreasonably compressing intervenor's time to prepare for the show cause hearing. For the reasons discussed below, we affirm the Licensing Board's order.

1/ 10 CFR § 50.59(a) provides that a licensee may make changes in a facility "without prior Commission approval, unless the proposed change . . . involves a change in the technical specifications incorporated in the license or an unreviewed safety question."

2/ 14 NRC at 1033. See 10 CFR § 2.764(a).

I.

A. Before chronicling the somewhat convoluted procedural history of this case, a brief explanation of the nature of the steam generator repair problem that led to the proceeding is in order. The Wisconsin Electric Power Company's Point Beach Units 1 and 2 are identical Westinghouse two-loop pressurized water reactors. Each unit contains two steam generators, or heat exchangers, where water from the primary cooling system transfers heat to the secondary cooling loop. Because the tubes of the steam generator constitute the pressure boundary of the primary coolant system, a major safety consideration is that the steam generator tubes retain adequate structural integrity. 3/

Since both Point Beach units began commercial operation, the steam generator tubes have undergone varying degrees of degradation due to corrosion. The plant's technical specifications require WE to plug any steam generator tube (i.e., to seal both ends so no primary coolant can enter it) when its level of degradation exceeds 40 percent of the nominal tube wall thickness. The

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3/ For a discussion of the functioning of steam generators in nuclear power plants, see Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units Nos. 3 and 4), ALAB-660, 14 NRC 987 (1981); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-343, 4 NRC 169 (1976).

technical specifications preclude the licensee from returning to service a tube degraded beyond this plugging limit even after it has been repaired by use of a newly developed sleeving technique. This process consists of installing, inside the degraded steam generator tube, a smaller diameter sleeve that spans the problem area of the original tube and thereby provides a new primary pressure boundary for the repaired tube.

B. On July 2, 1981, the licensee filed with the Director of the Office of Nuclear Reactor Regulation an application pursuant to 10 CFR § 50.59 for amendments to the technical specifications of the operating licenses for Point Beach Units 1 and 2. If authorized, the amendments would allow (without any limitation on the numbers involved) the "repair of degraded or defective steam generator tubes by sleeving." The application also indicated that, during the fall 1981 refueling outage, licensee intended to sleeve several steam generator tubes (including six already defective and previously plugged ones) as a demonstration of this new process. This demonstration, the application stated, "can only be accomplished if the subject Technical Specification changes are granted." Notice of licensee's application was published in the Federal Register on August 7, 1981. 46 Fed. Reg. 40359.

Even before that notice was published, however, Wisconsin's Environmental Decade filed a petition to intervene and sought a hearing on the application. The petition set forth ten contentions relating to the health and safety consequences of the proposed sleeving repair program. 4/ The petition was opposed by the licensee and

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4/ Decade's contentions were as follows:

> (1) Degradation of as few as one to ten steam generator tubes in a pressurized water reactor such as Point Beach could induce essentially uncoolable conditions in the course of loss of coolant accident, according to several independent scientific studies.
>
> (2) Rupture of steam generator tubes in normal operation will release radiation to the environment from the secondary system, and, if the rupture is sufficiently severe, in amounts in excess of maximum permissible doses.
>
> (3) During sleeving, the braze or weld between the upper rim of the sleeve and the inner surface of the original tube will weaken the integrity of the tube even in laboratory conditions, and, in the field, may fatally compromise its integrity. This may lead to a circumferential rupture of the tube under various operating and/or accident conditions.
>
> (4) The annullus [sic] between the original tube and the sleeve may give rise to an unexpectedly corrosive environment where the tube is or may be suffering in the future from a through wall crack and secondary water impurities seep into the narrow space.
>
> (5) The presence of the sleeve will make the interpretation of eddy current test results extremely difficult and increase the probability that tubes with incipient failures may go undetected and rupture during a loss of coolant accident.

(FOOTNOTE CONTINUED ON NEXT PAGE)

the NRC staff. Subsequently, the Commission designated a Licensing Board to rule on the petition. 46 Fed. Reg. 43531 (Aug. 25, 1981).

