

**NUCLEAR REGULATORY COMMISSION
ISSUANCES .**

**OPINIONS AND DECISIONS OF THE
NUCLEAR REGULATORY COMMISSION
WITH SELECTED ORDERS .**

July 1, 1992 - December 31, 1992

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PREFACE

This is the thirty-sixth volume of issuances (1 - 396) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from July 1, 1992 - December 31, 1992.

Atomic Safety and Licensing Boards are authorized by Section 191 of the Atomic Energy Act of 1954. These Boards, comprised of three members conduct adjudicatory hearings on applications to construct and operate nuclear power plants and related facilities and issue initial decisions which, subject to internal review and appellate procedures, become the final Commission action with respect to those applications. Boards are drawn from the Atomic Safety and Licensing Board Panel, comprised of lawyers, nuclear physicists and engineers, environmentalists, chemists, and economists. The Atomic Energy Commission first established Licensing Boards in 1962 and the Panel in 1967.

Beginning in 1969, the Atomic Energy Commission authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission in facility licensing proceedings. In 1972, that Commission created an Appeal Panel, from which are drawn the Appeal Boards assigned to each licensing proceeding. The functions performed by both Appeal Boards and Licensing Boards were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represent the final level in the administrative adjudicatory process to which parties may appeal. Parties, however, are permitted to seek discretionary Commission review of certain board rulings. The Commission also may decide to review, on its own motion, various decisions or actions of Appeal Boards.

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. In the future, the Commission itself will review Licensing Board and other adjudicatory decisions, as a matter of discretion. See 56 Fed. Reg. 29 & 403 (1991).

The Commission also has Administrative Law Judges appointed pursuant to the Administrative Procedure Act, who preside over proceedings as directed by the Commission.

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

Issuances are referred to as follows: Commission--CLI, Atomic Safety and Licensing Boards--LBP, Administrative Law Judges--ALJ, Directors' Decisions--DD, and Denial of Petitions for Rulemaking--DPRM.

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or to have any independent legal significance.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket Nos. 50-498
50-499

HOUSTON LIGHTING & POWER
COMPANY, *et al.*
(South Texas Project, Units 1
and 2)

July 2, 1992

The Commission denies the motion of Houston Lighting & Power Company to modify or quash ten (10) Office of Investigations' (OI) subpoenas issued to certain South Texas Project employees and management officials in an investigation concerning Thomas J. Saporito, Jr. OI issued the subpoenas after those individuals attempted to condition their voluntary testimony. The Commission finds that OI's refusal to guarantee as a precondition to a compelled interview that a witness will unequivocally receive a copy of his transcript does not violate the Administrative Procedure Act.

ADMINISTRATIVE PROCEDURE ACT: 5 U.S.C. § 555(c)
(INVESTIGATION TRANSCRIPTS)

Transcript rights granted under section 555(c) of the Administrative Procedure Act do not extend to testimony voluntarily given. *United States v. Murray*, 297 F.2d 812, 821 (2d Cir. 1962); *Att'y General's Manual on the Administrative Procedure Act*, 67 (1947).

ADMINISTRATIVE PROCEDURE ACT: 5 U.S.C. § 555(c) ("GOOD CAUSE" EXCEPTION)

Section 555(c) of the Administrative Procedure Act requires that when testimony is compelled from a party or a witness, that person is entitled, upon payment of costs, to obtain a copy of his transcribed testimony. However, a "compelled" witness' right to obtain a transcript of his testimony may be limited in nonpublic investigatory proceedings to inspection of the transcript, upon a showing of "good cause" by the agency.

ADMINISTRATIVE PROCEDURE ACT: 5 U.S.C. § 555(c) ("GOOD CAUSE" EXCEPTION)

The invocation of the good-cause exception contained in section 555(c) of the Administrative Procedure Act is within the agency's discretion and applies to situations where evidence is taken in a case in which prosecutions may be brought later and it would be detrimental to the due execution of the laws to permit copies of the transcript to be circulated. *Commercial Capital Corp. v. SEC*, 360 F.2d 856, 858 (7th Cir. 1966).

ADMINISTRATIVE PROCEDURE ACT: 5 U.S.C. § 555(c) ("GOOD CAUSE" EXCEPTION)

An agency is not required to make a good-cause determination prior to receiving testimony from a witness. *SEC v. Sprecher*, 594 F.2d 317, 319 (2d Cir. 1979).

MEMORANDUM AND ORDER

This matter is before the Commission on a motion by Houston Lighting & Power Company, *et al.* (South Texas Project, Units 1 and 2) to modify or quash ten (10) subpoenas issued by the Director of the Office of Investigations ("OI"). For the reasons explained below, we deny this motion.

I. BACKGROUND

On March 3, 1992, Robert D. Martin, Regional Administrator RIV, requested the Office of Investigations to conduct an investigation to determine the facts surrounding the denial of access of Thomas J. Saporito, Jr., a contract Instrument and Control Technician, to South Texas Project ("STP"). Mr. Saporito contends

that his unescorted access was denied solely on the basis of his having identified to the NRC potential regulatory violations by STP. STP contends that Mr. Saporito's access was denied for having provided false information on his employment application.

As part of this investigation, the OI investigator assigned to the case determined that testimony from STP employees and management officials was required. The investigator attempted to conduct these interviews on a noncompelled basis, transcribing management interviews as is OI's regular practice. As communicated through counsel, these witnesses indicated that they would agree to noncompelled interviews only if OI would either guarantee that transcripts of these interviews be given to the witnesses no later than 2 weeks after the date of each interview or comply with one of several other alternatives outlined in counsel's April 24, 1992 letter to the OI investigator. (Attachment 2 to Motion to Modify or Quash Subpoenas). Each of these demands was rejected by OI as being contrary to its policy not to release voluntary interview transcripts until the end of the investigation.¹ This impasse necessitated the issuance of the OI subpoenas at issue in the present motion.

II. THE MOTION TO MODIFY OR QUASH

We note at the outset that this challenge is to compelled interviews and is therefore governed by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"). Section 555(c) of the APA affords certain "procedural protections to a person subject to agency investigation . . . an assurance of lawfulness in the investigation, and the right to retain, procure, or at least inspect the data or evidence [the witness] has been compelled to submit." *Guardian Federal Savings and Loan Ass'n v. FSLIC*, 589 F.2d 658, 663 (D.C. Cir. 1978). Specifically, section 555(c) of the APA requires that when testimony is compelled from a party or a witness, that person is entitled, upon payment of costs, to obtain a copy of his transcribed testimony. This right, however, may be limited in nonpublic investigatory proceedings, upon a showing of "good cause," to inspection of the transcript. The invocation of the good-cause exception contained in section 555(c) is within the agency's discretion and applies to situations where evidence is taken in a case in which prosecutions may be brought later and it would be detrimental to the due execution of the laws to permit copies of the transcript to be circulated. *Commercial Capital Corp. v. SEC*, 360 F.2d 856, 858 (7th Cir. 1966). Moreover, the agency is not required to

¹This policy is consistent with the Administrative Procedure Act. Transcript rights granted under section 555(c) of the Act do not extend to testimony voluntarily given. *United States v. Murray*, 297 F.2d 812, 821 (2d Cir. 1962); *Att'y General's Manual on the Administrative Procedure Act* 67 (1947).

make a good-cause determination prior to receiving testimony from the witness. *SEC v. Sprecher*, 594 F.2d 317, 319 (2d Cir. 1979). To require otherwise would force OI to determine the impact on its investigations of releasing transcripts that do not yet exist. The APA does not require such an impractical procedure. *See id.*

With this understanding of the APA, we find premature Petitioners' argument that OI has violated the APA by refusing to guarantee, as a precondition to compelled interviews, that the witnesses will receive a copy of their transcribed testimony. There can be no procedural violation of section 555(c) of the APA until OI conducts interviews, produces transcripts, and takes some action pertaining to the transcripts. At the appropriate time, OI, of course, must allow the witnesses to obtain a copy of their interview transcripts unless, for good cause, the witnesses are limited to inspection of the transcripts.²

III. CONCLUSION

For the foregoing reasons, we deny the motion to modify or quash the subpoenas in this case.

It is so ORDERED.

For the Commission³

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 2d day of July 1992.

²Petitioners also argue that they "have an unqualified right to obtain interview transcripts because they will almost certainly involve information germane to an administrative proceeding currently being conducted by the Department of Labor." Petitioner's Motion at 8. Petitioners construe language taken from both the House and Senate committee reports on section 555(c) stating that "[t]hey [witnesses] should also have such copies whenever needed in legal or administrative proceedings" as establishing this right. S. Rep. No. 752, 79th Cong., 1st Sess. 206 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 265 (1946). We disagree. Even assuming Petitioners' interpretation of the legislative history to be correct, legislative history does not create substantive rights not contained in the statute itself. 2A N. Singer, *Sutherland Statutory Construction* § 48.06 (4th ed. 1984) at 308. Section 555(c) does not provide that witnesses should have such copies whenever needed in legal or administrative proceedings. Rather, section 555(c) explicitly provides that witnesses are entitled to obtain copies of their transcribed testimony except that, upon a showing of good cause by the agency, witnesses may be limited to inspection of the transcripts. We therefore decline to enlarge rights granted under the APA beyond what Congress enacted.

³Chairman Selin was unavailable to participate in this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Richard F. Cole
Frederick J. Shon

In the Matter of

Docket No. 70-3070-ML
(ASLBP No. 91-641-02-ML)
(Special Nuclear
Materials License)

LOUISIANA ENERGY SERVICES, L.P.
(Claiborne Enrichment Center)

July 8, 1992

RULES OF PRACTICE: DISCOVERY

Security plans are to be withheld from public disclosure, irrespective of whether discovery of the documents is sought from the Nuclear Regulatory Commission or the applicant.

RULES OF PRACTICE: PROPRIETARY DETERMINATIONS

An applicant has no obligation to establish that the security plan is privileged or confidential. Section 2.790(d) of 10 C.F.R. deems it to be.

RULES OF PRACTICE: PROPRIETARY DETERMINATIONS

An applicant has no obligation under 10 C.F.R. § 2.790(b)(1) to submit an affidavit for having the security plan withheld from public disclosure. Section 2.790(b)(1) requires such an affidavit when a person "proposes" that the document be withheld because it contains confidential commercial or financial

information. In the case of a security plan, it has already been deemed to be such information under section 2.790(d).

RULES OF PRACTICE: PROPRIETARY DETERMINATIONS

Where an applicant has made a *prima facie* case that the security plan should be withheld from public disclosure and that an *in camera* proceeding is required in order to fashion an appropriate protective order under which portions of the security plan could be made available to the intervenor, the refusal of the intervenor to participate in the *in camera* proceeding is an effective waiver of its right to further consideration of its discovery request of the matter. The applicant should not respond to the discovery request, and the motion to compel shall be denied.

MEMORANDUM AND ORDER

(Ruling on Discovery Disputes Pertaining to Contentions L and M)

The matters for decision before the Board are discovery disputes between Applicant, Louisiana Energy Services, L.P. (LES), and Intervenor, Citizens Against Nuclear Trash (CANT), pertaining to Contentions L and M. The contentions involve the adequacy of Applicant's safeguards for protecting against the unauthorized production or diversion of highly enriched uranium.

On April 28, 1992, CANT filed interrogatories and a request for the production of documents from LES. Applicant responded on May 18, 1992. It claimed that, in many cases, to answer would disclose proprietary or classified information and therefore only referenced relevant portions of the documents, the Physical Security Plan (PSP) and the Fundamental Nuclear Material Control Plan (FNMC), where such information is contained. LES objected to producing the documents without appropriate controls. Applicant also objected to the manner in which LES was defined in the discovery request, which it believed would result in all of the partners having to answer each inquiry.

Attached to the response to the discovery request was Applicant's motion for a protective order protecting Applicant's partners from discovery and Applicant from disclosing portions of the PSP and FNMC without appropriate safeguards.

In turn, CANT on June 2, 1992, filed a motion to compel LES to respond to discovery and objected to Applicant's motion for a protective order. It argued that Applicant's objections and protective motion were without merit and that Intervenor was entitled to complete answers to its interrogatories and to inspect and copy the requested documents. Applicant filed a response on June 16, 1992, objecting to CANT's motion to compel.

In this Memorandum and Order, the Board rules on the cross-motions.

A. Dispute as to Who Is to Respond to Discovery

Applicant was concerned that under the definition CANT used to describe LES in the discovery request it was meant to require each partner to answer each interrogatory, to which Applicant objects. The same issue has previously been disposed of by the Board in this proceeding in Memorandum and Order (Ruling on Discovery Disputes Pertaining to Contentions, B, H, I, J, and K) (June 18 1992), at 2-4 (unpublished).

The Board found that the issue had been rendered moot by disputants' understanding that LES has the responsibility for responding to discovery, and where it does not have the information directly it will obtain it from the partners if they possess it. We reach the same decision here. The Board similarly denies that part of each motion dealing with the dispute as to who the proper parties are in responding to discovery.

B. Dispute as to the Production of Requested Documents

1. Applicant's Position

Applicant, in response to Interrogatories 4, 5, 17, 18, 19, 20, and 22-26, referenced its answers to the PSP and the FNMC. It then refused to produce the documents in response to Intervenor's two requests for the production of documents on the ground that both documents are proprietary in their entirety and additional parts are classified as Confidential National Security Information (CNSI). The FNMC describes Applicant's material control and accounting (MC&A) information.

LES was willing to disclose those portions of the PSP or FNMC that were not CNSI, under the terms of an appropriate protective order. It would not permit the disclosure of CNSI to Intervenor because it is not aware that CANT has appropriate authorization to obtain the information.

Under the NRC regulations governing the Availability of Official Records (10 C.F.R. § 2.790), an applicant's physical protection and MC&A program for special nuclear material, not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data, are deemed to be commercial or financial information within the meaning of 10 C.F.R. § 9.17(a)(4). 10 C.F.R. § 2.790(d)(1).

Section 9.17(a)(4) exempts agency records from public disclosure that contain trade secrets and commercial or financial information obtained from a person and privileged or confidential. Section 2.744 provides procedures for obtaining NRC documents that are not available pursuant to section 2.790. One avenue is

through the Executive Director for Operations, the other through the Presiding Officer.

LES argues that like the NRC, which is exempt under 10 C.F.R. § 2.741(e) from the general discovery provisions governing the production of NRC records and documents, it too can limit access to the security plan documents Intervenor seeks, when the documents held by the Applicant are the same as possessed by the NRC.

LES relies on *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1402 (1977), in which the Appeal Board stated:

The security plan for the Diablo Canyon nuclear power facility is (or will be) in the possession of both the applicant and the Commission.¹¹ Whether discovery of the documents comprising that plan be from one source or the other, essentially the same standards apply.¹²

¹¹See 10 CFR §§ 50.34(e), 50.39 and 2.790(a).

¹²See 10 CFR § 2.740(b)(1) ("[p]arties may obtain discovery regarding any matter not privileged . . .") and (c) (protective orders). For a general discussion of these provisions see *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 413-18 (1976).

The Appeal Board, as to security plans, further stated:

Under 10 CFR § 2.790, they are clearly not to be made available to the public at large. And while they must be released to interested parties under appropriate conditions, that does not mean in all cases they need be released in their entirety or to anyone selected by the intervenors or without protective safeguards.

Id. at 1404.

Applicant asserted in its response to Intervenor's motion to compel that *Diablo Canyon* is consistent with the regulations governing the disclosure of Safeguards Information.

Safeguards Information is defined in 10 C.F.R. § 73.2 as:

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

Applicant asserts that PSP and FNMC information is covered by the Safeguards Information prohibitions against disclosures. FNMC information is included because it contains MC&A information. LES cites the Commission's discussion of proposed 10 C.F.R. § 74.33, where it stated:

MC&A is only one part of the safeguards program required for uranium enrichment applicants and licensees. Failure to properly carry out certain safeguards activities at enrichment facilities could adversely affect the national common defense and security. Safeguards consists of physical protection, MC&A, and information security.

55 Fed. Reg. 5126 (1990).

LES notes that the following regulations do not differentiate as to whether the NRC or a private party possesses the information.

Section 73.21 which governs the disclosure of Safeguards Information provides:

(a) [e]ach licensee who . . . acquires Safeguards Information shall ensure that Safeguards Information is protected against unauthorized disclosure.

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

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

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

It also cited section 147 of the Atomic Energy Act (42 U.S.C. 2167) which prohibits the unauthorized disclosure, by whomever possessed, of safeguards information including security measures and material accounting procedures and control.

As to the portions of the documents that are CNSI, Applicant points out that 10 C.F.R. § 95.35 prohibits their disclosure to any individual that does not have the appropriate security clearance. Applicant is unaware that Intervenor has the required security clearance. It states that during the course of the proceeding Intervenor has maintained that it will not seek a security clearance.

2. *Intervenor's Position*

Intervenor premises its motion to compel on the general discovery rule which allows the discovery of "any matter, not privileged, which is relevant to the subject matter involved in the proceeding." 10 C.F.R. § 2.740(b)(1). It notes that the law of evidence contains no exception for privileged or confidential commercial information.

CANT argues the inapplicability of sections 2.741(e) and 2.790 because they only apply to the production of NRC-held records and documents and not to those privately possessed.

CANT disagrees with Applicant's position that *Diablo Canyon* authorizes LES to treat its security plan in the same manner that the NRC can. CANT

asserts that the footnotes to the Appeal Board's statement that "the same standards apply" whether the security plan is in the hands of the applicant or the NRC, only relate to discovery in general and not to NRC records, and therefore, only the general rules of discovery are applicable.

Intervenor claims that even if section 2.790 were applicable, it is Applicant's burden to establish that the "[t]rade secrets and commercial or financial information" are "privileged or confidential," which it has not done. It asserts that section 2.790(d) does not convey an automatic exemption for the PSP or FNMC.

CANT also raises as an allegation that LES has not complied with 10 C.F.R. § 2.790(b)(1). It requires that:

(1) A person who proposes that a document or a part be withheld in whole or part from public disclosure on the ground that it contains . . . confidential commercial or financial information shall submit an application for withholding accompanied by an affidavit . . .

(ii) . . . The application and affidavit shall be submitted at the time of filing the information sought to be withheld.

Intervenor states that Applicant's failure to comply with the regulation results in its not being able to claim that the documents are privileged or confidential commercial or financial information.

Applicant acknowledges that it has not complied with the requirements of section 2.790(b)(1). It states that its reason for not doing so is that under section 2.790(d) the documents are deemed to be commercial or financial information and are "exempt from public disclosure" subject to the provisions of section 9.19. That provision instructs the NRC on the segregation of exempt information and the deletion of the identifying details.

Intervenor contends that Applicant has not shown that any of the requested information is CNSI. It asserts that LES offers no proof that the documents have been classified, or where, when, or by whom, and that no description is given of which sections of the documents are classified.

Furthermore, CANT asserts that Applicant has essentially admitted that its documents are not CNSI. Applicant has claimed that its PSP and FNMC fall under section 2.790(d)(1) which describes "information or records concerning a licensee's or applicant's physical protection or material control and accounting program . . . not otherwise designated as Safeguards Information or classified as National Security information . . ." CANT states that the Applicant, by claiming that this information fits into section 2.790(d)(1), admits that the PSP and FNMC are "not . . . classified as National Security Information."

Applicant, as part of its June 16, 1992 response to CANT's motion to compel, submitted an affidavit from the Licensing Manager of the Claiborne Enrichment Center. In it, he states that he is a derivative classifier authorized by the NRC to classify Restricted Data and National Security Information in the hands of LES.

that PSP and FNMC contain information required by Executive Order 12356 to be protected as CNSI, and that various sections of the PSP and Chapter 9 of the FNMC are classified as CNSI.

LES, in its response, satisfied Intervenor's criticism that Applicant may not have fulfilled the request for production by not stating whether any other documents other than the PSP and FNMC were consulted in preparing the answer. It advised that it listed the documents it consulted, i.e., PSP and FNMC.

3. Board Discussion

The Board finds that Applicant was correct in its refusal to produce the PSP and FNMC in response to CANT's discovery request in the absence of an appropriate protective order.

Diablo Canyon made clear that under 10 C.F.R. § 2.790 security plans are not to be made available to the public at large because of their sensitive nature. The Appeal Board further declared that security plans, if and to the extent released, should in most circumstances be subject to a protective order consistent with section 2.740(c). 5 NRC at 1403, 1404.

Intervenor's argument that, where identical security plans are in the hands of an applicant and the NRC, the NRC plans are protected from public disclosure and those in the hands of the private party are not, is not meritorious.

Diablo Canyon unequivocally states that "the same standards apply" irrespective of the source of the document. The fact that the footnoted material to the statement may only relate to general discovery rules does not establish that it was solely the general discovery rules that the Appeal Board was speaking about.

The Appeal Board's continuing discussion of the law applicable to security plan disclosure, in which the general discovery rules and those pertaining to the Availability of Official Records (section 2.790) were considered, makes it apparent that the security plan is to be withheld from public disclosure, whomever the source of the documents. *Id.* at 1402-04.

The very purpose of limiting disclosure is to keep security information out of the wrong hands in order to protect the public health and safety or the common defense or security. It would be illogical to have a regulatory scheme that would limit the plan's availability when the NRC held it, but not when it was held by a private party. To do otherwise would be comparable to barring the windows and leaving the front door unlocked in attempting to guard security plans.

Applicant had no independent obligation to establish that the security plans are privileged or confidential. Section 2.790(d) deems them to be. Neither did LES have an obligation under section 2.790(b)(1) to submit an affidavit for having the security plan withheld from public disclosure. Section 2.790(b)(1) requires such an affidavit when a person "proposes" that the document be

withheld because it contains confidential commercial or financial information. In the case of a security plan, it has already been deemed to be such information under section 2.790(d). There was no need to propose that it be done.

From the information furnished by the Applicant, the security plan appears to meet the definition of Safeguards Information contained in 10 C.F.R. § 73.2. If treated as Safeguards Information, it too would be subject to limited disclosure, irrespective of whoever holds it.

Section 147 of the Atomic Energy Act prohibits its disclosure by "whomever possessed." Under the implementing regulation, section 73.21(c)(1) and (2), no person may have access other than on a "need to know basis" and disclosure to an individual must be ordered pursuant to section 2.744(e).

Section 2.744(e) provides:

When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a party other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved.

Additional protection must be afforded to the PSP and FNMC where they contain CNSI. In response to Intervenor's claim that LES has not shown that any of the requested information contains CNSI, Applicant has done so with the affidavit of its derivative classifier. The affidavit states that Chapter 9 of the FNMC is CNSI. It does not identify any specific portion of the PSP as containing CNSI but states that it is in various sections. Section 95.35(a) limits access to persons with security clearance on a need-to-know basis. Section 2.905 describes as to how access may be obtained. Applicant was correct in refusing to produce the documents containing the CNSI in the absence of a security clearance on the part of CANT.

Applicant has made a *prima facie* case that the documents should be withheld from public disclosure, whether they are considered to contain proprietary information, Safeguards Information, or CNSI. However, a number of matters would require resolution if CANT would continue to pursue access.

Those parts of PSP that consist of CNSI should be identified. It should be resolved whether contents of the documents be considered proprietary information or Safeguards Information. The furnishing of access to Safeguards Information is on a "need-to-know basis" and breach of a protective order is subject to criminal penalties. 10 C.F.R. §§ 2.744(e) and 73.21(c)(2). These conditions do not apply to privileged or confidential information disclosures. The extent and terms on which disclosure would be made to Intervenor would have to be decided and be made part of a protective order.

The foregoing would require a detailed examination of the documents. It would require that the examination be conducted *in camera*. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214 (1985).

Intervenor has already made known that it will not participate in closed proceedings. CANT has consistently maintained throughout this proceeding that it would not participate in *in camera* proceedings involving classified information because of its principle of bringing issues to public light. Tr. 113, 160, and 186. There is no basis to believe that Intervenor's attempt, by letter of February 26, 1992, to get the diameters of the piping at potential online enrichment measuring points declassified, even if successful, will eliminate all of the issues that need to be considered in the *in camera* proceeding.

The public interest does require the conducting of an *in camera* proceeding, which is an approved process under the circumstances of the case. Intervenor, in being unwilling to participate in the process that could result in the disclosure of the information it seeks, has effectively waived its right to further consideration of its discovery request on these matters. It cannot claim prejudice. *Id.* Applicant's request for a protective order on this issue will be granted and Intervenor's motion to compel will be denied.

C. Dispute as to the Completeness of the Response to Interrogatories

1. Intervenor contends that Applicant cannot avoid answering relevant interrogatories by stating that the answers are available in documents and then claim that Intervenor cannot obtain the documents. In support, Intervenor argues that section 2.740b, which governs interrogatories, and section 2.740, which has the general provisions for discovery, do not contain an exemption for proprietary information as does section 2.790.

The Board finds that Applicant responded to the interrogatories to the fullest extent allowable. Intervenor cannot obtain indirectly what it cannot obtain directly. The documents are not to be produced because of the sensitive information they contain. The information is not to be produced irrespective of what form the request takes, whether for the production of the documents themselves, or through questions about it. Applicant's motion for a protective order on this issue is granted and the motion to compel is denied.

2. Intervenor asserts that Applicant has not answered Interrogatory 18 fully. It asked whether Applicant takes into account "all" conceivable and credible scenarios for unauthorized production of uranium, and Applicant answered that conceivable and credible scenarios have been taken into account, without mentioning "all." CANT calls this answer evasive.

In its answer to the motion to compel, Applicant responded that it has considered all conceivable and credible scenarios as suggested by NUREG/CR-

5734. With the answering of the question, Applicant has rendered the issue moot. The motions on that issue are denied.

ORDER

Based upon all of the foregoing, it is hereby Ordered that:

(a) Applicant's motion for a protective order of May 18, 1992, is granted insofar as it seeks protection from disclosing the contents of the PSP and FNMC. LES shall not disclose the contents of the PSP and FNMC whether in response to a request for the production of the documents, in response to interrogatories, or otherwise, unless specifically ordered. The motion is otherwise denied, and

(b) CANT's motion to compel of May 19, 1992, is denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
CHIEF ADMINISTRATIVE LAW
JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 8, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 030-29626-OM&OM-2
(ASLBP Nos. 92-653-02-OM
92-662-06-OM-2)
(Byproduct Material License
No. 24-24826-01)
(EA 91-136, 92-054)
(License Revocation,
License Suspension)

PIPING SPECIALISTS, INC., and
FORREST L. ROUDEBUSH
d.b.a. PSI INSPECTION, and
d.b.a. PIPING SPECIALISTS, INC.
(Kansas City, Missouri)

July 10, 1992

After an evidentiary hearing had been conducted and proposed findings were pending in this enforcement action, the Licensing Board discovered language in the license making the Radiation Safety Officer "completely responsible" for compliance with safety regulations. Consequently, the Board issued a proposed resolution of the case under which the license would be revoked without any further determination of the degree of responsibility of the sole proprietor of Licensee. The Board scheduled oral argument on this proposition, which had not been addressed by the parties.

RULES OF PRACTICE: PROPOSED RESOLUTION

When a Licensing Board discovered grounds for decision that had not been argued by the parties, it decided to announce a proposed decision and to invite oral argument by the parties.

MEMORANDUM AND ORDER (Proposed Resolution of the Case)

Licensee,¹ which is a small firm licensed to utilize a radiographic camera for industrial purposes, contests the validity of the license suspension and license revocation orders issued to it by the Staff of the Nuclear Regulatory Commission on October 17, 1991, and April 22, 1992.

We have been reviewing the record² carefully, analyzing it from the standpoint of the specific knowledge and responsibility of Mr. Forrest Roudebush, who is Licensee's sole proprietor. During our review, however, we made a significant discovery about language in the license, and we reached some tentative conclusions, as shown in Table 1.

TABLE 1. Tentative Conclusions

1. Item 7 of the contested license reads:

INDIVIDUAL RESPONSIBLE FOR THE RADIATION SAFETY PROGRAM

Radiation Safety Officer: Mr. Ken Keeton

Mr. Ken Keeton will have *complete responsibility and authority to direct all aspects of the radiation safety program of the company*. In addition, Mr. Keeton is *the manager of the company's radiography program*. [Emphasis added.]

Specifically, Mr. Keeton's responsibilities shall include: [fifteen listed responsibilities, seven of which begin with the term "administer."] Source: OI Report of Investigation, Case No. 3-91-011, Exhibit 1, page 121 of 187.

2. Item 7 of the contested license, as just set forth, has been amended by Amendment No. 02. This amendment makes James A. Hosack Radiation Safety Officer, but condition 17 continues the rest of Item 7 in effect. Source: OI Report of Investigation, Case No. 3-91-011, Exhibit 1, page 15 of 187.

¹The name of the Licensee is Piping Specialists, Inc. However, the orders also have been made applicable to Mr. Forrest Roudebush since there is no legal entity by the name of Piping Specialist, Inc.

²An evidentiary hearing was held in Kansas City, Missouri, April 28, 1992, to May 1, 1992.

TABLE 1. Tentative Conclusions (Continued)

3. Mr. James A. Hosack has complete responsibility and authority to direct all aspects of PSI's radiation safety program and also to manage that program. Hence, Mr. Forrest Roudebush's knowledge or alleged culpability are irrelevant to the company's compliance with its license.

4. It is appropriate to revoke this license because the person completely responsible, Mr. James A. Hosack, has committed numerous, egregious violations — including the intentional falsification of records. Licensee has admitted these errors.

5. It is outside the jurisdiction of this Licensing Board to determine the effect of this decision on a future license application by Mr. Roudebush.

In light of these tentative conclusions, we have decided to schedule an on-the-record telephone conference, for the purpose of oral argument, on July 20, 1992. Each side will have 20 minutes to present its argument concerning the appropriate treatment of the findings tentatively presented in Table 1. The Staff may go first and may reserve up to 5 minutes for rebuttal. Licensee may also reserve 5 minutes for surrebuttal.

We urge that prior to the scheduled telephone conference the parties should seek to reach a voluntary settlement. The date of the conference may be deferred upon agreement of the parties.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
AND PRESIDING OFFICER

Before Administrative Judges:

Thomas S. Moore, Chairman and Presiding Officer
Frederick J. Shon
James H. Carpenter

In the Matter of

Docket Nos. 030-05980-ML&ML-2
030-05982-ML&ML-2
(ASLBP Nos. 92-659-01-ML
92-664-02-ML-2)

SAFETY LIGHT CORPORATION, *et al.*
(Bloomsburg Site Decommissioning and
License Renewal Denials)

July 17, 1992

MEMORANDUM

The Commission on July 2, 1992, issued an order granting review of the NRC Staff's June 26, 1992 petition for review of the June 11, 1992 consolidation order of the Presiding Officer and the Licensing Board in this proceeding. The order granting review directed the parties to address three questions concerning the proceeding. Additionally, the review order invited us to provide the Commission with "[our] views in this matter" as well as "[our] views on the positions of the parties in response to the questions posed."¹

We must respectfully decline the Commission's offer. As administrative trial judges charged with safeguarding the public health and safety in a quasi-judicial

¹ Commission Order, July 2, 1992, at 5.

adjudicatory system, we must maintain absolute neutrality in disputes between the parties in agency proceedings. Our position as impartial decisionmakers precludes us from advocating any position before a superior appellate tribunal as if we were another party to the proceeding. Disregarding this long and well-founded judicial tradition of neutrality could only compromise our institutional responsibility to ensure that neither the parties before us nor the general public have any occasion, real or imagined, to question our impartiality or fairness in conducting the proceeding. Any party in a contested adjudicatory proceeding that believes its interests would be served by challenging any of our rulings before the Commission has the right to do so. Similarly, if it is in the interests of another party to defend a particular ruling, it is that party's responsibility to do so. For trial judges to assume the mantle of another appellate advocate to defend their own rulings serves no one's interests. Accordingly, we must decline the Commission's invitation to express our views in this matter.

Having said that, we nonetheless believe it is appropriate to detail our reasons for consolidating the proceeding involving the Staff's February 7, 1992 denial of the license renewal applications and the proceeding involving the Staff's February 7, 1992 decommissioning order because those reasons do not appear on the record.²

By way of background, there currently are three *Safety Light* proceedings: the OM proceeding involving an immediately effective Staff order of March 16, 1989; the OM-2 proceeding involving an immediately effective Staff order of August 21, 1989; and the consolidated ML, ML-2 proceeding involving the license renewal denials and the decommissioning order. All three of these proceedings are being conducted pursuant to the Commission's Rules of Practice in 10 C.F.R. Part 2, Subpart G, governing formal, on-the-record, adjudicatory proceedings. Underlying all of the proceedings is the need for the substantial and costly cleanup of the Licensees' Bloomsburg, Pennsylvania site and the possibility that the Licensees' assets may be insufficient to decontaminate the site to an acceptable level of risk.

Initially, a single Licensing Board (the ML Board) was established to preside over a proceeding involving both the Licensees' hearing requests on the Staff's February 7, 1992 denial of the license renewal applications and the Staff's February 7, 1992 decommissioning order.³ Thereafter, the Licensing Boards

² The June 11, 1992 order did not contain a recitation of reasons for consolidating the proceedings because at that time the question of the authority of the Licensing Board and the Presiding Officer to consolidate the proceedings was conceded by the Staff (Tr. 59-61), allaying any need to frigate an otherwise routine procedural order with an exposition of that authority or the advantages of consolidation. Subsequently on June 18, 1992, Staff counsel retracted his concession claiming, *inter alia*, that "[he] inadvertently allowed [him]self to be misunderstood" and orally moved for reconsideration of the June 11 order. Tr. 152. Rather than further delaying the proceeding so that the Staff could do what it should have done initially, i.e., file a written reconsideration motion, we orally denied that motion. Tr. 161.

³ 57 Fed. Reg. 10,932 (Mar. 31, 1992).

presiding over the distinct OM and OM-2 proceedings were reconstituted so that all three proceedings, as they then existed, were before identically constituted Boards.⁴

The original ML Board determined that the proceeding involving the license renewal denials and the decommissioning order should be adjudicated first before either of the pending OM or OM-2 proceedings. This determination was based upon the likelihood that the OM and OM-2 proceedings would become moot in the event the Board upheld the Staff's denial of the license renewal applications and the Board sustained the Staff's decommissioning order. Thus, the ML Board decided that efficient and cost-effective case management counseled holding one trial in an effort to avoid holding three, thereby minimizing the expenditure of the Licensees' limited assets on legal fees and litigation expenses when those assets are needed for the costly cleanup of the Bloomsburg site.

In response to a Staff request, on June 9, 1992, the portion of the ML proceeding involving the Staff's February 7, 1992 license renewal denials was severed from the proceeding by the Chief Administrative Judge. He appointed a single Presiding Officer to hear that part of the case (the ML-2 proceeding) under the Commission's Rules of Practice in 10 C.F.R. Part 2, Subpart L, governing informal adjudicatory proceedings.⁵ Thereafter on June 11, 1992, the ML Board and the ML-2 Presiding Officer consolidated the two proceedings under Subpart G pursuant to 10 C.F.R. § 2.716.⁶ We consolidated these proceedings because

⁴ 57 Fed. Reg. 11,343 (Apr. 2, 1992).

⁵ Chief Administrative Judge's Memorandum (Designating Presiding Officer), June 9, 1992.

⁶ The plain language of 10 C.F.R. § 2.716, a Subpart G provision of the Commission's "Rules of General Applicability," specifically authorizes presiding officers, like the Commission itself, to consolidate non-like-kind proceedings (i.e., proceedings with differing procedures) and directs that the consolidated proceeding be conducted in accordance with Subpart G procedures. Hence, whatever authority the Commission has pursuant to section 2.716 to consolidate a Subpart L and a Subpart G proceeding, or any other proceedings employing different procedures, presiding officers also have that authority. See 43 Fed. Reg. 17,798, 17,800 (1979).

With that in mind, it is apparent that the subsequent promulgation of the special Subpart L rules for some materials license proceedings did not supplant the authority of the Commission or presiding officers to consolidate proceedings, including Subpart L proceedings, pursuant to section 2.716. This follows from the operation of traditional rules of statutory interpretation which are fully applicable in construing the Commission's regulations. Those rules require that the Commission's regulations be read as a whole, including later-enacted amendments. Effect is to be given to each part of the regulations and all provisions are to be interpreted so they do not conflict. Only if the terms of general rules cannot be harmonized with specific rules, including later-enacted specific rules, do the new provisions prevail. Stated otherwise, only where there is an inescapable conflict between general and specific provisions of the regulations do the specific rules apply. See 1A N. Singer, *Sutherland Statutory Construction* §§ 22.34-35 (4th ed. 1985); 2A N. Singer, *Sutherland Statutory Construction* § 46.05 (4th ed. 1984). Essentially, these are the statutory interpretation rules codified in 10 C.F.R. §§ 2.2, 2.3.

Here, the regulatory language of section 2.716 does not inherently conflict with the terms of 10 C.F.R. § 2.1201, the provision that establishes the application of Subpart L to Commission adjudicatory proceedings. Section 2.1201(a) does not use conventional statutory language of mandatory direction and exclusivity such as "shall" and "notwithstanding any other provision," that would cut off the application of section 2.716. In these circumstances, there is no sound basis for finding a conflict between the general rule of section 2.716 and the special rule of section 2.1201(a), and the later section does nothing to constrict the authority of the Commission or presiding officers to consolidate proceedings pursuant to the former.

both cases shared common, unresolved, issues of first impression involving the agency's personal jurisdiction over the corporate subsidiaries of licensee USR Industries, Inc., that likely involve disputed issues of fact.⁷ Similarly, because of the common factual setting of both matters relative to the substantive issue of whether the Staff's actions are sustainable, there likely are other material factual disputes common to both proceedings.⁸ Further, without consolidation as a Subpart G proceeding, the doctrine of collateral estoppel may well be inapplicable because that doctrine has generally been recognized to require a mutuality in the quality and extensiveness of procedures that arguably is lacking between proceedings conducted pursuant to Subpart L, on the one hand, and Subpart G on the other.⁹ Thus, we joined the two proceedings pursuant to section 2.716 to avoid the necessity of trying the same issues twice in two separate proceedings under different procedural requirements, with the attendant risk of inconsistent factual findings by the Presiding Officer and the Licensing Board emanating from the marked differences in procedures between a Subpart L proceeding and a Subpart G proceeding.¹⁰ Additionally, we sought to avoid the unnecessary expense of duplicative hearings that seemingly would squander what by all accounts are the Licensees' limited resources so those assets could be preserved for the decontamination of the Bloomsburg site. Accordingly, we found in our June 11, 1992 order, as required by section 2.716, that "the consolidation of these two proceedings for all purposes will be in the best

⁷ These same contested, unresolved, jurisdictional issues are also present in both the OM and OM-1 proceedings.

⁸ Of course, the actual determination of how many factual disputes exist can only be made after we resolve the party's summary disposition motions.

⁹ See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 n.15 (1979). See also C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4423 (1981); 1B J. Moore, et al., *Moore's Federal Practice*, § 0.441[3-3] (2d ed. 1988).

¹⁰ Further, consolidation had the added benefit of avoiding future litigation over the propriety of applying Subpart L procedures to the denial of extremely long-pending license applications when, in substance (in contrast to form), the Staff's February 7, 1992 action arguably was a license revocation or some other type of 10 C.F.R. Part 2, Subpart B, enforcement action that would have entitled the Licensees to a Subpart G hearing.

interests of justice and be most conducive to the effective and efficient resolution of the issues and the proceedings."¹¹

THE ATOMIC SAFETY AND
LICENSING BOARDS

Thomas S. Moore, Chairman and
Presiding Officer
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

James H. Carpenter
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 17, 1992

¹¹ Order, June 11, 1992, at 2.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Charles N. Kelber
Dr. Jerry R. Kline

In the Matter of

Docket No. 50-336-OLA
(ASLBP No. 92-665-02-OLA)
(FOL No. DPR-65)
(Spent Fuel Pool Design)

NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Unit 2)

July 29, 1992

MEMORANDUM AND ORDER
(Establishing Pleading Schedule)

SYNOPSIS

This proceeding involves a license amendment for the recently redesigned spent fuel pool at Millstone Unit 2. The Board is considering several petitions for leave to intervene and requests for hearing in response to the *Federal Register* notice of the amendment application (57 Fed. Reg. 17,934 (Apr. 28, 1992)).¹

¹ Initially petitions were filed by Mary Ellen Marucci (undated), Earthvision, Inc. (dated May 27, 1992), and Michael J. Pray (dated May 29, 1992). In addition, Ms. Marucci and others filed on behalf of Cooperative Citizens' Monitoring Network (CCMN) on June 23, 1992, Rosemary Griffiths, on June 29, 1992, and Joseph M. Sullivan, on July 6, 1992, filed nearly identical form petitions which seek intervention individually and which authorize
(Continued)

The NRC Staff and the Licensee opposed early petitions on the grounds that they do not demonstrate standing to intervene and on other grounds. They have not yet answered later-filed petitions.²

Because the NRC Rules of Practice provide very broad opportunities to amend and to supplement intervention petitions, the Board has decided to defer rulings on intervention status until the final round of pleadings has been filed.

In this order, we set a schedule for the filing of amended and supplemental petitions to intervene and answers to such petitions. In addition, to aid the Board in ruling on petitions, we request the Petitioners, the NRC Staff, and the Licensee to address specified questions concerning standing to intervene.

BACKGROUND

In Licensee Event Report 92-003-00, dated March 13, 1992, Northeast Nuclear Energy Company (Licensee) reported that criticality analysis calculation errors with respect to the Millstone Unit No. 2 spent fuel pool had been discovered. The Licensee reported that:

The safety consequence of this event is a potential uncontrolled criticality event in the spent fuel pool. Upon consideration of the following, a significant margin to a critical condition was always maintained and, therefore, the safety consequences of this event were minimal [factors omitted].

Id. at 3.

Consequently, on April 26, 1992, the Licensee requested an amendment to its Millstone Unit 2 operating license incorporating proposed changes to spent fuel pool technical specifications. Licensee reported that the calculational errors were due primarily to an incorrect treatment of Boraflex panels in the calculations and proposed several corrective modifications to the spent fuel pool design, procedures, and terminology.

The NRC Staff, on behalf of the Commission, found that the proposed changes are acceptable and determined that the proposed amendment involves a "no significant hazards consideration" as provided by 10 C.F.R. § 50.92. Accordingly, on June 4, 1992, the Staff issued Amendment No. 158 to the Millstone Unit 2 facility operating license with supporting Safety Evaluation by the Office of Nuclear Reactor Regulation.

CCMN to represent their respective interests in the proceeding. On July 2, 1992, Mr. Pray augmented his petition to respond to questions of timeliness. Mr. Pray also authorizes CCMN to represent his interests. We discuss the status of the later-filed intervention pleadings on p. 28, *infra*.

²In our orders of June 30, and July 15, 1992, we requested the NRC Staff and the Licensee to defer answering later-filed intervention pleadings until further order of the Board. We also extended the time for answering.

As noted at the outset, the notice of the opportunity for hearing on the proposed amendment had been published earlier — on April 28, 1992. Nevertheless, pursuant to the provisions of 10 C.F.R. § 50.91(a)(4), the amendment was issued before any hearing could be convened, even though adverse comments and requests for hearing had been received.

QUESTIONS CONCERNING STANDING TO INTERVENE

Although the Petitioners have not yet availed themselves of their right to state their final positions on standing to intervene, they have expressed concerns about a fuel pool accident in general (Pray and Marucci petitions) and a criticality accident in particular (Sullivan and Griffiths petitions). Their concern is that, because of the proximity of residences, schools, and other physical features, they would be injured by such an accident at Millstone. These concerns are very similar to the traditional "injury-in-fact" ingredient of standing to intervene in NRC proceedings.

Similarly, the Licensee and the NRC Staff have yet to address the final positions of the earlier Petitioners, and they have not yet answered the later-filed petitions. Even so, their answers to the initial petitions have raised possibly novel questions which should be answered before any final ruling on standing to intervene.

As a part of their opposition to the initial Marrucci, Earthvision, and Pray petitions, both the Staff and Licensee state in various terms that: (1) any injury-in-fact to Petitioners must derive from the design change authorized by the amendment itself and not from a general concern about a criticality accident in the spent fuel pool; and (2) since the amendment reduces rather than expands the fuel pool's storage capacity, the amendment does not increase the risk to nearby residents from the operation of Millstone even if a related accident scenario existed prior to the amendment; therefore, (3) no injury-in-fact from the amendment can be inferred from proximity to Millstone.³

Taking their argument to its logical conclusion, the Licensee and Staff seem to argue that, if the amendment reduces risks from the pre-amendment condition, there can be no injury within the scope of the notice of opportunity for a hearing. Living or functioning in close proximity to the plant would be irrelevant to the issue of standing to intervene.

³ E.g., Staff Response to Earthvision at 7; Staff Response to Marucci at 7; Licensee's Response to Marucci at 9-10.

ASSUMPTIONS

Solely for the purpose of discussing the standing-to-intervene issue, we assume (as Licensee states) that the amendment "simply imposes additional restrictions on the use of the Unit 2 fuel pool" and therefore would not increase risks from the pre-amendment condition. Licensee's Reply at 10. Indeed, for purposes of analysis we assume that the amendment actually decreases the risk of offsite releases from a spent fuel pool accident at Unit 2. We assume further that the pre-amendment accident under consideration is causally related to the event reported in LER 92-003-00.⁴ With these assumptions the Board invites the Petitioners, the Licensee, and especially the NRC Staff, to address the following questions in the forthcoming round of intervention pleadings.

QUESTION NO. 1

Assuming as above stated, could an allegation that the technical specifications, as amended, do not bring the spent fuel pool up to the licensing basis and do not satisfy NRC criticality requirements, establish injury-in-fact? In simpler terms, can nearby Petitioners suffer injury-in-fact from postulated offsite releases if the amendment increases safety, but not enough?

QUESTION NO. 2

If Question No. 1 is answered in the negative, what relief from relevant post-amendment risks are available to nearby residents?

QUESTION NO. 3

In discussing the final "no significant hazards consideration" procedures, the Commission provided examples of amendments that are considered likely, and examples that are considered unlikely to involve significant hazards considerations.⁵ Among the examples in the "likely" category was:

⁴ Any well-founded, properly pleaded allegation that standing is based upon an increased risk caused by the amendment is not foreclosed by the Board's purely hypothetical assumptions. As the Licensee notes, the Staff's determination that the amendment is a "no significant hazards determination" is not binding on Petitioners. Licensee's Reply to Pray petition at 13. Further, the Commission stated in the final procedures on "no significant hazards considerations," that such a determination is procedural only, without substantive safety significance. See Final Procedures and Standards on No Significant Hazards Consideration, 51 Fed. Reg. 7744, 7746 (Mar. 6, 1986).

⁵ *Id.*, 51 Fed. Reg. at 7750-51.

(vii) A change in plant operation designed to improve safety but which, due to other factors, in fact allows plant operation with safety factors significantly reduced from those believed to have been present when the license was issued.

51 Fed. Reg. at 7751.

Does not the cited example, notwithstanding its category, indicate that the Commission does not intend to foreclose a hearing to persons whose interests may be affected by an amendment that does not in itself threaten injury, but where injury results directly from the amendment's failure to achieve adequate safety margins?

AMENDED AND SUPPLEMENTAL PETITIONS

The intervention rule provides that any person who has filed a petition for leave to intervene pursuant to the rule may amend his or her petition without prior approval of the presiding officer (i.e., Licensing Board) at any time up to 15 days prior to the holding of the first prehearing conference. 10 C.F.R. § 2.714(a)(3).

In addition, section 2.714(b)(1) provides that, not later than fifteen (15) days prior to the holding of the first prehearing conference, the Petitioner shall file a supplement to his or her petition to intervene which must include a list of the contentions that Petitioner seeks to have litigated in the hearing.

The NRC intervention rule tends to be forgiving in the sense that Petitioners have a chance to conform their petitions after seeing any objections to the initial petitions by the Licensee or the NRC Staff. In this case, Petitioners would be well served by examining carefully those objections. The questions we posed above should not be regarded as a road map to intervention. Standing with "injury-in-fact," as discussed in the cases cited by the Licensee and NRC Staff, is an absolute intervention requirement. Standing must be clearly and specifically established before intervention can be granted.

The *Federal Register* notice explained in detail the requirements for filing contentions in NRC proceedings. The Board recommends that the Petitioners study the contention requirements of the rule carefully since the rule provides that a Petitioner who fails to satisfy the requirements will not be admitted as a party. 10 C.F.R. § 2.714(b)(1), (2).⁶

⁶ In particular, section 2.714(b) provides:

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(Continued)

The Commission is not lenient in overlooking substantive shortcomings in intervention pleadings. It has stated that "the current section 2.714(b) provides rather clear and explicit notice as to the pleading requirements for contentions." Licensing boards may not ignore those requirements when evaluating intervention petitions. *Arizona Public Service Co.* (Palo Verde Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 n.1 (1991).

LATER-FILED PETITIONS

The *Federal Register* notice set May 28, 1992, as the date by which petitions for leave to intervene may be filed in this proceeding and explained that nontimely filings will not be entertained absent a balancing of the factors specified in 10 C.F.R. § 2.714(a)(i)-(v).⁷ The petitions of Mr. Pray, Mr. Sullivan, and Ms. Griffiths were filed after May 28.⁸ Complicating this situation is the fact that all three of the later-filing Petitioners, arguably with standing to intervene, are members of CCMN and authorize that organization to represent them. Ms. Marucci filed a timely petition as an individual, but may lack standing to intervene as an individual. She also alluded to her role as the coordinator of CCMN. That organization later ratified Ms. Marucci's initial timely filing.

The Board will consider amendments to petitions addressing the five factors to be balanced for nontimely petitions. We shall also consider any arguments that the CCMN petitions as a group are timely. Licensee and the NRC Staff may, of course, answer these arguments.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

⁷ The five factors to be balanced are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

⁸ Mr. Pray filed a letter supplement dated July 2, 1992, to his petition, in which he argues that his petition was not untimely. The Licensee and NRC Staff have not had an opportunity to answer Mr. Pray's July 2 filing.

SCHEDULE FOR FURTHER INTERVENTION PLEADINGS

The sequence and timing of the filing of amended and supplemental petitions under the rule can be changed by order of the Board to provide for the efficient and rational management of the proceeding. 10 C.F.R. §§2.711, 2.718(m). There is normally no need for a prehearing conference until it has been established by the filing of at least one facially acceptable contention by a Petitioner with standing to intervene that a hearing might be required.⁹ Therefore, the Board suspends the provisions of the rule that permits filing up to 15 days before the prehearing conference and sets another schedule below.

ORDER

Pleadings shall be filed in accordance with the following schedule:

Each Petitioner may file no later than August 14, 1992, an amended petition and a supplement to his or her petition which includes a list of contentions that Petitioner seeks to have litigated in a hearing.¹⁰

Licensees may file answers to amended petitions and supplements to petitions within 10 days after service of the amended petitions or supplements.

⁹ Also, if the Petitioners wait until 15 days before the first prehearing conference to file amended and supplemental petitions, the answers to those petitions would not be in the hands of the Board and parties until the very day of the prehearing conference at the earliest, and possibly several days later. In short, the Board and parties would not be prepared to attend to the very business for which the prehearing conference is convened if the schedule set out in the rule is followed.

¹⁰ Parties to NRC proceedings are responsible for serving their papers directly upon other parties and members of the Board in compliance with the provisions of 10 C.F.R. § 2.701. So far the Petitioners have not been complying with the service requirements. The Clerk to the Licensing Board will provide to the Petitioners a current service list for this proceeding. Petitioners must carefully follow the provisions of 10 C.F.R. Part 2 (Rules of Practice) in future filings. Intuitive intervention in NRC proceedings has a high probability of failing.

A copy of the pertinent regulations, 10 C.F.R. Parts 0 to 50, is available from the U.S. Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328 or may be examined at the local public document room as stated in the *Federal Register* notice of this proceeding.

The NRC Staff shall file answers to amended petitions and supplements within 15 days following their service.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles N. Ke'ber
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 29, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE EXECUTIVE DIRECTOR FOR OPERATIONS

James M. Taylor, Executive Director for Operations

In the Matter of

Docket No. PRM 50-54

DANIEL BORSON on Behalf of
PUBLIC CITIZEN

July 27, 1992

The Nuclear Regulatory Commission (NRC) is denying a petition for rule-making (PRM 50-54) from Daniel Borson on behalf of the Public Citizen. The Petitioner requested that the NRC amend its regulations regarding the licensing of independent power producers to construct or operate commercial nuclear power reactors. The petition is being denied on the basis that current NRC regulations provide authority for the licensing of an Independent Power Producer (IPP) should such an application be submitted and for a review of the applicant's financial qualifications to construct and operate a commercial power reactor.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 50)

The existing regulations in 10 C.F.R. Part 50 provide authority to request the necessary information from non-utility applicants to perform a financial qualifications review, as well as require the applicants to set aside funds for decommissioning of the reactor.

REGULATIONS: INTERPRETATION (10 C.F.R. Part 140)

Each licensee, utility or non-utility, is required by 10 C.F.R. § 140.21 to maintain adequate monies, through several approved methods indicated in that section, to guarantee payment of deferred premiums to satisfy its responsibility under the Price-Anderson Act.

DENIAL OF PETITION FOR RULEMAKING

I. THE PETITION

In a letter dated November 22, 1989, Mr. Daniel Borson, on behalf of the Public Citizen, filed a petition for rulemaking with the NRC. The petition, which consisted of two parts, requested that: (1) NRC promulgate rules concerning the licensing of Independent Power Producers (IPPs) in general; and (2) these rules include specific criteria for financial qualifications for an IPP seeking a construction permit or an operating license for a commercial nuclear power reactor.

II. BASIS FOR PETITIONER'S REQUEST

Since all licensees of commercial nuclear power plants are presently regulated utilities, NRC regulations for financial qualification of licensees for the construction and operation of these facilities assume that local, state, or federal regulatory bodies will ensure that nuclear licensees have sufficient funds to safely operate their facilities. Regulated utilities have defined fixed markets for their electricity and usually are assured a set return on the amount of investment in plants which is included in the rate base. However, IPPs, on the other hand, must compete openly in the wholesale marketplace and may not have a steady supply of customers for their power. Consequently, while their rates are usually set by the Federal Energy Regulatory Commission (FERC), if IPPs fail to sell all the electricity they produce, or if their plants fail to produce enough electricity, they may not make a profit. Therefore, the long-term financial stability of an IPP is less certain than that of a regulated utility. This potentially precarious financial position may adversely affect the accrual of decommissioning funds, the promptness of necessary maintenance and repairs, the payment of waste fees, and the ability to pay funds in the event of an accident at any commercial nuclear plant as specified under the Price-Anderson Act. Currently, there are no regulations specifically addressing the licensing of IPPs or the transfer of licenses to IPPs.

In light of the above, Public Citizen petitioned NRC to require an affirmative showing of financial qualification by an IPP seeking a construction permit, an operating license, or a transfer of licenses. Additionally, Public Citizen requested that the specific financial qualifications be made part of the IPP's application for a license. The financial questions should include but not be limited to requiring the IPP to:

Establish a procedure to ensure that sufficient funds will be available for payment to the Nuclear Waste Fund established by the Nuclear Waste Policy Act.

Establish a mechanism to ensure that the money that the Price-Anderson Act requires licensees to pay in the event of an accident at any commercial nuclear plant would be available when needed.

Prepay into an external fund the cost of decommissioning the reactor, or demonstrate the absolute assurance by a financial institution that sufficient funds will be available for decommissioning.

III. PUBLIC COMMENTS ON THE PETITION

A notice of receipt of the petition for rulemaking was published in the *Federal Register* on March 12, 1990 (55 Fed. Reg. 9137). Interested persons were invited to submit written comments or suggestions concerning the petition by May 11, 1990. The NRC received 17 comments in response to the notice: 9 from public utilities/industry representatives, 2 from public corporations, 2 from state agencies, 2 from citizens' groups, 1 from a private citizen, and 1 from the Department of Energy (DOE). The majority of the commenters (13) opposed granting the petition. The main reasons cited by the commenters who were opposed to the petition were:

The DOE, the New York Power Authority, and others, stated that they believed that current NRC regulations are sufficient to recognize an entity other than an electrical utility as a licensee for a nuclear power plant. Further, they stated that Part 50 contains language that allows the Commission to obtain information on the financial integrity of an IPP to assure itself that the IPP is qualified to build, operate, and provide for other financial obligations in connection with the plant for the life of the license.

The Nuclear Management and Resources Council (NUMARC) as well as several utilities pointed out that the Petitioner failed to indicate any specific areas of the regulations that required change or to provide any arguments to justify the need for additional regulations at this time.

Financial qualifications for licensees are addressed in the current regulations (10 C.F.R. Parts 50 and 140) and apply to all applicants.

A private citizen pointed out that the promulgation of additional rules is not required to ensure the protection of the health and safety of the public.

Several commenters pointed out that any lender or investor supporting an application from an IPP would clearly insist on adequate financial arrangements to address all significant contingencies.

The Palisades Generating Company pointed out that the IPP concept has not yet been applied to nuclear plants; even in the nonnuclear segment of the electric industry, the concept is still evolving.

The remaining four commenters were in favor of granting the petition. The reasons provided for supporting the petition are as follows:

The State of Illinois stated that specific financial qualifications should be made a part of the application for an operating license. Satisfactory monetary provisions for plant decommissioning, Price-Anderson insurance, and disposal of radioactive waste must be assured. IPPs should have no less culpability than a regulated utility.

The Ohio Citizens for Responsible Energy stated that NRC has developed no substantive rules or a body of case law to address a situation such as the completion and operation of a nuclear reactor such as Perry 2 by an IPP. Stringent financial qualifications review and standards are essential to ensure that the IPPs have sufficient funds to cover appropriate expenses.

The Alabama Public Service Commission stated that the assumption should not be made that current regulations would encompass new entrants such as IPPs. Further, IPPs need to know what will be required by the NRC to determine whether to construct or operate a nuclear reactor and be reasonably sure of making a profit.

Public Citizen sent in a letter to NRC and reiterated essentially what had been stated in their petition.

IV. REASONS FOR DENIAL

Upon receipt of the petition from Public Citizen, the Staff examined the petition in detail to determine which specific regulations the Petitioner believed should be amended to address the licensing of an IPP, or which regulations were inadequate to determine the financial qualifications of an IPP. However, the Petitioner provided no specific reference to the regulations in 10 C.F.R. Chapter I that should be amended.

The Staff then examined each of the seventeen comments submitted by the public on the petition. None of the four commenters who favored granting the petition provided any reference to the specific regulations that should be amended by rulemaking. One of the commenters stated that specific financial qualifications should be made a part of the application for an operating license and that satisfactory monetary provisions for plant decommissioning, Price-Anderson insurance, and disposal of radioactive waste should be ensured. The Staff agrees that this type of information is important to any license application and such information will be reviewed in detail during any license review of an

IPP. Another commenter stated that IPPs should have no less culpability than a regulated utility. The Staff also agrees with this statement. Another commenter stated that NRC has not developed a "body of case law" to address IPPs. NRC has not developed a "body of case law" because an IPP has yet to submit an application for a construction permit or operating license, and the Staff believes that the current regulations provide authority to review an application by an IPP should one be submitted.

In its petition, Public Citizen has not presented any tangible evidence as to why or how the NRC regulations are inadequate. Nor does the Public Citizen demonstrate or state how the NRC would fail to apply existing regulations on a case-by-case basis to the circumstances of an IPP before making the necessary public health and safety findings prior to the issuance of any permit or license. The Staff agrees with the comments of the DOE, NUMARC, and others that the current regulations in 10 C.F.R. Part 50 can be appropriately applied to IPPs.

The Staff believes that the existing regulations in 10 C.F.R. §§ 50.33 and 50.75 provide the authority to request the necessary information from non-utility applicants to perform a financial qualifications review, as well as require the applicants to set aside funds for decommissioning of the reactor. The regulations in 10 C.F.R. § 50.75(d) specifically address "non-electric utility applicants" and require these applicants to submit a decommissioning report to the Commission describing the cost estimate for decommissioning the facility and the manner (which must be acceptable to the Commission) in which the funds will be set aside. Moreover, 10 C.F.R. 50.75(e)(2) specifically defines the acceptable financial assurance mechanisms for a licensee other than an electric utility. Public Citizen has not indicated in its petition where the Commission's regulations are inadequate for accommodating a non-utility applicant.

Non-utility applicants for operating licensees must demonstrate financial qualifications pursuant to 10 C.F.R. § 50.57, and 10 C.F.R. § 50.80 allows the Commission to request information on the financial qualifications of any applicant for license transfer.

Each licensee, utility or non-utility, is required by 10 C.F.R. § 140.21 to maintain adequate monies, through several approved methods indicated in that section, to guarantee payment of deferred premiums to satisfy its responsibility under the Price-Anderson Act. Moreover, if the suggested methods of guarantee are for any reason inadequate or inapplicable for a particular licensee, 10 C.F.R. § 140.21(f) provides for "such other types of guarantee as may be approved by the Commission."

Pursuant to Public Citizen's concern that non-utility applicants will not have sufficient monies available to fund their requisite payment to the Nuclear Waste Fund, the Staff believes that DOE, the agency that administers the Fund, is the best judge of whether a licensee has sufficient funds set aside to meet the costs of disposal of radioactive waste.

For the reasons cited above, the NRC denies the petition.

For the Nuclear Regulatory
Commission

James M. Taylor
Executive Director for Operations

Dated at Rockville, Maryland,
this 27th day of July 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE EXECUTIVE DIRECTOR FOR OPERATIONS

James M. Taylor, Executive Director for Operations

In the Matter of

Docket No. PRM 20-19

GENERAL ELECTRIC STOCKHOLDERS'
ALLIANCE, *et al.*

July 27, 1992

The Nuclear Regulatory Commission (NRC) is denying a petition for rule-making (PRM 20-19) from Betty Schroeder on behalf of the General Electric Stockholders' Alliance, *et al.* The Petitioner requested that the NRC issue a regulation to require that a detectable odor be injected into the emissions of nuclear power plants and other nuclear processes over which the NRC has jurisdiction. The petition is being denied on the basis that the proposed action is not necessary because: (1) current monitoring and emergency response procedures provide an adequate level of safety; (2) it would not result in any increased protection of the public health and safety and as a result would not meet the Commission's "Backfit Rule," 10 C.F.R. § 50.109; (3) the proposed action is not technically feasible; and (4) the injection of odors in detectable concentrations over the Emergency Planning Zone for a nuclear power plant or suitable area for other nuclear facility would likely be detrimental to the environment.

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: Emergency Plans; Environmental Effects of Odorants; Health Effects; Low-Level Radiation Releases; Radioactive Plumes; Radiological Monitoring.

DENIAL OF PETITION FOR RULEMAKING

I. THE PETITION

In a letter dated October 8, 1988, Ms. Betty Schroeder, Secretary of the GE Stockholders' Alliance, filed a petition for rulemaking with the NRC on behalf of herself, the Alliance, and "all the people in the country [USA] and all future generations." The Petitioner requested that the NRC issue a regulation to require that a detectable odor be injected into the emissions of nuclear power plants and other nuclear processes over which the NRC has jurisdiction. The petition specified that the injected odor be similar to, but recognizably different from, the mercaptans used in natural gas.

II. BASIS FOR REQUEST

As a basis for the requested action, the Petitioner stated that compliance with this requirement would immeasurably improve health and safety of the public by providing for early detection of radiation leaks, giving the public notice of the need to take protective measures. The Petitioner recognized that nuclear facilities are required to maintain monitoring stations, but alleges that the accident at Three Mile Island demonstrates deficiencies in the capability to alert the public of dangerous releases. In addition, the Petitioner claims that radiation plumes are erratic and unpredictable in their dispersion upon release because of varying weather and geophysical characteristics of the terrain. Furthermore, the Petitioner asserts that scientific studies prove that even the smallest amounts of ionizing radiation cause harmful health effects, stating that there is ample evidence that radiation causes increased infant mortality, genetic abnormalities, cancer and leukemia, and makes the body more prone to disease by "lowering" the immune system.

By example, the Petitioner asserts that the natural gas industry requires inexpensive, nontoxic mercaptans (recognizable odors) to be injected into gas to help people detect gas leaks and to provide confidence that the use of gas is safe.

III. PUBLIC COMMENTS ON THE PETITION

On February 1, 1989 (54 Fed. Reg. 5089), the NRC published a notice of receipt of the petition for rulemaking in the *Federal Register*. Interested persons were invited to submit written comments or suggestions concerning the petition by April 3, 1989. The NRC received 52 letters of comment in response to the

notice: 28 letters from individuals with 3 opposed, 24 in favor, and 1 urging a feasibility analysis; 10 letters from industry and industrial organizations argued against the petition; 13 public interest groups responded with 1 opposed, 10 in favor, and 2 requesting that NRC examine the technical feasibility of such a requirement; and 1 local governmental entity in favor.

Many of the commenters in favor of the petition gave no reasons for their support. Some only provided statements, without giving the basis for their statements, that this requirement would provide assistance in detecting leaks and/or normal releases, that it would provide the public an advanced warning of leaks, or that it would enhance the public's ability to take protective actions or save lives. A number of commenters stated or implied that it would improve public health or safeguard the future. Two commenters suggested property loss and damage would also be avoided. One commenter stated that it would improve NRC awareness of public exposure. Several of the commenters who favored the petition felt it was important to assuage worries of the public, increase public awareness, or aid public acceptance concerning nuclear power and radioactive emissions. One commenter, however, suggested that if an odorant were added to all emissions that it could mean the end of nuclear power. One commenter wanted to be able to detect leaks because she does not trust the government. One commenter also stated that if the NRC was unwilling to require the odorant, the NRC would be demonstrating to the public that it was hiding the danger from emissions. One commenter, who was apparently in favor of the petition, simply submitted an article which addressed lasting problems resulting from the accident at Three Mile Island. A few commenters seemed to be in favor of the odorant only for leaks or abnormal releases, a few clearly believed that information on all releases should be provided to the public in this way. One of these commenters contended that there was no proof that allowable levels of releases were not harmful. Two commenters stated that the public had a right and a need to know about all exposures. Although a few commenters gave an opinion that it would be technically feasible, none gave any information to support that statement other than noting the benefits of the use of mercaptans in natural gas.

None of the commenters presented any information that was convincing concerning the need for or the feasibility of the proposed requirement.

Although the Petitioner's proposal, if it were feasible, would provide one method of warning the public, the means currently in place are more effective. As discussed further below, the comparison with mercaptans in natural gas breaks down when one goes beyond the simplest of factors. As for this method providing more information to the NRC on public exposures, current systems for measuring releases, estimating doses to the public, and reporting to the NRC are more accurate than the use of an odorant in emissions would be. As to the public's right and need to know what their exposures are, existing

information, though not direct, is available to the public. For example, the NRC publishes an annual report entitled "Radioactive Materials Released from Nuclear Power Plants" compiled by Brookhaven National Laboratory for U.S. Nuclear Regulatory Commission, NUREG/CR-2907.¹ Various volumes cover different report years (each also summarizes previous data). Whether or not such a requirement in the long run would improve or diminish the public's faith in nuclear power would be difficult to predict; however, the question becomes irrelevant given the many arguments against the use of an odorant.

Three of the commenters that supported adding an odorant to emissions also suggested the addition of a safe, nontoxic colorant.

This suggestion is outside the scope of the original petition. However, the Commission notes that although a colorant might have some small advantage in terms of the timing of any warning, most of the considerations applicable to the use of an odorant would also be relevant to a similar use of a colorant.

The commenters that opposed the petition presented significant reasons for their opposition. Many commenters stated that there would be no significant increase in the protection of public health and safety. A few commenters concluded that the requirement would have a negative impact on public health and safety and the environment. Some concluded this because of the difficulty of choosing an odorant that would not be toxic when using the large quantities that would be necessary. Others were concerned that the safety of plants would be reduced. Some of the reasons expressed for this second concern were that an odorant would make it difficult for workers to respond in an emergency, problems of odorants at the plant would make a nuclear incident more probable, an odorant might be explosive in the containment or corrosive, an odorant might be detrimental to the functioning of emergency equipment, and modification to systems might be necessary.

A number of the commenters stated that existing effluent monitors and notification procedures are more feasible, more sensitive, and more orderly and that present regulations require the integration of instrumentation and public notification procedures that would allow an adequate time for protective actions. Some concluded that the use of an odorant would be unreliable and inaccurate.

Many of the commenters indicated that use of an odorant is not feasible and discussed the technical difficulties. The main points were that: (1) the quantity of odorant required for even a threshold detection in an Emergency Planning Zone (radius of about 10 miles) for a nuclear power plant is greater than is feasible, (2) odors could not be related to the amount of radiation

¹ Copies of NUREGs may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. A copy is also available for inspection and/or copying at the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC.

because of different half-lives or different concentrations, and (3) it is technically untenable to label fission products with an odor. Some commenters discussed the differences between radioactive emissions and the use of mercaptans in natural gas. They pointed out that: (1) natural gas is piped directly to and used in homes and buildings where there are no other warning devices and where a leak can create an immediate hazard to life and health; (2) mercaptans in natural gas are intended for the detection of very localized leaks, thus very small concentrations are used; and (3) mercaptans are gases that dissolve into the natural gas. These commenters stated that the situation with radioactive emissions is drastically different with the objective of detecting releases to the unbounded outdoors for miles around.

Some commenters indicated the importance of a unique odor and discussed problems with the choice of an odorant. A number of commenters including one in favor of the requirement pointed out problems with mercaptans or similar compounds. One commenter submitted extensive information concerning the toxicity of various mercaptan compounds. One commenter suggested peppermint or a specific perfume. Another commenter pointed out that even a usually pleasant odorant could be an allergen to some people.

Other problems pointed out by the commenters were: (1) the odorant would be overwhelming on site and possibly toxic to workers, (2) there would be a likelihood of false alarms as a result of similar odors or because of system malfunctions, (3) the length of time for the odor to reach the public would be unacceptably long, (4) the cost of the system would be an unnecessary financial burden to licensees, and (5) the public would have to be trained to recognize the odor. Some problems pertaining particularly to the use of an odorant in routine emissions were noted: (1) a problem of aesthetics for nearby residents, (2) olfactory fatigue, and (3) the possibility that the odor would become too familiar and not be responded to when appropriate.

Generally, the NRC agrees with those commenters who were opposed to the petition. Although there may have been a few minor overstatements or misstatements, the NRC agrees that all of the basic reasons given by the commenters for opposing the petition are valid.

In addition, two responders submitted that in accordance with 10 C.F.R. § 2.803, the NRC should not have instituted this proceeding on the basis that the petition was without merit and a waste of NRC, industry, and public resources and presumably not worth public comment.

The NRC's regulations require that a petition that meets the threshold requirements in 10 C.F.R. § 2.802(c) be docketed as a petition for rulemaking. Although publication for comment in the *Federal Register* is discretionary, it is not a burdensome procedure and affords members of the public an opportunity to participate in the agency's deliberative processes that would not otherwise be available. Public comment is frequently of value in considering the merits

of a petition, particularly where the petition raises an issue for the first time. Generally, the NRC prefers to err on the side of openness rather than invite public distrust.

IV. REASONS FOR DENIAL

The NRC has considered the petition, the public comments received, and other related information and has concluded that the issues raised by the petition are without merit. The following is a discussion of the details of that conclusion.

The primary concern of the Petitioner is a perceived need to improve the health and safety of the public by improving the detection of radiation leaks and providing the public with notification to take protective measures. In fact, for the case of nuclear power reactors, systems for the detection of radioactive leaks and the ability to quickly notify the public to take protective measures are in place as required by NRC regulations. A number of these measures were instituted based on lessons learned from the TMI accident.

Sensitive and redundant radiation monitors are located throughout nuclear power plants to provide detection and alarm capability at the point of release. These monitors measure, numerically and directly, the amount of radiation. In contrast, if detection of radiation were dependent upon identification of an odor by a person offsite rather than an instrument, the detection would be delayed by at least the time it would take to reach the first person off site trained to recognize the odor. At best, the use of an odorant in conjunction with radioactive emissions would be an indirect and not a quantitative indication of the presence of radioactivity.

The Petitioner contends that the accident at Three Mile Island demonstrated deficiencies in the ability to alert the population of dangerous releases.² After the accident, the NRC did conclude that the requirements for emergency preparedness needed to be significantly upgraded. Consequently, regulations elaborating the scope and contents of emergency plans for nuclear power plants were instituted. Included in these requirements are capabilities to promptly and accurately detect releases of radioactivity, as well as the potential for a release, and to notify the public within 15 minutes of the declaration of an emergency. Before a nuclear power plant is licensed to operate, the NRC must verify that the licensee's emergency plans and procedures are adequate to protect the public health and safety in the event of an accident. Further, the emergency planning for these licensees must be coordinated with local and state authorities. Also,

² The Petitioner should note that careful analysis of the actual radioactive release during the accident at Three Mile Island showed that the resultant dose to the public was comparable to that which would result from one or two trans-Atlantic commercial airline trips, and therefore, would not be considered dangerous.

emergency plans must be maintained and updated annually and exercises must be conducted annually (with state and local participation biannually). In addition, the NRC inspects licensees annually to ensure compliance with the regulatory requirements.

In summary, for the case of nuclear power plants, a system is already in place, which the NRC has previously determined provides adequate protection of the public health and safety. It is unlikely that the addition of an odorant to emissions could add any margin of safety to that provided by existing systems. Therefore, the addition of an odorant to the radioactive emissions from power reactors would not meet the Commission's Backfit Rule, 10 C.F.R. § 50.109.

In the case of NRC licenses other than those for power reactors, emergency preparedness is commensurate with the hazard. The potential radioactive hazards from most of these licensees are not sufficient to affect the general public. However, for those licensees with sufficient materials to meet the criteria for requiring an emergency plan, the appropriate surveys and monitoring for radioactive releases are required, as well as timely reporting of radioactive releases to the proper authorities. As in the case of power reactors, the existing required systems have been judged adequate and are superior to the indirect indication that would be provided by an associated odorant.

The Petitioner specifically asserts that radiation plumes are erratic and unpredictable in their dispersion upon release because of varying weather and geophysical characteristics of the terrain.

Plumes of radioactive substances behave in accordance with their physical and chemical characteristics. In this respect, they are no different from plumes of stable elements with the same physical and chemical characteristics, such as temperature, velocity, density, particle size, etc. The NRC, other federal agencies, and licensees routinely predict the dispersion of radioactive plumes based on dispersion models (that are often computerized) that include factors such as weather and terrain. As with all modeling there are associated uncertainties. These models are used to predict the path of plumes and to enable public officials to recommend protective actions before the plume arrives at downwind, populated areas.

In contrast, the use of odorants would require the arrival of the plume in populated areas to initiate any protective actions. Precautionary evacuation, with virtually no radiation dose to the public, would not be an option with the use of an odorant. An additional problem is that a gaseous odorant may not have the same physical characteristics as the radioactive releases and thus may not follow the same path as the radioactive emissions. If this were the case, the detectability of the odorant may not be a good indicator of the presence or the concentration of radioactivity.

As discussed extensively by some of the commenters, the use of an odorant for the purpose of warning people of radioactive releases is not feasible. Most

sources of potential releases are not in a form such that an odorant could be dissolved into or otherwise associated with the radioactive material in a way that they would be automatically released together. It would be necessary to rely on a system of detecting radioactivity, such as existing measuring devices, which would then trigger the addition of odorants to stack effluents or venting systems. It would not be possible to account for all sources of releases, although main stacks or vents would be the primary sources of releases. In part because of the complexity of implementing such a requirement, reliance on licensee compliance and government enforcement would still be necessary. Thus, the problem of lack of trust of a segment of the public in the licensees and the government could not be eliminated.

A further concern is that the concentrations of odorants used would have to be very high at the point of release in order to be detectable at any significant distance. Concentrations reaching people would vary considerably, depending on the distance from the source and other factors, such that odors would likely be overwhelming on site and in some locations off site and quite possibly toxic while being undetectable at other locations. As noted above, it would also be impossible for the chemical and physical characteristics of the odorant to match those of all the releases that are both gaseous and particulate. Thus, the concentrations of odorants would not remain proportional with the concentrations of contaminants. The concentrations of odorants would also not match the relative hazard of contaminants, because the radiotoxicity of various nuclides varies greatly.

The prospect of injecting an odorant into emissions of radioactivity also raises an environmental issue. If the odorant were used in connection with normal permitted releases as specifically suggested by some of the commenters, it would cause the institution of an objectionable and continual insult to the air quality in and downwind from licensed facilities. For example, it is highly likely that the addition of a mercaptan-like odorant to radionuclides used in the nuclear medicine sections of hospitals would be intolerable. Similarly, residents downwind from nuclear power plants would be subjected to a decreased quality of air. It would be difficult, if not impossible, to select an odorant that would not be toxic in the concentrations required. As discussed above, the addition of an odorant would provide little, if any, benefit to the protection of the public health and safety. Therefore, the detrimental effects on the environment outweigh the benefits, if any, of injecting an odorant into radioactive emissions from NRC licensed facilities.

The petition erroneously states that scientific studies prove that even the smallest amounts of ionizing radiation cause harmful health effects. On the contrary, there is a controversy in science on the health effects, if any, of very small doses of ionizing radiation. Nonetheless, the NRC regulates on the basis of the linear nonthreshold hypothesis which assumes that there is no threshold

of dose below which there is no harm, i.e., that even the smallest doses are potentially harmful.³

Taking all the considerations above into account with respect to the early detection goal of the proposed requirement, the Petitioner fails to recognize that more timely and sensitive methods of detection of radioactive emissions are already in place. Similarly, with respect to the ability to notify the public to take protective actions in a timely manner, the Petitioner does not recognize that an effective method for notifying the public is already in place.

Therefore, there would be little, if any, increased benefit to the public health and safety as a result of the proposed requirement.

In conclusion, the NRC finds the petition without merit, and denies the petition.

For the Nuclear Regulatory
Commission

James M. Taylor
Executive Director for
Operations

Dated at Rockville, Maryland,
this 27th day of July 1992.

³The Petitioner also erroneously states that the natural gas industry requires the injection of odors into gas for commercial and domestic use. In fact, it is the federal government that requires the use of odorants in natural gas as stated in the regulations (49 C.F.R. § 192.626).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket Nos. 50-440-A
50-346-A
(Applications to Suspend
Antitrust Conditions)

OHIO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1)

CLEVELAND ELECTRIC ILLUMINATING
COMPANY and
TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1; Davis-Besse Nuclear
Power Station, Unit 1)

August 12, 1992

The Commission denies City of Cleveland's appeal of a Prehearing Conference Order, LBP-91-38, 34 NRC 229 (1992), which granted Applicants' hearing petitions. The Commission determines that its broad authority to amend licenses at the request of licensee extends to requests for amendments to antitrust conditions. The Commission also denies City of Cleveland's motion for revocation of the Commission's referral of the hearing requests to the Licensing Board. The Commission determines that the Licensing Board's development of a detailed record and analysis of the complex issues raised in this proceeding will aid the Commission in any review that may be undertaken.

ATOMIC ENERGY ACT: AUTHORITY TO AMEND OPERATING LICENSES

Amendments to operating licenses are contemplated under both the Atomic Energy Act (AEA) and the Commission's implementing regulations. See AEA §§ 161, 182, 183, 187, 189, 42 U.S.C. §§ 2201, 2232, 2233, 2237, 2239 (1988); 10 C.F.R. §§ 50.90, 50.92 (1992).

ATOMIC ENERGY ACT: RIGHT TO A HEARING

Hearing rights provided in section 189 of the Atomic Energy Act may be invoked not only by interested members of the public but also by license applicants or licensees. 42 U.S.C. § 2239(a)(1) (1988).

ATOMIC ENERGY ACT: RIGHT TO A HEARING

Although a license applicant or licensee may have a right to a hearing under section 189 of the AEA if its interest is adversely affected (e.g., if a license or amendment application is denied or a license is suspended or revoked), a hearing must still be requested; otherwise Staff's decision is final. See 10 C.F.R. §§ 2.103(b), 2.105(d), 2.108(b), 2.1205 (1992).

ATOMIC ENERGY ACT: ANTITRUST JURISDICTION

The Commission has jurisdiction under sections 103, 161, and 189 of the AEA to entertain Applicants' request to amend their licenses to suspend the effect of antitrust conditions. Neither the statutory language nor the legislative history of section 105 of the AEA suggests that Congress intended antitrust license conditions to be immutable, irrespective of whether the conditions have become unjust over time. Neither *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977), nor *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1; Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-428, 6 NRC 221 (1977), prohibit suspension of antitrust conditions at a licensee's request.

ATOMIC ENERGY ACT: RIGHT TO A HEARING

Staff's consideration of Applicants' amendment request was not a "hearing" that satisfies section 189 of the AEA; Staff's determination was administrative in nature and does not suffice as an adjudicatory review of the application request.

MEMORANDUM AND ORDER

I. INTRODUCTION

The Atomic Safety and Licensing Board (Licensing Board) granted hearing petitions of Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company (Applicants) in a Prehearing Conference Order dated October 7, 1991. LBP-91-38, 34 NRC 229. The City of Cleveland (Cleveland), an intervenor in the instant dockets, appealed this order on the grounds that this proceeding lacks a legal basis. Cleveland also sought revocation of the Commission's referral of the hearing requests to the Licensing Board. For the reasons stated below, we *deny* Cleveland's appeal and *deny* the motion to revoke the referral.

The effect of our order is simply to allow the Board and parties to proceed to resolve the question of whether Applicants were properly denied suspension of antitrust conditions attached to their licenses. However, as we explain below, the basis for our decision involves intricate considerations relating to our regulatory authority.

II. BACKGROUND

This matter began when Ohio Edison Company filed an application in September 1987 for an amendment to suspend the antitrust conditions in the operating license for the Perry Nuclear Power Plant. In May 1988, Toledo Edison Company and Cleveland Electric Illuminating Company filed a joint application also requesting relief from the Perry antitrust conditions and additionally seeking suspension of the antitrust conditions in the Davis-Besse nuclear plant licenses. After considering public comments and advice from the Department of Justice's Antitrust Division, the Nuclear Regulatory Commission (NRC) Staff in April 1991 denied the Applicants' requests. 56 Fed. Reg. 20,057 (May 1, 1991). The Applicants petitioned for a hearing on the Staff's denial of the requested amendment. The Applicants' hearing petitions were filed with the Office of the Secretary (Secretary) of the Commission in accordance with Staff's notice of denial of the Applicants' amendment requests. After receiving the requests for a hearing, petitions for intervention, and Cleveland's opposition to a hearing, the Secretary referred the requests and petitions to the Licensing Board for appropriate action.¹

¹ See Memorandum from S.J. Chilk, Secretary, to B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel (June 7, 1991).

The Licensing Board ruled on the requests for hearing and petitions for intervention and other threshold procedural matters in its Prehearing Conference Order, LBP-91-38, *supra*. Pursuant to 10 C.F.R. § 2.714a, Cleveland filed its appeal of LBP-91-38. The Applicants and Staff opposed the appeal. Additionally, on December 19, 1991, Cleveland filed a motion, also opposed by Staff and Applicants, for Commission revocation of the referral of the hearing petitions to the Licensing Board and also for Commission adoption of NRC Staff's April 24, 1991 decision denying the Applicants' amendment requests.

III. THE LICENSING BOARD'S DECISION

In determining whether to grant the Applicants' hearing requests, the Licensing Board addressed Cleveland's four main objections to entertaining such a hearing: (1) the Applicants were not "person[s] whose interest may be affected" by this proceeding such that they are entitled to a hearing under section 189a(1) of the Atomic Energy Act (AEA);² (2) section 189a(1) does not enumerate the subject matter of this proceeding as being subject to a hearing, i.e., the denial of a request for suspension of antitrust conditions; (3) Applicants have already had their hearing before Staff; and (4) the Commission lacks the authority to grant the relief requested.³

In LBP-91-38, the Licensing Board easily dismissed Cleveland's first three arguments. The Licensing Board concluded that Applicants are considered "persons" within the meaning of the AEA and that their "interests" are affected by the outcome of this proceeding because it is their amendment request that was denied.⁴ Although the Licensing Board conceded that a "suspension" is not typically considered an amendment, the Licensing Board nevertheless concluded that the word suspension is used in the instant applications to characterize Applicants' request to have the antitrust conditions nullified, and as such is "by any reasonable interpretation" a request for an "amendment" of the existing operating licenses.⁵ Furthermore, the Licensing Board found that Staff's review was not an adjudicatory determination regarding the merits of the application to which Applicants are entitled under section 189a. Although an administrative denial by Staff regarding an amendment application may be dispositive, the statute requires a hearing if the Applicants request one.

The Licensing Board found more problematic Cleveland's fourth argument regarding whether the Commission has the authority to suspend antitrust conditions after the issuance of the operating license. Recognizing the Commis-

² 42 U.S.C. § 2239(a)(1) (1988).

³ LBP-91-38, *supra*, 34 NRC at 237.

⁴ *Id.* at 238.

⁵ *Id.* at 238-39.

sion's limited antitrust jurisdiction under section 105 of the AEA,⁶ the Licensing Board nevertheless determined that the Commission has the statutory authority to amend antitrust conditions under the general provisions contained in section 189a of the AEA and implemented in 10 C.F.R. § 50.90 providing for amendments to licenses at the licensees' request.

IV. ARGUMENTS BEFORE THE COMMISSION

On appeal, Cleveland argues that the Licensing Board erred in relying on section 189a of the AEA for authority to conduct the antitrust review sought by Applicants.⁷ Cleveland argues that section 189a is purely procedural in nature and does not grant a substantive right to amend the operating license. In addition, according to Cleveland, section 189 confers hearing rights on the public only, not on the Applicants. Cleveland further maintains that the Licensing Board misinterpreted the statute and its implementing regulations (specifically, 10 C.F.R. § 50.90) regarding the authority of the Commission to conduct postlicensing antitrust review. Cleveland interprets prior Commission decisions, namely, *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977) (*South Texas*), and *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1; Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-428, 6 NRC 221 (1977) (*St. Lucie*), to hold that any postlicensing antitrust review is prohibited. In addition, Cleveland argues that the Commission's authority to enforce antitrust license conditions does not include the authority to delete or modify those same conditions.