Thereafter, on September 16, 1981 in a transcribed telephone conference initiated by the Licensing Board, counsel for licensee emphasized that it wished to implement the demonstration sleeving project on Unit 1 during the

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4/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

> (6) The insertion of a sleeve with a nominal outer diameter of 3/4 inch tube inside the original 7/8 inch tube will reduce the flow of primary core cooling water and the cooling capacity of the core under various accident scenarios to an extent not bounded in previous safety analyses.
>
> (7) The large number of workers required to perform a full scale sleeving program in the highly radioactive environment of the primary side of the steam generator will exceed the ability of the licensee or vendor to provide from their stable work forces. This will necessitate the employment of untrained and transient "jumpers" to perform the bulk of the work which quality may deteriorate as a consequence.
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> (8) The interests of the Petitioner are not adequately protected by any other party to this proceeding.
>
> (9) The present technical specifications in the license require that tubes degraded beyond the plugging limit be removed from service by plugging and do not permit the proposed sleeving repair program.
>
> (10) The best evidence strongly suggests that the actual cost of the proposed sleeving program will exceed projected costs by more than a magnitude of four.

upcoming October-November refueling outage. The licensee also wished to complete any hearing on its proposed license amendment prior to a then-planned spring 1982 full-scale sleeving of Point Beach Unit 2.[5/] Because of the imminence of the autumn outage, the licensee sought independent authorization for the demonstration program so that it could bring Unit 1 back up to power without replugging the six degraded tubes it wished to repair during the project. Tr. 7-9, 10, 11. The licensee additionally asked the Board to expedite the hearing schedule for its entire proposed amendment. Tr. 16.

In the interest of meeting licensee's schedule, but in view of the fact that petitioner Decade had not yet been formally admitted to the amendment proceeding, the Board indicated it would proceed with the demonstration project authorization and asked Decade to particularize its contentions as soon as possible. It also encouraged Decade to initiate immediately an informal exchange of information with the licensee and the staff. Tr. 49-50, 62-63, 69-70.

5/ Licensee subsequently informed the Board that it planned to defer the full-scale sleeving at Unit 2 until spring 1983. See letter from licensee's counsel to Licensing Board (October 23, 1981). In early 1982, licensee confirmed this plan as to Unit 2, and notified the Board that it intended to replace both steam generators in Unit 1, rather than undertake further sleeving in that unit. See letter from licensee's counsel to Licensing Board (January 15, 1982).

Decade subsequently filed additional information as to its contentions on September 24, 1981.

On September 28, 1981, licensee filed a motion, accompanied by a detailed supporting affidavit, asking the Board to authorize operation of Point Beach Unit 1 following the demonstration sleeving. It also filed the following day a copy of a technical report prepared by Westinghouse Electric Corporation on the proposed sleeving program.

On October 1, 1981, the Licensing Board issued a memorandum and order (LBP-81-39, 14 NRC 819) in which it ordered licensee to respond to certain technical and legal questions concerning the motion for interim operation. The Board then formally authorized Decade to commence discovery and proposed a special "show cause" procedure and standard that would govern the litigation pertaining to the demonstration project, providing it were to admit Decade as an intervenor. As described by the Board (id. at 826):

> Decade and the Staff would have 14 days from receipt of WE's answers to Board questions to show cause why an Order authorizing immediate operation with up to 12 tubes sleeved should not be issued. Cause might consist of legal argument or of a substantive matter which should be pursued before the Board can reach a reasonable conclusion concerning the safety and environmental acceptability of the amendment. Cause could include comment on whether the demonstration proposed by WE is important to its overall sleeving program.

The Board stated that although these procedures were "unorthodox," it believed it necessary to deviate from the

Commission's Rules of Practice in this case to provide "the timely decision that is required." Id. at 823.

On October 8, 1981, licensee filed a motion, with supporting affidavits, for summary disposition of Decade's contentions 3-6 insofar as they related to its request for interim operation. During a second telephone conference held on October 9, the Board indicated its tentative decision to admit Decade to the proceeding. Tr. 78. Following the conference, the Board issued a notice of hearing on the pending motions to be held in Milwaukee, Wisconsin, on October 29 and 30, 1981. 46 Fed. Reg. 50633 (Oct. 14, 1981). That same day, licensee submitted responses to the questions set out by the Board in LBP-81-39, supra.

The Board issued two further memoranda and orders on October 13, 1981. In one (LBP-81-44, 14 NRC 850), the Board set out additional technical questions to be answered by licensee, and provided that, upon its receipt of licensee's answers, Decade would have seven days to show cause why the demonstration program should not go forward. In the other (LBP-81-45, 14 NRC 853), the Board formally admitted Decade's contentions 3, 4, 5 and 7, "simplified" into the following single contention (id. at 854, 860):

> Wisconsin Electric Power Company has not demonstrated that Point Beach Nuclear Plant, Units 1 and 2, will operate as safely with its degraded steam generator tubes sleeved as it would if they were required to be plugged.