Finally, Cleveland maintains that section 105 of the AEA provides the only authority for the Commission to conduct antitrust review, and because that section does not provide authority to conduct postlicensing review, a licensee cannot confer this jurisdiction simply because it volunteers to undergo the amendment process.⁸

The NRC Staff maintains that the Licensing Board was correct in determining that the Commission has authority to conduct a hearing regarding the amendment

⁶ 42 U.S.C. § 2135 (1988).

⁷ See Brief of City of Cleveland, Ohio, in Support of Notice of Appeal of Prehearing Conference Order Granting Request for Hearing at 36-37 (Oct. 23, 1991) (Cleveland's Brief).

⁸ Cleveland has moved for leave to file a reply to the Applicants' and Staff's briefs opposing Cleveland's appeal. Cleveland's reply was attached to the motion. NRC Staff opposes this motion, and has requested that, if the motion is granted, Staff should be permitted to respond to Cleveland's reply. See NRC Staff's Answer in Opposition to the Motion of the City of Cleveland, Ohio, for Leave to File a Reply Brief at 2 (Dec. 26, 1991). We find that the reply adds nothing of substance to Cleveland's position. It essentially provides additional comments regarding the same arguments that were addressed in Cleveland's original brief. For these reasons, Cleveland's motion for leave to file a reply to its brief in support of its appeal of LBP-91-38 is *denied*.

or modification of license conditions, including antitrust conditions.⁹ According to Staff, section 105 of the AEA limits the Commission's authority to initiate antitrust review. However, Staff contends that section 105 does not specifically address license amendments sought by licensees and thus cannot be interpreted as limiting the Commission's general authority to amend licenses that it issues. Staff argues that *South Texas* and *St. Lucie* address only whether the NRC can impose new restrictions due to alleged anticompetitive behavior by a licensee, but do not specifically address license amendments sought by licensees. Moreover, the Staff contends that the Commission's broad statutory power to impose conditions in a license include: the power to relax such conditions if circumstances warrant.

The Applicants' arguments are essentially the same as those of NRC Staff.¹⁰ However, in addition, Applicants emphasize that their requests here should not entail a traditional "antitrust review" under section 105. More specifically, the Applicants argue that the purpose of a traditional section 105 antitrust review is to determine whether licensees are or were acting anticompetitively in order to determine whether new antitrust conditions are warranted on a license. Applicants agree that this type of antitrust review is limited under section 105. In this proceeding, Applicants argue that a traditional "antitrust review" is not required to resolve the questions raised, but rather that statutory interpretation of section 105 of the AEA is necessary.¹¹ In support of their argument, Applicants note that a threshold question now before the Licensing Board, as agreed to by all the parties, is whether the Commission has the general authority to retain antitrust license conditions under certain circumstances.¹² Therefore, according to Applicants, the limitations on postlicensing "antitrust review" do not apply in this case.

⁹ NRC Staff's Brief in Opposition to the City of Cleveland's Appeal of Prehearing Conference Order Granting Request for Hearing (Nov. 21, 1991).

¹⁰ Applicants' Brief in Opposition to the Appeal of the City of Cleveland, Ohio, of the Licensing Board's Prehearing Conference Order (Nov. 21, 1991).

¹¹ *Id.* at 5-8.

¹² The parties informed the Licensing Board that they all agreed upon the following as the "bedrock" legal issue in this proceeding:

Is the Commission without authority as a matter of law under section 105 of the Atomic Energy Act to retain antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of the electricity from alternative sources, all as appropriately measured and compared?

And, the parties further agreed to address the following issue:

Are the Applicants' requests for suspension of the antitrust license conditions barred by res judicata, or collateral estoppel, or laches, or the law of the case?

See Letter from R. Goldberg and C. Strother, Jr., Counsel for the City of Cleveland, to Judges Miller, Hechhoefer, and Bollwerk (Nov. 7, 1991).

V. ANALYSIS

A. The Commission's General Authority Over Licenses

It is clear that the Commission can amend licenses. Amendments to licenses are contemplated under both the AEA and the Commission's implementing regulations.¹³ Although, as Cleveland points out, section 189 does not provide the substantive standard by which the proposed amendment should be judged, section 189a does provide a right to a hearing and prescribes procedural requirements attaching to certain specified NRC actions, including proceedings to amend licenses.

Contrary to Cleveland's assertions, the hearing rights provided in section 189 may be invoked not only by interested members of the public but also by license applicants or licensees. Section 189a(1) provides in its pertinent part:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award of royalties under sections 153, 157, 186c, or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.¹⁴

Apparently Cleveland concedes that Applicants are "persons" within the meaning of AEA § 11, 42 U.S.C. § 2014 (1988), and have an interest affected by this proceeding. However, Cleveland maintains that the language contained in section 189a(1), which states that a person whose interest is affected by a proceeding shall be admitted as a party to the proceeding, cannot be referring to the Applicants here because only persons other than the Applicants are required to establish standing and must be admitted as parties.¹⁵ Cleveland's interpretation misses the purpose behind section 189, which is to provide an opportunity for hearing upon the request of any person whose interest may be affected by a proceeding enumerated in that section. Although a license applicant or licensee may have a right to a hearing under section 189 if its interest is adversely affected (e.g., if a license or amendment application is denied or a license is suspended or revoked), a hearing must still be requested.¹⁶ Cleveland seems to assume that the Commission will always automatically hold a hearing upon a Staff denial

¹³ See AEA §§ 161, 182, 183, 187, 189, 42 U.S.C. §§ 2201, 2232, 2233, 2237, 2239 (1988); 10 C.F.R. §§ 50.90, 50.92 (1992).

¹⁴ 42 U.S.C. § 2239(a)(1) (1988).

¹⁵ Cleveland's Brief at 38-41.

¹⁶ See, e.g., 10 C.F.R. §§ 2.105(d)(1), 2.202(a)(3) (1992).

of an amendment application.¹⁷ This is incorrect. In general, and in particular regard to an amendment proceeding, a hearing must be requested; otherwise Staff's decision is final.¹⁸ Although we agree with Cleveland that Applicants in this case do not have to file intervention petitions under 10 C.F.R. § 2.714 to establish standing, the Applicants nevertheless had to and did file a timely demand for a hearing. In this respect, it was necessary for the Licensing Board to review the Applicants' demand for hearing and it was not until their hearing petitions were granted that the Applicants were "admitted" as parties.

Cleveland contends that the lack of Commission case law establishing applicants' and licensees' rights under section 189, together with the cases that hold that section 189 confers hearing rights on the public,¹⁹ supports the argument that section 189 does not confer rights on the Applicants here. However, the cases cited by Cleveland do not state that section 189 confers hearing rights on the public only. In fact, one case upon which Cleveland relies, *Bellotti v. NRC*, assumes in the context of defining the rights of other persons in enforcement proceedings that licensees have a right to a hearing.²⁰ The dearth of case law regarding a licensee's or an applicant's right to a hearing under section 189a(1) is a reflection of long-standing, unchallenged Commission interpretation that the Commission must provide the opportunity for a hearing to a licensee or applicant in certain circumstances.²¹ Cleveland has not persuaded us that we should employ any other interpretation of section 189.

B. The Commission's Authority to Amend Antitrust License Conditions

Although the Commission has the authority to amend conditions of licenses it issues, the more difficult question raised by Cleveland is whether this general authority is applicable when a license condition involves antitrust matters,

¹⁷ In further support of its argument that section 189a(1) only confers hearing rights on parties other than applicants, Cleveland points out that in a proceeding involving a construction permit an applicant need not request a hearing; a hearing is automatically provided for under the AEA. Therefore, according to Cleveland, it would not make sense for section 189a(1) to apply to applicants for construction permits, because they would be required to request a hearing that already must be conducted. Cleveland's Brief at 40-41. However, the mandatory hearing for construction permits is the exception, not the rule, under section 189.

¹⁸ See 10 C.F.R. §§ 2.103(b), 2.105(d), 2.108(b), 2.1205 (1992).

¹⁹ Cleveland cites several cases that address public participation in certain NRC proceedings under section 189a(1). Cleveland's Brief at 39-40, citing *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1446 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985); *Bellotti v. NRC*, 725 F.2d 1380, 1383, 1386 (D.C. Cir. 1983); *Sholly v. NRC*, 651 F.2d 780, 791 (D.C. Cir. 1980) (per curiam), vacated as moot and remanded, 459 U.S. 1194 (1983).

²⁰ In *Bellotti*, the dissenting opinion criticizes the majority for making third-party hearing rights dependent on the licensee requesting a hearing. This argument necessarily assumes the right of the licensee to request a hearing, and the dispute was whether others' hearing rights should depend on whether licensee asserted this right. 725 F.2d at 1386 (Wright, J., dissenting).

²¹ Such interpretation reaches back to the earliest days of the regulatory program established under the AEA of 1954 and is reflected in the early procedural regulations of the Atomic Energy Commission, our predecessor agency. See 21 Fed. Reg. 804 (1956).

or whether any postlicensing amendment to an antitrust condition would be inconsistent with limitations in section 105c of the AEA. This specific question is not addressed directly by Congress in the AEA or its legislative history, and it has not been squarely addressed in any other Commission decision. Cleveland argues that amendments to antitrust conditions are not permitted because they are not enumerated in section 105, which is the only section in the AEA that contains express language regarding antitrust authority.

Cleveland points out, the *South Texas* and *St. Lucie* decisions address the limits of the NRC's authority to conduct antitrust review. We agree that these cases stand for the principle that, in accord with the underlying policy of section 105c, the NRC cannot initiate antitrust review to impose new antitrust conditions after the operating license has been issued, except under limited circumstances, not applicable here. However, as we will explain in more detail below, these cases do not squarely resolve the issue at hand, i.e., whether the Commission has the authority to suspend or modify the antitrust conditions already in a license, at the request of a licensee, pursuant to the Commission's general authority to amend conditions in licenses that it issues.

The specific question before the Commission in *South Texas* was at what point may an antitrust proceeding under section 105c be ordered subsequent to the issuance of the construction permit but prior to the issuance of the operating license. The proceeding was initiated after one of the joint holders of a construction permit petitioned for antitrust review because of alleged anticompetitive behavior by Houston Lighting and Power Company (HL&P), a co-holder of the construction permit. HL&P moved the Commission to waive the requirement that initiation of operating license antitrust review procedures await submission of the final safety analysis report that accompanies the operating license application.²² The Commission's decision in that proceeding did not address just this narrow question, but also discussed the Commission's overall antitrust responsibilities.

In *South Texas*, the Commission reviewed the legislative history regarding the 1970 amendments to section 105c.²³ The 1970 amendments to section 105c subjected all applicants for a section 103 facility license to a mandatory initial antitrust review by the Attorney General and, in the case of any contested adverse antitrust aspects, an adjudicatory hearing before the Commission at the construction permit stage.²⁴ In addition, if significant changes have occurred after the earlier antitrust review, an adjudicatory hearing would be conducted at the operating license stage to determine any adverse implications of these

²² 5 NRC at 1303.

²³ *Id.* at 1312-16.

²⁴ Section 105c, 42 U.S.C. § 2135(c) (1988).

changes.²⁵ In light of this significant hurdle placed in the licensing process, Congress constructed section 105c in such a way that it essentially prohibited postlicensing antitrust review undertaken to determine adverse antitrust aspects of a license. This prohibition was intended to eliminate the uncertainty of further antitrust review after the licensee had already invested considerable resources.²⁶

In light of these restrictions on postlicensing antitrust review, the Commission concluded in *South Texas* that the NRC does not have broad antitrust policing powers independent of licensing which could be relied upon as authority for postlicensing antitrust review undertaken to place *new* conditions in a license.²⁷ In general, "the Commission's antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited scheme set forth in Section 105."²⁸ This conclusion was based not only on the statutory language and its legislative history, but also was found to be consistent with the Commission's overall responsibilities.²⁹ As the Commission observed in *South Texas*, the Commission is in a unique position prior to the issuance of the initial operating license to identify and correct incipient anticompetitive influences that may flow from access to nuclear power. Therefore, at the prelicensing stage, section 105c provides for Department of Justice and Commission involvement and public participation. However, at the postlicensing stage the Commission is not so uniquely situated; the Department of Justice's Antitrust Division, the Federal Trade Commission, and the federal courts provide antitrust enforcement alternatives.

Cleveland argues, in essence, that it would be inconsistent with our *South Texas* decision to find that the Commission's general authority to amend licenses is not limited by section 105 even though the policing power is so limited. Cleveland construes the holding in *South Texas* too broadly. Although we held that the Commission does not have broad antitrust policing power,³⁰ a new antitrust conditions to the license, the Commission indicated that the policing power under section 186 of the AEA remains to ensure compliance with antitrust conditions attached to the license pursuant to section 105c review.³⁰ Although the power to enforce the conditions may not necessarily contemplate the power to relieve licensees of previously imposed conditions, the Commission's assertion of that power supports the view that provisions other than section 105c may be

²⁵ Section 105c(2), 42 U.S.C. § 2135(c)(2) (1988).

²⁶ See *Prelicensing Antitrust Review of Nuclear Power Plants: Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess. 37-38 (1969)* (remarks of Rep. Holtfield, ICAE Chairman).

²⁷ 5 NRC at 1317.

²⁸ *Id.*

²⁹ *Id.* at 1316-17.

³⁰ Interpreting *dictum* from *Cities of Statesville v. AEC*, 441 F.2d 962 (D.C. Cir. 1969), the Commission noted that it does have "continuing police power over the conditions properly placed on licenses, after [section] 105(c) antitrust review." 5 NRC at 1317.

relied upon to address antitrust issues raised by conditions in NRC licenses.³¹ Moreover, congressional deliberation on the 1970 amendments to section 105c did not include any discussion regarding when or whether a licensee could request the NRC to suspend or modify antitrust license conditions. Therefore, the legislative history cannot be interpreted as prohibiting the suspension of antitrust conditions as requested in this case.

St. Lucie,³² the other decision upon which Cleveland relies, also offers little guidance regarding whether the NRC can consider suspension of antitrust conditions at the request of a licensee. That case involved the question of whether the Commission has authority to conduct antitrust review if significant changes occurred after a license had been issued. The petitioners sought both leave to intervene out of time and an antitrust hearing concerning three operating plants. The plants had been previously licensed without antitrust review as research and development facilities under section 104b. In petitioners' view, the plants were really commercial generating facilities that should be subject to section 103 requirements, including antitrust review.³³ Relying on section 186a of the AEA, the petitioners argued that under the Commission's broad powers to revoke a license the Commission has the authority to order antitrust review after the operating license has been issued.³⁴ The Atomic and Safety and Licensing Appeal Board rejected these arguments. The Appeal Board found that after *South Texas* it was clear that "the NRC's supervisory antitrust jurisdiction over a nuclear reactor licensee does not extend over the full 40-year term of the operating license but ends at its inception," except as necessary to enforce the terms of the license, to revoke one fraudulently obtained, or to issue a new license if a plant is sold or is significantly modified.³⁵

The Applicants' request here does not fall within one of the exceptions enumerated in *St. Lucie* which would provide for postlicensing antitrust review. However, that decision again did not address the issue at hand, whether the Commission may act on a request to suspend the effect of existing antitrust conditions. Therefore, although *St. Lucie* does not provide authority to suspend antitrust conditions at a licensee's request, neither does it preclude it. The

³¹ As the Licensing Board pointed out in LBP-91-38, "the Commission's recognition of the 'policing' power was in the context of its authority to enforce existing conditions, a circumstance that may not encompass these licensees' requests to be relieved of previously imposed conditions." 34 NRC at 244 n.42 (emphasis in original). However, if the Commission has the power to enforce conditions, it seems that it could also suspend their effect. The Commission could simply choose not to enforce a condition and achieve the same result with less opportunity for the beneficiaries of the antitrust conditions to be heard. See *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 382-83 (D.C. Cir. 1983).

³² 6 NRC 221 (1977). The Commission declined review of the Appeal Board's decision. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1; Turkey Point Nuclear Generating Plant, Units 3 and 4), CLJ-77-26, 6 NRC 538 (1977).

³³ 6 NRC at 224.

³⁴ *Id.* at 225.

³⁵ *Id.* at 226.

conclusion that *St. Lucie* was not entirely determinative on the issue of the Commission's authority to review antitrust matters is further supported by the decision of the U.S. Court of Appeals for the District of Columbia Circuit on review.³⁶ The Court of Appeals indicated that the question of whether section 105 is the Commission's exclusive grant of antitrust authority was beyond the scope of that proceeding and, thus, the question was left open.

Our conclusion that neither *St. Lucie* nor *South Texas* prohibits suspension of antitrust conditions at a licensee's request is further supported by *dicta* in *Davis-Besse*, a later Appeal Board decision involving the same Applicants as in the present proceeding.³⁷ In *Davis-Besse*, the Appeal Board indicated that antitrust license conditions may be removed or modified after the issuance of the operating license. The Appeal Board suggested that if antitrust license conditions, which seemed fair at the time they were imposed, prove to be inequitable in the future, the Director of Nuclear Reactor Regulation has the authority to modify license conditions.³⁸

In addition to its arguments that suspension of the antitrust conditions in this license would be inconsistent with section 105c and Commission precedent, Cleveland argues that the Licensing Board ignored the effect that removal of the antitrust condition would have on the beneficiaries of the conditions. According to Cleveland, to adopt a rule that would limit its ability to seek relief from anticompetitive behavior through imposition of new license conditions, but allow the licensee to change existing conditions at any time, would adversely affect Cleveland's ability to provide an affordable, reliable power supply to those served by its municipal system. Thus, Cleveland maintains, the beneficiary of an antitrust license condition would be placed in the difficult position of having to defend the appropriateness of existing conditions from attack by the licensee, but would not be afforded the corresponding opportunity of being able to seek imposition of new conditions in a license.³⁹ Moreover, according to Cleveland,

³⁶ *Fort Pierce Utilities Authority v. United States*, 606 F.2d 986, 1001 n.17 (D.C. Cir.), cert. denied, 444 U.S. 842 (1979).

³⁷ *Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3)*, ALAB-560, 10 NRC 265 (1979).

³⁸ *Id.* at 294. The Appeal Board indicated that the requests for modification of license conditions would be handled by the Director of Nuclear Reactor Regulation under 10 C.F.R. §§ 2.200-2.204 and 2.206. While those sections of Part 2 are typically used in enforcement proceedings and Applicants' requested suspension in this case is more properly categorized as a license amendment rather than a request for enforcement action, the principle that the Commission has the authority to modify antitrust conditions at a licensee's request remains intact.

³⁹ The question whether parties may request that additional antitrust conditions be placed in the license if a licensee, in effect, restores NRC antitrust jurisdiction by seeking suspension of antitrust conditions, was raised by American Municipal Power—Ohio, Inc. (an intervenor), at the prehearing conference held on September 19, 1991, in this proceeding. See Prehearing Conference Transcript at 156-87. The Licensing Board did not squarely address this question in LBP-91-38. Nor need we decide it at this time. However, such an approach may not be inconsistent with the underlying philosophy of section 105c and could be sound policy. Congress placed a limitation on postlicensing antitrust review to provide certainty to the licensee that it would not be drawn into continuing antitrust proceedings before the Commission. When the licensee initiates a proceeding to suspend or modify the antitrust conditions, the policy of insulating the licensee from continuing antitrust proceedings may not hold the same, if any, force.

review of Applicants' request in this case and others in the future would threaten to involve the Commission unendingly in antitrust matters.⁴⁰

We recognize that under Applicants' and Staff's theory of antitrust jurisdiction a party such as Cleveland may not come to the Commission for relief from the licensee's anticompetitive behavior unless that behavior is proscribed by existing antitrust conditions. However, an aggrieved party is not left without a remedy. As indicated in *South Texas*, the Department of Justice's Antitrust Division can provide assistance in obtaining relief from anticompetitive behavior, and the Federal Trade Commission as well as the federal courts provide antitrust enforcement forums.⁴¹

We conclude that the Commission does have jurisdiction under sections 103, 161, and 189 of the AEA to entertain Applicants' request on its merits. As the agency empowered to issue nuclear plant licenses, only the Commission can grant the relief — if it is warranted — requested by the Applicants in this proceeding. If we were to determine that the NRC lacks the authority to suspend the antitrust license conditions (and if this determination were upheld), then the conditions would remain frozen in place for the life of the license no matter how unsuitable. Although Congress could have limited the NRC's authority in this manner, neither the statutory language nor the legislative history of section 105 suggests that Congress intended such a result. We do not accept the proposition that antitrust license conditions are immutable, irrespective of whether the conditions have become unjust over time.⁴²

We should emphasize that our decision today goes no further than to determine that the Commission has authority to amend a license at the request of the licensee to suspend the effect of antitrust conditions. Any such suspension by its very nature may be rescinded, and the conditions would then, once again, have full force.⁴³

⁴⁰ Cleveland's Brief at 32-33.

⁴¹ 5 NRC at 1316.

⁴² Furthermore, judicial precedent suggests the same conclusion that the Commission has authority to modify license conditions that prove to be unjust after time, due to changes in law or fact. A court can modify terms of an injunctive decree involving antitrust restrictions if the reasons for imposing those restrictions are no longer present or if the conditions have become unfairly burdensome. "The Court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *System Federation v. Wright*, 364 U.S. 642, 647 (1961) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)). This principle applies to the quasi-judicial role of the Commission as well. "An agency, like a court can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229 (1965); see also *Gus South, Inc. v. Brady*, 877 F.2d 858, 862-63 (11th Cir. 1989).

⁴³ See *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984) ("The lifting of a suspension does nothing to alter the original terms of a license; indeed, it removes a significant impediment to the enforcement of those terms") (emphasis in original), *aff'd en banc*, 789 F.2d 26 (D.C. Cir.), *cert. denied*, 479 U.S. 923 (1986).

C. Cleveland's Motion for Revocation

Having decided that the NRC has authority to suspend the effect of antitrust conditions in a license at the licensee's request, we must address Cleveland's motion for revocation of the referral of the Applicants' hearing requests to the Licensing Board. We deny Cleveland's motion for two reasons. First, Staff's administrative review was not a substitute for the adjudicatory hearing to which Applicants are entitled in that the decision rendered by Staff was a denial of a request for a license amendment. Second, due to the complexity of the issues raised in this proceeding, further development by the Licensing Board prior to any final Commission decision is appropriate.

Cleveland's arguments that Staff's denial is a final Commission decision pursuant to 10 C.F.R. § 2.101 are unavailing.⁴⁴ Section 2.101 is only applicable in this proceeding insofar as it sets out procedural requirements for information to be included in a license. The procedural requirements in section 2.101 regarding the disposition of antitrust matters are not applicable. The review under section 2.101(e) is limited to whether significant changes have occurred and is conducted in proceedings involving applications for operating licenses, not in amendment proceedings such as this.⁴⁵

Moreover, contrary to Cleveland's suggestions,⁴⁶ Staff's consideration of Applicants' amendment request was not a "hearing" that satisfies section 189. Staff's decision is administrative in nature and does not suffice as an adjudicatory review of the application request. As the Licensing Board pointed out in LBP-91-38, NRC process requires after Staff denial of an amendment application that an applicant be informed of the denial and its opportunity for a hearing, and if a hearing is requested it must be conducted by an adjudicatory tribunal.⁴⁷

While the Commission could elect to consider the matter in the first instance,⁴⁸ review by the Licensing Board at this time is more suitable. The Board's development of a detailed record and analysis of the complex issues raised in

⁴⁴ See Motion of City of Cleveland, Ohio, for Commission Revocation of the Referral to ASLB and for Adoption of the April 24, 1991 Decision as the Commission Decision at 2-3 (Dec. 19, 1991) (Cleveland's Motion).

⁴⁵ However, under 10 C.F.R. § 2.101(e), a significant changes review is undertaken if an amendment request involves the transfer of control of the operating license from the original owner(s) of a facility to another entity. Although that circumstance does not involve the issuance of a new license, a review of any adverse antitrust implications raised by the new ownership has never been undertaken. See, e.g., the Director of Nuclear Reactor Regulation's Reevaluation and Affirmation of No Significant Change Finding Pursuant to Seabrook Nuclear Station, Unit 1 Antitrust Post-Operating License Review (Apr. 9, 1992).

⁴⁶ Cleveland's Motion at 3-4.

⁴⁷ LBP-91-38, 34 NRC at 239. See generally *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980) (determination of hearing request in show-cause proceeding did not rest with Staff but with Commission or its delegated adjudicatory tribunal); see also 10 C.F.R. §§ 2.105(d), 2.1205 (1992).

⁴⁸ See *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1129 (D.C. Cir. 1969); see also *Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility)*, CLI-82-2, 15 NRC 232 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983).

this proceeding will aid the Commission in any review that may be undertaken. In addition, if the Applicants win on the "bedrock" issue, an evidentiary hearing may be required to determine the actual cost of Perry/Davis-Besse power. Such a hearing would be appropriately conducted by the Licensing Board.⁴⁹ Accordingly, we see no good reason to adopt Cleveland's suggestion that we remove all further proceedings from the Licensing Board.⁵⁰

VI. CONCLUSION

For the above reasons, Cleveland's appeal of LBP-91-38 is *denied*, and LBP-91-38 is *affirmed* insofar as it granted Applicants' hearing petitions. In addition, for the aforementioned reasons, Cleveland's motion for revocation of the Secretary's referral to the Licensing Board of Applicants' hearing requests and for adoption of Staff's April 24, 1991 decision as a Commission decision is also *denied*.

It is so *ORDERED*.

For the Commission⁵¹

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of August 1992.

⁴⁹ See *supra* note 12.

⁵⁰ In light of our decision to deny Cleveland's motion for revocation, Applicants' motion for additional time to file a reply to Cleveland's motion is denied. See Applicants' Answer to "Motion of City of Cleveland, Ohio, for Commission Revocation of the Referral to ASLB and for Adoption of the April 24, 1991 Decision as the Commission's Decision" (Dec. 24, 1991). In addition, Cleveland's motion for leave to file a reply to Applicants' answer is also denied because the reply raises no new substantive issues that require a response.

⁵¹ Commissioners Rogers and Curtiss were not present for the affirmation of this order. If they had been present, they would have affirmed it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket Nos. 50-445-OL&CPA
50-446-OL

TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*
(Comanche Peak Steam Electric
Station, Units 1 and 2)

August 12, 1992

The Commission denies Petitioners' requests for late intervention in the Comanche Peak OL proceedings and the Unit 1 CPA proceeding, which were closed in 1988 pursuant to a settlement agreement. The Commission further denies Petitioners' motions to intervene and to reopen the record in the Unit 2 proceeding, finding that Petitioners have failed to satisfy the criteria for late intervention and for reopening of the record. The Commission further denies the requests for protective orders, for suspension of the Unit 1 operating license, and for oral argument on the motions before it.

**RULES OF PRACTICE: OPERATING LICENSE (SUSPENSION)
(2.206 PETITION)**

Once the Commission has issued an operating license for a unit, that action effectively closes out an opportunity for a hearing on that license or on any construction permit amendments. Any subsequent challenge to that unit's license must take the form of a petition under 10 C.F.R. § 2.206 for an order under 10 C.F.R. § 2.202.

RULES OF PRACTICE: ORAL ARGUMENT

Because oral argument is clearly discretionary under 10 C.F.R. § 2.763, the Commission requires that a party seeking oral argument must explain how oral argument would assist it in reaching a decision. The Commission may deny requests for oral argument when based on the party's written submissions that it fully understands the positions of the participants and has sufficient information upon which to base its decision.

RULES OF PRACTICE: ORAL ARGUMENT

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.763)

A petitioner is not barred from requesting oral argument on a petition for late intervention. The requirement in 10 C.F.R. § 2.763 that a request for oral argument be made in a "brief" only applies to pleadings that constitute an "appeal."

RULES OF PRACTICE: NONTIMELY INTERVENTION

For the Commission to grant a petition for late intervention, a petitioner must demonstrate a favorable balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). Those five factors are: (1) good cause, if any, for failure to file on time; (2) the availability of other means for protecting the petitioner's interest; (3) the extent to which the petitioner's participation might reasonably assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

The test for "good cause" is not simply when a petitioner becomes aware of the material it seeks to introduce into evidence. Instead, the test is when the information became available *and* when a petitioner reasonably should have become aware of that information. In essence, not only must a petitioner have acted promptly after learning of the new information, but the information itself must be *new* information, not information already in the public domain.

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS

When an intervention is extremely untimely and the petitioner utterly fails to demonstrate any good cause for late intervention, it must make a compelling case that the other four factors weigh in its favor in order to satisfy the late-filing standard.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER MEANS TO PROTECT INTERVENOR'S INTEREST)

A petitioner has satisfied the second prong of the five-factor "late intervention test" where there is currently no ongoing proceeding and therefore no other means by which that petitioner's interest can be protected. 10 C.F.R. § 2.714(a)(1)(ii).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER PARTIES TO PROTECT INTERVENOR'S INTEREST)

A petitioner has satisfied the fourth prong of the five-factor "late intervention test" where there is currently no ongoing proceeding and therefore no other party able to represent that petitioner's interest. 10 C.F.R. § 2.714(a)(1)(iv).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER MEANS AND OTHER PARTIES TO PROTECT INTERVENOR'S INTEREST)

In evaluating the five factors to be met by a petitioner seeking a grant of late intervention, the second and fourth factors are the least important of the five.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (ASSISTANCE IN DEVELOPMENT OF SOUND RECORD)

When a petitioner addresses the third criterion, "the extent to which [its] participation might reasonably assist in developing a sound record," it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (DELAY OF PROCEEDING)

Barring the most compelling countervailing considerations, an inexcusably tardy intervention petition stands little chance of success if its grant would likely occasion an alteration in hearing schedules or the establishment of an entirely new hearing.

RULES OF PRACTICE: REOPENING OF RECORD

Section 2.734(b) of 10 C.F.R. requires that a motion to reopen the record must be accompanied by one or more affidavits which set forth the factual and/or technical basis for the movant's claim. If a petitioner fails to comply with this requirement, the Commission may deny a request to reopen the record because of this defect alone.

RULES OF PRACTICE: INTERVENTION (INTEREST)

Once the Commission has determined that a petitioner cannot become a party to a proceeding based on the record before it, a petitioner cannot seek to reopen the record of that proceeding.

RULES OF PRACTICE: REOPENING OF RECORD (TIMELINESS)

The "timeliness" requirement of 10 C.F.R. § 2.734 is not whether a motion to reopen is filed within 24 hours of a petition for late intervention; instead, the test is whether the information upon which the movant relies could have been presented to the NRC at an earlier date.

RULES OF PRACTICE: CONFIDENTIAL INFORMATION (PROTECTION FROM DISCLOSURE)

The purpose underlying a grant of confidentiality is to preserve the alleged's identity from public disclosure where such disclosure could cause harm to the alleged. However, even a *known* alleged can be granted confidentiality by the NRC Staff if that person can demonstrate that some harm might otherwise befall them or their sources.

**RULES OF PRACTICE: CONFIDENTIAL INFORMATION
(PROTECTION FROM DISCLOSURE)**

A grant of confidentiality is not dependent on an individual's success in seeking a grant of intervention or reopening of the record.

**RULES OF PRACTICE: OPERATING LICENSE (SUSPENSION)
(2.206 PETITION)**

A petitioner may not request suspension of an operating license as part of a petition for late intervention. Those matters are more properly placed before the NRC under the procedures specified in 10 C.F.R. §2.206.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a motion for late intervention and a motion to reopen the record by Sandra Long Dow, representing the "Disposable Workers of Comanche Peak Steam Electric Station" ("Disposable Workers"), and R. Micky Dow (collectively "Petitioners"). Petitioners seek to reopen the Comanche Peak operating license and construction permit amendment proceedings which were closed pursuant to a settlement agreement in 1988. Petitioners have also filed a motion seeking oral argument on their motions before the Commission. The Texas Utilities Electric Company ("TU Electric") and the NRC Staff oppose all three requests.

For the reasons stated below, we find that oral argument is unnecessary in this situation. We also find that Petitioners have failed to satisfy the requirements for late intervention. Even assuming *arguendo* that those requirements were satisfied, Petitioners have failed to satisfy the requirements to reopen the record.

II. BACKGROUND

On November 20, 1991, these same Petitioners filed a motion to reopen the record in the underlying Comanche Peak proceedings. We denied their request, pointing out that only a "party" could seek to reopen the record but that even if Petitioners had been "parties" to the underlying proceedings, their submissions were not sufficient to meet the reopening criteria. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1 (1992) ("CLI-92-1"). However, we also pointed out that "[b]ecause the NRC has not yet issued the license for Unit 2, there remains in existence an operating

license 'proceeding' that was initiated for Comanche Peak" See CLI-92-1, 35 NRC at 6 n.5.

On February 20, 1992, Petitioners filed a petition for late intervention not only in the Unit 2 operating license ("OL") proceeding but also in both the Unit 1 OL proceeding and the Unit 1 construction permit amendment ("CPA") proceeding. Neither of the latter proceedings now exists. On February 21, 1991, Petitioners filed a motion to reopen the record in all three proceedings, assuming *arguendo* that they had satisfied the criteria for late intervention. We directed that both the Staff and TU Electric file consolidated responses to the two motions and established a response time that took into account an anticipated supplement to the Petitioners' motions. Petitioners filed their supplement on March 13, 1991. Both TU Electric and the Staff responded in opposition to the two pleadings as supplemented.

On April 4, 1992, Petitioners filed a motion requesting an oral argument on the other two motions, alleging "material false statements" and "perjury" by the Staff and TU Electric in their responses to Petitioners' motions. TU Electric and the Staff have responded in opposition to the request for oral argument.

III. ANALYSIS

A. The Unit 1 Proceedings

Initially, Petitioners have disregarded our statement in CLI-92-1 that only the proceeding for the issuance of the operating license for Unit 2 was available for late intervention and potential reopening. Instead, Petitioners seek late intervention in both the Unit 1 OL and CPA proceedings. However, these proceedings are no longer available to them. The NRC has issued the operating license for Unit 1. That action has closed out the Notice of Opportunity for a Hearing for both the Unit 1 operating license, 44 Fed. Reg. 6995 (Feb. 5, 1979), and the Unit 1 construction permit amendment. 51 Fed. Reg. 10,480 (Mar. 26, 1986). Any challenge to the Unit 1 license must take the form of a petition under 10 C.F.R. § 2.206 for an order under 10 C.F.R. § 2.202. In fact, Petitioners have already filed such a petition which is now under consideration by the Staff. Thus, we summarily reject Petitioners' request insofar as it requests late intervention in the Unit 1 OL and CPA proceedings.

B. The Unit 2 Proceeding

1. The Motion for Oral Argument

We are unclear as to what Petitioners actually seek in their request for oral argument. Petitioners use the terms "oral argument" and "hearings"

interchangeably in their motion. Under our regulations, the terms clearly imply different concepts. "Oral argument" as contemplated by our regulations is an appellate-style argument, without witnesses. However, under NRC regulations the word "hearings" generally refers to an evidentiary procedure, which is what Petitioners' original motion seeks. Accordingly, we have treated Petitioners' request as a request for oral argument on the motion for late intervention and the motion to reopen the record.

Our regulations provide that "[i]n its discretion, the Commission may allow oral argument upon the request of a party made in the notice of appeal or brief, or upon its own initiative." 10 C.F.R. § 2.763. Because oral argument is clearly "discretionary," we have previously held that a party seeking oral argument must explain "how [oral argument] would assist us in reaching a decision." *In re Joseph J. Macktal*, CLI-89-12, 30 NRC 19, 23 n.1 (1989). We have denied requests for oral argument when "based on [written] submissions [the Commission] fully understands the positions of the participants and has sufficient information upon which to base its decision." *Advanced Nuclear Fuels Corp.* (Import of South African Enriched Uranium Hexafluoride), CLI-87-9, 26 NRC 109, 112 (1987).

Petitioners make two arguments in support of their request.¹ First, they allege that responses filed by the Staff and the Licensee to their motions are "wrought with inaccuracies." Request at 2.² In addition, Petitioners allege that the responses are "rife [sic] with material false statements . . . that border if not completely encompass perjury." *Id.*³ However, Petitioners do not provide any examples of these alleged statements. We will not accept bare allegations of such statements -- without more -- as support for a motion for agency action.

Moreover, as the Petitioners concede -- Request at 6 -- they could seek permission to reply to these pleadings in writing. Contrary to Petitioners' view, we do not believe that such a reply would "inundate" the record or "confuse" us. *Id.* Thus, Petitioners have failed to demonstrate that they could not counter any alleged misstatements by the Staff and Licensee by seeking leave to file a reply and responding to the alleged misstatements in writing.

Second, Petitioners argue that "it would be in the best interest of the public to hold oral argument . . ." Request at 2. *See also* Request at 5. However, we do not see how the public interest would be better served in this instance with

¹ Petitioners include other arguments, but in our judgment these arguments go to their requests for late intervention and to reopen the record. Accordingly, we will deal with these other arguments when we address the merits of Petitioners' motions now pending.

² Petitioners filed two pleadings before us entitled "Motion for . . ." In order to develop a convenient shorthand to distinguish between these two pleadings when citing to them, we will refer to the Motion for Oral Argument as the "Request" and the Motion to Reopen the Record as the "Motion."

³ Because Petitioners' pleading contains this allegation, it has been forwarded to the Office of Inspector General for appropriate action.

an oral argument as opposed to a decision based solely upon the written public record. In sum, we believe that we "understand the positions of the participants and [have] sufficient information upon which to base [our] decision." *Advanced Nuclear Fuels Corp.*, *supra*. Accordingly, we exercise our discretion to deny the request for oral argument.⁴

2. *The Motion for Late Intervention*

Petitioners can seek late intervention in the Unit 2 OL proceeding. That proceeding is still open for late intervention because that license has not been issued. However, in addition to the criteria that must be addressed in their petition under 10 C.F.R. § 2.714(a)(2), Petitioners must also demonstrate that a balancing of the five criteria set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) weighs in favor of their intervention. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 608-09 (1988) ("CLI-88-12"), *aff'd*, *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 246 (1990). Those five factors are: (1) good cause, if any, for failure to file on time; (2) the availability of other means for protecting Petitioners' interest; (3) the extent to which Petitioners' participation might reasonably assist in developing a sound record; (4) the extent to which Petitioners' interest will be represented by existing parties; and (5) the extent to which Petitioners' participation will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1)(i)-(v). Reviewing Petitioners' Motion for Late Intervention, we find that Petitioners have failed to satisfy these five criteria.

a. *Good Cause for Late Intervention*

Petitioners allege that they have good cause for the lateness of their filing because

[p]etitioners were not involved in this issue when it first came to light, and/or when the original licensing hearings were in session. They only became involved in this matter in January, 1991. [Subsequently] they received more and more information . . . and, then, based on vast portions of their evidence, became convinced that the hearings needed to be reopened in order to get this material on the record, as they believed that it would have prevented the licensing [of Comanche Peak], had it been brought to the attention of the original Atomic Safety [and] Licensing Board.

⁴ We reject the Staff's argument that Petitioners cannot request oral argument on a petition for late intervention. Because the pleadings before us do not constitute an "appeal," the requirement that a request for oral argument be made in a "brief" does not apply. *See generally* 10 C.F.R. § 2.763.

Petition at 1-2. In essence, Petitioners allege that they have demonstrated "good cause" because they themselves have just come into possession of information which they believe would have had an impact on the Comanche Peak licensing proceeding. However, our jurisprudence has specifically held that such an allegation standing alone does not satisfy the "good cause" requirement.

The test for "good cause" is not simply when the Petitioners became aware of the material they seek to introduce into evidence. Instead, the test is when the information became available *and* when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be *new* information, not information already in the public domain.

For example, the discovery of information that was publicly available 6 months prior to the date of the petition has been held insufficient to establish "good cause" for late intervention. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982). In that case, the Appeal Board rejected the concept that the "discovery" of information already publicly available would constitute "good cause" for late intervention. Quite simply,

[a] subjective test of this kind provides an incentive for remaining uninformed and creates the prospect of collateral factual contests aimed at ascertaining the state of mind of the prospective intervenor. We would not allow a *party* to the proceeding to press a newly recognized contention . . . unless the party could satisfy an objective test of good cause. Among other things, . . . the party seeking to reopen must show that the issue it now seeks to raise *could not have been raised earlier*. . . . We see no reason to employ a different and more lenient good cause standard for the late petitioner for intervention than for a party who is already in the proceeding and seeks to raise new issues.

ALAB-707, 16 NRC at 1765 (emphasis in original) (citation omitted) (footnote omitted).

In this case, Petitioners may have only recently become aware of certain information, but they do not demonstrate that this information is only now available for the first time, i.e., could not have been raised earlier. Instead, the information that Petitioners seek to introduce is extremely dated information. For example, all information relied on by Petitioners in their previous motion to reopen (filed on November 20, 1991) was over a year old at the time and all but two documents had been in the public domain for a much longer period of time. See CLI-92-1, 35 NRC at 7-9. Thus, that information cannot constitute "good cause" for late intervention.

In their request for late intervention, Petitioners name two individuals, Ron Jones and Dobie Hatley, who would be prospective witnesses if Petitioners

were allowed to intervene. See Petition at 3.⁵ Petitioners claim that "[t]hese two individuals who . . . have held their silence, out of fear of reprisal, are now willing to come forward and testify, for the first time in four years." *Id.* However, as the Staff points out, both persons claim that they *were* willing to testify in the original proceeding. See Jones Statement attached to Petition; Hatley Statement attached to Motion to Reopen. Staff Response at 9. In fact, as the Staff also points out, Ms. Hatley's testimony was actually filed before the Licensing Board in 1984 by the intervenor in that proceeding, the Citizens Association for Sound Energy ("CASE"). *Id.* Thus, the mere availability of these individuals does not constitute "good cause" for Petitioners' late intervention. Furthermore, neither of these individuals states what new information they have to provide that is not already in the public domain.

In an effort to provide Petitioners with a complete evaluation of the information they allege supports their late intervention, we have also reviewed the allegations contained in their Motion to Reopen the Record, the Supplement, and the Motion for Oral Argument. However, the information in those documents does not constitute "newly discovered" information that would support a finding of "good cause" for late intervention.

In the Motion to Reopen the Record, Petitioners allege that TU Electric attempted to cover up fire watch violations. Motion at 4. However, TU Electric itself reported those violations to the NRC in October of 1990. See NRC Response at 24; see also Affidavit of Amarjit Singh, Exhibit B to NRC Staff Response. The Staff issued a Notice of Violation on the issue. See Exhibit C to NRC Staff Response. Thus, not only was the NRC aware of the issue, but the NRC has reviewed TU Electric's resolution of the issue and has approved it. See Singh Affidavit, *supra*. Petitioners do not offer any additional information on this issue that could constitute "good cause" for late intervention.