The Board also set out discovery rules and indicated that, after discovery was completed (id. at 854-55),

> Decade will have the burden of coming forward to demonstrate that there are one or more genuine issues of fact related to this contention. [Licensee] will then have the burden of persuasion concerning the existence of a genuine issue of fact; and it will of course have the burden of persuasion on any issue admitted for hearing.

On October 15, 1981, the Board issued yet a further memorandum and order in which it set the agenda for the upcoming October 29-30 hearing (LBP-81-46, 14 NRC 862, 863):

> I. A show cause hearing concerning Wisconsin Electric Power Company's (WE) motion to obtain interim relief so that it can operate its power reactor with up to six deteriorated steam generator tubes sleeved rather than plugged.
>
> II. Additional argument, if any, concerning WE's motion for summary judgment. (However, the Board is inclined to rule that at this stage of a proceeding when discovery has not yet been completed, that the standards for summary judgment are the standards already articulated with respect to the show cause order.)
>
> III. If necessary, to conduct a limited evidentiary hearing for the purpose of helping to resolve the show cause or summary judgment motions.
>
> IV. If necessary and helpful, to conduct an evidentiary hearing on unresolved issues of material fact.

Decade filed its response in opposition to licensee's summary disposition motion on October 24, 1981. The response consisted primarily of a reiteration of its previous filings and was not accompanied by supporting

affidavits. The staff responded (with accompanying affidavits) in support of the licensee's summary disposition motion on October 26.

Two additional prehearing telephone conferences were held on October 20 and 26, 1981. The October 20 conference dealt principally with the resolution of a dispute between Decade and the licensee concerning the protective agreement governing Decade's access to certain assertedly proprietary information in the Westinghouse sleeving report. See note 30, infra. The Board also modified the wording of its simplified contention. Tr. 164-65. In the final prehearing conference on October 26, the Board discussed and summarized the "show cause" demonstration it expected of Decade. Tr. 219-24. The Board characterized the standard several different ways: e.g., Decade was to show an "important genuine issue" and the existence of "serious questions remaining in this case concerning the demonstration program" or, alternatively, the "specific reasons it requires additional time to respond adequately." Tr. 221, 223, 224.

A hearing was held in Milwaukee on October 29 and 30, 1981.[6/] The Board heard oral argument on a motion (filed

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6/ Decade filed its response to the Board's show cause orders (LBP-81-39 and LBP-81-45, supra) at the October 29 session. See Tr. 279-80.

by Decade just three days earlier) for a continuance of the hearing, based on the asserted need for further discovery and more time to review WE's technical filings. The Board denied the motion (Tr. 399-402) and went on to hear legal argument by counsel for all parties and limited testimony by licensee and staff witnesses on certain aspects of the demonstration program. At the close of all testimony and argument, the Board orally authorized the issuance of a license amendment allowing Unit 1 to resume operation following the demonstration project. The Board subsequently memorialized the authorization in the memorandum and order that constitutes the basis for Decade's appeal. See LBP-81-55, 14 NRC 1017, supra.

II.

A brief comment on the intervenor's appellate papers is in order before turning to the other matters before us.

In a previous memorandum and order in this case, we noted that Decade's brief was "generally inadequate" and that "intervenor must bear full responsibility for any possible misapprehension of its position caused by the inadequacies of its brief and its determination not to attend oral argument to respond to Board questions." ALAB-666, 15 NRC 277, 278 (1982). Specifically, Decade's brief begins with a numbered list of seven "exceptions" to portions of the Licensing Board's decision followed

immediately by a nine-page argument that neither specifies nor particularizes the exceptions to which it relates. 7/ Nor are these distinctions discernible from the argument itself. As best we can determine, Decade's entire argument relates to its first two exceptions concerning the Licensing Board's adoption of the "show cause" proceeding and standard and the Board's denial of intervenor's motion for a continuance. See note 7, supra.

We have held numerous times that exceptions not adequately briefed are waived. See, e.g., Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co., No. 81-2335 (3rd Cir. Aug. 27, 1982); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 315 (1978); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-367, 5 NRC 92, 104 n.59 (1977);

7/ Under a heading entitled "Portions of Initial Decision to Which Exception is Taken," Decade's exceptions state (Exceptions and Brief at 2):

1. Standards for showing cause - Pages 6 to 7.
2. Ruling on Motion for Continuance - Page 8.
3. Admission of test results under trade secret protection - Page 10.
4. Ruling on Contention #3 - Pages 13 to 16.
5. Ruling on Contention #4 - Pages 16 to 17.
6. Ruling on Contention #5 - Pages 17 to 18.
7. Ruling on Contention #7 - Pages 18 to 19.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 413-14 (1976). As we stated in Marble Hill, supra, 7 NRC at 315 (footnotes omitted):

> [B]riefs are necessary to "flesh out" the bare bones of the exceptions, not only to give us sufficient information to evaluate the basis of objections to the decision below, but also to provide an opponent with a fair opportunity to come to grips with the appellant's arguments and attempt to rebut them. The absence of a brief not only makes our task difficult but, by not disclosing the authorities and evidence on which the appellant's case rests, it virtually precludes an intelligent response by appellees. For these reasons we generally follow the course charted by the Federal courts and disregard unbriefed issues as waived.

Because the argument contained in Decade's brief appears to relate to only its first two exceptions and intervenor fails to brief its remaining exceptions adequately, we shall consider intervenor's exceptions numbered 3 through 7 [8/] as abandoned. See 10 CFR § 2.762(a), (f); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC ___ (Sept. 28, 1982). Moreover, because intervenor comes before us with counsel, we are neither required nor disposed to piece together or to restructure vague references in its brief in order to make Decade's arguments for it. See Salem, supra, 14 NRC at 51.

8/ See note 7, supra.

III.

A. At the threshold we must consider whether the Licensing Board's order is "final" and therefore appealable as a matter of right under 10 CFR § 2.762(a). Both the licensee and the staff claim that intervenor's appeal is an impermissible interlocutory one proscribed by 10 CFR § 2.730(f). They argue that the Rules of Practice permit interlocutory appeals only from orders granting or totally denying a petition to intervene. See 10 CFR § 2.714a. Here, the argument continues, the Board's decision neither denies Decade's intervention petition nor disposes of all of intervenor's contentions. Rather, it is only an interim one that permits operation of Unit 1 with six degraded steam generator tubes sleeved until the license amendment noticed for hearing can be finally decided. That proceeding, involving a request to permit operation with a large number of sleeved tubes, is currently ongoing, with Decade's contentions still at issue. Therefore, according to appellees, Decade's intervention petition has not been wholly denied and the intervenor's appeal is prohibited.

Although licensee and the staff are correct that the Rules of Practice permit interlocutory appeals only from orders granting or totally denying an intervention petition, that principle is inapposite in the circumstances presented. As we observed in Toledo Edison Co. (Davis-Besse Nuclear

Power Station), ALAB-300, 2 NRC 752, 758 (1975) (footnotes omitted):

> The test of "finality" for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.

In our view, the Licensing Board's order authorizing a license amendment disposes of a "major segment" of this case and is a final appealable order. Indeed, practically viewed, the Board's decision concludes one entire license amendment proceeding. Compare Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-690, 16 NRC ___ (Sept. 7, 1982).

The appellees characterize the Board's order as an interim operation decision. 9/ But that label elevates form over substance, and it is settled that the question of appealability is determined by the nature of the order, not the name it bears. Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-331, 3 NRC 771, 774 & n.5 (1976). In reality, the order authorized the second of two separate license amendments sought by WE. The first amendment, requested by licensee's July 2, 1981

9/ Interestingly, the Licensing Board neither titled its decision as "interim" nor characterized its order as temporary. See 14 NRC at 1018, 1033.

application and still under consideration, would modify the technical specifications of both Point Beach units to permit operation (irrespective of the number of tubes involved) with previously degraded tubes sleeved. The second amendment, requested by licensee on September 28, 1981 and prompted by the impossibility of concluding the first amendment proceeding before the October refueling outage, authorized licensee to return Unit 1 to operation after conducting the more limited demonstration sleeving program on the six degraded tubes. It is this order that Decade appeals.

The Board's order is comparable to any initial decision authorizing a license amendment and, thus, is a final appealable order. See Wolf Creek, supra, 3 NRC at 774. It concluded all proceedings on the demonstration program. Without the amendment authorization, WE would have been unable to operate Unit 1 without first plugging the six newly sleeved tubes. Hence, important consequences flowed from the Board's order. Moreover, if WE should for any reason withdraw its first amendment application, the Unit 1 amendment authorized by the Board's order will remain in effect. In these circumstances, the pendency of a proceeding on the July 2 amendment request is irrelevant to a determination of the finality and appealability of the Board's order now before us.

B. Decade's first exception is to the Licensing Board's "[s]tandards for showing cause." 10/ Its brief, however, provides little useful elaboration on this point. Decade variously argues that the Licensing Board's decision "is based upon an implied legal test requiring an intervenor to prove his or her case in order to secure the same hearing at which time the opportunity to make such a proof is customarily provided" and it "required intervenor[ ] to prove [its] case prior to the hearing instead of merely showing that the contention had a sufficient basis to justify a trial." Exceptions and Brief at 1-2, 3. 11/ It appears therefore that Decade challenges the Board's adoption of the "show cause" procedure and standard. In our view, Decade's arguments fail.