Petitioners also allege that they have discovered evidence about "on-site and off-site waste dumps for both toxic and radiation contaminated materials" Motion at 4. However, Petitioners concede that various organizations have had access to this information since August 1990, including CASE and the Texas Water Commission ("TWC"), an agency of the State of Texas. Moreover, another organization, the Citizens for Fair Utility Regulation ("CFUR") has already presented this issue to the NRC in the form of a request for enforcement action under 10 C.F.R. § 2.206. See DD-91-4, 34 NRC 201 (1991). In its decision on that petition, the NRC Staff reviewed this information and determined that (1) the information did not raise a "substantial concern . . . regarding the safe operation of [Comanche Peak]," (2) that no violations of NRC regulations had been identified, and (3) that the NRC Staff would monitor

⁵ As the Staff notes, this is the only substantive information in the petition itself to support Petitioners' request. Moreover, as the Staff also notes, Mr. Hatley's statement is neither notarized nor made under oath.

proceedings before the TWC to determine if any other action was necessary after conclusion of those proceedings. 34 NRC at 207. Petitioners do not explain how their information could supplement the information already in the public domain or why it could not have been presented sooner.⁶

Next, Petitioners submit nine Nonconformance Reports ("NCRs") which they allege "show significant errors in the seismic restraint compression fitting crimps" Motion at 3. However, these NCRs were filed and resolved in 1984. Petitioners do not explain why this issue could not have been raised sooner. Petitioners also allege that other NCRs "were never placed in the record or addressed." *Id.* However, Petitioners do not provide these NCRs that were allegedly "withheld" or offer any other specifics about them. Absent such an explanation, these vague allegations cannot constitute "good cause" for late intervention.

In their Supplement, Petitioners allege that Ms. Hatley altered the records in TU Electric's files regarding the NCRs and that the NRC cannot rely on those written records for an analysis of the NCRs. Supplement at 4. However, the NCRs were resolved *after* Ms. Hatley left Comanche Peak. *See* NRC Staff Response at 26-27, 32-33; *see also* Affidavit of Robert M. Latta, attached as Exhibit F to the Staff Response. Thus, it appears that Ms. Hatley could not have affected the resolution of these NCRs and, accordingly, this information does not constitute "good cause" for late intervention.⁷

Next, Petitioners submit an anonymous handwritten note dated January 30, 1992, regarding an incident at Comanche Peak in which a worker was injured. However, the note itself documents that the incident was reported to the NRC. Moreover, that incident, which occurred on October 6, 1991, has long been public knowledge and has been resolved by the NRC. *See* Affidavit of William D. Johnson, attached as Exhibit E to the NRC Staff Response. Again, this does not constitute "new" information that would constitute "good cause" for late intervention.

Finally, Petitioners submit a group of documents that appear to be related to claims by Joseph J. Macktal regarding a disputed settlement agreement. However, there is no showing that these documents are "new." In fact, many

⁶ Petitioners also allege that they have taken samples from these dumps and that these samples have been tested as radioactive. Motion at 5. In addition, Petitioners allege that they offered to provide this material to the Region IV Staff but that the Staff refused to accept the information or even to open an allegation file on the issue. *Id.* The Staff has not responded to this allegation other than to point out — correctly — that Petitioners have not provided any documentation of these tests. Staff Response at 25-26. However, the Staff should contact Petitioners to see if documentation exists and take appropriate followup action.

⁷ Ms. Hatley alleges that she "was asked to falsify records and documents and drawing numbers etc in order to pass audits of the NRC[.]" Hatley Statement at 1, implying that she did so. She also states that she "would like to testify and have my concerns in the record . . ." *Id.* We direct the Staff to communicate with Ms. Hatley in an effort to obtain whatever additional information she wishes to present. Ms. Hatley can "place her concerns on the record" by providing documents to or meeting with the NRC Staff. The Staff should follow up on any allegations provided by Ms. Hatley in this regard.

of these same documents were also submitted to the NRC as attachments to Petitioners' November 20, 1991 Motion to Reopen the Record. As we noted then, this "information is simply not timely in any sense of the word." CLI-92-1, 35 NRC at 8. For example, in this group of documents only the legal memorandum is less than 2½ years old.

Moreover, there is no showing that any of this information is not already well known. In fact, Mr. Macktal's claims have been well documented before the NRC, as reflected by the fact that many of the documents cited by Petitioners are NRC documents. In addition, the Commission reviewed Mr. Macktal's claims as they related to Comanche Peak. See, e.g., CLI-89-6, 29 NRC 348 (1989), *aff'd sub nom. Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990); *Macktal*, CLI-89-12, *supra*; *In re Joseph J. Macktal*, CLI-89-14, 30 NRC 85 (1989); *In re Joseph J. Macktal*, CLI-89-18, 30 NRC 167 (1989).

Furthermore, both the DOL and the NRC have acted on Mr. Macktal's allegations. For example, the DOL has voided the settlement agreement that Mr. Macktal claimed illegally prevented him from testifying before the NRC. See *Macktal v. Brown & Root*, Docket No. 86-2332 (Nov. 14, 1989). Furthermore, the NRC has adopted a regulation specifically preventing the type of agreement that Mr. Macktal alleges that he was "coerced" into signing. See 10 C.F.R. § 50.7(f). Finally, Mr. Macktal has explained all his concerns to the NRC Staff during a transcribed interview. Thus, the responsible federal agencies have reviewed Mr. Macktal's concerns and these materials do not constitute "good cause" for late intervention.

In conclusion, we find that Petitioners have failed to demonstrate "good cause" for their attempt to intervene in the OL proceeding for Unit 2, 13 years after TU Electric's request for an operating license was published in the *Federal Register*.⁸

b. The Remaining Four Factors

"[W]here no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong." *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977). "When the intervention is extremely untimely . . . and the petitioner utterly fails to demonstrate any 'good cause' for late intervention, it must make a 'compelling' case that the other four factors weigh in its favor." *Comanche Peak*, CLI-88-12, *supra*, 28 NRC at 610 (citing cases). As we will demonstrate

⁸ Petitioners attempt to resurrect their claims from their earlier attempt to reopen the record which we denied in CLI-92-1 by incorporating those claims into this petition. However, as we pointed out then, with only two exceptions, those records had long been in the public domain. In fact, many of them dealt with Mr. Macktal's claims and — as we have seen above — those have been resolved. Thus, even factoring those documents into the arguments and allegations presented here, Petitioners have failed to demonstrate "good cause" for late intervention.

below, we do not find that Petitioners have made a compelling case here on the remaining four factors.

The NRC Staff concedes that Petitioners satisfy the second and fourth prongs of the test. Assuming *arguendo* that Petitioners have an "interest" in the proceeding, i.e., that they have standing to participate in the proceeding, there is no other means by which that interest can be protected. Likewise, because there is currently no proceeding, there is no other party able to represent their interest. However, these two factors are the least important of the five factors. *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894-95 (1981), *aff'd sub nom. Fairfield United Action v. NRC*, 679 F.2d 261 (D.C. Cir. 1982); *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982); *Fermi*, ALAB-707, *supra*, 16 NRC at 1767.

More importantly in our view, Petitioners have failed to satisfy the third prong of the test: that they have the ability to contribute to the development of a sound record. As we noted in a similar situation, "the Appeal Board has repeatedly stressed the importance of providing specific and detailed information in support of factor (iii)." *Comanche Peak*, CLI-88-12, *supra*, 28 NRC at 611. "When a petitioner addresses this [third] criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." *Id.*, quoting *Grand Gulf*, ALAB-704, *supra*, 16 NRC at 1730. See also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983).

In this case, Petitioners alleged that they would introduce "a massive amount of evidentiary material . . . [and] witnesses who had extensive testimony" Petition at 3. However, as we noted above, Petitioners have identified only two prospective witnesses, Mr. Ron Jones and Ms. Dobie Hatley. Furthermore, they have failed to summarize their testimony, except to state that Mr. Jones had discovered "massive wiring violations" and evidence of drug use in the control room. *Id.*

Additionally, as we have also noted above, the documentary evidence specifically identified by Petitioners or submitted as attachments to their pleadings and the information contained therein is already in the public domain and is generally extremely out of date. Moreover, Petitioners have failed to demonstrate any disagreement with the NRC's resolution of the matters they have raised. Thus, Petitioners have failed to demonstrate how this evidence would create a record that would assist us in determining whether we should issue an operating license to Unit 2. Moreover, Petitioners have completely failed to address how their concerns — many of which date from the 1984 time frame — would have been affected by the extensive corrective programs undertaken at the plant since that time. See, e.g., *Comanche Peak*, CLI-88-12, *supra*, 28 NRC at 611. In

sum, we find that the third factor weighs heavily against granting Petitioners' request for late intervention.

Moreover, the fifth factor — the possibility of delay and expansion of the hearings — also weighs heavily against granting Petitioners' request. "[I]ndeed — barring the most compelling countervailing considerations — an inexcusably tardy petition would (as it should) stand little chance of success if its grant would likely occasion an alteration in hearing schedules." *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650-51 (1975) (opinion of Mr. Rosenthal speaking for the entire Board on this point).

In this case, there is currently no formal proceeding at all. Thus, granting the petition will result in the establishment of an entirely new formal proceeding, not just the "alteration" of an already established hearing schedule. Moreover, as we noted in an earlier *Comanche Peak* opinion, "there will be an inevitable delay while [petitioner] acquaints itself with the proceedings." CLI-88-12, *supra*, 28 NRC at 611. As we noted there, "[t]he petition indicates that [the petitioner] apparently has no knowledge of the extensive proceedings that have occurred . . ." *Id.* In that case, we found that because a former intervenor had been absent from the proceedings for six years, there would be an inevitable delay while the petitioner reacquainted itself with the proceedings.

In this case, Petitioners have never been involved in the formal proceedings involving *Comanche Peak* and they have only been involved in matters related to *Comanche Peak* since last spring. At no time have Petitioners demonstrated that they are familiar with the factual background of the extensive proceedings that occurred from 1979 through 1988. Nor have they demonstrated any familiarity with NRC rules and procedures. Thus, we find that there will inevitably be a long delay while Petitioners prepare for the hearing process.

In sum, we find that Petitioners have not established "good cause" for their request for late intervention. Moreover, we find that they have failed to make a "compelling" case on the remaining four factors. While they arguably satisfy the two minor factors, those factors are clearly insufficient, standing alone, to satisfy the balancing test required for late intervention. See, e.g., *Fermi*, ALAB-707, *supra*, 16 NRC at 1767; *Grand Gulf*, ALAB-704, *supra*, 16 NRC at 1730-31. Moreover, Petitioners clearly fail to satisfy the two remaining major factors, the ability to contribute to the development of a record and delay and/or expansion of the proceedings. Thus, we find that Petitioners have failed to demonstrate a favorable balancing of the five factors required for granting a petition for late intervention and we hereby deny their request.⁹

⁹In view of this finding, we need not reach the question of Petitioners' standing. However, we have strong doubts that Petitioners could satisfy our standing requirements. First, the Dows themselves live in Pennsylvania
(Continued)

3. *The Motion to Reopen the Record*

As the Commission pointed out in CLI-92-1, a person cannot seek to reopen the record unless that person first becomes a party to the proceeding. CLI-92-1, 35 NRC at 6. Because we have determined above that Petitioners cannot become parties to the Unit 2 OL proceeding based on the record now before us, we find that they cannot seek to reopen the record of the proceeding.

Additionally, as the Staff correctly points out, Petitioners have failed to satisfy the requirements of our regulations which provide that a motion to reopen the record "must be accompanied by one or more affidavits which set forth the factual and/or technical basis for the movant's claim that the [reopening] criteria have been satisfied." 10 C.F.R. § 2.734(b). We have denied requests to reopen the record because of this defect. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989). Neither of the attachments to the Motion to Reopen the Record meets this requirement.

Moreover, Petitioners have again misinterpreted the "timeliness" requirement. The issue is not whether the motion to reopen is filed "within 24 hours of the petition for late intervention." Motion at 2. Instead, the test is whether the information upon which the movant relies could have been presented to the NRC at an earlier date. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 202 (1985); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 n.12 (1973).

Here, as we noted above — and in CLI 92-1 — the material relied upon by Petitioners has been in the public domain for some time and has — generally — been acted upon either by the DOL or the NRC. In those cases where either the DOL or the NRC has acted on the material, Petitioners have failed to allege some reason for taking additional action, i.e., they have failed to allege where either agency acted incorrectly. For example, as we noted above, both the NRC and the DOL have acted on the concerns raised by Mr. Joseph J. Macktal. As another example, TU Electric reported — on its own — the fire-watch violations raised by Petitioners, and the NRC has already acted on that issue by issuing a Notice of Violation. In both cases, Petitioners have failed to allege any inadequacy in the resolution of these issues.

while Comanche Peak is in Texas. Thus, it is unlikely the Dows themselves have standing. Moreover, the Staff raises several possibly valid concerns regarding the standing of the Disposable Workers organization. See Staff Response at 17-20. See also *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-700, 16 NRC 1329, 1333-34 (1982); *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

C. Request for Protective Orders

Petitioners request protective orders for seven (7) named persons — including both Mr. and Ms. Dow — and six (6) unnamed persons under 10 C.F.R. § 2.734(c). Motion at 6. Assuming *arguendo* that this request constitutes a request for “confidentiality” status under NRC Manual Chapter 0517, we deny that request at this time. Quite simply, such requests should not be granted on a blanket basis; instead, they are fact-specific and should be granted only on a fact-specific showing that the requesting party meets the requirements of Manual Chapter 0517.

Turning to the specific requests, we are unclear why Petitioners request a protective order for known individuals. In a similar situation, we questioned how a person who was a known critic of Comanche Peak could demonstrate how he could be harmed if his name became associated with additional allegations. “The purpose underlying a grant of confidentiality is to preserve the alleged’s identity from public disclosure where such disclosure could cause harm to the alleged.” *Macktal*, CLI-89-12, *supra*, 30 NRC at 24. Nevertheless, in that case we pointed out that if the petitioner could demonstrate that some harm might befall him — or his sources, for example — the Staff would be empowered to grant that request. However, the burden was on the petitioner to demonstrate that harm to the Staff. *Id.* The same is true of the individuals who are named by Petitioners in this case.

Turning to the unnamed individuals, they also can seek “confidentiality” status from the NRC Staff even though we have denied both intervention and reopening of the record. The NRC’s guidelines for confidentiality are set forth in NRC Manual Chapter 0517. They — like the seven named individuals — should address their individual requests to the Allegations Coordinator of Region IV or the Allegations Coordinator in the Office of Nuclear Reactor Regulation at NRC Headquarters.

D. Request for Suspension of License(s)

Petitioners also request that we suspend the operating licenses for both Unit 1 and Unit 2 — presumably during the pendency of the hearing sought by Petitioners — for alleged deficiencies in the labeling of pressure valves and limit switches.¹⁰ Motion at 6-7. However, as the Staff notes, again, this matter has already been reviewed and resolved by the Staff. *See* Affidavit of William D. Johnson. Moreover, this is a matter more properly placed before the Staff under 10 C.F.R. § 2.206. Petitioners currently have a section 2.206 petition pending before the Staff; accordingly, we deny this request and refer this issue

¹⁰ We presume that Petitioners mean the Unit 2 construction permit. Unit 2 does not have an operating license.

to the Staff for their consideration as an additional issue in conjunction with the current petition under section 2.206.

IV. CONCLUSION

For the reasons stated above, we (1) deny Petitioners' request for oral argument; (2) summarily deny Petitioners' requests for late intervention in the Comanche Peak, Unit 1 proceedings; and (3) find that Petitioners have failed to satisfy a balancing of the five factors necessary for late intervention in the Comanche Peak Unit 2 OL proceedings. Moreover, assuming *arguendo* that Petitioners were eligible to participate in the Unit 2 OL proceeding, they have failed to meet the standards necessary to reopen the record of that proceeding. Finally, we deny the requests for protective orders and for a suspension of the Unit 1 operating license.

It is so ORDERED.

For the Commission¹¹

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of August 1992.

¹¹ Commissioners Rogers and Curtiss were not present for the affirmation of this order; if they had been present, they would have affirmed it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket Nos. 030-05980-ML&ML-2
030-05982-ML&ML-2

SAFETY LIGHT CORPORATION, *et al.*
(Bloomsburg Site Decontamination
and License Renewal Denials)

August 12, 1992

On review of an order, LBP-92-13A, 35 NRC 205 (1992), which consolidated an informal proceeding under Subpart L of 10 C.F.R. Part 2 with a formal proceeding under Subpart G, the Commission determines that the Licensing Board and the Presiding Officer exceeded their authority by not seeking prior Commission authorization for consolidation in view of the requirement in 10 C.F.R. § 2.1209(k) (1992) that the Commission approve application of alternative hearing procedures for Subpart L proceedings. The Commission authorizes, however, the consolidation of the proceedings.

**RULES OF PRACTICE: COMMISSION SUPERVISORY
AUTHORITY OVER ADJUDICATIONS**

Even in the absence of a petition for review, the Commission retains its supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself.

RULES OF PRACTICE: COMMISSION GRANTING OF PETITION FOR REVIEW

In the interest of reaching an expeditious resolution of a novel issue raised in a proceeding, the Commission may grant a petition for review without awaiting a reply from any responding party. Because the grant of a petition only indicates that an issue is worthy of Commission consideration, respondents are not prejudiced if they are provided a subsequent opportunity to present their views on the merits of the issue accepted for review.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Although the Commission conducts review of interlocutory orders of presiding officers sparingly, the Commission may take review of an interlocutory order to remove doubt as to the proper resolution of an unusual or novel question or to cure an error, particularly when the matter bears on the underlying authority of the presiding officer to take certain action in a proceeding.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Although the Commission's supervisory power extends to circumstances that do not meet the standards for review specified in 10 C.F.R. § 2.786(b) and (g), the Commission adheres as a general rule to the standards codified in those regulations.

RULES OF PRACTICE: DISCRETIONARY INTERLOCUTORY REVIEW

The unprecedented consolidation of a Subpart G and a Subpart L proceeding raised a substantial and important jurisdictional question and affected the Subpart L proceeding in a pervasive and unusual manner such that discretionary interlocutory review by the Commission of the consolidation order was warranted.

RULES OF PRACTICE: INFORMAL HEARINGS

A hearing on the denial of a materials license is ordinarily governed by the informal hearing procedures in Subpart L of 10 C.F.R. Part 2; Commission approval is required for the application of alternative procedures in such proceedings.

RULES OF PRACTICE: RULES OF GENERAL APPLICABILITY

Although procedures in Subpart G of 10 C.F.R. Part 2 may have general application to all types of Commission proceedings other than rulemaking, application of Subpart G must be determined in the context of the special rules that are applied to other proceedings. In any conflict between a general rule in Subpart G and a special rule in another subpart, the special rule governs. See 10 C.F.R. §§ 2.2, 2.3 (1992).

RULES OF PRACTICE: CONSOLIDATION OF PROCEEDINGS

Although the concept of consolidation of proceedings embodied in 10 C.F.R. § 2.716 (1992) is not in itself inconsistent with Subpart L procedures, conversion of a Subpart L proceeding into a Subpart G proceeding through consolidation of proceedings requires Commission authorization in order to give proper effect to limitation specified in 10 C.F.R. § 2.1209(k) (1992) with respect to the adoption of alternative hearing procedures in Subpart L proceedings.

RULES OF PRACTICE: CONSOLIDATION OF PROCEEDINGS

As a general practice, the Commission defers to the Licensing Board's judgment on the consolidation of proceedings, absent the most unusual circumstances.

RULES OF PRACTICE: CONSOLIDATION OF PROCEEDINGS

The common litigants, the potential commonality of issues, and the avoidance of unnecessary litigation over procedural matters weighs in this case in favor of consolidation of a Subpart L proceeding with a Subpart G proceeding.

MEMORANDUM AND ORDER

I. INTRODUCTION

In our order of July 2, 1992 (unpublished), we granted the Nuclear Regulatory Commission (NRC) Staff's petition for interlocutory review of an order dated June 11, 1992, I.BP-92-13A, 35 NRC 205, which consolidated two proceedings before an Atomic Safety and Licensing Board. One proceeding concerns the Staff's denial of applications for renewal of materials licenses. The other

proceeding concerns a decommissioning order, the effectiveness of which is contingent on the sustaining of Staff's license denial.

The controversy centers initially on the authority of the Presiding Officer and the Licensing Board to consolidate the proceedings and the consequent application of formal, as opposed to informal, hearing procedures to the license denial proceeding. Staff contends that the informal hearing procedures in Subpart L of 10 C.F.R. Part 2, rather than the formal hearing procedures under Subpart G applicable to the contingent order proceeding, should apply to the license denial proceeding.¹ Subpart L normally contemplates that the presiding officer will render a decision based on the review of an identified hearing file and other written submissions of the parties. See 10 C.F.R. §§ 2.1231, 2.1233 (1992). By consolidating the denial proceeding with the contingent order proceeding, the June 11 consolidation order converted the license denial proceeding from a Subpart L to a Subpart G proceeding. Subpart G of 10 C.F.R. Part 2 provides more formal, trial-type hearing procedures, including discovery and cross-examination that are not routinely available under Subpart L.²

We asked the parties, the Licensing Board, and the Presiding Officer to provide us their views on several questions related to the consolidation of the proceedings and the applicability of particular hearing procedures. Although we have determined that the Licensing Board and the Presiding Officer did not have the authority to consolidate the two proceedings without Commission approval, we now authorize consolidation.

II. BACKGROUND

The unusual circumstances that led to our decision to review the June 11 order began with Staff's denial on February 7, 1992, of pending applications for renewal of byproduct material licenses and its concurrent issuance of a contingent decommissioning order to Safety Light Corporation and other corporations (hereinafter "Licensees").³ The Staff relied on the Licensees' alleged failure to comply with the financial assurance requirements of 10 C.F.R. § 30.35 (1992) as the primary basis for license denial. The Staff's order was issued under 10 C.F.R. § 2.202 (1992) and established decommissioning criteria

¹ 10 C.F.R. §§ 2.1201-2.1263 (1992).

² 10 C.F.R. §§ 2.700-2.790 (1992).

³ Letter from Robert M. Bernero, Director, Office of Nuclear Material Safety and Safeguards, to Jack Miller, President, Safety Light Corp., and Ralph T. McElvenny, Chairman, USR Industries, Inc. (Feb. 7, 1992). Staff denied renewal of two licenses: License No. 37-00030-02, which authorized possession of byproduct material in the form of contaminated facilities and equipment at the Bloomsburg, Pennsylvania site for purposes of decontamination and disposal; and License No. 37-00030-08, which principally authorized possession and use of tritium for research, development, and manufacture of products for further distribution. The Commission recognizes that USR Industries and its subsidiaries dispute the Staff's assertion of jurisdiction over them, just as they denied NRC's jurisdiction with respect to earlier Staff orders. See ALAB-931, 31 NRC 350 (1990).

and standards for the Licensees' site in Bloomsburg, Pennsylvania, *contingent* on the effectiveness of the Staff's license denial.⁴ At the time Staff issued its license denial and contingent order, a proceeding (the "OM" proceeding) was pending on two Staff orders issued in 1989 to compel the same Licensees to undertake site characterization and decontamination and to establish a \$1 million escrow fund to be used for such purposes.⁵

On February 27, 1992, the Licensees requested a hearing on the license denial and the contingent order. The Secretary of the Commission referred the Licensees' request to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for appropriate action in accordance with 10 C.F.R. §§ 2.772(j), 2.1261 (1992).⁶ Relying on the procedures in Subpart G of Part 2, 10 C.F.R. §§ 2.700-2.790, the Chief Administrative Judge established a three-member Atomic Safety and Licensing Board to preside over proceedings on the license denial and contingent order.⁷

However, on April 13, 1992, the Staff moved the Licensing Board to refer the case back to the Chief Administrative Judge to correct the allegedly erroneous establishment of the three-member Board and to reassign the proceedings to a single presiding officer under Subpart L of 10 C.F.R. Part 2, the procedures that normally apply to hearings involving materials licensing matters. The Staff argued in its motion that both the license denial *and* the contingent order should be governed by Subpart L rather than Subpart G. In the Staff's view, the contingent order, though it was issued under section 2.202 and referenced certain Subpart G procedures, "flowed" from the license denial and should be considered under Subpart L.

In a June 1 order (unpublished), the Licensing Board granted the Staff's motion in part by referring the license denial back to the Chief Administrative Judge for consideration of whether it should be severed from the proceeding and a single presiding officer appointed under Subpart L to conduct the license denial proceeding. Although the Board expressed concern over the potential inefficiency that creation of a separate proceeding on the denial could engender, the Board agreed with Staff that section 2.1201(a) appeared to direct that the hearing on the license denial be conducted under Subpart L. The Board rejected Staff's argument that its contingent order could be heard under Subpart L in view of the order's explicit reliance on section 2.202 and the direction in sections 2.700 and 2.1201(b) that hearings on section 2.202 orders be conducted in

⁴ Order Establishing Criteria and Schedule for Decommissioning the Bloomsburg Site, 57 Fed. Reg. 6136 (Feb. 20, 1992).

⁵ 54 Fed. Reg. 12,035 (Mar. 23, 1989); 54 Fed. Reg. 36,078 (Aug. 31, 1989).

⁶ Memorandum for B. Paul Cotter, Jr., Chief Administrative Judge, from Samuel J. Chilk, Secretary (Mar. 17, 1992).

⁷ 57 Fed. Reg. 10,932 (Mar. 31, 1992). The Licensing Board members were the same as were assigned to the "OM" proceeding.

accordance with Subpart G. Acting on the Licensing Board's referral, the Chief Administrative Judge accepted the Board's analysis and severed the license denial from the contingent order and appointed Judge Moore, the chair of the Licensing Board in the contingent order proceeding, as the Presiding Officer in the license denial proceeding in accordance with Subpart L. Unpublished Memorandum (Designating Presiding Officer) (June 9, 1992).

On June 11, however, the Licensing Board in the contingent order proceeding and Judge Moore as the Presiding Officer for the license denial proceeding decided that "the consolidation of these two proceedings for all purposes will be in the best interests of justice and be most conducive to the effective and efficient resolution of the issues and the proceedings." LBP-92-13A, *supra*, 35 NRC at 205. They relied on 10 C.F.R. § 2.716 (1992) as a basis for consolidation of the two proceedings as a Subpart G proceeding. They also indicated that the Staff had conceded that they could take such action. *Id.* at 206 n.*, citing Prehearing Conference Transcript (Tr.) 61 (May 8, 1992). They did not consolidate the proceedings with the preexisting "OM" proceedings under Subpart G, but held out the possibility that such action might be taken in the future.

The Staff sought reconsideration of the Board's June 11 order in a prehearing conference called at Staff's request on June 18, 1992. The Staff denied that it had conceded the Board's power to consolidate the two proceedings and suggested that Staff counsel's comments had been misinterpreted. The Board rejected Staff's request for reconsideration and for a stay of the proceedings while the Staff sought Commission review. Tr. 161, 167.

The Staff sought Commission review of the Board's consolidation order in a petition for review filed on June 26, 1992. We decided to take review in our July 2 order and invited the parties, the Presiding Officer, and the Licensing Board to offer us their views on the following questions related to the determination to consolidate the proceedings:

1. Should the proceeding concerning the denials of the applications for renewal of the licenses be conducted in accordance with the informal procedures set forth in Subpart L? If not, what special circumstances or issues warrant the application of other procedures?
2. If the proceeding concerning denial of the applications for renewal of the licenses is conducted under Subpart L, should the proceeding under Subpart G on the decommissioning order, and/or the proceedings under Subpart G on the March and August 1989 orders, be held in abeyance pending decision in the Subpart L proceeding?
3. If the proceeding concerning denial of the applications for renewal of the licenses is conducted under Subpart G, should that proceeding be consolidated with the proceeding on the order of February 7, 1992, for decommissioning, and/or the ongoing proceedings concerning the March and August 1989 orders? In particular, to what extent are the same interests affected and the same questions raised in these proceedings?

III. ANALYSIS

A. The Propriety of Commission Review

At the outset we note Licensees' suggestion that we should have awaited their response to the Staff's petition for review before we decided to step into this matter. Although the Licensees do not claim that they were in any way prejudiced by our action, they suggest that we would have had a greater appreciation of the "painstaking effort" undertaken by the Licensing Board to unravel the knotted strands of the Safety Light proceedings.⁸ Moreover, Licensees suggest that Staff omitted any discussion from its petition of the "careful and methodical process" that the Licensing Board undertook to arrive at its decision and for that reason alone Staff's petition should be denied.⁹

Although we could have waited to consider a response from Licensees to Staff's petition before acting, we were not required to do so. Even in the absence of a petition for review, the Commission retains its supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself.¹⁰ In view of the novel question presented by the Licensing Board's and Presiding Officer's assertion of authority to consolidate the two proceedings and in the interest of reaching an expeditious resolution of the issue, we granted review. Because our July 2 order merely decided that the issue was worthy of our consideration, Licensees have been afforded a full opportunity to have their views heard on the substantive issues.

We are mindful of Licensees' caution that we exercise our interlocutory review authority sparingly, lest we discourage responsible actions by presiding officers or licensing boards in managing our proceedings. We certainly do not leap forward to scrutinize every interlocutory directive or procedural order of the presiding officers or boards, but adhere as a general rule to the stringent standards for interlocutory review which are codified in 10 C.F.R. § 2.786(g) (1992).¹¹ Nonetheless, no matter how otherwise sensible or thoughtful the actions of a licensing board or presiding officer may be, we do no harm to

⁸ Response of USR Industries, Inc., and Safety Light Corporation to the Nuclear Regulatory Commission's July 2, 1992 Order at 3-5 (July 13, 1992) (hereinafter Licensees' Response). Staff asks that we grant leave under 10 C.F.R. § 2.786(b)(3) (1992) to consider Staff's views filed in response to Licensees' opposition to its petition for review. NRC Staff's Reply to Response of USR Industries, etc., at 3 n.4. Our leave is not required, because our July 2 order itself permitted a reply to Licensees' filing.

⁹ Licensees' Response at 5. We see no merit to Licensees' suggestion that Staff omitted significant information from its petition or that Staff otherwise exceeded the bounds of advocacy in its petition. Staff's petition makes fair reference to the events that ultimately precipitated its petition. In any event, we have access to the docket of this proceeding and are well aware of the filings and orders that preceded our action.

¹⁰ 10 C.F.R. §§ 2.718(1), 2.786(a), 2.1209(d) (1992); see *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLJ-91-15, 34 NRC 269 (1991), *reconsideration denied*, CLJ-92-6, 35 NRC 86 (1992); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLJ-90-3, 31 NRC 219, 229 (1990).

¹¹ See *Safety Light Corp.* (Bloomsburg Site Decontamination), CLJ-92-9, 35 NRC 156, 158 (1992); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLJ-76-26, 4 NRC 608 (1976).

the orderly conduct of adjudicatory proceedings by intervening to remove doubt as to the proper resolution of an unusual or novel question or to cure an error, particularly when the issue bears on the underlying authority of the presiding officer or licensing board to take action in a proceeding.

Although our supervisory power extends to circumstances that do not meet the standards for review under 10 C.F.R. § 2.786(b)(4) and (g), our decision to take review in this case fully satisfies those standards. In view of the unprecedented nature of the consolidation which arguably exceeded the bounds of the Licensing Board's and Presiding Officer's delegated authority, we believe that a substantial and important jurisdictional question has been raised.¹² As has been repeated many times in NRC proceedings, licensing boards and presiding officers possess only the powers granted to them by regulation or Commission order.¹³ The consolidation order certainly affected the license denial proceeding in a pervasive and unusual manner by converting it from a Subpart L proceeding into a Subpart G proceeding.¹⁴

B. Authority to Consolidate Subpart G and Subpart L Proceedings

For the reasons that follow, we believe that the Licensing Board and the Presiding Officer exceeded their powers in the June 11 order. Under the Commission's regulations, a hearing on the denial of a materials license is ordinarily governed by the informal hearing procedures in Subpart L of 10 C.F.R. Part 2; hearings on section 2.202 orders are governed by the trial-type procedures set forth in Subpart G. 10 C.F.R. §§ 2.700, 2.1201 (1992). The Licensees did not indicate in their hearing requests the procedures that they expected to be applied in any hearing nor did they express a preference for procedures.¹⁵ The Licensing Board in its June 1 order and the Chief Administrative Judge in his June 9 order correctly construed sections 2.700 and 2.1201 in determining that the hearing on the license denial is governed by Subpart L and that the hearing on the Staff's contingent decontamination order is governed by Subpart G. The terms of those regulations leave little doubt as to their applicability to the proceedings on those respective actions.¹⁶

¹² See 10 C.F.R. § 2.786(b)(4)(ii), (iii) (1992).

¹³ See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1977).

¹⁴ See 10 C.F.R. § 2.786(g)(2) (1992).

¹⁵ Under Subpart L, a licensee may seek the application of procedures other than Subpart L when a hearing request is made. 10 C.F.R. § 2.1205(b) (1992).

¹⁶ Staff does not raise on review its earlier argument that the contingent order, because it "flowed" from the license denial, could be handled under Subpart L. Although the establishment of the decommissioning criteria might have been handled by some other procedural means, Staff chose to impose the requirements through an enforcement order under 10 C.F.R. § 2.202 (1992) and relied specifically on Subpart G procedures on intervention in its order.

However, the subsequent consolidation of the license denial and the decontamination order proceedings does not appear to be consistent with the governing procedural regulations. The Licensing Board and Presiding Officer rely on 10 C.F.R. § 2.716 (1992) as a rule of general applicability in Subpart G which authorized them to consolidate the two proceedings.¹⁷ Although Subpart G procedures may be generally applicable to types of proceedings other than rulemaking, application of Subpart G must be determined in the context of the special rules that are applied to other proceedings.¹⁸ Moreover, in any conflict between a general rule in Subpart G and a special rule in another subpart, the special rule governs.¹⁹

We agree with the Licensing Board and Presiding Officer (and Licensees who make a similar argument) that the concept of consolidation of proceedings embodied in section 2.716 is not in itself inconsistent with Subpart L procedures. The critical inquiry is, however, whether consolidation of a Subpart L proceeding with a Subpart G proceeding can be effected without the Commission's authorization. In Subpart L proceedings, presiding officers are limited to using the procedures in that subpart unless they recommend and receive Commission approval for the application of other procedures. 10 C.F.R. § 2.1209(k) (1992).²⁰ In this case, the consolidation order converts the Subpart L proceeding into one governed by the procedures of Subpart G. Thus, absent Commission authorization, the Licensing Board's and the Presiding Officer's consolidation of the proceedings evades the provisions of the specific rule in section 2.1209(k). Although consolidation may be an appropriate step, Commission authorization for consolidation is required to ensure that the proper effect is given to the limitation on the application of other hearing procedures specified in section 2.1209(k).

C. Whether Consolidation Should Be Authorized

In its July 17 memorandum issued in response to our order taking review, the Licensing Board and the Presiding Officer elaborated upon their reasons for consolidating the license denial proceeding with the proceeding on the contingent

¹⁷ LBP-92-16A, 36 NRC 18, 20 n.6 (1992).

¹⁸ 10 C.F.R. § 2.2 (1992).

¹⁹ 10 C.F.R. § 2.3 (1992).

²⁰ We reiterated in a 1990 rulemaking the necessity of obtaining Commission approval for use of other procedures. Informal Hearing Procedures for Nuclear Reactor Operator Licensing Adjudications, 55 Fed. Reg. 36,801, 36,804 (Sept. 7, 1990). Subpart L provides an exception in section 2.1207 which permits consolidation of proceedings concerning receipt and possession of unirradiated fuel with related proceedings under Subpart G on Part 50 facility licensing upon certification by the licensing board that the issues in the proceedings are substantially identical. In our view, this exception underscores the general rule in section 2.1209(k) otherwise requiring Commission approval of alternative procedures.

order.²¹ In their view, the proceedings share a common factual setting and involve common, unresolved, and novel issues concerning personal jurisdiction over USR Industries and its subsidiaries. Consolidation will avoid, they believe, duplicative hearings that would squander the Licensees' limited resources that would otherwise be available for site remediation.

The Licensing Board and the Presiding Officer are also concerned that the doctrine of collateral estoppel may be inapplicable between the two proceedings if the license denial proceeds under Subpart L because of the potential absence of a "mutuality of quality and extensiveness of procedures" between informal proceedings under Subpart L and formal proceedings under Subpart G.²² By consolidating the proceedings under Subpart G, they believe they can avoid this potential problem and the concomitant risk and expense of having to try some issues twice with possibly inconsistent results. The Board and Presiding Officer also suggest that their action avoids the litigative risk over the propriety of applying Subpart L procedures to the Staff's denial action when that action could also be characterized as a license revocation or other enforcement action subject to Subpart G. LBP-92-16A, *supra*, 36 NRC at 21 n.10.

The Licensees give a number of reasons why they believe the proceedings should be consolidated and conducted in accordance with Subpart G procedures. Response to July 2, 1992 Order at 8-12. Several of these are premised on a perceived common factual basis for the license denial and the contingent order as well as asserted overlap or interrelationship of issues in the denial and contingent order proceedings and the "OM" proceeding on the 1989 orders. The Licensees emphasize in particular the potential interrelationship between the funding requirements for decommissioning under one of the 1989 orders and their alleged failure to meet the funding obligations under 10 C.F.R. § 30.35 (1992) which led to Staff's denial of license renewal. The Licensees also see potentially common issues related to the decommissioning requirements and standards imposed by the 1989 order and the 1992 contingent order.²³

The Licensees also suggest that Subpart G procedures should apply to the license denial proceeding to permit them to explore the possibility of arbitrary and dilatory action by the Staff in handling the license renewal applications as well as the application of rules in agreement states compatible with 10 C.F.R.

²¹ LBP-92-16A, *supra*, 36 NRC at 20-21. The Board and Presiding Officer state that they did not explain in detail in their July 11 order their reasons for consolidating the proceedings because they believed that Staff counsel had conceded their authority to do so, thereby obviating the need to give a detailed exposition of their rationale. *Id.* at 19 n.2.

²² *Id.* at 21 n.9, citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 n.15 (1979).

²³ Thus, in response to the Commission's question, the Licensees believe that *all* pending proceedings involving Safety Light's operations should be consolidated, a step that the Licensing Board and the Presiding Officer did not take.

§ 30.35 (1992).²⁴ The Licensees do little to explain why these issues, to the extent they may be litigable, require application of Subpart G procedures.

Staff insists that the license denial should not be consolidated with any of the other proceedings but should be handled under Subpart L procedures. In Staff's view the license denial involves the discrete issue, primarily legal in nature, of the Licensees' compliance with section 30.35, which can be judged on the basis of the documents submitted by the Licensees and any other documents relevant to Staff's review and determination to deny the applications. Subpart L is particularly well suited, Staff maintains, to the resolution of matters that can rest on review of a written record. With the exception of jurisdictional questions, Staff disputes that the denial proceeding concerns substantially the same issues as the contingent order proceeding or the "OM" proceeding. Staff asserts that the substantive issues involved in the contingent order do not involve any question as to Licensees' compliance with section 30.35. Moreover, Staff maintains that the funding requirements under the 1989 order are not substantially related to compliance with section 30.35. In Staff's view, the Licensees' contentions concerning dilatory and arbitrary conduct on the part of the Staff and unfair application of section 30.35, even if they present litigable matters, do not inherently require application of Subpart G procedures. As to the collateral estoppel effect of a decision reached under Subpart L to a Subpart G proceeding, Staff suggests that the Board and Presiding Officer can avoid the question by proceeding with the resolution of the jurisdictional matters in the "OM" proceeding under Subpart G and then applying that decision to the Subpart L denial proceeding.

Having considered the views of the Licensing Board and the Presiding Officer and the positions of the parties, the Commission has decided to adhere to our general practice of deferring to the Licensing Board's judgment on consolidation of proceedings, absent "the most unusual circumstances."²⁵ Although consolidation may not be the only way of dealing with some of the thorny problems posed by these proceedings, the Licensing Board and Presiding Officer base their decision on factors that are well within the traditional grounds for consolidating proceedings: i.e., the similarity of issues in the proceedings, the commonality of litigants, and the convenience and saving of time or expense.²⁶ Accordingly, we consent to the consolidation of the license denial proceeding and the proceeding on the contingent decommissioning order.

²⁴ Licensees' Response at 10-12.

²⁵ *Pebble Springs*, CLI-76-26, *supra*, 4 NRC at 609; see also *Alabama Power Co.* (Alan R. Barton Nuclear Plant, Units 1, 2, 3, and 4; Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-75-12, 2 NRC 373 (1975).

²⁶ *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-540, 9 NRC 428, 434 (1979).

In reaching our decision, we do not mean to imply that we believe Subpart L procedures are inadequate to resolve the issues bearing on the license denial. Even if Licensees' charges of dilatory conduct by the Staff or discriminatory application of section 30.35 are litigable, nothing in the Licensees' submittal convinces us that the issues in the denial proceeding inherently demand the application of hearing procedures beyond that afforded in Subpart L.²⁷ Moreover, the possibility that the Staff, rather than denying renewed licenses, could have issued an enforcement action under Subpart B of 10 C.F.R. Part 2 on the basis of Licensees' alleged violation of section 30.35 does not require application of Subpart G procedures in the denial proceeding.²⁸ If that were so, virtually no license renewal proceeding could be heard under Subpart L, because the fundamental question in any licensing case is whether the applicant meets the requirements of the governing statute and regulations. Subpart L is not inherently inadequate to satisfy the hearing requirements of the Atomic Energy Act or due process in determining such issues. *See City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983).

Our decision is based instead on the potential commonality of issues in the various *Safety Light* proceedings as well as the additional complications that may arise if we insist that the issues be resolved on two different procedural tracks. Although it is difficult to pinpoint at this early stage precise areas of overlap between the license denial and contingent order proceedings, the Licensing Board's and Presiding Officer's perception that such overlap is likely is difficult to dismiss without committing ourselves to a far closer examination of the issues than we are prepared to undertake at this time.²⁹

We are not prepared to hold that a lack of mutuality of procedure exists between Subpart L and Subpart G which would preclude the Commission from giving collateral estoppel effect in Subpart G proceedings to prior decisions in Subpart L proceedings. However, we recognize that consolidation of proceedings here and the consequent conversion of the license denial proceeding into a Subpart G proceeding would certainly avoid the need to litigate the application of the collateral estoppel doctrine. In this sense, consolidation will avoid needless litigation in the interest of reaching a decision on the more important issues in these proceedings.

On balance, if we were to insist under these extraordinary circumstances on the application of Subpart L procedures to the license denial proceeding, we

²⁷ Licensees made little more than bald assertions that Subpart G procedures were necessary to address the issues. Licensees' Response to July 2, 1992 Order at 10-12.

²⁸ See LBP-92-16A, *supra*, 36 NRC at 21 n.10.

²⁹ The parties, the Board, and the Presiding Officer suggest that certain jurisdictional issues are common to all pending proceedings. With respect to the license denial and the "OM" proceeding, we note that there is sharp disagreement between Staff and Licensees over the relevance of the Licensees' funding assurances pursuant to one of the 1989 orders to the Staff's basis for denial of the renewal licenses.

might well undermine the principles of simplicity and efficiency that led us to the adoption of Subpart L in the first instance. A decision to sever the proceedings would not end the haggling over the proper application of procedures to particular issues in these proceedings or the desirability of additional procedures. In these unusual circumstances, the avoidance of additional procedural complications outweighs any added burden that application of Subpart G might impose. We are concerned that the resources available for site remediation not be consumed by unnecessary litigation costs.

We note Staff's concern that consolidation of the proceedings may postpone a decision on some issues that could be decided in advance of others. Our impression is that the Licensing Board is working hard to sort out the issues in the various *Safety Light* proceedings to ensure their timely and rational resolution. We encourage the Licensing Board to use the tools at its disposal, e.g., reasonable limits on discovery and use of summary disposition, to expedite the resolution of these proceedings with due regard to the rights of the parties. We leave to the Licensing Board's sound discretion whether formal consolidation of the "OM" proceeding with these proceedings is appropriate to ensure a prompt and just resolution of the issues.