In its October 1, 1981 order, the Licensing Board proposed what it styled a "show cause" proceeding to resolve Decade's challenge to the licensee's proposed demonstration sleeving project. The Board's order directed a series of questions to the licensee about its demonstration project and proposed that "Decade . . . have 14 days from the

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10/ See note 7, supra.

11/ See also Exceptions and Brief at 6, 10.

receipt of WE's answers to Board questions to show cause why an Order authorizing immediate operation with up to 12 tubes sleeved should not be issued." LBP-81-39, supra, 14 NRC at 826. The Board then ordered the "parties and petitioner . . . to comment on the issuance of the show cause order discussed in the accompanying memorandum." Id. In response to that directive, neither Decade nor the other parties objected to the Board's proposed adoption of the "show cause" procedure or standard. Rather, Decade responded that "[i]n the interests of accommodating the Board's desire to rule on the Licensee's interim application in the time requested, we will endeavor to meet the proposed 14 day filing deadline to respond to the utility's answers to the Board's questions."[12/] Indeed, three days later during the October 9 telephone conference, Decade's counsel orally agreed to the Board's adoption of the "show cause" procedure and standard for resolving Decade's challenge to WE's demonstration sleeving project. [13/] Further, at no other time prior to the October 29-30 hearing did Decade object. Having been specifically offered the opportunity to demur but having failed timely to object, Decade cannot now be heard to complain about the "show cause" procedure adopted by the Board.

12/ Letter from Decade's counsel to the Licensing Board (October 6, 1981).

13/ Tr. 110.

In addition, Decade's assertion that the Board required it to prove its case prior to trial misstates the "show cause" standard adopted by the Board. The Board variously set forth that standard 14/ but its theme remained the same. As the Board stated in its final memorandum, Decade was to establish that "it can either demonstrate the existence of a genuine issue of fact or can show that there is a good reason for the Board to defer judgment until after specific discovery requests are made and answered." LBP-81-55, supra, 14 NRC at 1021. The first part of the Board's standard is a paraphrase of the essential element of 10 CFR § 2.749(a) that requires a party opposing a motion for summary disposition to "annex[ ] to any answer opposing the motion a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be heard." Compare Fed. R. Civ. P. 56(c), (e). Likewise, the second part of the Board's standard is a paraphrase of the essential element of 10 CFR § 2.749(c) that permits a party opposing a motion for summary disposition to seek a deferral of action on the motion by demonstrating, with affidavits, "that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition." Compare Fed. R. Civ. P. 56(f).

14/ See, e.g., LBP-81-45, supra, 14 NRC at 854; LBP-81-46, supra, 14 NRC at 863; Tr. 221-24.

Thus, the Board's adoption of what is styled a "show cause" standard was, in effect, nothing more or nothing less than an adoption of the essential elements of the Commission's rules for properly opposing a motion for summary disposition. And, the Commission's summary disposition rule, like Rule 56 of the Federal Rules of Civil Procedure after which it is modelled, does not require a party opposing a motion for summary disposition to prove its case before trial. 15/ Rather, it is a procedural device to screen contentions that do not involve real factual controversies. See p. 32, infra. Thus, in the circumstances, the Board's adoption of the "show cause" standard, with the consent of all the parties, was not reversible error. As we discuss below, however (pp. 30-33, infra), the Board's unusual approach resulted in what we view to be an unnecessarily confusing proceeding, and should not be employed in the future.

15/ It appears from the record of this proceeding that Decade may have seriously misapprehended the basic structure of Commission proceedings. For example, during the October 20, 1981 telephone conference, Decade's counsel stated: "By the Board's acceptance of contentions of fact, they have, in my understanding of the law, automatically precluded a Motion for Summary Disposition." Tr. 153. See also Exceptions and Brief at 3. But a proper contention only gains an intervenor admission to a licensing proceeding. Admission as a party to a Commission proceeding -- like party status in a case governed by the Federal Rules of Civil Procedure -- does not preclude summary disposition or guarantee a party a hearing on its contentions. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980).

C. Decade has effectively abandoned its exceptions numbered 4-7 [16/] by its failure to brief them adequately. Those exceptions apparently challenged the Board's rulings on intervenor's contentions 3, 4, 5 and 7. Nevertheless, we have reviewed those rulings that applied the "show cause" standard to Decade's admitted contentions and find the Board's result justified. With regard to each of Decade's contentions, we are satisfied that the Board's application of that standard was the functional equivalent of a proper grant of summary disposition.