IV. CONCLUSION

For the reasons stated in this order, we reverse the Licensing Board's and Presiding Officer's order of June 11, 1992, insofar as it consolidated the license denial and the contingent decommissioning order proceedings without prior Commission authorization. However, we now authorize consolidation of these proceedings for the reasons stated in this order.

IT IS SO ORDERED.

For the Commission³⁰

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of August 1992.

³⁰ Commissioners Rogers and Curtiss were not present for the affirmation of this order. If they had been present, they would have affirmed it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Harry Foreman
Thomas D. Murphy

In the Matter of

Docket No. 030-31758-EA
(ASLBP No. 92-656-01-EA)
(EA 91-154)
(Byproduct Material License
No. 34-26201-01)

RANDALL C. OREM, D.O.

August 6, 1992

MEMORANDUM AND ORDER
(Approving Settlement Agreement
and Terminating Proceeding)

On July 28, 1992, the parties to this enforcement proceeding, the NRC Staff and Randall C. Orem, D.O., filed with the Atomic Safety and Licensing Board (1) a Settlement Agreement that has been accepted and signed by both parties and (2) a joint motion requesting the Board's approval of the Agreement and entry of an order terminating this proceeding, together with a proposed Order. The Board has reviewed the Settlement Agreement under 10 C.F.R. § 2.203 to determine whether approval of the Settlement Agreement and consequent termination of this proceeding is in the public interest. Based upon its review, the Board is satisfied that approval of the Settlement Agreement and termination of this proceeding based thereon are in the public interest.

Accordingly, the Board approves the Settlement Agreement attached hereto and, pursuant to sections 81 and 161 of the Atomic Energy Act of 1954, as

amended (42 U.S.C. § 2111 and 2201), incorporates the Settlement Agreement by reference into this Order. Pursuant to 10 C.F.R. § 2.203, the Board hereby terminates this proceeding on the basis of the Settlement Agreement.

THE ATOMIC SAFETY AND
LICENSING BOARD

Harry Foreman (by I.W.S.)
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 6, 1992

ATTACHMENT

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 030-31758-EA
(ASLBP No. 92-656-01-EA)
(EA 91-154)

RANDALL C. OREM, D.O.
(Byproduct Material License
No. 34-26201-01)

SETTLEMENT AGREEMENT

Randall C. Orem, D.O., was the holder of Byproduct Material License No. 34-26201-01 (license) issued pursuant to Parts 30 and 35 of the Commission's regulations. The license authorized the possession and use of radiopharmaceuticals in nuclear medical activities. On November 29, 1991, the NRC Staff (Staff) issued an Order Revoking License (Effective Immediately) to Dr. Orem. 56 Fed. Reg. 63,986 (Dec. 6, 1991). Dr. Orem requested a hearing on that order on December 3, 1991.

An Atomic Safety and Licensing Board (Board) was designated on January 6, 1992 (57 Fed. Reg. 1285 (Jan. 13, 1992)), and a prehearing conference was held, telephonically, on January 29, 1992. At that conference, the pending Office of Investigation's (OI) investigation was discussed. It was explained to Dr. Orem's attorney that additional enforcement sanctions could be imposed or a referral to the Department of Justice could be made based on the outcome of the investigation. Tr. 8-14. As a result of that discussion, Dr. Orem filed, on February 27, 1992, "Motion for Adjournment of Hearing." The Staff did not oppose Dr. Orem's Motion.

On March 19, 1992, the Board issued "Memorandum and Order (Ruling upon Dr. Orem's Motion to Adjourn Hearing)." In that Order, the Board granted the motion, in part. The Board stated that "[t]his proceeding is hereby continued until the completion of the OI investigation or until July 1, 1992, whichever is earlier." Order at 2. The Board also requested the Staff to file a status

report on the OI investigation by June 15, 1992. *Id.* On June 15, 1992, the Staff filed "Status Report," indicating that the best estimate for the completion of the OI investigation would be the end of August or early September 1992. Subsequently, the Staff filed "Supplemental Status Report" on July 1, 1992. In that report, the Staff stated that OI had completed all the necessary field work for the OI investigation, although the actual report was not yet completed. The NRC decided not to take any further action against Dr. Orem.

After discussions between the Staff and Dr. Orem, the parties agree that it is in the public interest to terminate this proceeding without further litigation and agree to the following terms and conditions:

1. Upon Licensing Board approval of the Settlement Agreement, Dr. Orem's request for a hearing dated December 3, 1991, is withdrawn.
2. Upon Licensing Board approval of the Settlement Agreement, the Order Revoking License, dated November 29, 1991, is withdrawn.
3. Upon Licensing Board approval of the Settlement Agreement, Dr. Orem's license is terminated. In agreeing to the termination of his license, Dr. Orem does not admit to any wrongdoing or violation of federal statutes and regulations.
4. The NRC Staff agrees that none of the facts associated with this proceeding will be held against him in the event Dr. Orem submits another application for a specific license on his own behalf or a license amendment application is submitted to name Dr. Orem as an authorized user. If such application is in compliance with the Atomic Energy Act and the Commission's regulations, such application shall be granted.
5. The Staff and Dr. Orem shall jointly move the Atomic Safety and Licensing Board for an Order approving this Settlement Agreement and terminating this proceeding.

6. This agreement shall become effective upon approval by the Licensing Board.

FOR THE NUCLEAR
REGULATORY COMMISSION

Marian L. Zobler
Counsel for NRC Staff

FOR RANDALL C. OREM, D.O.

Georgette J. Siegel
Counsel for Randall C. Orem, D.O.

Dated July 28, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Marshall E. Miller, Chairman
Charles Bechhoefer
G. Paul Bollwerk, III

In the Matter of

Docket Nos. 50-440-A
50-346-A
(ASLBP No. 91-644-01-A)
(Suspension of Antitrust
Conditions)
(Facility Operating Licenses
Nos. NPF-58, NPF-3)

OHIO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1)

CLEVELAND ELECTRIC ILLUMINATING
COMPANY and
TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1; Davis-Besse Nuclear
Power Station, Unit 1)

August 6, 1992

In this Memorandum and Order, the Licensing Board grants a late intervention petition. The Board concludes that (1) recent developments have cured a previously identified deficiency in the Petitioner's standing to intervene in the proceeding, and (2) a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) governing late intervention favors granting the Petitioner party status.

**ATOMIC ENERGY ACT: STANDING TO INTERVENE
(INJURY IN FACT)**

**RULES OF PRACTICE: STANDING TO INTERVENE
(INJURY IN FACT)**

A municipal ordinance that makes provisions for all the elements essential to carrying out the construction, operation, and maintenance of a municipal electrical system demonstrates that the enacting municipality's interest in the proceeding as a customer and competitor of a utility applying for suspension of its facility's operating license antitrust conditions is tangible enough to afford the municipality standing.

**ATOMIC ENERGY ACT: STANDING TO INTERVENE
(ZONE OF INTEREST(S))**

**RULES OF PRACTICE: STANDING TO INTERVENE
(ZONE OF INTEREST(S))**

Although a municipality's electrical system is in its incipient stage, the municipality's indication that it ultimately may wish to invoke the protection afforded by operating license antitrust conditions imposed pursuant to section 105 of the Atomic Energy Act (AEA), 42 U.S.C. § 2135, makes its expressed interest in preserving those antitrust provisions one that falls within the "zone of interests" created by AEA section 105.

**RULES OF PRACTICE: INTERVENTION PETITION(S) (GOOD
CAUSE FOR LATE FILING)**

In the 10 C.F.R. § 2.714(a)(1) five-factor balancing test governing late intervention, the first factor of "[g]ood cause, if any, for failure to file on time" is important because, in the absence of "good cause," there generally must be a compelling showing regarding the other four factors. *See* LBP-91-38, 34 NRC 229, 249 & n.60 (1991).

**RULES OF PRACTICE: INTERVENTION PETITION(S) (GOOD
CAUSE FOR LATE FILING)**

Bearing in mind the Appeal Board's observation that "newly acquired" standing is generally unsuitable as a basis for "good cause," *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), an act of independent utility occurring after the filing deadline that, only consequently, has the effect of affording standing is not

so unmeritorious as to permit intervention only upon a substantially enhanced showing on the other late intervention factors.

RULES OF PRACTICE: INTERVENTION PETITION(S) (GOOD CAUSE FOR LATE FILING)

In determining whether "good cause" exists for a late-filed intervention petition, the significance to be placed on the amount of delay "will generally hinge upon the posture of the proceeding at the time the petition surfaces." *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983).

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITION(S) (AVAILABILITY OF OTHER MEANS TO PROTECT PETITIONER'S INTEREST(S))

"[T]he distinctive nature of the Commission's authority to consider and address the validity of the antitrust conditions it imposed leads us to agree with [the Petitioner] that no other forum or means now available can provide equivalent protection for its interest in seeing that the existing license conditions are maintained." LBP-91-38, 34 NRC at 247.

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITION(S) (ADEQUACY OF EXISTING REPRESENTATION)

Challenge to a late intervention petition that seeks to equate the duplication of issues with a similarity of the existing participants' interests is misdirected. See *Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979). Rather, the question is, given the matters at issue, will the existing parties effectively represent the Petitioner's interests relative to those matters.

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITION(S) (ADEQUACY OF EXISTING REPRESENTATION)

Argument that a Petitioner's interests can be adequately represented by the existing parties because its witnesses would be available to those parties fails to afford proper recognition to the value of participational rights enjoyed by a party, including conducting cross-examination. See *Duke Power Co.*, ALAB-528, *supra*, 9 NRC at 150 & n.7.

**RULES OF PRACTICE: UNTIMELY INTERVENTION PETITION(S)
(BROADENING OF ISSUES OR DELAY)**

Late-comers to the agency's adjudicatory process generally must take the proceeding as they find it. See, e.g., *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983). Nonetheless, the addition of a late-comer brings the possibility that its participation will broaden the issues or otherwise slow the proceeding. This prospect is assessed in the fifth late-filed factor, which quite properly has been denominated as "of immense importance in the overall balancing process." *Id.*

**MEMORANDUM AND ORDER
(Granting City of Brook Park
Motion for Late Intervention)**

For the second time in this proceeding involving the requested suspension of the antitrust conditions in the operating licenses for the Perry Nuclear Power Plant, Unit 1, and the Davis-Besse Nuclear Power Station, Unit 1, we have before us a petition from the City of Brook Park, Ohio (Brook Park), asking permission to intervene out of time. We denied Brook Park's previous request principally for its failure to demonstrate an "injury in fact" sufficient to establish its standing to intervene. See LBP-91-38, 34 NRC 229, 251-52 (1991). Brook Park now claims it has cured the standing deficiency identified by the Board and, based on a balancing of the five factors governing late intervention set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), should be afforded party status. We agree on both counts and, accordingly, grant Brook Park's petition.

I.

In a May 1, 1991 *Federal Register* notice, the NRC Staff declared that any interested person desiring a hearing on its denial of the requests of Applicants Ohio Edison Company (OE), Cleveland Electric Illuminating Company (CEI), and Toledo Edison Company (TE) for suspension of the antitrust conditions in the Perry and Davis-Besse licenses must file a petition by May 31, 1991. See 56 Fed. Reg. 20,057 (1991). On August 8, 1991, Brook Park filed a petition to intervene out of time. Both the Applicants and the Staff opposed Brook Park's petition as insufficient to establish its standing and as failing to meet the section 2.714(a) standards governing late intervention.

In our October 7, 1991 prehearing conference order, we recognized Brook Park's assertion that it wished to participate in this proceeding to protect its

interest in interconnection access, wholesale power sale, and wheeling services now available under the antitrust conditions in the Perry license. We also noted Brook Park's admission that, despite various feasibility studies, it had not yet reached a decision to institute a municipal electrical system. Referring to counsel's statement during the prehearing conference that the citizens of Brook Park would vote in the near future on amending the city charter to establish a municipal electrical system, we declared:

If they do so, Brook Park's stake in this proceeding then will cease to be provisional and it will become subject to the same concrete injury in fact that could accrue to [intervenor City of] Cleveland or [American Municipal Power—Ohio, Inc.] as a result of a determination in this proceeding in favor of licensees. At present, however, the abstract, hypothetical nature of the injury to Brook Park is insufficient to establish its standing to intervene in this proceeding.

LBP-91-38, 34 NRC at 252 (footnote omitted). This, we concluded, was dispositive of its intervention request.¹

Thereafter, the parties to this proceeding submitted summary disposition motions addressing what has been identified as the "bedrock legal" issue,² a process that culminated in a June 10, 1992 oral argument on the pending motions. At the conclusion of that argument, counsel for Brook Park came forward and advised the Board that the city had recently enacted an ordinance establishing a municipal electrical system; as a consequence, Brook Park again intended to seek late intervention. See Tr. 446-47. Subsequently, on June 15, 1992, Brook Park filed an "amended" late intervention petition in which it seeks either "of right" or discretionary intervention. See Amended Petition of [Brook Park] for Leave to Intervene Out of Time (June 15, 1992) [hereinafter Brook Park Amended Petition]. In their joint response, the Applicants oppose any grant of party status to Brook Park. See Applicants' Answer in Opposition to the Amended Petition of [Brook Park] for Leave to Intervene Out of Time (June

¹ In addition, we observed that Brook Park's request was lacking under a balancing of the five late intervention factors specified in section 2.714(s)(1). We made particular note of its failure to make a showing about the legal or technical experience it might bring to the proceeding, thereby demonstrating its compliance with late intervention factor three — the extent to which its participation will assist in developing a sound record. See LBP-91-38, 34 NRC at 252. Moreover, citing the reasons already expressed for denying its request for intervention as of right, we concluded that discretionary intervention was not appropriate for Brook Park. See *id.* at 252 n.73.

² As framed by the parties in a November 7, 1991 letter to the Board, the "bedrock" legal issue is as follows:

Is the Commission without authority as a matter of law under section 105 of the Atomic Energy Act to retain the antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared.

That issue, along with the question of whether the doctrines of res judicata, collateral estoppel, laches, or law of the case bar the Applicants' antitrust license condition suspension requests, is currently under consideration by the Board. If we decide, as the Applicants' assert, that the Commission has no authority in such an instance, then the Board would proceed in a second phase of the proceeding to consider, among other things, the question of exactly what are the actual costs of electricity for the Applicants' facilities and alternative sources.

30, 1992) [hereinafter Applicants' Answer]. In contrast, the Staff has declared that it does not contest the grant of Brook Park's most recent petition.³ See NRC Staff's Answer to Amended Petition of [Brook Park] for Leave to Intervene Out of Time (July 6, 1992) [hereinafter Staff's Answer].

II.

A. We begin our review of Brook Park's renewed intervention request with the issue that played a cardinal role in derailing its initial attempt to become a party — its standing to intervene in this proceeding in accordance with 10 C.F.R. § 2.714(d). In its most recent intervention petition, Brook Park states that, in accordance with section XVIII of the Ohio Constitution, it has now decided to establish and operate a municipal electrical system, which will be in the service area of applicant CEI. See Brook Park Amended Petition at 8-9. According to Brook Park, on November 7, 1991, local citizens by a more than three-to-one margin approved a ballot referendum permitting the city to establish a municipal electrical system. Thereafter, following additional review and analysis of the means necessary to establish such a system, on April 21, 1992, Brook Park's City Council unanimously passed Ordinance No. 7711-1992 establishing a municipal utility in accordance with requirements of the Ohio Constitution, Art. XVIII, §§ 4-5. Brook Park also states that, in accordance with section 5 of Article XVIII, this ordinance did not become effective until May 22, 1992.

In our prehearing order, we suggested that action by Brook Park authorizing establishment of a municipal power system would make its interest sufficiently tangible to fulfill the requisite "injury in fact" element of the well-recognized judicial test for standing that governs NRC adjudicatory proceedings. See LBP-91-38, 34 NRC at 249 & n.60. The Staff agrees with this assessment. See Staff's Answer at 5. The Applicants, however, intimate that our observation was premature. They maintain that the favorable citizen action on the referendum, followed by the passage of the ordinance, does not make Brook Park's interest sufficiently concrete for standing purposes because Brook Park has not shown that it has taken any steps, such as arranging financing, that will result in the actual development of a municipal electrical system. See Applicants' Answer at 4 n.8.

The terms of the ordinance passed by the Brook Park City Council to implement the citizen referendum belie this objection. That enactment, entitled "An Ordinance Declaring It Necessary to Establish, Acquire, and Operate a Municipal Electric System," states in its preamble that based upon the prior feasibility studies, the city council determined that "it is in the public interest to

³None of the other intervening parties has taken any position regarding the propriety of Brook Park's request.

establish a municipal electric utility owned and operated by" Brook Park. Brook Park Amended Petition, Exh. A at 1 (Brook Park, Ohio, Ordinance No. 7711-1992, preamble (Apr. 21, 1992)). Thereafter, in section 1 the legislation ordains that Brook Park "shall proceed to acquire, construct, own, lease, and operate . . . a public electric utility . . ." *Id.* (Brook Park, Ohio, Ordinance No. 7711-1992, § 1). Further, under the ordinance the Mayor of Brook Park is "authorized and directed" to perform the "activities necessary" to implement section 1, including developing plans for the establishment, operation, and maintenance of a municipal power system. *Id.* at 1-2 (Brook Park, Ohio, Ordinance No. 7711-1992, § 3). In addition, the ordinance states that "funding for acquisition, construction and improvement" of the power system "shall be obtained" by issuing, to the maximum extent possible, "self-supporting obligations" of the city and that, prior to issuance of such obligations, city "moneys in its general fund or other available funds" may be used to "pay any costs of acquiring, constructing, equipping and operating" the municipal power system. *Id.* at 2 (Brook Park, Ohio, Ordinance No. 7711-1992, §§ 4-5).

There undoubtedly is much to be done before Brook Park has a fully operational municipal electrical system. Nonetheless, in light of the ordinance, it is reasonable to conclude that Brook Park has made a firm commitment to develop a municipal electrical system. The Applicants' suggestions to the contrary notwithstanding, the ordinance makes provisions for all elements essential to carrying out the construction, operation, and maintenance of that system. We thus have no difficulty concluding that Brook Park's interest in this proceeding as a customer and competitor of applicant CEI now is sufficiently tangible to afford it standing. Additionally, while the electrical system presently is in an incipient stage, Brook Park has indicated that it ultimately may wish to invoke the protections afforded by the existing antitrust conditions in the Perry and Davis-Besse licenses imposed pursuant to section 105 of the Atomic Energy Act (AEA), 42 U.S.C. § 2135. This makes its expressed interest in preserving those provisions one that falls within the "zone of interests" created by AEA section 105. Accordingly, with its municipal electrical system program now firmly in place, Brook Park is able to fulfill both prongs of the recognized judicial standard and establish its standing to intervene in this proceeding.

B. Of course, at this point in the proceeding, having standing is not enough to gain party status for Brook Park. As Brook Park recognizes, because its request comes after the deadline for filing intervention petitions, it must establish its right to intervene under a balancing of the additional factors set forth in section 2.714(a)(1) to govern late-filed intervention. We review those factors *seriatim*.

1. *Good Cause for Late Filing*

To establish its case for late intervention under the first factor — whether good cause exists for the Petitioner's failure to file on time — Brook Park argues that good cause for its failure to file within the time specified in the May 1992 notice of opportunity for hearing lies in its lack of standing to attain party status, a deficiency that was only recently rectified. *See* Brook Park Amended Petition at 13-14. The Staff disagrees. Referencing the Appeal Board's observation in *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), that "[i]f newly acquired standing (or organizational existence) were sufficient of itself to justify permitting belated intervention, the necessary consequence would be that parties to the proceeding would never be determined with certainty until the final curtain fell," the Staff declares that the recent creation of Brook Park's electrical system may not be "good cause" for its failure to file on time. *See* Staff's Answer at 5-6. (Ultimately, however, the Staff finds this not critical by concluding that a balancing of the other four factors supports intervention.) The Applicants likewise assert that Brook Park lacks "good cause" for filing late, although for a different reason. They contend that Brook Park relinquished any "good cause" argument by waiting 2 months after the adoption of Ordinance No. 7711-1992 before filing its intervention petition. *See* Applicants' Answer at 4-6.

As we observed in our prehearing conference order, this first factor is important because, in the absence of "good cause," there generally must be a compelling showing regarding the other four factors. *See* LBP-91-38, 34 NRC at 246 & n.53. Nonetheless, in the circumstances here, any lack of "good cause" for the late filing adds only marginally to the showing that must be made under the other four factors.

Bearing in mind the Appeal Board's observation about the general unsuitability of "newly acquired" standing as a basis for "good cause," we nonetheless find that admonition is tempered here by the fact that the occurrence that created Brook Park's standing, i.e., the citizen referendum and the passage of the ordinance, had no direct relationship to the prosecution of this proceeding by Brook Park. This is not, for instance, a case in which the Petitioner seeks to justify its untimeliness based on its inability to finish chartering the organization created solely to serve as the vehicle for intervention. *See Boston Edison Co.* (Pilgrim Nuclear Power Station, Unit 2), LBP-74-63, 8 AEC 330, 331-32, 335-36, *aff'd*, ALAB-238, 8 AEC 656 (1974). Rather, the city's legislative authorization of a municipal electrical system is an act of independent utility that, only consequentially, has the effect of affording it standing in this proceeding. Thus, even if Staff is correct that Brook Park's justification for its delay is insufficient to establish "good cause," its excuse is not so unmeritorious as to permit interven-

tion only upon a substantially enhanced showing on the other late intervention factors.

The same is true regarding the Applicants' complaint about the length of the delay between the April 21, 1992 passage of the Brook Park ordinance and the June 15, 1992 filing of its petition. Assuming *arguendo* that this is actually the period of delay,⁴ as the Appeal Board has previously observed, the significance to be placed on the amount of a delay "will generally hinge upon the posture of the proceeding at the time the petition surfaces." See *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983). Here, as the Applicants themselves point out, see Applicants' Answer at 5-6, if Brook Park had sought to intervene in April shortly after passage of the ordinance, it would have been too late to participate in the existing parties' briefing of the "bedrock" legal issue without impeding the established schedule. Further, as we describe in more detail in section II.B.5, *infra*, in acknowledging that it must take this proceeding as it finds it at the time it files its petition — with the "bedrock" legal issue fully briefed, argued, and submitted for determination — Brook Park eviscerates any negative impact that otherwise might arise from the claimed 2-month delay about which the Applicants object. Thus, this delay also is insufficient (either alone or in conjunction with the standing justification discussed *supra*) to warrant any enhancement in the showing Brook Park must make on the other four late intervention factors.

2. Availability of Other Means to Protect Petitioner's Interests

The Staff notes that the second late intervention factor — the availability of other means to protect Petitioner's interests — is not addressed in Brook Park's petition. Nonetheless, citing the burdensome nature of undertaking a civil action under the antitrust laws, the Staff concludes that the second factor supports Brook Park's intervention. See Staff's Answer at 7. Although asserting that Brook Park fails to fulfill this late intervention factor, see Applicants' Answer at 7 & n.14, the Applicants make no specific argument as to why factor two does not support intervention, see *id.* at 7-10.

Analyzing the impact of this factor on the late intervention request of American Municipal Power—Ohio, Inc. (AMP—Ohio), in our prehearing conference order we found that "the distinctive nature of the Commission's authority to consider and address the validity of the antitrust conditions it imposed leads

⁴The Ohio Constitution, Art. XVIII, §5, provides a 30-day period within which local citizens can seek a referendum on an ordinance creating a municipal public utility, thereby staying its effectiveness. See Brook Park Amended Petition, Exh. A at 3 (Brook Park, Ohio, Ordinance No. 7711-1992, §9). Brook Park indicates that with this provision, it felt its interest was not sufficiently concrete to warrant moving ahead with intervention until May 22, 1992, the date Ordinance No. 7711-1992 actually became effective. See *id.* at 13-14. This position is not unreasonable and, if accepted, would reduce the period of delay to a little more than 3 weeks.

us to agree with AMP-Ohio that no other forum or means now available can provide equivalent protection for its interest in seeing that the existing license conditions are maintained." LBP-91-38, 34 NRC at 247. The Applicants provide no justification for a contrary result here. Consequently, we conclude that factor two supports Brook Park's late intervention.

3. *Petitioner's Assistance in Developing a Sound Record*

In addressing the third factor — the extent to which Petitioner's participation in the proceeding will assist in developing a sound record — Brook Park provides an extensive exposition of its counsels' expertise and experience in the creation and development of municipal electrical systems, in the Staff's administrative review process on the Applicants' license condition suspension requests while representing the City of Clyde, Ohio, and in the application of antitrust principles to the utility industry through representation of various intervenors in Federal Energy Regulatory Commission proceedings. See Brook Park Amended Petition at 18-20. This, it asserts, establishes that Brook Park is in a sound position to make a contribution to the record of this proceeding.

For their part, the Applicants contend that Brook Park's ability to contribute to the record of this proceeding is negligible. According to the Applicants, the type of knowledge and expertise attributed to Brook Park's counsel is irrelevant because neither Brook Park nor its counsel purport to have any knowledge about the antitrust provisions of the Atomic Energy Act, the focal point of the first portion of this proceeding, nor do they demonstrate any knowledge about the relative cost of nuclear power generation at the Applicants' facilities, the central subject of the proceeding's second phase. See *supra* note 2. The Applicants also declare irrelevant Brook Park's professed interest in maintaining the existing antitrust conditions because this likewise has nothing to do with the issues in this proceeding. See Applicants' Answer at 10-13.

The Staff also maintains that Brook Park's showing on this factor is wanting, asserting that its discussion of counsel's legal ability — as opposed to Brook Park's ability to contribute sound evidence — is irrelevant. See Staff's Answer at 6 & n.6 (citing *Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-671, 15 NRC 508, 513 n.14 (1982)). The Staff nevertheless concludes that this element supports intervention because of Brook Park's apparent ability, as an entirely new market entrant, to provide firsthand evidence concerning the difficulties in overcoming barriers to entry and the advantages that will be lost by suspension of the license conditions.

Accepting *arguendo* the Applicants' assertion that the focus of the second portion of this proceeding will be the relative costs of nuclear power as compared to other alternative sources, at this juncture we have little difficulty in concluding that Brook Park can assist in developing a sound record. As

Brook Park declares, it "is an emerging municipal system, engaged in the process of exploring and acquiring power supply . . ." Brook Park Amended Petition at 17. Further, as its petition makes clear, Brook Park already has done studies intended to demonstrate the feasibility and prudence of establishing a municipal electrical system, which undoubtedly included consideration of the relative costs of different electrical supply sources. Moreover, as it moves forward to obtain a power supply for the electrical distribution system it has decided to create, the relative costs of different sources no doubt are important to Brook Park, thereby mandating that it will have on hand, and can provide, useful comparative information. And, to the degree that any second phase to this proceeding involves the issue of barriers to market entry, and whether there has been attenuation of those barriers sufficient to suspend the Perry and Davis-Besse antitrust conditions, the Staff is correct that as a new market entrant Brook Park is in a unique position to provide evidence relative to that question. We conclude, therefore, that factor three weighs in favor of permitting the late intervention of Brook Park.

4. *Representation of Petitioner's Interests by Existing Parties*

Brook Park contends with respect to the fourth factor — the extent to which Petitioner's interests will be represented by existing parties — that no other party now represents its interests. Its status as a nascent municipal electrical system is, according to Brook Park, a pivotal factor differentiating its interests from those now represented by the other intervening utilities.

This is especially so, Brook Park asserts, for the City of Cleveland, Ohio (Cleveland), because, as a large and well-established utility, it does not face the same competitive challenges as Brook Park. Brook Park also maintains that Cleveland is at least a potential competitor for the supply of a portion of Brook Park's power and energy requirements. See Brook Park Amended Petition at 17.

Concerning intervenor AMP-Ohio, which represents numerous Ohio municipal electric companies in acting as a wholesale power supplier, Brook Park notes that it is not an AMP-Ohio member. In addition, Brook Park contends that its interests are not represented by AMP-Ohio because, as a wholesale power supplier, AMP-Ohio does not compete in the retail electric market with any applicant, as will Brook Park. See *id.* at 16-17.

Brook Park also declares inapposite the interests of Alabama Electric Cooperative (AEC), which we admitted to this proceeding as a discretionary intervenor. See LBP-91-38, 34 NRC at 248-51. According to Brook Park, AEC is not a competitor in the relevant product and geographic markets previously established in the Commission's antitrust proceeding relative to the Perry and Davis-Besse facilities. See Brook Park Amended Petition at 17-18.

Finally, Brook Park declares that its interests as a particular beneficiary of the existing antitrust provisions clearly are different from those represented by the Staff and the Department of Justice in carrying out their broad, public-interest responsibilities. *See id.* at 18. *Compare* LBP-91-38, 34 NRC at 253.

The Applicants vigorously challenge Brook Park's analysis of its interests vis-a-vis those of the other parties to this proceeding. *See* Applicants' Answer at 7-10. They contend that the status of Cleveland as a "potential competitor" is irrelevant because it does nothing to differentiate Cleveland from Brook Park relative to the prosecution, in either phase one or phase two of this proceeding, of their identical, central position that the existing Perry and Davis-Besse antitrust conditions should be retained. Indeed, the Applicants assert that the Staff and the other intervening parties to the proceeding all champion this same central position and Brook Park has failed to show how its legal or factual positions diverge from theirs. The Staff, on the other hand, maintains that Brook Park has shown that it will not occupy the same distribution level as AMP-Ohio, and may be a customer of AMP-Ohio and Cleveland, thereby establishing a basis for concluding that its interests may not be adequately represented by the existing parties. *See* Staff's Answer at 6-7.

As it seeks to equate the duplication of substantive issues with a similarity of participants' interests, the Applicants' challenge is misdirected. *See Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979). Rather, the question is, given the matters at issue, will the existing parties effectively represent Brook Park's interests relative to those matters.

In this instance, even when addressing the same matters as existing intervenors, Brook Park's singular status as an emerging municipal power system, in conjunction with its position as a possible customer or competitor of AMP-Ohio and Cleveland, translates into a difference in perspective, and approach, relative to those matters.⁵ Moreover, because Brook Park must take this proceeding as it finds it, *see* section II.B.5, *infra*, the problem suggested by the Applicants, i.e., numerous intervenors addressing the same matters, really exists only for phase two of this proceeding and may invite the cure of party consolidation, a remedy we can take up if and when we reach that point. At present, however, that concern does not merit assigning factor four a negative weight in the late-intervention balance.

⁵Although the Applicants imply that Brook Park's interests can be adequately represented by existing parties because the city's witnesses would be available to those parties, *see* Applicants' Answer at 7 n.16, it has previously been recognized that such an argument fails to afford proper recognition to the value of the participational rights enjoyed by parties, including conducting cross-examination. *See Duke Power Co.*, ALAB-528, *supra*, 9 NRC at 150 & n.7.

5. *Petitioner's Participation as Broadening or Delaying the Proceeding*

As has often been noted, late-comers to this agency's adjudicatory process generally must take the proceeding as they find it. *See, e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983). Nonetheless, the addition of a late-comer brings the possibility that its participation will broaden the issues or otherwise slow the proceeding. This prospect is assessed in the fifth late-filing factor, which quite properly has been denominated as "of immense importance in the overall balancing process." *Id.*

Brook Park contends that its participation will have no appreciable impact on this proceeding's completion. Declaring that it accepts the proceeding as it finds it, with regard to the first phase on the "bedrock" legal issue Brook Park asks only that, to preserve any appellate rights, it be permitted to file a formal statement specifying those portions of the arguments already advanced by the existing parties that it wishes to adopt. Brook Park further declares that if it becomes necessary to advance to phase two, its evidentiary presentation will not involve more than two or three witnesses. *See* Brook Park Amended Petition at 21-22. The Applicants counter by asserting that Brook Park's proposed phase-one submittal is either worthless, as a mere repetition of the other parties' positions, or will involve the formulation of new arguments that, by requiring time for responses, will delay the resolution of the pending summary disposition motion and, therefore, the proceeding. Further, given Brook Park's expressed intent to demonstrate how the removal of the existing antitrust conditions would harm its competitive position, the Applicants characterize Brook Park's participation in phase two as either irrelevant to the appropriate subject matter or as broadening the scope of phase two extraordinarily. *See* Applicants' Answer at 13-14. The Staff concludes that Brook Park's willingness to accept the existing briefing schedules means that this factor weighs in favor of late intervention. *See* Staff's Answer at 7.

To accept the Applicants' argument regarding delay arising from Brook Park's participation in phase one would, as a practical matter, stand this factor on its head. We perceive no basis for penalizing Brook Park for structuring its participation in such a way as essentially to eliminate any delay in the resolution of the pending motions. As for the Applicants' concerns about phase two, we are unable to accept its characterization of the burden imposed by Brook Park's participation because, pending the resolution of the "bedrock" legal issue, the final parameters of the issues to be litigated during that hearing have not yet been specified. This significant factor, therefore, supports late intervention by Brook Park.

6. Conclusion

As we have outlined above, even assuming that Brook Park did not have "good cause" for its late-filed petition, in this instance there is no reason for that factor to take on any particular weight relative to the other four factors. As to the other four, each one, including the important "delay" factor, supports permitting late intervention by Petitioner. As a consequence, we conclude that the balance of the section 2.714(a)(1) late intervention factors (in conjunction with its showing regarding its standing to intervene) now supports Brook Park's admission as a party.

For the foregoing reasons, it is, this sixth day of August 1992, ORDERED that:

1. The June 15, 1992 amended late-filed intervention petition of Brook Park is *granted* and it is admitted as a party to this proceeding.

2. On or before *Monday, August 17, 1992*, Brook Park may file a pleading indicating, by reference to the particular pages, the specific portions of the summary disposition filings of the existing parties it agrees with and wishes to adopt. This pleading is not to include any additional analysis or argument by Brook Park. No responses to this pleading will be entertained.

3. In accordance with the provisions of 10 C.F.R. §2.714a(a), as it rules upon an intervention petition, this order may be appealed to the Commission within 10 days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Charles Bechhoefer
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 6, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

James P. Gleason, Presiding Officer

In the Matter of

Docket No. 40-08681-MLA
(ASLBP No. 92-666-01-MLA)
(Source Materials License
No. SUA-1358)

UMETCO MINERALS CORPORATION

August 5, 1992

MEMORANDUM AND ORDER
(Request for Hearing and Stay of License Amendment)

I. REQUEST FOR HEARING

On July 2, 1992, the State of Utah filed a request for hearing on the issuance by the Nuclear Regulatory Commission of Amendment 30 to License No. SUA-1358. The State also requests a stay of the amendment pending completion of the proposed adjudication.¹ Licensee, the Umetco Minerals Corporation (UMC), opposes the hearing request,² and the Staff also filed a response in opposition to both the hearing request and the request for a stay.³ The Staff indicates that it intends to participate as a party if a hearing is granted.

The UMC application for Amendment 30, filed on January 18, 1989, is to perform plant processing tests on 600 wet tons of feed containing source

¹ Request for Hearing and Stay, Utah Department of Environmental Quality and Assistant Attorney General, July 2, 1992.

² Letter from R.A. Van Horn, Director of Operations, UMC, to NRC Executive Director of Operations James Taylor, July 16, 1992.

³ NRC Staff's Response to Request for Hearing by State of Utah, July 30, 1992.

material received from the Teledyne Wah Chang Company in Albany, Oregon. The material for the processing test is not natural ore mined for its uranium content but rather comes from the processing of ore to recover zirconium. It contains greater than 0.05% recoverable uranium, and UMC intends to process the material for its uranium content at its White Mesa Mill, a licensed facility in Blanding, Utah. After processing, UMC intends to dispose of the resulting tailings at the mill's impoundment. The State asserts that the NRC is taking licensing action without first adequately determining whether UMC is actually engaged in waste disposal of material from the Wah Chang Company instead of uranium reprocessing as alleged. As an Agreement State, Utah asserts that it, rather than the NRC, may have jurisdiction over the materials if they are either low-level waste or source material. Further, the State asserts that the NRC's amendment action may hinder the Department of Energy's (DOE) responsibility to assume long-term custodial care of the processed materials. Finally, the State also expresses a concern over the lack of NRC oversight of UMC's tests and the characteristics of the materials to be processed. The State contends, *inter alia*, that a hearing is necessary in order to resolve the nature of the materials being processed, the Licensee's intention in processing the material, and questions concerning title to the material.

In opposing the hearing, UMC cites NRC's regulations, 10 C.F.R. § 2.1205(c)(2)(i) and (ii), requiring that a hearing request must be filed within thirty (30) days after the requestor receives actual notice of a pending application or agency action granting the application, or 180 days after agency action granting the application, whichever is earlier. The Licensee contends that here the State had much more than 30 days' knowledge of the license amendment application prior to filing its hearing request. In support of its position, UMC references specific meetings it had with State environmental officials to discuss the application.⁴ In its response, the Staff alleges that the State had actual notice of the pending application as early as April 1989.⁵ Because the Presiding Officer is required under the Commission's regulations to determine that requests for hearings are timely filed, we address that issue first.

The applicable regulation, 10 C.F.R. § 2.1205(c)(2), states in its pertinent part that:

(c) A person other than an applicant shall file a request for a hearing

(2) If a *Federal Register* notice is not published in accordance with paragraph (c)(1), the earlier of —

(i) Thirty (30) days after the requestor receives actual notice of a pending application or an agency action granting an application; or

⁴ *Umetco Minerals Corporation*, July 16, 1992, at 2.

⁵ Staff Response at 6-7.

(ii) One hundred and eighty (180) days after agency action granting an application.

Both UMC and the Staff argue that since the State had actual notice of the then-pending license application months before the NRC approved and issued the amendment, a request for hearing was required to be filed within 30 days of such notice. The State rejoins that it was entitled to file, as it did, within 30 days of the agency action granting the license amendment. As the State does not appear to be seriously objecting to the assertion that it had prior notice of the pending application, the question here is whether 10 C.F.R. § 2.1205(c)(2)(i) provides for two windows of opportunity rather than one for filing a request for hearing.⁶ Nothing in either the plain language of the regulation or the underlying Statement of Consideration militates against an interpretation providing two such windows of opportunity. There is nothing in the plain language of the regulation to support an opposite conclusion. Indeed, to subscribe to the position advanced by UMC and the Staff, one must conclude, without more, that the word "earlier" modifies both a notice of a pending application and notice of an agency action granting the application as well as the 180-day period set forth in 10 C.F.R. § 2.1205(2)(ii). Neither party has suggested any basis for such an interpretation, nor can it be supplied here. As physically structured and grammatically written, the words "earlier of-" refer to and modify the whole of subsection (i) and the whole of subsection (ii). The modifier "earlier" can neither structurally nor grammatically properly modify both components of subsection (i) as well as subsection (ii). To obtain that result, the regulation would have to be written with three subsections so that the current first subsection would be split into two separately numbered subsections and the current second subsection would become a third subsection. Accordingly, the plain language of section 2.1205(c)(2)(i) provides two windows of opportunity for filing a hearing request. As the U.S. Court of Appeals has suggested, an agency's interpretation of its own rules cannot fly in the face of the language of the rules themselves. See *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (1983).

In support of this conclusion, the commentary in the Commission's Statement of Consideration refers to the fact that the proposed rule, in section 2.1205(c), provides that a hearing petition will be considered timely if filed within 30 days after the petitioner receives actual notice of a licensing action.⁷ No rationale is apparent as to why the Commission would wish to require a person to file a hearing request at a time, such as is evident here, when ongoing communications may prevent the necessity for a hearing at all. That expectation would be extinguished only when the NRC approved the action being opposed by the State. It is a more reasonable procedure and, in any event, what the plain

⁶ State of Utah's Supplemental Request for Hearing at 1 (Aug. 31, 1992).

⁷ See 54 Fed. Reg. 8271 (Feb. 28, 1989).

language of the regulation requires, that when an effort toward resolution fails, a 30-day period would then ensue for requesting a hearing. Here, the State acted within this time frame. Thus the State's request for a hearing was timely filed.

Alternatively, even if the State's petition is found untimely, its lateness is excusable under the provisions of 10 C.F.R. § 2.1205(k). In the circumstances, the fact that the State was engaged in discussions with the Staff, as well as the Licensee, on the requested license amendment makes the delay in filing an earlier request for hearing excusable. Also, the current request by the Staff, *agreed to by Licensee*, to delay processing of the material tends to buttress a finding that a grant of the hearing petition would not result in undue prejudice or injury to the other participants in the proceeding.⁸ The fact that the proposed license amendment request was filed over 3-1/2 years ago, and no action has ensued to the present time, also supports a finding that no undue prejudice would result from the grant of the hearing petition alone.

The applicable regulations also require that the Presiding Officer determine that the specified areas of concern are germane to the subject matter of the proceeding and that the requestor meets the judicial standards for standing.⁹ Neither the Licensee nor the Staff addresses the standing or areas of concern submitted in the State's petition.¹⁰ No serious question can be raised on the State's standing in this proceeding. Its petition cites issues of jurisdiction over the materials involved, the proper characteristics of such material, the purpose for which the materials have been received, the failure to place proper conditions on the license amendment, and questions concerning governmental responsibility for the ultimate custody of the materials. These matters setting forth possible injuries in fact are within the zone of interests protected by statute and meet the standards for standing in Commission proceedings.¹¹ I find that the State has standing to participate and has set forth areas of concern germane to this proceeding.

II. REQUEST FOR STAY

In its petition, the State also requests a stay of the license amendment pending the completion of a hearing. In the Subpart L proceedings, an application for a

⁸ Presiding Officer Telephone Conference at 6-7 (July 30, 1992).

⁹ 10 C.F.R. § 2.1205(g).

¹⁰ The Staff does allege, with supporting attachments, that substantially identical Utah State concerns have been addressed and resolved with notice and consent of the Commission prior to the issuance of the license amendment. NRC Staff Response at 8 n.14.

¹¹ *Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2)*, CLJ-76-27, 4 NRC 610, 612-13 (1976).

stay is governed by the provisions of 10 C.F.R. § 2.1263 which incorporates the traditional four-stay criteria of 10 C.F.R. § 2.788:

1. Whether the movant has made a strong showing that it is likely to prevail on the merits;
2. Whether the movant has shown that it will be irreparably injured unless a stay is granted;
3. Whether a stay would harm other parties; and
4. Where the public interest lies.

Under the Commission's regulations, 10 C.F.R. § 2.1237(b), the State has the burden of persuasion on these factors. Here, however, the State's petition fails even to address the criteria for a stay set forth in the regulation. Although arguably the third- and fourth-stay criteria might be satisfied by the State's recital of its concerns, the failure to address the first two criteria is fatal to its request. Obviously, the public interest would be served in having the question of jurisdiction finally established. Similarly, the Licensee would not be harmed by a stay because it has agreed to the Staff's request to delay any materials processing until an effort is made to resolve the State's concerns, *supra*. But since the State has made no showing that it is likely to prevail on the merits or that it will be irreparably injured, a stay cannot be granted. The request for a stay is therefore denied.

Order

For the reasons stated, it is, this 5th day of August 1992, ORDERED:

1. The request for hearing by the State of Utah is granted and the request for a stay of Amendment 30 to License No. SUA-1358 is denied.
2. A hearing on the License Amendment will be held and the time and other details concerning the hearing will be published at a future date.
3. Petitions to intervene in this proceeding must be filed within thirty (30) days of this Order appearing in the *Federal Register*. The Licensee and Staff will have ten (10) days to respond after service of any petition.
4. An appeal from this Order, by parties other than the petitioner, may be filed with the Commission within ten (10) days of the service of the Order. 10 C.F.R. § 2.1205(n).

James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 5, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

In the Matter of

Docket Nos. 50-348-CivP
50-364-CivP
(ASLBP No. 91-626-02-CivP)

ALABAMA POWER COMPANY
(Joseph M. Farley Nuclear Plant,
Units 1 and 2)

August 12, 1992

MEMORANDUM AND ORDER
(Approving Settlement Agreement
and Terminating Proceeding)

In this proceeding, Licensee Alabama Power Company (APCo) has challenged the NRC Staff's imposition of a \$450,000 civil penalty for alleged violations of the Commission's requirements in 10 C.F.R. § 50.49 regarding environmental qualification of electrical equipment important to safety. See 55 Fed. Reg. 35,203 (1990). During 12 days of hearings in February and May of this year, APCo and the NRC Staff presented numerous witnesses in support of their positions regarding the civil penalty. See Tr. 1-2309. Thereafter, the Board established a filing schedule for the parties' proposed findings of fact and conclusions of law. See Memorandum and Order (June 1, 1992) (unpublished). Now, by joint motion dated August 6, 1992, the parties request that we approve a settlement stipulation they have provided and terminate this proceeding prior to a merits determination relative to any of the legal or factual matters at issue.

Pursuant to section 234 of the Atomic Energy Act of 1954 (AEA), as amended, 42 U.S.C. § 2282, and 10 C.F.R. § 2.203, we have reviewed the settlement agreement to determine whether approval of the agreement and termination of this proceeding is in the public interest. On the basis of that review, and according due weight to the position of the Staff, we have concluded that the parties' agreement and the termination of this proceeding are consistent with the public interest.*

Accordingly, the joint motion of the parties is *granted* and we *approve* the "Settlement Agreement," which is attached to (not published) and incorporated by reference in this Memorandum and Order. Further, pursuant to AEA sections 103, 161(b), 161(o), and 191, 42 U.S.C. §§ 2133, 2201(b), 2201(o), 2241, and 10 C.F.R. § 2.203, the Board *terminates* this proceeding.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

James H. Carpenter
ADMINISTRATIVE JUDGE

Peter A. Morris
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 12, 1992

*Previously, we have recognized that counsel for both parties have displayed a laudable spirit of cooperation in litigating this matter, see Tr. 1318-19, 2308, an observation that bears repeating in light of their settlement of this otherwise vigorously contested proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

James P. Gleason, Presiding Officer

In the Matter of

Docket No. 40-08681-MLA
(ASLBP No. 92-666-01-MLA)
(Source Materials License
No. SUA-1358)

UMETCO MINERALS CORPORATION

August 12, 1992

MEMORANDUM AND ORDER
(Amendment)

The Order issued on August 5, 1992, should have provided for an appeal of the denial of the State of Utah's (State) request for a stay of the Nuclear Regulatory Commission's grant of a license amendment to the Umetco Minerals Corporation. I now amend that Order to provide an opportunity to the State for an appeal of my decision on the stay request. An appeal may be filed within ten (10) days of the service of this Amendment, or such other times as the Commission may direct.

James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Thomas D. Murphy

in the Matter of

Docket No. 50-312-DCOM
(ASLBP No. 92-663-02-DCOM)
(Decommissioning Plan)
(Facility Operating License
No. DPR-54)

SACRAMENTO MUNICIPAL UTILITY
DISTRICT
(Rancho Seco Nuclear Generating
Station)

August 20, 1992

In a proceeding concerning a proposed decommissioning plan for a facility, the Licensing Board rules that, because the single petitioner for intervention lacks standing to participate, has submitted no proposed contentions adequate for adjudication and, for that reason, also does not warrant discretionary intervention, the petition should be denied and the proceeding terminated.

RULES OF PRACTICE: INTERVENTION

To participate as a party in an NRC adjudicatory proceeding, a petitioner must initially demonstrate both that it has standing and has proffered at least one viable contention. 10 C.F.R. §§ 2.714(a)(2) and (d)(1)(iii).

RULES OF PRACTICE: STANDING

The Commission applies contemporaneous judicial concepts of standing, which require a petitioner to demonstrate that (1) it has suffered or will likely suffer "injury in fact" from the action under review, an injury that would be redressable by a favorable decision in the proceeding; and (2) the injury falls within the "zone of interests" at least arguably sought to be protected by the statute being enforced.

RULES OF PRACTICE: STANDING (PLEADING REQUIREMENTS)

In determining whether injury in fact has been adequately set forth, a Licensing Board is limited to assertions actually pleaded by the petitioner; it may not assume or presume facts not actually pleaded.

RULES OF PRACTICE: SERVICE OF DOCUMENTS

A licensee must serve relevant documents on other parties, not upon petitioners for intervention. 10 C.F.R. §§ 2.701, 2.712. Adjudicatory documents filed by parties responsive to or bearing upon intervention petitions must be served on the petitioners.

RULES OF PRACTICE: INTERVENTION PETITION (GROUP)

An organization may gain standing in two ways: (1) in its own right, assuming one of its own interests has been or may be adversely affected, or (2) as a representative of one or more of its members, assuming that such members otherwise have standing, the interests it seeks to protect are germane to the organization's purposes, and neither the claim asserted nor the relief requested require the individual member's participation in the lawsuit.

RULES OF PRACTICE: STANDING (PLEADING REQUIREMENTS)

In seeking representational standing, an organization normally must provide affidavits of members who authorize the organization to represent their interests.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

An organization pleading injury to informational interests, such as the failure to receive information appearing in an environmental impact statement, must allege explicit environmental harm with a direct impact upon the petitioner. A generalized claim is not enough.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

The presumption of standing for those living or working within 50 miles of a facility applies only in proceedings involving reactor construction permits, operating licenses, or significant amendments thereto, where there is clear implications for the offsite environment or a clear potential for offsite consequences. In other situations, a petitioner must allege some specific injury.

RULES OF PRACTICE: STANDING (ZONE OF INTERESTS)

Protection of financial interests such as excessive electric rates or higher fuel costs is not within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act.

RULES OF PRACTICE: STANDING (DISCRETIONARY)

The most important criterion for evaluating whether discretionary standing should be granted is the extent to which the participant's participation may reasonably be expected to assist in developing a sound record.

RULES OF PRACTICE: COLLATERAL ESTOPPEL

The NRC may apply collateral estoppel principles, where appropriate. Collateral estoppel requires an identity of issues. It is an equitable doctrine, not required as a matter of law, that should be applied only with a sensitive regard for any changed circumstances or the possible existence of some public interest factors. *Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2)*, CLI-74-12, 7 AEC 203; ALAB-182, 7 AEC 210 (1974).

RULES OF PRACTICE: CONTENTIONS

Incorporating by reference Staff questions to a licensee, without explaining their significance, fails to conform to the pleading requirements for contentions.

RULES OF PRACTICE: CONTENTIONS

As amended in 1989, the Rules of Practice require, with respect to contentions, a specific statement of law or fact to be raised or controverted, a brief explanation of the bases, a concise statement of supporting "facts or expert opinion," together with references to specific sources and documents of which the petitioner is aware and upon which the petitioner intends to rely, and suffi-

cient information to show a genuine dispute with the applicant (or licensee) on a material issue. If proved, the contention must entitle the petitioner to relief.

NEPA: ENVIRONMENTAL REPORT

The decommissioning environmental review supplements the operating license review and thus need only reflect new information or significant environmental change associated with decommissioning or storage of spent fuel. 10 C.F.R. § 51.53(b).

NEPA: GENERIC ISSUES

The environmental impact of decommissioning can normally be delineated in generic terms through reference to the Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (NUREG-0586). To the extent that impacts from decommissioning a particular plant are significantly different from the generic impacts, they may be covered in a supplemental impact statement.

NEPA: SCOPE OF REVIEW

The scope of a decommissioning action must be contrasted with the scope of an action to discontinue facility operation (for which no license is required). Need for power and the environmental effects of replacement power relate to ceasing operations, not to decommissioning.

NEPA: CONSIDERATION OF ALTERNATIVES

An agency need consider only alternatives that lead to the objective of a proposal. For decommissioning, the NRC need consider only alternate forms of decommissioning, together with the "no action" alternative. Resumed operation is an alternative only to the cessation of operations, not to decommissioning.

PREHEARING CONFERENCE ORDER

(Terminating Proceeding)

This proceeding involves consideration of a proposed order approving a decommissioning plan for, and authorizing decommissioning of, the Rancho Seco Nuclear Generating Station (hereinafter, Rancho Seco), located near Sacramento, California. For reasons set forth below, the single petition for leave to intervene and request for a hearing that has been filed is deficient in failing to

establish the standing of the Petitioner to participate (either as a matter of right or of discretion) or the adequacy of any proposed contention. Accordingly, we are denying the intervention petition and terminating the proceeding.

I. BACKGROUND

A public referendum on June 6, 1989, required the Sacramento Municipal Utility District (hereinafter SMUD or Licensee) to discontinue operation of Rancho Seco. As a result, SMUD decided to shut down the facility, and it has taken a multistage approach to reach this result.

On June 7, 1989 (the day following the public vote), SMUD discontinued producing power from the facility.¹ Reactor defueling was completed on December 8, 1989.² On April 26, 1990, the Licensee continued its scale-down activities by applying to convert the operating license into a possession-only license (POL) that would authorize only the "use and possession" of the facility, not its operation. Following an adjudicatory proceeding during which the Petitioner now before us sought unsuccessfully to intervene, that application was approved by the Commission on March 17, 1992.³

The final stage involves a proposed decommissioning plan, leading eventually to termination of the operating license and release of the site for unrestricted use. See 10 C.F.R. § 50.82. On May 20, 1991, the Licensee filed its application for termination of its license, including a proposed decommissioning plan.⁴ In general, the plan provides for 10 to 20 years of onsite storage (SAFSTOR) followed by the removal of residual radioactivity.⁵ On October 21, 1991, SMUD filed a supplement to its environmental report, concerning the impacts of the method of decommissioning it had selected. The NRC Staff began reviewing the application and, on March 12, 1992, requested additional information from the Licensee on both the decommissioning plan and the environmental report. (The Licensee responded on April 15, 1992.)

On March 19, 1992, the NRC published a Notice of Opportunity for Hearing with respect to both the decommissioning plan and the environmental report.⁶ One timely request for a hearing and petition for leave to intervene was filed,

¹ Sacramento Municipal Utility District, Rancho Seco Nuclear Generating Station, Proposed Decommissioning Plan (DP), p. 1-27; see also 57 Fed. Reg. 9577 (Mar. 19, 1992).

² *Id.*

³ Amendment 117 to Facility Operating License No. DPR-54, 57 Fed. Reg. 10,193 (Mar. 24, 1992). The effective date of this amendment was made subject to two stays of 10 working days each, leading to an April 24, 1992 effective date for the POL. See generally CLI-92-2, 35 NRC 47 (1992).

⁴ SECY-92-150, "Quarterly Report on the Status of Prematurely Shut Down Plants," at 4 (furnished to Licensing Board and hearing participants by Memorandum from Chief, Docketing and Services Branch, Office of the Secretary, NRC, dated April 28, 1992).

⁵ 57 Fed. Reg. 9577 (Mar. 19, 1992). See also DP at 1-1.

⁶ 57 Fed. Reg. 9577.

by the Environmental and Resources Conservation Organization (hereinafter, ECO), on April 20, 1992. As noted earlier, ECO had sought unsuccessfully to participate in the POL proceeding. On May 13, 1992, the Commission established this Licensing Board to consider the petition and preside over a hearing if one were ordered.⁷

SMUD and the NRC Staff each opposed ECO's hearing request and intervention petition.⁸ Because a petitioner for intervention is permitted by 10 C.F.R. § 2.714(a)(3) to amend its petition without leave of the Board until 15 days prior to the first prehearing conference, the Board, by Memorandum and Order dated May 15, 1992, set schedules for the filing of an amended petition, including contentions, receipt of responses, and a prehearing conference.

ECO filed a timely amendment/supplement to its petition on June 29, 1992. On July 8 and 10, 1992, the Licensee and Staff, respectively, filed responses in opposition to the amended petition. The Board conducted a prehearing conference in Bethesda, Maryland, on July 14, 1992, at which representatives of ECO, SMUD, and the Staff appeared.⁹

Following the prehearing conference, on July 17, 1992, ECO filed two motions: (1) a Motion for an Order to Compel Service, and (2) a Contingent Motion to Withhold Any Order Wholly Denying the Petition for Leave to Intervene and/or the Request for a Hearing. The Licensee opposed both of these motions and filed cross-motions to strike certain portions of each motion; the Staff opposed the second motion but took no position on the first.¹⁰ (The Staff supported the Licensee's motions to strike.¹¹) Thereafter, on August 14, 1992, ECO filed two more motions: (1) ECO's Motion to Strike, and (2) its Anticipatory Motion for Leave to File ECO Pleading (seeking leave to file the foregoing Motion to Strike). We treat these motions later in this Opinion.

II. STANDING

To participate as a party in an NRC adjudicatory proceeding, a petitioner must initially demonstrate both that it has standing and that it has proffered

⁷ 57 Fed. Reg. 21,433 (May 20, 1992).

⁸ Licensee's Answer, dated May 5, 1992; NRC Staff Response, dated May 11, 1992.

⁹ See Tr. 1-180. The conference had been announced by a Notice of Prehearing Conference, dated June 23, 1992, published at 57 Fed. Reg. 29,739 (July 1, 1992).

¹⁰ Licensee's Answer in Opposition to Petitioner's Motion for an Order to Compel Service and Licensee's Motion to Strike Portions Thereof, dated July 27, 1992; Licensee's Answer in Opposition to Petitioner's Contingent Motion to Withhold Any Order Wholly Denying the Petition for Leave to Intervene and/or the Request for a Hearing and Licensee's Motion to Strike Portions Thereof, dated July 27, 1992; NRC Staff Response in Opposition to ECO's Contingent Motion to Withhold Any Order Wholly Denying Its Petition for Leave to Intervene, dated August 6, 1992.

¹¹ NRC Staff Response in Support of Licensee's Motions to Strike Improper Argument in Environmental and Resources Conservation Organization's Filings, dated August 17, 1992.

at least one viable contention. 10 C.F.R. § 2.714(a) and (b). Turning first to standing, the petitioner must demonstrate its interest in the proceeding (10 C.F.R. § 2.714(a)(2)) and the "possible effect of any order that may be entered . . . on [its] interest" (10 C.F.R. § 2.714(d)(1)(iii)).

To determine whether a petitioner has adequately demonstrated its standing, the Commission applies contemporaneous judicial concepts of standing. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). Those standards involve a two-pronged test: (1) the petitioner must demonstrate that it has suffered or will likely suffer "injury in fact" from the action under review, an injury that would be redressable by a favorable decision in the proceeding; and (2) the injury must fall within the "zone of interests" at least arguably sought to be protected by the statute being enforced — here, either the Atomic Energy Act or the National Environmental Policy Act (NEPA). *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); see *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. ___, ___, 112 L. Ed. 2d 1125, 1134 (1991); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988).

An organization such as ECO may gain standing in two ways. First, it may demonstrate standing in its own right, assuming one of its own interests has been or may be adversely affected. However, if such interest is informational, such as the failure to receive information appearing in an environmental impact statement, explicit environmental harm with a direct impact upon the petitioner must also be alleged. A generalized claim of informational injury is not enough. CLI-92-2, *supra*, 35 NRC at 57-60; *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 84 (D.C. Cir. 1991); see also *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882-83, 111 L. Ed. 2d 695, 712-13 (1990).

Second, an organization may gain standing as a representative of one or more of its members, assuming that such members otherwise have standing, the interests it seeks to protect are germane to the organization's purposes, and neither the claim asserted nor the relief requested require the individual member's participation in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 343 (1977). The members must normally provide affidavits authorizing the organization to represent their interests. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-97 (1979).

At the outset, we note that both the Licensee and the Staff assert that ECO should be estopped from asserting its standing claims in this proceeding because of their similarity or, indeed, identity with claims unsuccessfully asserted as a basis for standing in the POL proceeding. The NRC may, of course, apply collateral estoppel principles where appropriate. See, e.g., *Alabama Power Co.*

(Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, *remanded on other grounds*, CLI-74-12, 7 AEC 203 (1974).

Collateral estoppel is an equitable doctrine, not required as a matter of law, that should be applied only "with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some public interest factor in the particular case" *Farley*, CLI-74-12, *supra*, 7 AEC at 203-04; ALAB-182, *supra*, 7 AEC at 216. For collateral estoppel to apply, there must be an identity of issues — here, the issue of ECO's standing. *Farley*, ALAB-182, *supra*, 7 AEC at 213.

Despite the similarity of ECO's standing assertions in the POL proceeding and this proceeding, the scope of this decommissioning proceeding appears to be sufficiently different from the POL proceeding to at least raise questions as to whether changed circumstances may be present. Among other matters, the health and safety and environmental effects of the two proceedings do not appear identical.

The Licensee and Staff have not addressed these apparent differences or shown that they would not affect ECO's standing status in this proceeding. In addition, we perceive some public-interest considerations in affording ECO a full opportunity of convincing this Board of its standing. (We, of course, do recognize various prior rulings of the Commission for their precedential value.) We conclude that the Licensee and Staff have not made a sufficient showing on the identity of the standing issues in the two proceedings for collateral estoppel to apply, and we decline to bar ECO's standing claims on that basis.

A. Injury in Fact

In determining whether injury in fact has been adequately set forth, we are limited to assertions actually pleaded by the petitioner. See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114 (1992). The petition itself must "set forth with particularity" the elements of standing. 10 C.F.R. § 2.714(a)(2). We are thus not permitted to assume or presume the existence of facts not actually pleaded. See *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

ECO's claims for having standing are set forth in both its April 20, 1992 petition and its June 29, 1992 supplement. The latter document additionally sets forth contentions, to which we will refer to the extent relevant to the standing claims.

Although not a model of clarity, ECO has put forward several discrete bases for its standing. Specifically, it sets forth (1) claimed injuries to itself as an

organization, and (2) claimed injuries of certain specified members whom it represents.¹² We turn to each of these claims:

1. ECO first asserts that it (as well as its members) will be adversely affected if an environmental impact statement (EIS) for the proposed decommissioning is not prepared. With respect to its organizational interests, ECO initially stated that

ECO strongly supports the use of nuclear plants to provide the safe and domestically secure electricity needed in this country. This mission necessarily includes intervening in the present matter where the destruction of a state-of-the-art nuclear reactor is sought in order to inform decisionmakers and the public of the consummate folly of decommissioning Rancho Seco.¹³

ECO goes on to state that the NRC Staff's failure to indicate that it will prepare an EIS on the decommissioning deprives ECO of its ability to comment directly on the environmental report prepared by SMUD and on a draft EIS prepared by the Staff, to advise its members of the environmental risks involved with each alternative and to report the findings and recommendations of the environmental evaluations to the public.¹⁴

ECO's supplemental petition adds little with respect to organizational standing, except to indicate that the contentions contained therein are examples of the injury suffered by ECO. (An affidavit by the President of ECO is also provided, formalizing in essence ECO's general claims and providing ECO's articles of incorporation, setting forth the organization's purposes.) Looking at the contentions, the only one bearing on ECO's organizational standing claims is the purported lack of an EIS (including alleged inadequacies in the Licensee's Environmental Report).

It is clear from the precedents cited above that ECO has failed to present an adequate basis for organizational standing. The lack of an EIS would at most affect ECO's informational interests, but nowhere is there asserted any environmental harm that would affect the organization, other than informationally. That being so, ECO has not satisfied the informational harm criteria sanctioned by recent court decisions and set forth by the Commission — with respect to ECO itself — in the POL proceeding. CLI-92-2, *supra*, 35 NRC at 57-61. It thus has not established standing on that basis.

2. ECO also seeks standing as the representative of certain of its members. In its initial petition, ECO listed the names of two members who purportedly live within 50 miles of the facility. No affidavits authorizing representation by ECO were included.

¹² April 20, 1992 Petition at 4; June 29, 1992 Supplement at 2-10.

¹³ April 20, 1992 Petition at 19.

¹⁴ *Id.* at 19-20.

The only description of how these individuals might be affected by the proposed decommissioning action was that they "have an interest in whether the proposed order provides reasonable assurance of their radiological health and safety . . . and whether the decision . . . is made in accordance with and is consistent with the goals of NEPA."¹⁵ ECO goes on to claim that certain of its members (not explicitly the two listed) depend on SMUD to meet their electric energy needs and that ECO has a vital interest in ensuring that an adequate and reliable supply of electricity will be available. Nowhere does ECO provide any factual basis for its thesis that radiological health and safety of the two listed members would be compromised or that their future supply of electricity would become unreliable. Nor does it show how, as it claims, the absence of Rancho Seco would lead to the substitution of fossil fuel plants that would contribute not only to acid rain, the greenhouse effect, and other effects adverse to the environment but also to the endangerment of national energy security.¹⁶

In its Supplement, ECO refers only to one of the aforementioned members, identifying him as living 43 miles from the facility and providing an affidavit authorizing ECO to represent his interests. It relies on the so-called "presumption of standing which attaches to residency within a 50 mile radius of the plant."¹⁷ It also cites portions of the decommissioning plan and the environmental report which analyze certain effects of the plan extending as much as 50 miles from the facility.¹⁸

As the Commission has explicitly held, the 50-mile presumption of standing applies only in proceedings involving reactor construction permits, operating licenses, or significant amendments thereto — cases "with clear implications for the offsite environment, or . . . a clear potential for offsite consequences." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). In other situations, a petitioner must allege "some specific 'injury in fact' that will result from the action taken . . ." *Id.* at 330.

As we have seen, ECO has relied primarily upon the so-called presumption. It asserts that decommissioning involves at least as much radioactivity as a construction permit and, thus, that the same presumption should apply. This reasoning, however, ignores the foundation for the 50-mile presumption — the fact that significant offsite consequences can result from the operation of a facility for which a construction permit is sought. ECO does not even allege

¹⁵ April 20, 1992 Petition at 18.

¹⁶ ECO makes other claims — likewise unspecific — concerning the members' interest in electricity at reasonable rates, the likely rise in those rates as a result of decommissioning, and the contribution of decommissioning to the national trade deficit. As set forth later in this Opinion, at pp. 130-31, *infra*, none of the claims of that sort fall within the zones of interest arguably sought to be protected by the Atomic Energy Act or NEPA.

¹⁷ Supplement at 8. See also Oral Argument, Tr. 6-8.

¹⁸ Supplement at 10.

that similar offsite radiological or environmental consequences eventuate from decommissioning. As for its second claim, ECO has made no attempt to show how any of the effects cited in the decommissioning plan or environmental report as extending as much as 50 miles from the facility affect the particular individual.

At the prehearing conference, ECO asserted that the individual whom it represents would also be affected by the radiological effects of transportation attendant to the decommissioning proposal — “the transportation of spent fuel . . . and high level transuranic and low level waste off site and through the area surrounding the plant where [the individual represented by ECO] lives.”¹⁹ ECO had not mentioned transportation either in its pleadings or in the affidavit of the affected individual. And it has not spelled out what the radiological impact, if any, would be on the affected individual. Because of this lack of particularity, as well as ECO’s failure to mention transportation prior to the prehearing conference, we are not accepting any of ECO’s transportation assertions in our consideration of its standing.²⁰

In sum, ECO’s unsupported general references to radiological consequences are insufficient to establish a basis for injury. Similarly, as the Commission has made clear in an earlier ruling in another case, the social-type environmental consequences that ECO alleges will come not from decommissioning but from the prior, unreviewable action of SMUD to discontinue operation of the facility. See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207-08 (1990), *reconsideration denied*, CLI-91-2, 33 NRC 61 (1991). That being so, ECO has not adequately alleged “injury in fact” to its member to support its claim of representational standing.

B. Zone of Interests

Not only must a petitioner allege “injury in fact,” but the injury alleged must be within the zone of interests allegedly sought to be protected by the Atomic Energy Act or NEPA (the only two statutes that govern in the current situation). We need not devote extended discussion to this matter, given our determination that no valid “injury in fact” has been pleaded. However, because of our authority in certain circumstances to permit discretionary standing, we will at least touch briefly on the zone-of-interests question.

It has long been held that protection of financial interests such as excessive electric rates or higher fuel costs is not within the zone of interests sought

¹⁹ Tr. 8.

²⁰ In addition, transportation impacts are not at issue in this proceeding. We express no view, however, on whether transportation impacts arising from a decommissioning proposal could serve as a basis for standing, irrespective of their litigability in this proceeding.

to be protected either by the Atomic Energy Act or NEPA. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 806, *aff'd*, CLI-76-27, 4 NRC 610, 614 (1976); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1420-21 (1977). Just recently, the Commission reiterated the same point in its ruling on ECO's attempt to enter the POL proceeding. CLI-92-2, *supra*, 35 NRC at 56. Specifically with respect to NEPA, the Commission observed that, although NEPA does protect some economic interests, it only protects against those injuries resulting from environmental damage. We reiterate again that no such injury is here alleged.

ECO's very general claims with respect to radiological health and safety may not run afoul of the zone-of-interests test. But, as set forth earlier, they are so generalized, so lacking in specific detail as to injury in fact, that they cannot serve as a basis for standing.

C. Conclusions as to Standing of Right

For the reasons set forth above, ECO has failed to present a valid claim of "injury in fact," either organizationally or as a representative of its listed member. Most of its claims also fail to fall within the zone of interests arguably protected by the Atomic Energy Act or NEPA. That being so, we hold that ECO has failed to establish standing of right.

D. Discretionary Standing

ECO next claims that, should we determine that it lacks standing of right, we nevertheless grant it discretionary standing, as authorized by the Commission in *Pebble Springs*, CLI-76-27, *supra*, 4 NRC at 614-17. There, the Commission set forth criteria to evaluate whether discretionary intervention should be granted — the most important of which is "[t]he extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record." *Id.* at 616.

The Licensee and Staff each claim that discretionary intervention is not permissible in a situation where, as here, no other petitioner has sought a hearing. In *Watts Bar*, ALAB-413, *supra*, 5 NRC at 1422, the Appeal Board suggested otherwise, commenting that intervention as a matter of discretion could trigger a hearing when there was "cause to believe that some discernible public interest will be served by the hearing." A licensing board recently adopted that viewpoint, although not permitting intervention in the particular situation. *Envirocare of Utah, Inc.*, LBP-92-8, 35 NRC 167, 182-83 (1992).

Here, although we tend to favor the *Watts Bar* and *Envirocare* approach, we need not reach the question. For, in view of the contentions sought to be litigated by ECO, none of which are acceptable (see discussion *infra*), we have determined that ECO would not reasonably be expected to assist in building a sound record on which the Commission may base its decision in this proceeding. We thus are declining to grant discretionary standing.

III. CONTENTIONS

To be admitted as a party, ECO must not only establish its standing but also proffer at least one valid contention. Although we would not routinely consider the validity of contentions where standing has not been found, we are doing so here in light of ECO's request for us to grant discretionary standing.

ECO's proposed contentions are not clearly labelled as such. At the prehearing conference, ECO attempted to include as contentions material from its initial petition (not there designated as contentions) as well as material from its June 29, 1992 supplement.²¹ Because of our direction that contentions be filed in the supplement, we ruled that only information appearing in the supplement would be considered as contentions.²² We therefore turn to Parts III and IV of ECO's supplement, which contain, respectively, ECO's environmental and safety-based contentions.

A. General Criteria for Contentions

Before dealing with specific contentions, we here review the standards for admissibility of contentions. The applicable rules, 10 C.F.R. § 2.714(b) and (d), were amended in 1989 "to raise the threshold for the admission of contentions." 54 Fed. Reg. 33,168 (1989).

In short, they now require, *inter alia*, that there be a specific statement of law or fact to be raised or controverted, a brief explanation of the bases of the contention, a concise statement of the "facts or expert opinion" that support the contention, together with references to specific sources and documents of which the petitioner is aware and upon which the petitioner intends to rely, and sufficient information to show that a genuine dispute exists with the applicant (or licensee) on a material issue. On NEPA issues, the contentions are to be based on the applicant's or licensee's environmental report. Further, the contention must be of consequence in the proceeding and, if proved, entitle the petitioner to relief of some sort.

²¹ Tr. 109.

²² Tr. 112.

B. Environmental Contention

In Part III of its Supplement, ECO presents what it describes as a single environmental contention, which is divided into several subparts.²³ Its general thrust is that "SMUD's environmental report is inadequate."²⁴ At least two reasons are assigned — first, that the NRC's Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (NUREG-0586) (hereinafter, GEIS) provides inadequate consideration of decommissioning of Rancho Seco under NEPA; and second, that SMUD's October 21, 1991 Supplement to its Environmental Report is "totally inadequate."

As background to this contention, ECO lists what it characterizes as the various "mandatory" requirements for environmental reports, as set forth in 10 C.F.R. § 51.45. It then goes on to particularize what it describes as additional requirements for an environmental report for decommissioning. ECO then asserts that NEPA requires the consideration of "cumulative impacts," which it goes on to define as including "past" actions, regardless of what person undertakes such action. It next sets forth what it deems NEPA to require by way of defining "Major Federal action" and "significantly affecting the quality of the human environment." Finally, it describes requirements for the consideration of alternatives, including the "no action" alternative.

As its first specific claim, ECO asserts that NUREG-0586 provides "inadequate consideration" of the decommissioning of Rancho Seco. It lists several reasons: i.e., that its purpose was to assist NRC in developing policies and amended regulations dealing with decommissioning, that it was never intended to deal with decommissioning of a facility that had not reached the end of its useful life by age or accident, and that it provides inadequate treatment of radiological impacts and virtually no treatment of nonradiological impacts.

ECO then goes on specifically to describe several alleged omissions from the Environmental Report. Most specifically, ECO scores the report for omitting any meaningful discussion of alternatives, either the "no action" alternative or the alternative of resumed operation, and for failing to include a cost-benefit balance. ECO explicitly states that

the availability of the option of selling SMUD [*sic*; should be Rancho Seco] to a responsible entity for operation rather than decommissioning is a significant distinction between this case and the Shoreham situation where there was an agreement to decommission.²⁵

Finally, ECO faults the environmental report on the basis of the Staff's March 12, 1992 questions. It attempts to incorporate those questions by reference,

²³ Supplement at 16-28; Tr. 114.

²⁴ Supplement at 16.

²⁵ *Id.* at 27.

contending without further explanation that "each one" represents a deficiency in the report.

The Licensee and Staff assert that this environmental contention involves matters previously designated by the Commission as unnecessary for the environmental review of decommissioning, such as need for power or the environmental effects of replacement power. Moreover, they declare that the numerous vague and unsupported allegations in the environmental contention fail to meet the rather stringent pleading requirements that the Commission adopted in 1989, because they include no facts that would establish a material issue of fact or law.

With respect to issues of law, the Licensee and Staff assert that the major thrust of ECO's environmental claims — that the effects of ceasing operations are cumulative effects that must be analyzed in an EIS — has been rejected by the Commission with respect to decommissioning. Further, they contend that ECO's challenge to the use made by the Licensee of the GEIS fails to acknowledge the Commission's directions with respect to the GEIS.²⁶

In reviewing ECO's environmental assertions, it is clear that ECO misperceives the character of the environmental review established by the Commission for a decommissioning case such as this. The Commission views the environmental review as a supplement to that which already occurred during the operating license phase of the proceeding. Thus, a licensee's environmental report for decommissioning need only "reflect any new information or significant environmental change associated with the [licensee's] proposed decommissioning activities or with the [licensee's] proposed activities with respect to the planned storage of spent fuel." 10 C.F.R. § 51.53(b).

Beyond that, the Commission has concluded that, in the usual case, the environmental impact of decommissioning can be delineated in generic terms through reference to the GEIS. To the extent that the impacts from decommissioning a particular plant are significantly different from the generic impacts, those impacts may be covered in a supplemental EIS. Thus, in promulgating decommissioning regulations in 1988, the Commission stated with respect to the GEIS:

The Commission's primary reason for eliminating a mandatory EIS for decommissioning is that the impacts have been considered generically in a GEIS. The Commission determined that examination of these impacts and their cumulative effect on the environment and their integration into the waste disposal process could best be examined generically. A final, updated GEIS has been issued The GEIS shows that the difference in impacts among the basic alternatives for decommissioning is small, whatever alternative is chosen, in comparison with the impact accepted from 40 years of licensed operation. The relative impacts are expected to be similar from plant to plant, so that a site-specific EIS would result

²⁶ See pp. 134-35, *infra*.

in the same conclusions as the GEIS with regard to methods of decommissioning. Although some commenters correctly point out that an EA is much less detailed in its assessment of impacts than an EIS, if the impacts for a particular plant are significantly different from those studied generically because of site-specific considerations, the environmental assessment would discover those and lay the foundation for the preparation of an EIS. If the impacts for a particular plant are not significantly different, a Finding of No Significant Impact would be prepared.²⁷

With this in mind, it is not difficult to perceive why a separate EIS for decommissioning a particular facility is rarely, if ever, necessary. See *Shoreham*, CLI-91-2, *supra*, 33 NRC at 74; *id.*, CLI-90-8, *supra*, 32 NRC at 209.

To repeat, no NRC approval is required for a licensee to cease operation. *Shoreham*, CLI-90-8, *supra*, 32 NRC at 207. That decision is SMUD's to make and does not represent a decision of any kind. Therefore, no EIS need be prepared for that action. Moreover, the impacts that ECO now seeks to have discussed relate only to the cessation of operations — they are not impacts of decommissioning. *Shoreham*, CLI-91-2, *supra*, 33 NRC at 71. That being so, they are not pertinent to the environmental effects of decommissioning — with which ECO has not taken issue or raised an environmental question.

Resumed operation would be an alternative to the cessation of operation, not to decommissioning (as to which the Commission has stated that only alternative forms of decommissioning, together with "no action," are all that need be discussed.) *Shoreham*, CLI-90-8, *supra*, 32 NRC at 208. As pointed out by the Licensee,²⁸ this is consistent with cases holding that, under NEPA, an agency need consider only alternatives that lead to the objective of a proposal. See *City of Angoon v. Hodel*, 803 F.2d 1016, 1020-22 (9th Cir. 1986) (per curiam), *cert. denied*, 484 U.S. 870 (1987); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 116 L. Ed. 2d 638, 112 S. Ct. 616 (1991). Resumed operations thus need not be considered in conjunction with the proposed decommissioning action that is before us.

Failure to prepare an EIS may be an issue raised in certain proceedings. But where, as here, the action is allegedly deficient for failing to include matters that the Commission has already ruled are outside the scope of consideration of a proceeding such as this, we decline to consider a contention to that effect. Further, where the Licensee has filed an Environmental Report that on its face attempts to supplement the GEIS with site-specific information sufficient to provide the Commission with information to determine whether a supplemental EIS may be necessary, we will not entertain an unsupported generalized claim that the Commission is placing undue reliance on the GEIS in its assessment of the impacts of decommissioning the particular facility.

²⁷ 53 Fed. Reg. 24,018, 24,039 (1988).

²⁸ Licensee's July 8, 1992 Answer at 10.

Finally, ECO's attempt to incorporate by reference the questions asked by the Staff concerning the environmental report fails to comply with the Commission's pleading requirements. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 346, 357-58 (1991). ECO does not describe the significance of the matters to which the questions are addressed or why, indeed, they might constitute a defect in the environmental report. Even under the Commission's earlier rules, they would not have been pleaded sufficiently. *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 216 (1976); see also *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768-78 (1977).

ECO's environmental contention is accordingly rejected.

C. Safety Contentions

ECO includes six safety-related contentions in part IV of its Supplement (designated Contentions IV.A-IV.F). The Licensee and Staff deem each of them to be legally or factually incorrect and to be inadequately pleaded under the Commission's contention requirements.

Contention IV.A asserts that the decommissioning plan is premised upon, *inter alia*, the availability of Hardened-SAFSTOR to be implemented after the fuel has been moved to dry storage in an Independent Spent Fuel Storage Installation (ISFSI). ECO claims, however, that "SMUD has terminated its application for the ISFSI thereby invalidating a large part of the decommissioning plan."

ECO provided no basis for this claim, thereby invalidating the contention on pleading grounds. But when asked for its source at oral argument, ECO identified a letter from SMUD to the Staff, dated March 20, 1992, which requests the Staff to "terminate" certain aspects of its review pending selection by SMUD of an appropriate storage cask. (The Licensee previously provided the Board and ECO with a copy of that letter, appended to its July 8, 1992 filing.)

At oral argument, the Licensee conceded that the wording of the letter might have been more felicitous, using "suspend" rather than "terminate," but it claimed that the "application" had not been abandoned. Only the safety review had been suspended, pending selection of a cask; the environmental review is continuing. The Staff agreed that this was the case and the ISFSI application remains active.²⁹ That being so, *Contention IV.A* must be rejected.

Contention IV.B claims that SMUD lacks an adequate funding plan for the decommissioning. Such a plan is required by 10 C.F.R. § 50.75. The reason alleged by ECO for the deficiency is the Staff's revocation of an exemption

²⁹ Tr. 96-97.

it had previously granted SMUD, permitting funding over the course of the original operating license (i.e., until 2008) rather than at time of shutdown.

The Staff granted the exemption without receiving public comments. Because the Staff had earlier promised ECO that it would be permitted to comment, the Staff then revoked the exemption and has received comments from ECO (which it has not yet finished evaluating).

Even though ECO may be technically correct about the current funding plan, we fail to see how this establishes a material factual or legal dispute. If the Staff should grant the exemption, it will remedy the defect. (The granting of such an exemption would be consistent with a newly revised version of 10 C.F.R. § 50.75.) If the Staff should deny the exemption, it will have to take steps to ensure that SMUD provides adequate funding for the decommissioning. Indeed, the crux of ECO's concern, that its views on the exemption be taken into account, has been fulfilled.³⁰ We thus decline to entertain ECO's contention on this subject.

Contention IV.C challenges the adequacy of the *Federal Register* notice for this proceeding, claiming that it failed to identify any relevant documents other than the decommissioning plan and the environmental report. ECO contends that adequate notice demands identification of all supplements and amendments to that application.

There is no such requirement. Potential intervenors reasonably are expected to research these documents in the Commission's Public Document Rooms, where supplements and amendments would be available. In any event, at the time of the Notice, there were no supplements or amendments. This contention is thus rejected.

Contention IV.D asserts that the decommissioning order may not be issued prior to the completion of an adjudicatory hearing. ECO cites the introductory phrase of section 191a of the Atomic Energy Act, 42 U.S.C. § 2241(a). That phrase, however, only authorizes the Commission to use a three-member licensing board, such as this one, to conduct a formal on-the-record adjudication, in lieu of a single Administrative Law Judge as required by the Administrative Procedure Act.

ECO has, in fact, been afforded the *opportunity* for a public adjudicatory proceeding. As the Licensee observes, whether a hearing on a licensing action will be a pre-effectiveness hearing is not within the province of this Board but, rather, the Commission itself. 10 C.F.R. §§ 50.58(b)(6), 50.91, 50.92. Moreover, there does not appear to be any requirement in the Atomic Energy Act that would mandate a pre-effectiveness hearing for decommissioning. See

³⁰ 57 Fed. Reg. 20,718 (May 14, 1992); Tr. 139-43, 162.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 77 (1992).

For these reasons, Contention IV.D is rejected.

Contention IV.E is a procedural claim that, since filing its intervention petition, ECO was entitled to be served with all documents filed by SMUD and its attorneys. ECO cites 10 C.F.R. § 2.712.

That section deals only with the technical aspects of service of adjudicatory documents and, in any event, requires service only on "parties," which ECO is not.³¹ The scope of document service is covered by 10 C.F.R. § 2.701(b), which also only applies to "parties." Adjudicatory documents filed by parties responsive to or bearing upon intervention petitions must, of course, be served upon the petitioner — as was the situation here.

At oral argument, ECO supplemented its request by referencing the Board's general authority as a basis for requiring service upon ECO. If ECO were to become a party, that remedy would not be necessary. Where, as here, ECO is not being admitted as a party, that remedy would be inappropriate, if not beyond our authority. In any event, ECO was unable to identify any document with which it had not been served. It mentioned the Licensee's response to Staff questions, a nonadjudicatory document dated April 15, 1992, but that document was filed prior to ECO's submission of its April 20, 1992 petition for intervention.³² We are thus denying this contention.

Somewhat related is ECO's recently filed Motion for an Order to Compel Service, together with portions of its even more recent Motion to Strike. We have examined those motions and, for similar reasons, are denying them.

Contention IV.F is an attempt to incorporate by reference questions raised by the Staff in its March 12, 1992 series of questions to the Licensee. No explanation is provided concerning the significance of any question. ECO merely portrays the questions as a *per se* reflection of defects in the decommissioning plan. ECO does not bother to reference the Licensee's extensive April 15, 1992 responses to the questions asked. (Those responses were available before ECO filed its intervention petition and over 2 months before ECO filed its incorporation-by-reference contentions.)

For the same reasons that we rejected a similarly worded environmental contention, we also reject this attempt to rely on incorporation by reference as a foundation for a contention.

One isolated sentence in the affidavit of the individual whom ECO represents might also be deemed a safety contention. That sentence reads:

³¹ ECO, in its Motion to Strike filed on August 14, 1992, n.1, incorrectly cites 10 C.F.R. § 2.714a as denominating petitioners as parties, presumably for all purposes. All that provision does is provide a right of appeal to petitioners who are denied intervention or requested hearings. ECO here is given that right.

³² That document is a nonadjudicatory document that, unless it related directly to a previously accepted contention, would not have been required to be served upon a party.

However, if the plant cannot be preserved for its intended purpose then it is my opinion that the DECON method of decommissioning is the preferred alternative both because it would best protect the public health and safety by removing the radiological hazard most promptly and it would offer better assurance that the economic costs of decommissioning would be minimized and borne by those persons who received the benefits of Rancho Seco.³³

No data or witnesses (expert or otherwise) are identified to support this claim. Although the subject matter could be considered in a proceeding of this type, the claim satisfies none of the pleading requirements necessary to support a contention. For that reason, we decline to consider it.

D. Conclusion on Contentions

Based on the foregoing, there are no contentions that are admissible. Some concern subject matter that is outside the scope, as properly defined, of the decommissioning matter before us. The Commission itself has previously ruled directly on a number of these items. Nor are any of the contentions in conformity with the Commission's pleading requirements. That being so, we are rejecting all the contentions both as contentions and as potential support for discretionary standing, based on ECO's ability to assist in developing a sound record.

IV. OTHER MATTERS

As we pointed out earlier, ECO filed four motions following the prehearing conference. We considered and denied the first, dealing with service of documents, in conjunction with our consideration of Contention IV.E. See p. 138, *supra*.

Because of this action, the Licensee's cross-motion for us to strike certain portions of ECO's motion (supported by the Staff) becomes moot, and we are dismissing it for that reason. (This dismissal also makes moot the portion of ECO's August 14, 1992 Motion to Strike directed to this cross-motion of the Licensee, which we also dismiss.)