As noted above, the licensee filed a motion, with supporting affidavit, for summary disposition of intervenor's contentions 3-6. [17/] The staff responded in support of licensee's motion with two additional affidavits, also asserting that there were no genuine issues of material fact with respect to these contentions. Although Decade replied to the licensee's motion on October 24, 1981 asserting that the motion should be denied, it did not file any affidavits setting forth "specific facts showing that there is a genuine issue of material fact," or a "short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be heard."

16/ See note 7, supra.

17/ Decade's Contention 6, however, was not admitted by the Board as a proper contention.

10 CFR § 2.749(b), (a). Instead, Decade's response consisted solely of the unadorned claim that intervenor's contentions 3-6 were relevant to WE's proposed sleeving project. Nor, alternatively, did Decade's response establish by affidavit or otherwise that it could not yet obtain affidavits to establish such a genuine issue or identify what further discovery was necessary to establish such an issue. 10 CFR § 2.749(c). Decade similarly failed to make either showing in its "show cause" response [18/] or during the course of its argument at the October 29-30 hearing.

In these circumstances, intervenor failed either to show cause why the licensee's demonstration sleeving project should not be authorized or to oppose properly WE's motion for summary disposition. The licensee's summary disposition motion and supporting affidavit demonstrated that there were no genuine issues of material fact to be heard as to those contentions, that the affiant was fully competent to testify about these matters, and that WE was entitled to a decision as a matter of law. Therefore, the Board's action was justified and equivalent to a proper grant of WE's motion

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18/ Decade's Response to the Chairman's Comments on Order to Show Cause (October 29, 1981).

for summary disposition. 19/

D. Decade also takes exception to the Licensing Board's ruling on intervenor's motion for a continuance. 20/ As we have already pointed out, Decade's appellate papers are not clear. As best we can determine, Decade seems to argue that the Licensing Board's denial of its motion for a continuance effectively precluded intervenor -- a citizens' organization with limited resources, which already was pressed by the Board's prehearing schedule -- from completing discovery and preparing for the Board's "show

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19/ The licensee's motion for summary disposition did not seek judgment on Decade's contention 7. That contention concerns the adequacy of the training for the large number of temporary channel head workers who will be conducting a portion of the sleeving repairs on WE's full-scale sleeving of the Point Beach units. See note 7, supra. Because contention 7 by its terms was inapplicable to the licensee's demonstration sleeving project and the Licensing Board did not admit contention 7 until after WE filed its motion for summary disposition, the licensee did not include that contention in its motion. Putting to one side the question of the Licensing Board's admission of contention 7 to the demonstration project proceeding, that contention's omission from the summary disposition motion, in the circumstances, is immaterial. The licensee's responses to both the Board's questions and Decade's discovery requests demonstrated there was no genuine issue of material fact concerning contention 7. Further, Decade was unable even to proffer any speculation as to how its contention could affect the efficacy and safety of the demonstration sleeving project when aligned against the licensee's training and quality assurance programs for the project. See Tr. 622-26; LBP-81-55, supra, 14 NRC at 1031-32.

20/ See note 7, supra.

cause" hearing. Exceptions and Brief at 5-6. That hearing was scheduled on October 9 for October 29, 1981. 21/

Disposition of this issue need not detain us long. We will not reverse a licensing board's scheduling rulings unless the "board abused its discretion by setting a hearing schedule that deprives a party of its right to procedural due process" [footnote omitted]. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978). Even putting to one side the lateness of intervenor's request for a delay, no due process violation is apparent on the record before us. Rather, the record shows that although the time for case preparation was compressed, it was not so unreasonable as to deny Decade an adequate opportunity to prepare. Indeed, as the Licensing Board observed, "[t]o the extent that these problems have existed, they are problems of Decade's own creation." LBP-81-55, supra, 14 NRC at 1025.

In common with the licensee and the staff, Decade consented to the Board's "show cause" proceeding. 22/ The intervenors understood that the very purpose of this special procedure was to expedite the proceeding so that licensee, if possible, could undertake the

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21/ See p. 9, supra. See also LBP-81-46, supra, 14 NRC at 862-63.

22/ See p. 19, supra.

demonstration sleeving project before the end of the October refueling outage, i.e., early November. [23/] And as part of its effort to speed up the proceeding, the Board took a number of steps to aid intervenor. On September 16, 1981, it encouraged the parties to commence discovery even before it ruled on the admissibility of Decade's contentions. [24/] Subsequently, upon receipt of the Westinghouse sleeving report, the Board immediately propounded a detailed set of questions to WE, which the licensee answered on October 9. [25/] To help the intervenor even further, the Board severely restricted discovery against Decade so as not to hinder intervenor's case preparation. [26/] Yet, Decade directed no discovery requests to the licensee until October 24 -- more than two weeks after the hearing was scheduled and less than one week

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23/ See letter from Decade's counsel to Licensing Board (October 6, 1981).

24/ See Tr. 49-50, 69-70.

25/ See pp. 8-9, supra; LBP-81-55, supra, 14 NRC at 1020. The licensee made the sleeving report available to Decade as well, but the intervenor refused to review the document until later in the proceeding. See note 30, infra.

26/ See LBP-81-39, supra, 14 NRC at 823; LBP-81-46, supra, 14 NRC at 863.

before it was to begin. 27/ In any event, the licensee quickly responded in only three days. 28/ In these circumstances, where the intervenor failed to utilize the discovery procedures available to it until the eleventh hour, the Licensing Board's denial of Decade's motion to delay the proceeding for further discovery was not error.29/

In addition, the record shows that Decade's own actions significantly abridged its preparation time. By refusing to sign a protective agreement concerning the proprietary information contained in the sleeving report and other materials provided by licensee, Decade drastically

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27/ See Decade's First Interrogatories and Request for Production of Documents to Licensee on the Demonstration Sleeving Program (October 24, 1981). See also LBP-81-55, supra, 14 NRC at 1025.

28/ See Licensee's Response To Decade's First Interrogatories (October 27, 1981). See also LBP-81-55, supra, 14 NRC at 1020.

29/ Similarly, on the record before us, we are unpersuaded by Decade's argument that its lack of resources entitled it to special consideration when it sought a continuance. As the Commission has stated: "While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may . . . possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

foreshortened its time to prepare for the hearing. 30/ The Commission's rules contemplate a resolution of proprietary information disputes after the merits are resolved in order to avoid delay in proceedings. See 10 CFR § 2.790(b)(6). The Board indicated it would follow this course. See Tr. 87-92, 101-02; LBP-81-55, supra, 14 NRC at 1024-25. Decade was, of course, free, as a litigation tactic, to seek an immediate resolution of the proprietary information issue, but it must be willing to accept the consequences of adhering to its position in the face of the Board's adverse ruling. It may not now be heard to complain

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30/ The licensee made the sleeving report available to Decade at the end of September when it submitted the report to the staff and the Board. Because the manufacturer considered much of the information contained in the report to be proprietary, licensee conditioned Decade's receipt of the report on intervenor's execution of a protective agreement. Decade refused, wanting instead the public release of the report. See letter from Decade's counsel to licensee's counsel (October 6, 1981). Thus Decade denied itself access to the report until October 9 when the matter was apparently resolved in the course of the telephone conference (see Tr. 87-92) and a copy of the report was delivered to Decade. Decade subsequently discontinued its review of the sleeving report when a further dispute arose with licensee as to the terms of the protective agreement; however, Decade did not notify the licensee or the Board that it had done so, contrary to the Board's directive in the October 9 conference. Tr. 92. Neither did Decade seek any specific relief. See LBP-81-55, supra, 14 NRC at 1020-21, 1025; Tr. 155-57. Hence, Decade did not undertake a review of the sleeving report until October 20, when in the course of the telephone conference, the Board ordered adoption of the protective agreement as framed by the licensee. Tr. 143.

that it was deprived of adequate time to prepare for the "show cause" hearing when its own actions abbreviated its preparation time. 31/ Accordingly, the Board's denial of Decade's motion was not an abuse of discretion arising to the level of a due process violation.

IV.

A. Quite apart from the two issues we can discern from Decade's brief, we have undertaken our customary sua sponte review of the Licensing Board's decision and the underlying record. As we recently observed in Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC ___, ___ (Sept. 1, 1982)(slip opinion at 4), "[t]his long standing Commission-approved appeal board practice is undertaken in all cases, regardless of their nature or whether exceptions have been filed" [footnote omitted]. See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633 (1974).

31/ As part of its argument regarding the Board's denial of its motion for a continuance, Decade asserts that the Board ordered the proceeding expedited "even though the Licensee's formal representations to the Board did not include any statement of reason why the demonstration program was immediately necessary." Exceptions and Brief at 4. But Decade's assertion is irrelevant to its argument that the Board erred in denying it a continuance; moreover, intervenor filed no exception to perfect an appeal on this issue. In any event, even assuming the validity of Decade's assertion, such action by the Licensing Board would not be reversible error where Decade was given an adequate time to prepare for the "show cause" hearing.