The second motion is denominated as a "Contingent Motion to Withhold Any Order Wholly Denying the Petition for Leave to Intervene and/or the Request for a Hearing." Anticipating that we might reach the very conclusions we have described in this Order, ECO asks us to forbear and instead issue an order permitting it to amend its contentions or file new contentions within a reasonable time after SMUD files revisions to its environmental report and the Staff issues an environmental assessment.

³³June 29, 1992 Supplement, Crespo Affidavit at 4.

ECO provides several reasons for the relief it seeks, most notably the prospect (not disputed by anyone) that in the future SMUD will supplement its environmental report. ECO also cites its "vested right" to amend its contentions — a right that ECO already exercised in filing its June 29, 1992 supplement.

The so-called "vested right" to amend, to the extent it may properly be so described, extends only until 15 days prior to the first prehearing conference, 10 C.F.R. § 2.714(a)(3). Beyond that, it may be exercised only with leave of the Licensing Board, based on prescribed factors. In this case, granting this motion would run counter to the Commission's long-standing requirement that contentions be submitted prior to the first prehearing conference and that contentions or amended contentions submitted thereafter be considered "late-filed" and judged under the criteria applicable to such contentions. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

We are accordingly denying ECO's motion. In view of the position we have taken on ECO's various contentions, we consider the Licensee's cross-motion to strike certain portions of ECO's motion (supported by the Staff) as moot and, accordingly, are dismissing it on that basis. Similarly, in view of this dismissal, we also consider the portions of ECO's Motion to Strike relating to the Licensee's and Staff's responses to ECO's Contingent Motion to Withhold Decision to be moot and are dismissing it on that basis.

ECO's third motion, denominated as a Motion to Strike, dated August 14, 1992, seeks to have us strike certain portions of the Staff's and Licensee's responses to ECO's previous motions. (Its fourth motion seeks leave to file the foregoing Motion to Strike.) We are permitting ECO to file the Motion to Strike, even though it consists mainly of a reply to certain of the points raised by the Licensee and Staff in response to ECO's earlier motions. As noted earlier, we have denied or dismissed as moot several aspects of this Motion to Strike. Although we have declined to strike the materials specified, we have taken ECO's reply into account in ruling on those earlier motions.

V. ORDER

Based on the foregoing, and the entire record of this proceeding, it is, this 20th day of August 1992, ORDERED:

1. The Petition for Leave to Intervene and Request for Prior Hearing of the Environmental and Resources Conservation Organization (ECO), dated April 20, 1992, is hereby *denied*.
2. ECO's July 17, 1992 Motion for an Order to Compel Service and its July 17, 1992 Contingent Motion to Withhold any Order Wholly Denying the Petition for Leave to Intervene and/or the Request for a Hearing are each

hereby *denied*. The Licensee's cross-motions to strike certain material from the foregoing motions are each *dismissed* as moot.

3. ECO's Anticipatory Motion for Leave to File ECO Pleading, dated August 14, 1992, is hereby *granted*. ECO's Motion to Strike, dated August 14, 1992, is hereby *denied* or *dismissed* as moot, as set forth earlier in this Opinion.

4. This proceeding is hereby *terminated*.

5. This Order is subject to appeal to the Commission pursuant to the terms of 10 C.F.R. § 2.714a. Any such appeal must be filed within ten (10) days after service of this Order and must include a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in opposition to the appeal within ten (10) days after service of the appeal.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 20, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-528
50-529
50-530

ARIZONA PUBLIC SERVICE
COMPANY, *et al.*
(Palo Verde Nuclear Generating
Station, Units 1, 2, and 3)

August 12, 1992

The Director of the Office of Nuclear Reactor Regulation denies the remainder of a Petition submitted by Mrs. Linda E. Mitchell (Petitioner) requesting action with regard to the Palo Verde Nuclear Generating Station of Arizona Public Service Company, *et al.* (Licensee).

In her Petition, Petitioner alleged that serious violations existed at the Palo Verde facility in the systems for emergency lighting and fire protection. In a Partial Director's Decision issued on October 31, 1990 (DD-90-7, 32 NRC 273), this aspect of Petitioner's request for action pursuant to 10 C.F.R. § 2.206 was denied.

Petitioner had also alleged improprieties by Licensee personnel regarding NRC inspection activities, specifically that Licensee personnel acted improperly to "water down" inspection findings, suppress serious violations, and discredit an NRC inspector. Based on an investigation by the NRC's Office of the Inspector General, these allegations were found to be without merit. Accordingly, the Director denied this aspect of the Petitioner's request for action pursuant to section 2.206.

FINAL DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On May 22, 1990, David K. Colapinto, Esq., submitted a Petition on behalf of Mrs. Linda E. Mitchell (Petitioner) requesting that the U.S. Nuclear Regulatory Commission (NRC) take actions pursuant to 10 C.F.R. § 2.206 regarding the Palo Verde Nuclear Generating Station (Palo Verde) of the Arizona Public Service Company, *et al.* (APS or Licensee). The Petitioner stated that she is employed by the Licensee as an associate electrical engineer at Palo Verde. She alleges that serious violations exist at Palo Verde in the systems for emergency lighting and fire protection which were uncovered by the NRC during routine inspections, and that Licensee personnel acted improperly to "water down" the inspection findings, suppress other serious violations, and discredit an NRC inspector. Petitioner also alleges that NRC Region V management retaliated against the NRC inspector in question and agreed to "water down" inspection report findings as a result of the efforts made by the Licensee.

Petitioner claims that these actions will chill efforts by NRC inspectors and employees of NRC-licensed facilities to raise safety concerns.

Petitioner sought a variety of relief, including (1) instituting a proceeding pursuant to 10 C.F.R. § 2.202 to modify, suspend, or revoke the licenses issued by the NRC for Palo Verde; (2) issuing citations to the Licensee for violations improperly and illegally deleted from an NRC inspection report; (3) issuing fines to certain employees of the Licensee for allegedly tampering, obstructing, and impeding an ongoing NRC inspection; (4) taking disciplinary actions against any and all NRC employees allegedly involved in retaliating against an NRC inspector; and (5) granting such other and further relief as the NRC may deem appropriate.

In a letter to Mr. Colapinto of June 21, 1990, I acknowledged receiving the Petition and informed him that the Petition would be treated under 10 C.F.R. § 2.206 of the Commission's regulations. I also informed Mr. Colapinto that allegations in the Petition concerning improprieties by NRC personnel had been referred to the Office of the Inspector General and that any inquiries regarding those allegations should be directed to that office. I will not further address the relief sought for these matters because these matters are outside the scope of section 2.206.

The allegations in the Petition fall into three categories. First, Petitioner alleges improprieties by NRC personnel regarding NRC inspection activities. As noted above, this matter was referred to the Office of the Inspector General. Second, the Petitioner alleges that, during routine NRC inspection activities, an

inspector uncovered serious safety violations at Palo Verde in the systems for emergency lighting and fire protection.

I addressed this aspect of the Petition in a Partial Director's Decision issued on October 31, 1990 (DD-90-7, 32 NRC 273), in which I found no justification for instituting a proceeding pursuant to section 2.202 to modify, suspend, or revoke the NRC licenses held by APS. I made this decision after reviewing the corrective actions that APS took to resolve the concerns found by the NRC Staff while inspecting emergency lighting and fire protection at Palo Verde. I found reasonable assurance that Palo Verde can be operated with adequate protection of the public health and safety until the Licensee completed its ongoing corrective actions. Therefore, I denied this aspect of the Petitioner's request for action pursuant to section 2.206.

The third category of allegations set forth by the Petitioner allege improprieties by APS personnel regarding NRC inspection activities. As was noted in the Partial Director's Decision of October 31, 1990, these allegations of wrongdoing were referred for investigation. I further noted in that Partial Decision that I would issue a Final Director's Decision dealing with these allegations upon receipt of the investigative findings. These matters were investigated by the NRC's Office of the Inspector General (OIG) which has completed its work on these matters. My decision with regard to these allegations of wrongdoing follows.

II. DISCUSSION

Petitioner alleges that Licensee personnel acted improperly to "water down" emergency lighting and fire protection inspection findings, suppress other serious violations, and discredit an NRC inspector. Petitioner also claims that these actions will severely chill the rights of employees at NRC-licensed facilities to speak freely and raise concerns with NRC inspectors and the rights of employees to raise safety concerns without fear of retaliation in general.

On April 24, 1990, the NRC Staff issued Inspection Report (IR) 90-02. In the letter transmitting IR 90-02, the NRC Staff stated that it found several concerns regarding the status of the 10 C.F.R. Part 50, Appendix R, emergency lighting at Palo Verde. In IR 90-02, the NRC Staff listed as unresolved items numerous apparent deficiencies in the emergency lighting system which were described in detail in the report. Unresolved items are items for which the NRC Staff needs additional information to decide whether the matter is a violation of NRC requirements. Petitioner alleges that APS officials improperly influenced the NRC Staff to "water down" IR 90-02 to cover up additional concerns raised by Petitioner and verified by an NRC inspector identified by Petitioner as "John Doe." Petitioner further alleges that, upon learning of these potential violations,

APS management began a concerted effort to harass and discredit "John Doe" through his superiors at NRC Region V, and that APS intended to cover up and suppress additional serious violations, many of which Petitioner's supervisors at APS recognized were legitimate concerns. Petitioner further alleges that APS employees stated that they were going to contact NRC management to get "John Doe" to revise his findings and have him transferred to another NRC region because he was causing too much trouble. Finally, Petitioner alleges that senior APS officials contacted NRC Region V officials by telephone and accused "John Doe" of misconduct to impede and interfere with an ongoing inspection.

As stated above, OIG has completed its investigation of the wrongdoing aspects of the Petition. OIG issued its report on September 30, 1991 (OIG Investigative Report, Case No. 90-45H). The following is a synopsis of this report.

The Petitioner told OIG that she had no first-hand knowledge of the alleged telephone calls by Palo Verde managers to NRC Region V officials. The Petitioner learned of the telephone calls from Inspector "John Doe." "John Doe" told OIG that it was his understanding based on discussions with Region V officials that Palo Verde officials had called the Region and expressed concern with the manner in which he presented his inspection findings on emergency lighting at an exit meeting on March 23, 1990. Specifically, Palo Verde officials were surprised at the exit meeting with new findings that "John Doe" had not previously discussed during the inspection. Therefore, they were not prepared to respond.

All of the Palo Verde and NRC officials allegedly involved in the communications regarding "John Doe" and the NRC inspection findings denied or had no recollection of ever discussing "John Doe's" performance during the March 23, 1990 exit meeting. However, Palo Verde and NRC Region V managers had discussed emergency lighting during telephone discussions following a February 9, 1990 exit meeting. According to the NRC Region V officials, "John Doe" was not mentioned during these telephone discussions, and Palo Verde did not contest the emergency lighting findings. NRC Region V held these telephone conversations with representatives of Palo Verde to inform them of the gravity of the emergency lighting issues.

With regard to IR 90-02, "John Doe" told OIG that he did not agree with the manner in which his inspection findings were presented. He believed his findings should have been reported as violations rather than as unresolved items.

In Inspection Report 90-02, the NRC Staff included as unresolved items all of the emergency lighting findings listed by "John Doe" in his draft inspection report. In other words, none of "John Doe's" findings were deleted from the report. The NRC Staff both at headquarters and Region V continued to research these issues for several months. Following additional inspections, Region V issued Inspection Reports 90-25 and 90-35 and assessed Palo Verde a civil

penalty of \$125,000 for emergency lighting violations. The OIG investigators did not substantiate the existence of a conspiracy between Palo Verde and NRC Region V officials to water down inspection findings, as alleged. This concludes the synopsis of the OIG Report.

The Petitioner also claimed that the Licensee actions alleged in the Petition would chill efforts by NRC inspectors and Licensee employees to raise safety concerns. As discussed above, the specific allegations of Licensee misconduct, which were the bases for the chilling effects claims, were not substantiated.¹

III. CONCLUSION

The OIG conducted an investigation and could not substantiate the existence of a conspiracy between Palo Verde management and NRC Region V officials to delete items or alter inspection findings, and other related aspects of alleged wrongdoing as detailed above. Therefore, I have decided to deny the Petitioner's requests for action: (1) that NRC institute a proceeding against APS pursuant to section 2.202; (2) that APS be cited for violations deleted from NRC Inspection Report 90-02; (3) that NRC issue fines to APS and certain named employees for tampering, obstructing, and impeding an NRC inspection; and (4) that NRC employees involved in retaliation against the NRC inspector be disciplined.

Finally, Petitioner requests that NRC grant such other and further relief as the NRC may deem appropriate. Based on the foregoing, there is no further action deemed appropriate with respect to this Petition. However, the NRC will continue to review DOL cases of discrimination and any OI investigations involving retaliation as they are completed for appropriate action, as is normal NRC practice.

¹ On March 16, 1992, I issued a Director's Decision regarding Palo Verde (DD-92-1, 35 NRC 133) in response to a Petition filed by Messrs. David K. Colapinto and Stephen M. Kohn. In footnote 1 of that Decision, I indicated that the issues of widespread harassment, intimidation, and retaliation raised by Messrs. Colapinto and Kohn would be the subject of a separate Director's Decision. These issues have not been finally resolved and are still under consideration by the NRC. The NRC will keep Messrs. Colapinto and Kohn advised of the resolution of these issues.

As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for its review.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 12th day of August 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

G. Paul Bollwerk, III, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket No. 70-135-DCOM
(ASLBP No. 92-667-03-DCOM)
(Decommissioning Plan)
(Materials License No. SNM-145)

BABCOCK AND WILCOX
(Apollo, Pennsylvania Fuel
Fabrication Facility)

September 4, 1992

In this 10 C.F.R. Part 2, Subpart L informal proceeding, the Presiding Officer grants the Petitioners an opportunity to supplement or amend their hearing request to address questions about their standing and whether they have presented litigable issues.

RULES OF PRACTICE: INFORMAL HEARING (AMENDMENT TO HEARING PETITION)

Unlike a formal adjudicatory proceeding under 10 C.F.R. Part 2, Subpart G, in an informal proceeding under Subpart L the petitioner requesting a hearing does not have the right to amend or supplement an otherwise timely hearing petition once the deadline specified in 10 C.F.R. §2.1205(c) for submitting hearing requests has passed.

RULES OF PRACTICE: INFORMAL HEARING (AMENDMENT TO HEARING PETITION)

In an informal adjudication under 10 C.F.R. Part 2, Subpart L, a petitioner may amend or supplement a timely hearing request only as permitted by the presiding officer, who is afforded this discretionary authority under the general powers granted by 10 C.F.R. § 2.1209 to regulate the course of an informal proceeding. The presiding officer retains that discretion at least up through the point at which he or she makes a final ruling upon the sufficiency of the hearing request.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

In addressing the matter of standing in a decommissioning proceeding, to establish "injury in fact" it must be shown how any alleged harmful radiological, environmental, or other legally cognizable effects that will arise from activities under the decommissioning plan at issue will cause injury to each individual or organizational petitioner or, in the case of an organization relying upon representational standing, the members it represents. *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 127-30 (1992); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 314-17 (1989).

RULES OF PRACTICE: INFORMAL HEARINGS (SPECIFYING AREAS OF CONCERN)

In contrast to the rules governing the admission of contentions in formal adjudications, *see* 10 C.F.R. § 2.714(b)(2), in specifying their areas of concern about the licensing activity that is the subject matter of the proceeding, *see* 10 C.F.R. § 2.1205(d)(3), the petitioners do not have to put forth a comprehensive exposition in support of the issues they wish to litigate. Nonetheless, to provide the presiding officer with a better understanding of their claims to aid him or her in making an informed determination about whether those matters are "germane" to the proceeding, *see* 10 C.F.R. § 2.1205(g), the petitioners are well served by providing as much substantive information as possible regarding the basis for the concerns specified in their hearing petition.

RULES OF PRACTICE: INFORMAL HEARINGS (LATE-FILED AREAS OF CONCERN)

In submitting an amended or supplemented hearing petition, if the petitioners wish to raise and provide information regarding matters that were not specified

in their initial hearing petition, they must make a showing that will satisfy the late-filing requirements of 10 C.F.R. § 2.1205(k).

MEMORANDUM AND ORDER
(Allowing Petitioners to Amend or Supplement
Their Hearing Request)

Presented for determination is the question whether, and under what circumstances, a hearing petition filed in an informal adjudicatory proceeding under 10 C.F.R. Part 2, Subpart L, may be amended or supplemented. For the reasons stated herein, and subject to the guidelines specified, I find that it is appropriate to permit the Petitioners here to amend or supplement their hearing request.

I.

This informal adjudicatory proceeding was convened to consider the challenge of Save Apollo's Future Environment (SAFE), Cynthia Virostek, Virginia Trozzi, William Whitlinger, and Helen and James Hutchison (hereinafter referred to collectively as "the Petitioners") to a license amendment for the Babcock and Wilcox (B&W) Apollo, Pennsylvania fuel fabrication facility that authorizes activities under the B&W Decommissioning Plan, Revision 2. In its August 11, 1992 response to the Petitioners' July 27, 1992 hearing request, Licensee B&W contends that the Petitioners have failed to establish, in accordance with 10 C.F.R. § 2.1205(d), that they have standing and that the issues they wish to litigate are germane to the subject matter of the proceeding. In light of this response, by means of an August 14, 1992 memorandum and order (unpublished), I asked for the participants' views on whether, consistent with Subpart L, the Petitioners should be permitted to amend or supplement their hearing request.

In their response, the Petitioners assert that they would like time to supply additional information relative to the matters raised in the B&W reply to their hearing petition. They also declare that nothing in Subpart L specifically prohibits the presiding officer from permitting a petitioner to supplement or amend a hearing request. Rather, they contend, a presiding officer's general powers under 10 C.F.R. § 2.1209 to manage the conduct of the proceeding are sufficiently broad to permit the submission of additional information.

According to Licensee B&W, the Petitioners cannot amend or supplement their hearing petition as a matter of right. As support for this position, the Licensee contrasts the Subpart L procedures with the rules governing formal adjudications under 10 C.F.R. Part 2, Subpart G. Licensee B&W points out that Subpart G permits amendment of a hearing petition without leave of the

that Subpart G permits amendment of a hearing petition without leave of the presiding officer up to 15 days prior to a special prehearing conference under 10 C.F.R. § 2.751a or, if no special prehearing conference is held, up to 15 days prior to the first prehearing conference. See 10 C.F.R. § 2.714(a)(3). The Subpart L rules, it declares, contain no similar provision, suggesting that there is no right to amend under Subpart L. Licensee B&W does conclude, however, that the presiding officer has the discretion to permit a petitioner to provide additional information to bolster its claims that it has standing and wishes to litigate germane issues, at least so long as any information regarding its areas of concern is limited to the claims enumerated in the petitioner's original hearing request.

In its response, the NRC Staff makes essentially the same points as the Licensee.¹ It also identifies several previous rulings by presiding officers in other informal adjudicatory proceedings that it asserts are consistent with its position that whether to allow a petitioner in an informal adjudication to supplement or amend a hearing request is a matter committed to the sound discretion of the presiding officer. See, e.g., *Northern States Power Co. (Pathfinder Atomic Plant)*, LBP-89-30, 30 NRC 311, 314-17 (1989).

II.

A. Both the Licensee and the Staff are correct that, unlike the petitioner in a formal, Subpart G proceeding, one requesting a Subpart L hearing does not have the right to amend or supplement an otherwise timely hearing petition once the deadline specified in 10 C.F.R. § 2.1205(c) for submitting hearing requests has passed. Instead, a petitioner may amend or supplement a timely hearing request only as permitted by the presiding officer, who is afforded this discretionary authority under the general powers granted by 10 C.F.R. § 2.1209 to regulate the course and conduct of an informal proceeding. Moreover, the presiding officer retains that discretion at least up through the point at which he or she makes a final ruling upon the sufficiency of the hearing request.

In this instance, I would be materially aided in fulfilling my responsibility to make an informed determination about whether the Petitioners have standing to contest the license amendment at issue and whether they have presented litigable issues by allowing them to submit additional information relative to those matters. Further, because the amendment in question apparently has been issued by the Staff and is in effect, thereby authorizing Licensee B&W to conduct

¹ By letter dated August 17, the Staff informed me that in accordance with 10 C.F.R. § 2.1213 it has decided to participate as a party in this proceeding.

decommissioning activities in accordance with the plan submitted to the Staff,² any delay encountered by permitting the Petitioners to make an additional filing will not inure to the detriment of the Licensee or the Staff.

Accordingly, the Petitioners' request to amend or supplement their hearing petition is *granted*. Petitioners should file (mail) their supplemental/amended hearing petition on or before *Friday, October 9, 1992*. The Licensee and the Staff may file responses to the Petitioners' supplemental/amended hearing petition on or before *Monday, October 26, 1992*.

B. In allowing the Petitioners to submit a supplemental/amended hearing request, it is important to ensure that they will address those issues that are of central importance to my determination regarding the sufficiency of their petition. Therefore, I provide the following guidelines for their filing:

1. In addressing the matter of their standing, the Petitioners should recognize that one of the critical elements is their ability to establish their "injury in fact." As has been acknowledged in other decommissioning proceedings, this requires that they show how any alleged harmful radiological, environmental, or other legally cognizable effects that will arise from activities under the decommissioning plan at issue will cause injury to each individual or organizational petitioner or, in the case of an organization relying upon representational standing, the members it represents. *See, e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 127-30 (1992); Pathfinder, LBP-90-3, 30 NRC at 314-17.*

In this regard, because they appear to rely principally upon the proximity of their residences to the B&W facility, each of the individual Petitioners should consider specifying by affidavit the distance his or her dwelling is from the facility. In the case of the organization SAFE, if it is relying upon the proximity to the B&W facility of certain of its members' homes to establish its standing, it also should consider submitting affidavits from each of those members, indicating that SAFE is authorized to represent him or her in this proceeding and specifying the distance his or her dwelling is from the B&W facility. It is, of course, incumbent upon the Petitioners to explain how, at the distances specified, each will be injured by any activities arising out of the decommissioning plan.

2. Although the Petitioners have already provided a statement of their concerns that lists twenty different items, most of these are bare-bones descriptions of the issues they wish to litigate. In contrast to the rules governing the admis-

² Although the Staff did not provide a formal response to my request in the August 14 memorandum and order that it confirm in writing (1) that Amendment No. 21 to Materials License No. SNM-145, issued June 25, 1992, is the same amendment it was "considering" granting at the time it issued the June 18, 1992 notice of opportunity for hearing that precipitated the Petitioners' hearing request (*see* 57 Fed. Reg. 28,539, 28,539 (1992)), and (2) that this amendment is now in effect, from the participants' recent filings I have been able to glean that this is, in fact, the case.

sion of contentions in formal adjudications, see 10 C.F.R. § 2.714(b)(2), at this point Petitioners do not have to put forth a comprehensive exposition in support of the issues they wish to litigate. Nonetheless, the more information I have on the basis for their claims, the better I will be able to understand their concerns and make an informed determination, as is mandated by 10 C.F.R. § 2.1205(g), about whether these matters are "germane" to this proceeding. The Petitioners thus would be well served by providing as much substantive information as possible regarding the basis for the concerns specified in their initial petition.³

Also in this regard, as the Licensee and the Staff have stated, if the Petitioners now wish to raise and provide information regarding matters that were not specified in their initial hearing petition, they must make a showing that will satisfy the late-filing requirements of 10 C.F.R. § 2.1205(k).

III.

In specifying the date for the Petitioners' filing, I am aware that they are in the process of trying to obtain legal (and perhaps technical) assistance for prosecuting their claims in this proceeding. Yet, despite the admonition in the August 14 memorandum and order that they must do so promptly and my request for specific information regarding the progress of their efforts in this regard, their response tells me nothing concrete about the success or timing of their efforts.

I appreciate the difficulties involved in trying, as I understand the Petitioners are, to obtain counsel on a pro bono or reduced-rate basis. Nonetheless, nearly 2½ months have passed since the publication of the notice in the *Federal Register*, providing interested persons an opportunity to request a hearing regarding the decommissioning amendment at issue here. Within that time frame, the Petitioners could have made considerably more progress in retaining counsel.

In these circumstances, I must advise the Petitioners that any last-minute request by a recently retained counsel to postpone the filing authorized in this Memorandum and Order will have limited prospects for success. Further, so that I might monitor this situation more closely, within 3 days of the date the Petitioners retain an attorney, counsel should file and provide to me by rapifax ((301) 492-7285) or overnight/express mail a notice of appearance that complies with the requirements of 10 C.F.R. § 2.713(b). Also, in the interest of conformity, I request that within 7 days of the date of service of this

³In addition, I would again urge the participants (if they have not already done so) to discuss the Petitioners' claims outside this adjudicatory forum and attempt to resolve or narrow as many of these issues as possible.

Memorandum and Order, counsel for Licensee B&W file a notice of appearance in the form specified in section 2.713(b).

Finally, if petitioner SAFE has not retained counsel by the time the Petitioners' supplemental/amended filing is due, along with that filing the individual representing that organization in this proceeding should submit a statement providing the basis for his or her authority to act in a representational capacity as specified in 10 C.F.R. § 2.1215(a).

It is so ORDERED.

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 4, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket Nos. 030-29626-OM&OM-2
(ASLBP Nos. 92-653-02-OM
92-662-06-OM-2)
(License Revocation,
License Suspension)
(Byproduct Material License
No. 24-24826-01)
(EA 91-136, 92-054)

PIPING SPECIALISTS, INC., and
FORREST L. ROUDEBUSH
d.b.a. PSI INSPECTION, and
d.b.a. PIPING SPECIALISTS, INC.
(Kansas City, Missouri)

September 9, 1992

The Licensing Board sustains a Staff order revoking the license of a company that employed one licensed radiographer (its Radiation Safety Officer) under the supervision of a person who had no experience with radiography and no training in NRC regulations. From the circumstances surrounding the issuance of this license and from its wording, the Board inferred that the owner-licensee was responsible for all the actions of its Radiation Safety Officer, to whom the license delegated "complete responsibility and authority."

The Board also concludes that there have been extensive failures by Licensee and its owner to comply with NRC regulations. Licensee has failed to act as a reasonable manager of licensed activities; failed to detect and correct violations

caused by an employee; willfully attempted to conceal violations from NRC Staff; and given untruthful information to the Staff during its inspections and investigations. Moreover, the Licensee's owner was untruthful in some aspects of his testimony both during a formal investigation and before the Licensing Board.

BYPRODUCT MATERIAL LICENSE: REVOCATION; SPECIFIC LICENSE PROVISION

From the circumstances surrounding the issuance of its license and from its wording, the Board inferred that the owner-licensee was responsible for all the actions of its Radiation Safety Officer, to whom the license delegated "complete responsibility and authority."

BYPRODUCT MATERIAL LICENSE: REVOCATION; ENFORCEMENT POLICY

The Board sustains the revocation of a byproduct material license for extensive failures by the Licensee and its owner to comply with NRC regulations. Licensee has failed to act as a reasonable manager of licensed activities, failed to detect and correct violations caused by an employee, willfully attempted to conceal violations from NRC Staff, and given untruthful information to the Staff during its inspections and investigations. Moreover, the Licensee's owner was untruthful in some aspects of his testimony both during a formal investigation and before the Licensing Board.

RULES OF PRACTICE: TRIAL OF A REVOCATION ORDER IS A TRIAL DE NOVO

It is not likely that, after a lengthy evidentiary hearing, a board would agree with the Director in every detail of an order revoking a license. Nor is that necessary in order to sustain the Director's decision. *Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 848-49 (1980) (the adjudicatory hearing in a civil penalty proceeding is essentially a trial *de novo*, subject only to the principle that the board may not assess a greater penalty than the Staff); compare *Hurley Medical Center* (One Hurley Plaza, Flint, Michigan), ALL-87-2, 25 NRC 219, 224-25 (1987).

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FINAL INITIAL DECISION

(Revoking License)

I. INTRODUCTION AND SUMMARY

Licensee,¹ which is a small firm licensed to perform industrial radiography, contests the validity of the license suspension and license revocation orders

¹The name of the Licensee is Piping Specialists, Inc. (PSI). However, the orders of the Staff of the Nuclear Regulatory Commission are applicable to Mr. Forrest Roubush and other entities under which he does business since there is no legal entity by the name of Piping Specialists, Inc.

issued to it by the Staff of the Nuclear Regulatory Commission (Staff) on October 17, 1991, and April 22, 1992. Licensee does not contest most of the substantive violations charged against it, but it does contest whether the appropriate sanction for the violations is revocation or whether the Staff should have imposed a less severe penalty under the circumstances of this case.

The Staff alleges:

- that substantive violations of NRC regulations occurred,
- that the violations were willful on the part of the Licensee,
- that the Licensee lied to Staff members who conducted inspections and investigations,
- that Licensee lacks the character and integrity required to give confidence that NRC regulations will be followed in the future.

Hence, the Staff concludes that the Piping Specialists, Inc. (PSI) license should be revoked.

Licensee concedes the violations cited by the Staff but asserts several lines of defense. It claims that the Licensee was a reasonably careful manager of licensed activities, that it was truthful in its dealings with the Staff, that it never willfully violated regulations, that it did not know of violations when they occurred, and that its violations were ascribable to the PSI Radiation Safety Officer (RSO) and not to the Licensee. Accordingly, Licensee urges the Board to find that Staff erred in revoking the PSI license and that the appropriate regulatory sanction would have been to remove the RSO from licensed duties and to order appropriate civil penalties for the violations as prescribed under NRC's enforcement policy.

A public evidentiary hearing was held in Kansas City, Missouri, from April 28 to May 1, 1992.² On July 10, 1992, we issued a Memorandum and Order (Proposed Resolution of the Case), LBP-92-16, 36 NRC 15 (1992). This Memorandum and Order was the subject of an on-the-record telephone conference on July 21, 1992.

In this Decision, we sustain the Director's decision revoking PSI's license to perform radiography. The Board concludes that the Staff has proved its principal allegations against Licensee and that Staff's revocation of the license was within the limits of discretion permitted by NRC regulations and enforcement policy, even though other less severe penalties were available and might have been imposed. We find no basis in the record to reduce the severity of the sanction imposed by the Staff. We reject Licensee's defenses as contrary to fact or prohibited by NRC regulations. We sustain the Director's decision.

² The parties filed suggested findings. NRC Staff Proposed Findings of Fact and Conclusions of Law in the Form of an Initial Decision, May 26, 1992 (Staff Brief). Licensee's Proposed Findings of Fact and Conclusions of Law in the Form of an Initial Decision, June 17, 1992 (Licensee Brief). NRC Staff Reply Findings of Fact and Conclusions of Law and Motion to Strike, July 1, 1992 (Staff Reply).

The Board's principal conclusion is that we support the Director's Revocation Order because:

1. The license at issue in this case gives the company's radiation safety officer "complete responsibility and authority" to direct all aspects of the company's radiation safety program. The evidence indicates that there was a reason for this complete delegation: that the owner-licensee had no experience in radiation safety or radiographic testing and planned to depend on the expertise of its RSO for compliance with NRC regulations. Having disclosed that it would depend entirely on its RSO, the Licensee cannot now defend its actions on the ground that it did not know about the violations. It had fully authorized its RSO to act for it in safety matters and it is wholly responsible for his actions.
2. In addition, we accept the agreed position of both the Licensee and Staff that Licensee's responsibility — despite the "complete" delegation of authority to his RSO in his license — was to exercise reasonable care in assuring that his RSO complied with his license. We find that he abrogated that responsibility.
3. Furthermore, Licensee's testimony in the hearing was in many respects unreliable and casts serious doubt on that aspect of his character and integrity that reflects on his willingness to comply with NRC regulations. Based on the record compiled in this case, we lack confidence that he is willing to comply with NRC regulations or to deal truthfully with the Staff in the course of its regulatory duties.³

II. BRIEF HISTORY OF THE CASE⁴

PSI is a small business that holds NRC Byproduct Materials License No. 24-24826-01 (license) issued on March 6, 1987. The license authorizes the use of byproduct material (iridium-192 and cobalt-60) for industrial radiography. The company does business at its facility located in Kansas City, Missouri. Licensed materials are authorized for use by PSI at temporary job sites anywhere in the United States where the NRC maintains jurisdiction and for storage at the company's Kansas City facility.

³Licensee attached to its brief several affidavits for our consideration. Staff asked us to strike the affidavits from our record. With the exception of the one matter, relating to Mobay records, that we had previously authorized, we grant the Staff's motion to strike. Licensee has not provided an adequate reason to reopen the record to include this new material. In addition, we note that nothing in the excluded material would persuade us to change any of our findings of fact or conclusions of law.

⁴This brief history is consistent with Licensee's Brief at 5-8, 11, 14.

PSI is operated as a sole proprietorship by Mr. Forrest Roudebush, Licensee, its president and sole owner. Although the business title implies the existence of a corporation, no corporation exists. Roudebush, ff. Tr. 940, at 4; Tr. 981. The license lists Mr. James Hosack, RSO, as the only individual authorized to act as a radiographer. No one is authorized to act as radiographer's assistant under the current license.

During the years from 1987 when the license was first issued until August 1991, the NRC conducted routine periodic inspections of PSI and found some severity level IV and V violations. No violation resulted in a civil penalty or escalated enforcement action and all were resolved to the satisfaction of NRC.

Mr. Roudebush had no skills in industrial radiography and no significant knowledge of health physics, radiation safety, or applicable NRC regulations when he applied for his initial license. The initial license application was prepared by a consultant, R.D. Donny Dicharry of Kenner, Louisiana, who submitted it to NRC on behalf of Mr. Roudebush. The license contained a provision that delegated complete authority and responsibility for safe operations to the then-current RSO. The NRC Staff issued the license containing the foregoing provision. The license also mentioned in a nonspecific manner that management involvement in licensed activities was required.

Throughout the term of the license, Mr. Roudebush maintained active involvement with the business aspects of the PSI radiography operations but played no significant management role in ensuring radiological safety or compliance with NRC regulations. This arrangement clearly depended heavily on the RSO having the integrity and the requisite knowledge and skills in radiography and radiation safety to conduct a safe operation and to avoid regulatory violations. In fact, the arrangement apparently worked without serious consequences for PSI through a succession of RSOs until the arrival of Mr. James Hosack as RSO in 1989. The first years of Mr. Hosack's tenure were outwardly uneventful, although later investigation showed that he was responsible almost from the outset for a developing pattern of failures of PSI to comply with NRC regulations.

In August 1991, a former PSI employee alleged to NRC that PSI radiography operations were being conducted unsafely. The allegations resulted in a month-long NRC investigation of PSI during September 1991. The investigation found nine apparent violations, some of which appeared to NRC as involving willful violation of regulations and deception on the part of the PSI president.

A followup investigative interview of Mr. Hosack and Mr. Roudebush was scheduled by NRC, but before it took place Mr. Hosack approached the investigator, Mr. Marsh, and confessed his involvement in numerous violations and alleged that Mr. Roudebush knew about the violations as they occurred and had ordered illegal actions and coverups. He asserted that he and Roudebush were to meet on the evening before the interviews for the purpose of conspiring to lie to the NRC investigators.

The NRC conducted investigative interviews of Hosack and Roudebush on October 16, 1991. The investigators concluded from the interviews that Hosack's allegations were accurate and that Mr. Roudebush had been untruthful under oath. On the next day, October 17, 1991, the Staff issued an immediately effective order suspending PSI's license.

The Licensee answered the suspension order with a request for hearing and an assertion that the violations were ascribable to its RSO and not the Licensee, who had no knowledge of them. Licensee therefore asked that its license not be suspended. The Staff continued its investigation of the apparent violations and subsequently referred the case to the Department of Justice for possible criminal prosecution. During the time of the pendency of the criminal prosecution, PSI — which had no currently effective license because it had fired the only RSO listed on its license — prepared and submitted to the Staff license amendments and a request for a license continuation. Finally, on March 13, 1992, the Licensee filed its "Suggestions in Opposition to NRC Staff's Second Motion for Temporary Stay of Proceedings," in which it declared that it had complied with all the requirements of the Board's January 9, 1992 Order and had submitted reasonably complete documentation to reactivate its license.

The Staff ultimately issued an order continuing the suspension and revoking the license on April 22, 1992. The revocation order was not made immediately effective pending the outcome of the hearing which commenced in Kansas City on April 28, 1992, and ended May 1, 1992. Subsequent to the hearing, the revocation case was consolidated with the suspension case without objection from the parties.

This proceeding calls upon the Board to decide whether the Staff order revoking the PSI byproduct material license should be sustained. In so doing, we first consider the effect on this proceeding of a license provision that delegates complete responsibility for ensuring radiological safety to PSI's RSO. We also consider whether Licensee was willfully involved in violations stemming from the acts or omissions of the RSO and whether he was untruthful in the information and assurances he gave to NRC inspectors and investigators. Finally we decide whether the Licensee possesses sufficient character and integrity in the conduct of licensed activities to assure that he could be relied upon to comply with NRC regulations in the future.

III. THE LEGAL SETTING

Section 186 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2235, authorizes revocation of a license:

- "for any material false statement in the application,"

- "because of conditions revealed by . . . [an] inspection or other means which would warrant the Commission to refuse to grant a license on an original application," or
- "for violation of, or failure to observe any of the terms or provisions of this Act or of any regulation of the Commission."

Part 2, Appendix C, § 1, of 10 C.F.R. sets forth the enforcement policy of the agency. In relevant part, it states:

Each enforcement action is dependent on the circumstances of the case and requires the exercise of discretion after consideration of these policies and procedures. *In no case, however, will licensees who cannot achieve and maintain adequate levels of protection be permitted to conduct licensed activities.* [Emphasis added.]

The enforcement policy also states that a revocation order may be issued for any reason for which revocation is authorized under section 186 of the Atomic Energy Act.⁵

We also note, as Staff requested we do on page 78 of its Brief, that the Commission is authorized to consider a licensee's character and integrity in deciding whether to continue or revoke a license. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1207 (1984), *rev'd in part on other grounds*, CLI-85-2, 21 NRC 282 (1985).⁶

The regulations that the Staff alleges have been violated are set forth below, in Appendix A, at p. 188.

IV. ALLEGATIONS AND RESPONSES

The Staff's allegations were set forth in two documents, the Order Suspending the License, October 17, 1991, and the Order Modifying Order Suspending

⁵ 10 C.F.R. Part 2, Appendix C, V.C(3)(e). However, the enforcement policy provides that suspensions ordinarily are not ordered where the failure to comply with requirements was "not willful and adequate corrective action has been taken." (Emphasis added.) We consider the validity of the revocation order first. If that order is valid, there is no further reason to consider the validity of the suspension order, which will have been superseded.

⁶ We adopt the following language, suggested to us by the Staff:

A licensee's ethics and technical proficiency are both legitimate areas of inquiry insofar as consideration of the licensee's overall management competence is at issue. *Three Mile Island, supra*, 19 NRC at 1227. Candor is an especially important element of management character because of the Commission's heavy dependence on a licensee to provide accurate and timely information about its facility. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 48, 51 (1985), citing *Three Mile Island, supra*, 19 NRC at 1208.

The generally applicable standard to determine licensee character and integrity is whether there is reasonable assurance that the licensee has the character to operate the facility in a manner consistent with the public health and safety, and with NRC requirements. To decide that issue, the Commission may consider evidence of licensee behavior having a rational connection to safe operation and some reasonable relationship to licensee's candor, truthfulness, and willingness to abide by regulatory requirements and accept responsibility to protect public health and safety. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985).

License (Effective Immediately) and Order Revoking License, April 22, 1992. These allegations were answered by Licensee in PSI's Answer to NRC's October 17, 1991 Order (Nov. 20, 1991), and in PSI's Request for Hearing and Answer to NRC's April 22, 1992 Order (Apr. 24, 1992).

A. The Order Revoking the License

1. Allegations

The Staff orders suspending the PSI license and later revoking the license are based on essentially identical allegations. An added allegation in the revocation order is that Licensee engaged in a conspiracy with the PSI RSO to lie to NRC investigators during the taking of sworn statements by the investigators.

The allegations in the revocation order [page references omitted] are:

- a. Deliberate falsification of utilization logs maintained in accordance with 10 C.F.R. § 34.27, in that numerous uses of NRC-licensed byproduct materials were not recorded, contrary to 10 C.F.R. § 30.9(a) during the period of January 1, 1991, through September 11, 1991.
- b. False oral information was provided on March 21, 1991, and on September 17 and 18, 1991, to NRC in violation of 10 C.F.R. § 30.9(a), concerning the following:
 - i. The accuracy of the utilization logs;
 - ii. The Licensee president's role in licensed activities including acting as a radiographer's assistant in violation of the license and not wearing all necessary personnel monitoring devices required by 10 C.F.R. § 34.33; and
 - iii. The conduct of radiographic operations on June 27 and 28, 1991, at the Licensee's facilities located at 1012 East 10th Street, Kansas City, Missouri.
- c. Additionally, the following violations identified in the inspection collectively demonstrate the lack of effective oversight of the Licensee's radiation safety program:
 - i. Failure to perform surveys between April 1990 and September 1991, when radiographic exposure devices were placed into storage, in accordance with 10 C.F.R. § 34.33(c).
 - ii. Failure to mark radiographic exposure devices as of September 18, 1991, with Licensee's address and telephone number, in accordance with 10 C.F.R. § 34.20(b)(1).
 - iii. Failure to properly mark and label radioactive material shipment containers as of September 18, 1991, in accordance with 49 C.F.R. § 173.25, contrary to 10 C.F.R. § 71.5.
 - iv. Failure to ship radioactive materials accompanied by properly completed shipping papers as of October 4, 1991, in accordance with 49 C.F.R. § 177.817(a), contrary to 10 C.F.R. § 71.5. Specific deficiencies were observed regarding shipping paper requirements specified in 49 C.F.R. §§ 172.201(d) and 172.203(d).
 - v. Failure to maintain complete records of quarterly physical inventories of sealed sources as of September 18, 1991, in accordance with 10 C.F.R. § 34.26.
 - vi. Failure to conspicuously post high radiation areas on October 4, 1991, in accordance with 10 C.F.R. § 34.42.

- vii. Failure to post required documents as of September 18, 1991, in accordance with 10 C.F.R. § 19.11.

The Staff stated, in conclusion [page reference omitted]:

PSI, by the acts and omissions of the PSI president and RSO, violated NRC requirements over an extended period of time. These violations jeopardized the public health and safety and, on that basis alone, they represent a significant regulatory concern. Although the RSO is no longer employed at PSI, the individual identified as the PSI president still holds the position of president and is responsible for the Licensee's actions. Furthermore, these violations demonstrate that the Licensee and its president are not willing or able to comply with the Commission's requirements to protect the public health and safety. Individually and collectively, the deliberate violations that involve the PSI president demonstrate that the Commission is not able to rely on the integrity of this individual. Such reliance is essential to assuring adequate protection of the public health and safety. Given the above matters and the involvement of the individual holding the significant position of president, the Commission lacks the requisite reasonable assurance that the public health and safety is adequately protected. If, at the time the license was issued, the NRC had known of the Licensee's inability or unwillingness to control licensed activities in accordance with the Commission's requirements, or the questionable integrity of the Licensee's president, the license would not have been issued.