Our review of the record below on the substantive safety and environmental issues has disclosed no error requiring corrective action. We have found no basis for concluding that the licensee's sleeving of six Unit 1 steam generator tubes (with degradation beyond the plugging limit) might either pose an undue risk to the public health and safety or have a significant effect on the environment.

B. In conducting our sua sponte review, we do not ordinarily examine a licensing board's rulings on procedural matters. See Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC ___, ___ (Sept. 9, 1982)(slip opinion at 14); Pilgrim, supra, 8 AEC at 633-34. Here, we see no need to deviate far from that practice because all parties were represented below by counsel capable of addressing any substantial error affecting their clients' interests. But we believe a few general observations on the procedures employed by the Licensing Board are in order.

As we previously explained, all parties consented to the Licensing Board's "show cause" procedure and standard for resolving Decade's challenge to WE's license amendment application. Further, in deciding Decade's appeal, we have concluded that the Board's application of the "show cause" standard was, in effect, the equivalent of the standard applicable to the grant of summary disposition on each of Decade's admitted contentions. Accordingly, we have affirmed the Board's result. In the future, however,

procedures such as those employed by the Licensing Board should be avoided. Here, the Board employed a "show cause" procedure and such other steps as ordering the commencement of discovery before admitting Decade as a party or ruling on the adequacy of intervenor's contentions. See LBP-81-39, supra, 14 NRC at 822-23, 826. It recognized these procedures were "extraordinary" (id. at 821) and "unusual" (LBP-81-44, supra, 14 NRC at 851) but determined they were necessary to expedite the case because the Rules of Practice only "should be used as helpful tools" and the "usual procedural tools will not provide us with the timely decision that is required." LBP-81-39, supra, 14 NRC at 823.

Although the goal of speedy resolution of Commission proceedings is a commendable one, the Board's conclusion that the procedures dictated by the Rules of Practice could not provide a timely decision in this case is badly in error. Rather, the procedures set fortn in the Rules of Practice are the only ones that should be used (absent explicit Commission instructions in a particular case) in any licensing proceeding. For example, we recently had occasion to comment in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC ___, ___ (Aug. 19, 1982) (slip opinion at 11), on several of the relevant practice rules and those remarks bear repeating: "[A] licensing board is not authorized to admit conditionally,

for any reason, a contention that falls short of meeting the specificity requirements". Similarly, "the Rules of Practice [do not] permit[ ] the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff." Id. at __ (slip opinion at 13). Finally, "discovery on the subject matter of a contention [can] be obtained only after the contention [has] been admitted to the proceeding." Id. at __ (slip opinion at 12 n.12).

We have stated that the summary disposition procedures in the Rules of Practice "provide in reality as well as in theory[ ] an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." Allens Creek, supra, 11 NRC at 550. In the interest of expedition, the Rules provide that a motion for summary disposition may be filed at any time in the course of a proceeding. 10 CFR § 2.749(a). See also 46 Fed. Reg. 30328, 30330-31 (June 8, 1981). Further, if the Board determines that there are no genuine issues of material fact, it may grant summary disposition even before discovery is otherwise completed if the opposing party cannot identify what specific information it seeks to obtain through further discovery. 32/

32/ 10 CFR § 2.749(c). The federal courts apply the same principles. See Fed. R. Civ. P. 56(f); Sec. & Exch. Comm'n v. Spence & Green Chemical Co., 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981); Donofrio v. Camp, 470 F.2d 428, 431-32 (D.C. Cir. 1972).

As a general matter when expedition is necessary, the Rules of Practice are sufficiently flexible to permit it by ordering such steps as shortening -- even drastically in some circumstances -- the various time limits for the party's filings and limiting the time for, and type of, discovery. See 10 CFR § 2.711. Other steps may also be taken. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). But a licensing board's regulation of a proceeding pursuant to 10 CFR § 2.718 should not encompass procedures fundamentally departing from those set forth in the Rules of Practice. See 10 CFR Part 2, Appendix A. Here, more judicious application of these principles would have not only provided for a timely decision but also resulted in a less confusing proceeding. Moreover, it must be remembered that steps to expedite a case are appropriate only upon a party's good cause showing that expedition is essential. 10 CFR § 2.711. Necessarily, any decision on this question involves a balancing of the competing interests of the parties, but it is inappropriate to order a proceeding expedited before a good cause showing by the party seeking expedition has been made.

For the foregoing reasons, the November 5, 1981 order of the Licensing Board is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins
Secretary to the
Appeal Board