2. Licensee's Response

PSI admits most of the violations cited by the Staff. It also admits that in a single instance the PSI president lied under oath to an NRC investigator during an investigative interview held on October 16, 1991.⁷ In all other respects, it denies that violations alleged by Staff were willful on the part of the PSI president or that the PSI president was untruthful in the information he gave to the Staff. PSI asserts that its president exercised reasonable management responsibility to control the actions of its employees. All willful violations and failures of candor are attributable to the acts of the former RSO, according to the Licensee.⁸

Licensee's specific defenses are:

- i. Licensee asserts that the Staff must prove each charge by "clear and convincing evidence."⁹
- ii. Staff has failed to prove that the Licensee created a substantial threat to public health and safety, or that the Licensee engaged in willful misconduct. Findings of that severity are required for revocation.¹⁰

⁷ PSI admits that "its president's statement to NRC investigators on October 16, 1991, in contradiction to the statements made by PSI's president to NRC investigators on September 17 or 18, 1991, were inaccurate." PSI's Request for Hearing (April 22, 1992) at 1.

⁸ *Id.* at 1-2.

⁹ See Section VI of our Decision, below.

¹⁰ See Sections V.B.1 and VI, below.

- iii. Licensee did not receive proper notice of the charges and was not given an adequate opportunity to respond.
- iv. Licensee is not strictly liable for the conduct of its RSO.¹¹ The Staff must prove management's knowledge of, and complicity in, the RSO's misconduct.¹²
- v. The NRC has no explicit standards for judging the management responsibilities in this case, and it is unfair to revoke a license on the basis of standards set after the fact.¹³
- vi. Licensee's former RSO lacked character and competence and was the source of Licensee's noncompliance. Licensee's president was not so lacking in character and competence as to justify the revocation.¹⁴
- vii. The Staff failed to impose fair and reasonable sanctions in this case.¹⁵

With the exception of the defense number iii, each of these defenses is addressed in the body of our Decision. For ease of reference, we have placed a footnote at the end of each defense to reference our principal discussion of it.

We do not address defense iii in the body of our Decision because we consider it to be moot. Licensee attempts to raise a question concerning the procedural regularity of the order suspending its license. However, Licensee never sought a stay of that order and never raised the issue of procedural regularity in a timely fashion. There has been every opportunity to contest the order of revocation, which we are now considering, and the method of issuance of the earlier order is not now relevant to the validity of the order of revocation. Even if the argument were correct, there would be no appropriate relief at this time. If it is appropriate to protect the public health and safety by revoking the license, improper procedures in adopting the earlier order suspending the license would not change the result.

We are aware that, in addition to its defenses, Licensee asserts certain factual denials. Each of its denials is addressed in the course of this Decision.

¹¹ See Section V.A of our Decision, below.

¹² See Sections V.B.1-B.10) of our Decision, below.

¹³ Like "negligence," the standard of "reasonable management conduct" requires considerable judgment by the trier of fact. Given that neither party has produced a prior case involving alleged lack of reasonable management conduct by a non-expert manager, there is no precedent directly in point here. It is appropriate, therefore, for the Licensing Board to be very careful not to apply a standard that is too demanding and that benefits too much from hindsight. Aware of our responsibility as triers of fact, we have considered and discussed all the circumstances of the case in order to form our opinion. See Sections V.A, V.B, and VI of our Decision, below.

¹⁴ See Sections IV and V of our Decision, below.

¹⁵ Our reasons for supporting the Staff's conclusions about revocation are thoroughly explained throughout our decision.

B. Uncontested Findings

PSI has chosen to admit the substantive violations charged against it, except for the charge that Mr. Forrest Roudebush conspired to present perjured testimony to the United States Nuclear Regulatory Commission. PSI's principal case is that it contests the seriousness of its offenses and the extent to which the owner-licensee was responsible for the violations of its Radiation Safety Officer. As a consequence of this line of defense, the Board adopts¹⁶ all the following findings proposed by the Staff in pages 55 to 64 of its brief:

The Board finds that PSI is the holder of NRC Byproduct Materials License No. 24-24626-01, issued on March 6, 1987. The license authorizes the use of byproduct material (iridium-192 and cobalt-60) for industrial radiography in devices approved by the NRC or an Agreement State. The facility where licensed materials are authorized for storage is located at 1012 East 10th Street, Kansas City, Missouri. The use of licensed materials is authorized at temporary job sites anywhere in the United States where the U.S. Nuclear Regulatory Commission maintains jurisdiction for regulating the use of licensed material.

The license identifies Mr. James Hosack as the Radiation Safety Officer (RSO) and the sole individual authorized to act as a radiographer. No individual is authorized to act as a radiographer's assistant.

Mr. Roudebush was listed as the president and sole owner of the business identified as PSI. However, the Board finds that the State of Missouri has no records of a corporation named Piping Specialists, Inc., doing business in that State. See Attachment 1 to Mr. Marsh's direct testimony, ff. Tr. 591. Mr. Roudebush has admitted that no corporation exists, owned by him, under the name of Piping Specialists, Inc. Roudebush [ff. Tr. 940] at 4; Tr. 981.

NRC Inspector Mulay stated that during an inspection of PSI on March 21, 1991, he reviewed survey records and utilization logs for the period of April 9, 1990, through March 2, 1991 (Report, Exhibit 15, at 1). The records were presented to him by Mr. Hosack as a complete and accurate record of radiographic work performed for the period. *Id.* NRC Inspector Kurth stated that during an NRC inspection on September 17-18, 1991, Mr. Hosack presented to him daily operation and survey reports as being complete and accurate (Report, Exhibit 11, at 1).

Mr. Kurth examined and obtained a copy of the PSI radioactive material utilization log on September 17 and 18, 1991, which was represented by Mr. Hosack as being complete and accurate (Report, Exhibit 11, at 1).

The Board finds that during the period from August 8, 1990, through December 17, 1990, the former PSI RSO (Mr. Hosack) deliberately failed to maintain utilization log records required by 10 C.F.R. § 34.27; records of pocket dosimeter readings required by 10 C.F.R. § 34.33; and records, required by 10 C.F.R. § 34.43, of surveys of radiographic exposure devices performed at the time of the storage of the device at the end of the work day. Hosack [ff. Tr. 218] at 3, 9; Tr. 271, 802-04. The Board also finds that Mr. Hosack, during 1990 and 1991, deliberately created and presented to the NRC, false radioactive material utilization logs and daily operation and survey reports because upon discovery of ongoing NRC investigations, records were fabricated to appear correct (Report, Exhibit 7, at 1). The period during which records were not maintained corresponds to the period when the Licensee's personnel dosimetry service was interrupted due to nonpayment of service fees,

¹⁶We have made some minor editorial changes.

thus concealing the fact that radiography was performed during periods when the Licensee's personnel were not wearing the required film badge or TLD. Tr. 260, 269-70, 362, 466, 834, 840. Mr. Hosack stated that dosimetry service was interrupted at periods of time and the utilization logs were documented in such a way that there was no activity recorded so that the NRC inspectors would not notice (Report, Exhibit 8, at 8-9). He stated that the records were prepared to reflect some activity to pacify the NRC as far as things being adequately done when they were not adequately done (Report, Exhibit 9, at 16).

The Board also finds that in violation of 10 C.F.R. § 30.9, during NRC inspections on March 21, 1991, and September 17-18, 1991, the former PSI RSO (Mr. Hosack) deliberately represented to NRC inspectors that the Licensee's utilization log records, records of pocket dosimeter readings, and records of surveys of radiographic exposure devices performed at the time of the storage of the device at the end of the work day, were complete and accurate when in fact those records were not complete¹⁷ in that the records did not document the use of radiographic exposure devices during periods when the Licensee's personnel dosimetry service was interrupted due to nonpayment of service fees. Mr. Hosack knew that the records had not been recorded daily as required, but had instead been fabricated "en masse" shortly before the inspections. Hosack [ff. Tr. 218] at 3, 9-12. Tr. 222-24, 271, 396-98, 453-57, 467, 515-17, 802-04, 808-09. Mr. Hosack admitted that he had deceived the NRC inspectors during the March and September inspections of 1991 as to the completeness and accuracy of various PSI records. Hosack [ff. Tr. 218] at 3; Tr. 921.

Mr. Robert Marsh testified that the review of the PSI utilization log revealed 41 dates of entry for source utilization from April 9, 1990, through September 11, 1991 (Report, Exhibit 11, Attachment 1) while the Mobay records alone revealed 48 dates of radiography work at Mobay from June 14, 1990, through December 20, 1990 (Report, Exhibit 11), and 74 dates of radiography work at Mobay from January 3, 1991, through September 23, 1991 (Report, Exhibit 12). Marsh [ff. Tr. 591] at 25. The Board finds that the utilization log also did not include the work performed for SOR Control on June 27, 1991 (Report, Exhibit 20), nor did it include the radiography performed at Williams Pipeline Company on June 28, 1991 (Report, Exhibit 14, at 1). *Id.*

It is an uncontroverted fact that various PSI records were fabricated in order to ensure that an incomplete system of records would appear to NRC inspectors to be complete. PSI's Answer to NRC's October 17, 1991 Order at 1 (November 20, 1991). See also Tr. 259, 269-70, 362, 363-64, 378-79, 381-84, 390-92, 466, 834, 840.¹⁸

Mr. Reil stated and the Board finds that during his employment with PSI, he was not issued, nor did he wear any dosimetry (Report, Exhibit 1, Attachments 1 and 2; Report, Exhibit 16, at 12). Mr. Reil stated that he asked Mr. Hosack each week about obtaining dosimetry, and Mr. Hosack put it off (Report, Exhibit 16 at 8-9, 16-17, and 55).

Mr. Hosack stated that Mr. Reil was not provided with TLD-type dosimetry because it was uncertain if Mr. Reil would continue in the employment of PSI, and Mr. Hosack claimed he did not believe Mr. Reil needed TLD-type dosimetry (Report, Exhibit 9, at 38-39). Mr. Hosack stated that Mr. Reil asked him several times for a TLD badge and on each occasion he (Mr. Hosack) put him off. He explained that if dosimetry was obtained for Mr. Reil, it would raise questions on why the license was not amended to include Mr. Reil as a radiographer (Report, Exhibit 10, at 1).

¹⁷ [Footnote added by the Board.] We do not specifically find that the documents, as presented to the Staff, were not "accurate." See Licensee's Brief at 78-79. However, the records were presented to create the impression that they were being kept in an appropriate, timely fashion — when they were not kept that way. And the records were incomplete. We do not consider this slight deviation from the original charge to be significant.

¹⁸ The Board modified this paragraph before adopting it.

Mr. Roudebush stated that Mr. Reil did not have a TLD-type dosimeter when employed at PSI (Report, Exhibit 18, at 25-26). As to the violation of 10 C.F.R. § 34.33(a), the Board finds that on multiple occasions during the period of June 15, 1991, through August 4, 1991, the former PSI RSO (Mr. Hosack) allowed a PSI employee (Mr. Aaron Reil) to act as a radiographer's assistant even though the employee was not wearing all the personnel monitoring equipment required by 10 C.F.R. § 34.33. Reil [ff. Tr. 204] at 2, 3, 5. Hosack [ff. Tr. 218] at 12. Tr. 210-12, 1034-37. In addition, the Board finds that in violation of License Condition No. 11.B, Mr. Hosack allowed the duties of radiographer's assistant to be performed by Mr. Reil during the time period mentioned above. Reil [ff. Tr. 204] at 4. Hosack [ff. Tr. 218] at 5.

We also find that in violation of 10 C.F.R. § 34.31(b), Mr. Reil did not receive copies of the Licensee's operating and emergency procedures nor had he been tested as required, prior to performing the duties of radiographer's assistant. Hosack [ff. Tr. 218] at 5, 9.

In violation of 10 C.F.R. § 34.33(a), on multiple occasions, we find that the former PSI RSO (Mr. Hosack) allowed a PSI employee (Mr. Scott Thrush) to act as a radiographer's assistant even though the employee was not wearing all the personnel monitoring equipment required by 10 C.F.R. § 34.33. Thrush [ff. Tr. 753] at 3. In addition, in violation of License Condition No. 11.B, we find that Mr. Hosack allowed the duties of radiographer's assistant to be performed by Mr. Thrush during the occasions mentioned above. Thrush [ff. Tr. 753] at 3. Tr. 755, 764.

The Board finds in violation of 10 C.F.R. § 34.31(b), that Mr. Thrush did not receive copies of the Licensee's operating and emergency procedures nor had he been tested as required, prior to performing the duties of radiographer's assistant. Tr. 757.

Mr. Roudebush, when asked if he performed work as an assistant radiographer, specifically stated, "No. I don't perform work as a radiation assistant" (Report, Exhibit 18, at 42). Mr. Hosack stated that Mr. Roudebush's radiographic activities would be defined as an assistant radiographer (Report, Exhibit 9, at 27-30) and that Mr. Roudebush was not truthful when he told the NRC inspectors in September 1991 that he had operated the radiography controls only one or two times (Report, Exhibit 9, at 30). Mr. Roudebush admitted that he had lied about whether he had ever been a helper or whether he had ever handled the camera. Roudebush [ff. Tr. 940] at 19; Tr. 952. In fact, Mr. Roudebush cranked out the radioactive source in the camera many times. See Hosack [ff. Tr. 218] at 11.

In violation of License Condition No. 11.B, on multiple occasions during 1990 and 1991, we find that Mr. Forrest Roudebush acted as a radiographer's assistant although he was not specifically named in License Condition No. 11.B. Roudebush [ff. Tr. 940] at 15. Tr. 922, 1059.

In violation of 10 C.F.R. § 34.31(b), we find that Mr. Roudebush had not been tested as required prior to performing the duties of radiographer's assistant. Tr. 922.

The Board finds in violation of 10 C.F.R. § 34.33(a), that Mr. Hosack performed radiography without proper dosimetry. Tr. 403-05.

Mr. Hosack stated that although Mr. Roudebush had dosimetry available to him, Mr. Roudebush did not have the dosimetry with him while performing as an assistant radiographer because Mr. Hosack did not believe that Mr. Roudebush needed dosimetry to help him (Mr. Hosack) perform radiography (Report, Exhibit 9, at 34-37). Mr. Hosack stated and the Board finds that during about 25 percent of 1990 there had been no TLD-type dosimetry available to himself or Mr. Roudebush; however, radiography was performed (Report, Exhibit 10, at 1).

In violation of 10 C.F.R. § 34.33(a), we find that on multiple occasions during 1990, Mr. Hosack allowed himself and Mr. Roudebush to perform radiography even though they were

not wearing all of the personnel monitoring equipment required by 10 C.F.R. § 34.33. Tr. 403-05, 823-26.

We find, in violation of 10 C.F.R. § 30.9, that during the formal NRC investigative interview on October 16, 1991, Mr. Forrest Roudebush falsely denied that he performed work as a radiographer's assistant. Roudebush [ff. Tr. 940] at 19. Tr. 952. During the NRC inspection conducted on September 17-18, 1991, Mr. Roudebush acknowledged that he had attached the control cables and guide tube to the radiographic exposure device and had used the radiographic exposure device to make radiographic exposures. Mr. Roudebush admitted that he had lied at the October 16, 1991 sworn investigative interview. Tr. 952.

It is an uncontroverted fact that Mr. Roudebush, Mr. Hosack, Mr. Reil, and Mr. Thrush acted as radiographers or radiographer's assistants without proper dosimetry. It is also an uncontroverted fact that Mr. Roudebush, Mr. Reil, and Mr. Thrush were all unauthorized users of radiographic equipment in violation of 10 C.F.R. § 34.31(b) and PSI's License Condition No. 11.B.

SOR Control components were being radiographed on the first floor of PSI's Kansas City Facility on June 27, 1991. Tr. 210-13, 477-96, 1064. It is an uncontroverted fact and we find that there were other instances of shooting on the first floor with large pieces of equipment that the NRC was not aware of. Tr. 485. In some instances, these first-floor shots were done during the day. Tr. 496.

Mr. Hosack stated that he understands that to perform radiography at the PSI offices, the activity would have to conform to field site criteria (Report, Exhibit 9, at 48). However, he stated that he assumed what the safe radiation boundaries for the first floor would be based on calculations he had used for the basement level, "with native stone construction, several feet thick" (Report, Exhibit 9, at 49) and that he did not maintain a proper barricade for the "high radiation area or for the five MR line" (Report, Exhibit 9, at 62).

The Board finds that indigent, homeless persons were known to sleep around PSI's Kansas City Facility. Tr. 637-40, 770-72, 897-900, 1063. Photographs of the PSI offices revealed that indigent persons frequently slept on the premises next to the building and the grounds showed pedestrian and vehicle traffic patterns in close proximity to all four sides of the building. Report, Exhibit 23.

Mr. Ray Hiersche testified that one had to be "crazy" to take radiographs on the first floor of PSI's Kansas City facility because of the potential to expose the public to radiation. Tr. 681-82.

The Board finds that PSI's former RSO, Mr. Hosack, did not perform a survey or set up barricades or signs during any period when radiography was performed at PSI's Kansas City facility. Report, Exhibit 9, at 62. Tr. 486, 901, 904. Mr. Kurth's exposure rate calculations, which conclude that signs and set boundaries were necessary during radiography on June 27, 1991, are uncontroverted. See memo bound into record, ff. Tr. 1062.

The Board also finds that Mrs. Reil was present on the night of June 27, 1991, while her husband was performing radiography on SOR Control components. Tr. 210, 215, 477-78, 897, 1031. She did not have a film badge or TLD because PSI had canceled their visitor badge dosimetry service. Tr. 405-06, 828.

PSI failed to post radiation area signs and set boundaries while conducting radiography at the PSI offices. The radiography created a radiation field that extended beyond the exterior walls of the building. The Board finds that this radiation field overlapped with public access frequented by indigent persons who on occasion slept near and against the exterior walls of the PSI office.

Mr. Roy Caniano's direct testimony on the dangers of industrial radiography is uncontroverted. "The radioactive sources used in industrial radiography are extremely dangerous and can cause high radiation fields in close proximity to the source. This can result in biological

damage to a person or persons in a few seconds, and can be potentially lethal within a few minutes of direct exposure." Caniano [ff. Tr. 591] at 5.

Mr. Hosack gave a sworn statement to Mr. Marsh on October 15, 1991. Tr. 543. The sworn statement was an admission by Mr. Hosack that he failed to fully comply with NRC regulations and PSI licensing requirements. In addition, the statement implicated Mr. Roudebush in the falsification of records and in a conspiracy to provide false sworn testimony to the NRC during formal NRC investigative interviews. See Report, Exhibit 7. Mr. Hosack gave a sworn statement on the morning of October 16, 1991, to discuss things Mr. Roudebush and he discussed on the night of October 15, 1991, and he gave a sworn statement in the afternoon of October 16, 1991, to provide full disclosure of the facts as he knew them. Tr. 544. See Report, Exhibit 8.

The Board finds that a meeting occurred between Mr. Hosack and Mr. Roudebush on the night of October 15, 1991, at Mr. Roudebush's home. However, the content of the meeting is a matter that is in controversy.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

We have reached our conclusions after examining the allegations in light of the written record, including our own examination of the license conditions. We have also reviewed the filings of both the parties.

We have reviewed the qualifications of each of the witnesses of the Staff of the Nuclear Regulatory Commission and find that they are qualified to give the testimony that has been received in this proceeding.

A. Complete Responsibility of RSO

We reject the first portion of Licensee's defense, that the Licensee should not be responsible for the acts of its Radiation Safety Officer (RSO) unless the Licensee's president somehow fell short of his obligation to supervise his employee.

In other contexts, this proposition has some validity. For example, in a complex activity such as building a nuclear power plant, there may be many violations without calling into serious question the effectiveness of management. See, e.g., *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-114, 16 NRC 1909, 1914 (1982); LBP-83-77, 18 NRC 1365, 1396 (1983) (holding that quality assurance deficiencies and difficulties do not necessarily demonstrate a failure of "adequate overview and control" and do not necessarily provide a reason to deny an operating license for a nuclear power plant).

However, in this case, Mr. Forrest Roudebush applied for a license with no prior training or experience in radiography.¹⁹ He neither read nor signed

¹⁹Direct Testimony of Forrest Roudebush, ff. Tr. 940, at 1-5.

the initial license application, which was "obtained" by Mr. Ken Keeton and prepared by R.D. Donny Dicharry, a consultant.²⁰ Mr. Roudebush may initially have believed that he was permitted to delegate all license-related responsibilities to an employee; his involvement with his license was so slight that he did not even read it at the time he submitted it, as is revealed in the following testimony in Tr. 1045:

JUDGE BLOCH: Did you read [your license] . . . before you applied for it . . . ? Did you read the application?

MR. ROUDEBUSH: No, sir, I did not read the application. Don Dicharry submitted it in to Washington.

JUDGE BLOCH: And you never reviewed it?

MR. ROUDEBUSH: No, sir.

Nor has Mr. Roudebush ever considered that he had any direct management responsibility or regulatory accountability for PSI.²¹

Some of these events are, of course, subsequent to the application for PSI's license. However, they reflect to some extent what may have been considered when the license application was submitted. Hence, it is understandable that Mr. Dicharry proposed that the PSI license contain a rather unusual clause, and the NRC Staff apparently acquiesced, although we do not know how much explicit consideration was given to this point. Pursuant to 10 C.F.R. § 34.11(e), which permits "delegations of authority and responsibility for operation of the program," the license said:

Mr. Ken Keeton [the RSO] will have *complete responsibility and authority to direct all aspects* of the radiation safety program of the company. In addition Mr. Keeton is the manager of the company's radiography program [emphasis added].

Specifically, Mr. Keeton's responsibilities shall include: [fifteen listed responsibilities, seven of which begin with the term "administer."]²²

²⁰ *Id.* at 4; see also Tr. 1045.

²¹ Mr. Roudebush testified:

Q10: How was your business operation organized after Ken Keeton obtained a license for RT testing?

MR. ROUDEBUSH: I continued to manage the piping supplies business operation. Ken Keeton, Joe Tercey, and subsequent PSI RSOs managed the radiography operation. With regard to PSI Inspection's Radiography operations, *my sole involvement was to keep track of jobs in progress, invoice for work completed, attempt to sell radiography services, and respond to RSO equipment and supply requests (since I was personally funding the operation).*

Roudebush Direct, ff. Tr. 940, at 5 (emphasis supplied).

²² OI Report of Investigation, Case No. 3-91-011, admitted Tr. 108 (OI Report), Exhibit 1, at 121 of 187.

Subsequently, the license was amended so that James Hosack became RSO; but the responsibility of the RSO was not changed.²³

From the circumstances surrounding the license and from its wording, we infer that Mr. Forrest Roudebush, owner-licensee, is responsible for all the actions of PSI's RSO, to whom he delegated complete responsibility and authority.²⁴ It is standard hornbook law that:

In an agency relationship, the party for whom another acts and from whom he derives authority to act is known and referred to as a "principal," while the one who acts for and represents the principal, and acquires his authority from him, is known and referred to as an "agent." The agent is a substitute or deputy appointed by the principal with power to do certain things which the principal may or can do. Pursuant to the grant of authority vested in him by the principal, *the agent is the representative of the principal and acts for, in the place of, and instead of, the principal.*²⁵

We conclude that Licensee and the NRC entered into a license agreement in which PSI's RSO was fully empowered to act for it. This did not mean, of course, that PSI had no responsibility. To the contrary, it was extremely important that it exercise great care in selecting its RSOs because it was completely responsible for them, having delegated complete authority to them. NRC enforcement policy specifically provides: "Generally, however, licensees are held responsible for the acts of their employees." 10 C.F.R. Part 2, Appendix C, V.A.

We have considered the seriousness of the admitted violations in light of the small size of this firm, which operated — under the nominal responsibility of its president — with only one authorized radiographer and no authorized radiographic assistants. The violations committed in a short span of time are directly attributable to PSI's RSO.

We note that some of the violations were themselves serious: permitting unauthorized personnel to operate the radiographic camera during an extended period of time, permitting people to operate the camera without proper radiographic badging during a several-month period, and — during one lengthy session on June 27, 1991 — using the camera without properly marking boundaries and without doing sufficient analysis or surveillance *in advance* to ensure the safety of homeless people known to frequent the area of the shooting.²⁶

We note Licensee's reliance on Commissioner Hendrie's concurring opinion in *Atlantic Research Corp.* (Alexandria, Virginia), CLI-80-7, 11 NRC 413, 426

²³ OI Report, Exhibit 1, at 15 of 187.

²⁴ Tr. 1126-52, *passim*, contains several discussions of why our ruling may be against public policy. However, none of the arguments of the parties seems to us to be persuasive.

²⁵ 3 Am. Jur. 2d, Agency (1986) C1, at 509-10 (footnotes deleted, emphasis added).

²⁶ Tr. 476-86.

(1980).²⁷ However, Commissioner Hendrie's unwillingness to impose penalties when violations occurred was limited to a situation in which "the licensee had exercised reasonable measures to select, instruct, and supervise the employee" who was responsible for the violations. Peculiarly enough, it is part of PSI's case that its president never instructed or supervised its RSO. Hence, the defense suggested by Commissioner Hendrie cannot be successfully asserted by PSI.

B. Abdication of Responsibility by Licensee

Neither party wishes this Board to decide the case solely on the grounds set forth in Section A, above, and both want us to adjudicate Mr. Roudebush's culpability or lack of culpability.²⁸ His culpability also is relevant to revocation because it may affect the time period during which he might be denied subsequent applications for a license.

Consequently, we analyze Licensee's principal defense, that Mr. Roudebush exercised reasonable management control over PSI. In the next section of this Decision, we will also assess his culpability with respect to some of the serious charges assessed against him personally in the revocation order.

I. Conclusions

(Conclusions are presented first, in this section, for the convenience of the reader. The conclusions are based on findings that are documented, with footnotes to the record, in the subsequent sections, each of which bears a subtitle that indicates the topic covered in the section.)

We conclude that, despite Mr. Roudebush's statements to the contrary, the Staff of the Commission regularly communicated with him about his responsibilities as Licensee; he, therefore, had adequate opportunity to learn about his responsibility under the NRC license. Despite these communications with the Staff, Mr. Roudebush never became an active manager, attempting even to the present time to make his lack of interest in management an excuse for not having controlled the behavior of his RSO.

We find that there were occasions on which Mr. Roudebush was informed, orally and in writing, that PSI was responsible for violations. Nevertheless, he never took enough personal interest to find out specifically what the violations were or to institute any reasonable program to prevent them from occurring in the future.

²⁷ Licensee's Brief at 33.

²⁸ Tr. 1129 (Staff); Tr. 1143 (Licensee). See also Tr. 1134-35, where both parties wish the Board to determine Mr. Roudebush's culpability. Note, however, that the Staff tried this case without noticing Item 7 in the license. Tr. 1137.

We also find that the NRC required PSI to promise that Mr. Forrest Roudebush would perform "quarterly audits of records." Mr. Roudebush testified that he did not know about that promise. However, we accept the testimony of Mr. Hosack that Mr. Roudebush did know. Mr. Roudebush could have complied with that promise simply by making a checklist of compliance items from the license and determining that each was fulfilled, but he did not do so.

We conclude that Mr. Roudebush did not fulfill his audit responsibility.

During the Evidentiary Hearing which we conducted, Mr. Tercey testified that he educated Mr. Roudebush concerning the daily utilization log, including how to fill it out and how to verify it by comparison with billing material. Mr. Roudebush also demonstrated his knowledge of auditing techniques during the hearing by voluntarily compiling (in only a half-hour) a list of invoices against which utilization logs could be checked. Prior to the October 1991 audit by the NRC, he also demonstrated that he knew about the significance of the relationship between invoices and utilization records by asking his bookkeeper to pull all the invoices and give them to Mr. Hosack to help him in compiling records.

Mr. Roudebush gave invoices to Hosack at a time when he knew that they were to be used to fabricate some utilization records, which he knew were required to be completed at the time the work had been done. Mr. Roudebush's repeated "nagging" of Mr. Hosack about whether his records were up to date indicated his awareness that Mr. Hosack was poor in his recordkeeping practices. Yet, despite both his knowledge of how to do so and his nagging suspicion that he needed to do so, he did not audit the recordkeeping practices of Mr. Hosack.²⁹

In addition, we find that Mr. Roudebush was responsible for paying for the processing of TLD badges, yet on several occasions, he failed to pay in a timely fashion and dosimetry service to PSI was terminated. He knew, or should have known, that there were periods during which there were no valid badges for a radiographer to use. Similar gaps had occurred during the time Mr. Tercey was RSO, and the significance of those gaps was clearly explained to Mr. Roudebush, who understood them. Nevertheless, radiography work went on with Mr. Roudebush's knowledge.

²⁹ With respect to PSI's defense of "reasonable management practice," we do not consider it to be reasonable for Mr. Roudebush to assure the NRC that he trusted the accuracy of Mr. Hosack's records. He knew enough of Mr. Hosack's recordkeeping practices to know the need to complete his own audit before accepting the accuracy or completeness of those records.

There was another reason why a reasonable manager would have distrusted Mr. Hosack: his demonstrated willingness to deceive government officials. During the first 6 months that Mr. Hosack was employed by PSI, Mr. Roudebush understood that Mr. Hosack was continuing to collect unemployment insurance illegally, from the State of Texas. Subsequently, there also were cash payments of salary to Mr. Hosack and a sizeable cash payment to Mr. Hosack, disguised as a loan, of a downpayment on Mr. Hosack's house.

Under the circumstances, it was particularly egregious for Mr. Roudebush to assure an NRC inspector, Mr. Kurth, that the utilization logs were complete. He had direct knowledge that they probably were not complete and he had every reason to distrust Mr. Hosack's willingness to comply with the law.

Furthermore, Mr. Roudebush used the radiography camera himself, when he knew that Mr. Hosack was the only one authorized to do so. He and Mr. Hosack both interviewed Mr. Aaron Reil, whom they decided to employ so that they could ascertain whether he might become a second radiographer. We conclude that he knew or should have known Mr. Reil was going to handle the source, contrary to the provisions of the license. He also knew that Mr. Reil should have been added to the PSI license; but he failed to do so because of the cost of making such an addition.³⁰

Mr. Roudebush testified that he did not know the regulations and should not be responsible for knowing them. Contrary to his testimony, the record shows that he was frequently informed of his obligations by NRC Staff. Moreover, the regulations are not particularly lengthy or complex. They were accessible for him to read. He should have read them himself or found a trustworthy means of educating himself in their meaning.

We find, however, that the Staff did not meet its burden of proof with respect to its allegation that Mr. Hosack and Mr. Roudebush conspired to commit perjury on the evening of October 15, 1991. The only clear instance of false testimony occurred on the following day, when Mr. Roudebush incorrectly stated that he had not acted as a radiographer's assistant, but this was not the result of the meeting between Mr. Hosack and Mr. Roudebush.

Despite our inability to sustain this portion of Staff's charge, we have concluded that the Staff has carried its burden of proof on its entire case. Mr. Roudebush's abdication of management responsibility was not reasonable.³¹ Mr. Roudebush's abdication of management responsibility requires that the license be revoked. There is no way to ensure, based on past conduct, that Mr. Roudebush could be trusted to conduct safe operations that comply with NRC regulations.

2. Staff Spoke to Licensee

Mr. Roudebush testified that he was unaware of his management responsibilities because the Staff of the Nuclear Regulatory Commission never spoke to him personally but had always spoken to his Radiation Safety Officer. He said:

³⁰ We accept the credibility of this earlier sworn testimony as opposed to Mr. Roudebush's later attempt to retract it. Tr. 1119.

³¹ See *Three Mile Island*, ALAB-772, *supra*, 19 NRC at 1206-08.

Licensee's Brief, *supra*, at 37, argues that if Mr. Roudebush had tried to tell the RSO how to do radiography, he would have been in violation of regulations because his RSO had complete responsibility for radiographic safety. However, Mr. Roudebush always had the power as owner-president to suspend operations or to fire his RSO. Furthermore, he had the power of persuasion. He could always have suggested what he thought complied with the law and asked if his RSO disagreed. Or, he could have checked with the NRC about his question and then attempted to persuade his RSO.

I should also mention that September of 1991 was the first time that anyone from the NRC had ever talked to me about anything. In all of the previous NRC Inspections, all communications were between PSI's RSO and the NRC investigator. As far as I know, PSI passed all of its previous NRC Inspections without any problem.³²

He also said, at Tr. 957-58:

[N]one of the inspectors came back to me and set down and talked to me about any deficiencies at all. . . . The only time that the inspectors even spent any time with me at all is when Mr. — Michael back there (pointing to Mr. Kurth), came in with somebody else which I cannot remember, and spent any length of time, and we didn't spend any length of time then, sir.

We find this testimony of Mr. Roudebush to be untruthful. On redirect, Tr. 1093, Mr. Roudebush admitted having conversations with the NRC when the Nuclear Regulatory Commission had amended the PSI license so that it would no longer be authorized to train people for radiographic responsibilities. He also admitted contacts with the Staff after each RSO quit. Furthermore, after Ray Hiersche quit, he remembered the Staff telling him not to open the vault since he was not authorized to do so.

But we are convinced that Mr. Roudebush had far more extensive contacts with the Staff than he admitted. At Tr. 296, his former RSO, Mr. Tercey — whom we find credible — testified that

Mr. Jim Lynch [of the Staff] gave the first inspection on the license within 90 days of the license and he sat Mr. Keeton and Mr. Roudebush down and explained several things of importance to them both, in great detail. At least a whole afternoon.

At Tr. 297, Mr. Tercey also said that he knew that he and Mr. Roudebush were told that they were both responsible but that:

Whether it was in terms of management responsibilities or what, . . . Mr. Roudebush did claim that he wasn't aware of a lot of things and Mr. Lynch emphasized upon the fact that he was the president of the company and that these were things that he had to be knowledgeable of.

Mr. George M. McCann of the Staff also testified, at Tr. 122-23, that he and Cassandra Frazier of NRC visited PSI in person³³ to review the qualifications of Ray Hiersche, in about August 1988. At that time McCann

³² Roudebush, ff. Tr. 940, at 12.

³³ See also Tr. 131-32, 135.

specifically discussed with Roudebush the need for management involvement and oversight of that program. And one of the license conditions incorporated in that license talks about management involvement.

See also Tr. 130-31.

Up to the present time, based on his testimony at the evidentiary hearing, Mr. Roudebush has not acknowledged that he had managerial responsibility and that he did not institute programs designed to correct problems.³⁴

We find that Mr. Roudebush abdicated all management responsibility. Consequently, it is not surprising that we also conclude, for reasons discussed below, that Mr. Roudebush failed to exercise reasonable management oversight and that he sometimes directly participated in illegal practices.

3. Licensee Was Told of Violations

Mr. Roudebush testified that he had not been notified when the Staff found that his firm had violated NRC regulations. However, before Mr. Roudebush testified, we had heard credible contrary testimony — from Staff witnesses and former employees of PSI — that Mr. Roudebush was told that his company had committed violations. His professed ignorance of violations by PSI is not believable in the face of the substantive weight of contrary evidence. It seems probable to us that his testimony is purposely inaccurate. *See also* ff. Tr. 975, Staff Exhibits 7-12.

We find the following testimony and records more credible than Mr. Roudebush's statement concerning his not being told of violations. Mr. Joseph Tercey, a former RSO whose veracity we accept, testified that Mr. Roudebush knew of the three violations found in the June 24, 1987 inspection and that Mr. Roudebush also saw PSI's response to those violations. Tr. 314.

In Staff Exhibit 9, ff. Tr. 975, Inspector Toye Simmons' March 29, 1989 through May 10, 1989 Industrial Radiography Inspection Field Notes (covering events that occurred in May through April) show that Mr. F.L. Roudebush, president, was the only person contacted with respect to action on a previous violation and on a new violation.

Staff Exhibit 12, ff. Tr. 975, shows that on February 15, 1990, the NRC wrote to the attention of Mr. Roudebush about discussions with Mr. Hosack ("Hosack"), listing four new violations and requiring an answer from PSI. Similarly, on May 17, 1989, according to Staff Exhibit 11, ff. Tr. 975, the NRC wrote to the attention of Mr. Roudebush stating that a routine inspection had no further questions about the apparent violations found on July 10, 1987. Exhibit

³⁴ *See note 21, above.*

11 also attached a new notice of violation (NOV) stating that "two individuals using iridium-192, performed radiography alone without the required training."

Staff Exhibit 8, ff. Tr. 975, was shown to Mr. Roudebush. It is a field note, signed by Inspector James L. Lynch on June 24, 1987, stating that an exit interview had taken place. When it was shown to Mr. Roudebush, he denied that the exit interview happened.³⁵ We have considered this testimony of Mr. Roudebush and, in light of the many other failures of his memory and at least one instance of a sworn false statement, we accept the evidence contained in the written field note.

With respect to NRC letters mailed to Mr. Roudebush, it is possible that he never read the mail addressed to him. If so, this would itself not be a reasonable management practice. However, Mr. Roudebush testified that he did read letters addressed to him.³⁶ As we reflect on this testimony, we conclude that either Mr. Roudebush does not open his own mail even when it is addressed to him, or he does open it but does not remember what is in it, or he remembers it and lies about it. In any of these cases, he has not fulfilled his obligations to manage his firm in a reasonable and trustworthy manner.

We considered the possibility that Mr. Roudebush read his mail but did not understand the importance of violations. But even this possibility is contradicted by reliable direct testimony. At Tr. 299-301, Mr. Joseph Tercey testified that in the first inspection, 90 days after licensing, on June 16, 1987, there were "significant dings" and that he had to impress on Mr. Roudebush "as to the

³⁵Tr. 964.

JUDGE BLOCH: . . . But the note says that you were at the exit interview, which means that the inspector's note says that you had an explanation of his preliminary findings.

THE WITNESS: No, sir.

JUDGE BLOCH: It didn't happen?

THE WITNESS: Never! Never!

³⁶Tr. 959-60.

Q: Did you -- and you just testified that you had no correspondence with the NRC. You left it completely up to your RSOs?

A: Well when correspondence come in for the inspections, I make sure that Hosack gets it, yes.

Q: Did you ever read the correspondence?

A: Normally my procedure is, when it comes to an inspection, I let him handle it.

Q: So you never read the correspondence, you just handed --

A: Well there's correspondence I'm sure I've read over a period of time naturally.

* * * *

JUDGE BLOCH: I would like to ask first, is there any difference as to whether you've read it, as to whether it was addressed to Forrest Roudebush or not? If it came in your name, would you read it?

THE WITNESS: No. Normally, if it comes to Hosack, I usually put it on his desk.

JUDGE BLOCH: No, I didn't say if it came to Hosack. If it's addressed to you, Forrest Roudebush, would you read it?

THE WITNESS: Yes, I would open it up and I would read it, sir.

severity of what had happened." We find that this discussion did take place and that Mr. Roudebush understood the significance of the violations that were assessed. We conclude that Mr. Roudebush understood that violations of NRC regulations were important. His failure to ensure that all violations were corrected was unacceptable management practice.

4. *Quarterly Audits of Records*

At one point, to be discussed below, PSI made a formal commitment to the Nuclear Regulatory Commission that Mr. Roudebush would conduct quarterly audits of PSI's records. We are confident that Mr. Roudebush knew of that obligation because NRC Inspector Samuel J. Mulay, ff. Tr. 116, at 20, of his joint direct testimony, stated:

Mr. Roudebush indicated that periodic audits of the RSO had been conducted by him (Mr. Roudebush).³⁷

We infer, from the fact that he did not question his obligation to conduct such audits, that Mr. Roudebush testified inaccurately, at Tr. 1046-47, that he never knew about the March 26, 1990 letter in which PSI promised that Mr. Roudebush would make periodic audits. We accept as truthful Mr. Hosack's statement, ff. Tr. 218, at 2, that Hosack checked with his boss before he requested the NRC to amend the PSI license to require quarterly audits of records by Mr. Roudebush. We accept Mr. Hosack's testimony that the request was submitted by Hosack "at the behest of Mr. Roudebush."³⁸ We are convinced that it is consistent with Mr. Hosack's relationship to Mr. Roudebush, who was his boss, that he would have obtained approval before making a promise to the NRC about Mr. Roudebush's obligations.

5. *Failure to Fulfill the Audit Responsibility*

As we have just discussed, PSI agreed that Mr. Roudebush would conduct quarterly management audits.³⁹ Since Mr. Roudebush testified, at Tr. 1046, that he did not even know about his responsibility to conduct periodic audits, it is clear that he did not fulfill that responsibility. Tr. 173.

³⁷ See also Tr. 162 and also the testimony of Michael Kurh, ff. Tr. 591, at 18.

³⁸ Note that the March 26, 1990 letter was the required response of PSI to the February 15 letter from the NRC to Mr. Roudebush concerning a series of violations. Because that letter was addressed to Mr. Roudebush, he had every reason to know that a response would be made and to demand, as a reasonable manager, to see that response. We conclude that he actually saw the response submitted by his employee and promising action by him.

³⁹ Letter of March 26, 1990, signed by Mr. James Hosack, OI Report, Exhibit 1 at 186 of 187.

In addition, we do not think it would have been that hard for Mr. Roudebush to fulfill his obligation. NRC Inspector George McCann testified, at Tr. 173, that the way you do a management audit is by:

periodically accompanying [radiological personnel], and that's why we ask for field accompaniments. In the application it talks about a field accompaniment, that's typically by the radiation safety officer. But if — that's the only way you can do it, is to accompany, to observe. That's the way you do anything, whether you're the manager of a company or an inspector, you observe and follow up on indications that may not look correct. You look deeper. . . . You know, I don't rely on someone telling me something necessarily, particularly if I feel there's a problem.

NRC Inspector McCann also testified, at Tr. 166-67, that it would have been an adequate audit if Mr. Roudebush had made a checklist of his license conditions and had determined that each had been met. This is a task that we conclude is well within Mr. Roudebush's capability.⁴⁰

Indeed, at Tr. 1055-57, Mr. Roudebush, according to his own testimony, conducted an audit. He took only a half-hour to make a list of invoices that could have been used to check against the utilization log to see what entries in the log were missing. Furthermore, reliable testimony at Tr. 302-04, from Mr. Joseph Tercey, shows that Mr. Roudebush was fully educated by him in the early days of the license in the different types of paperwork and how to pull billing material to verify the accuracy of that paperwork. Furthermore, at Tr. 304, Mr. Tercey testified that, "to my knowledge, in '87, he [Mr. Roudebush] understood what a utilization log was and what its purpose was and how to fill it out."

Because of his knowledge of the paperwork requirements, we also conclude that Mr. Roudebush knew that the records presented to the NRC investigators in September 1991 were incomplete. Hence, he lied to the NRC in the course of that investigation. We credit Mr. Kurth's testimony, ff. Tr. 591, at 22, that:

On several occasions, Mr. Hosack was asked if the utilization logs presented to me were complete. He said, "Yes." Mr. Roudebush was asked several times during the inspection if the utilization logs were complete. He responded that Mr. Hosack performed the radiograph work and he was the one who kept the records in order. He indicated that he trusted Mr. Hosack and that the records should be complete.

Mr. Roudebush acknowledged, ff. Tr. 940, at 6-7:

⁴⁰ Mr. Roudebush accompanied Mr. Hosack to field locations on numerous occasions and acted as a radiographer's assistant, contrary to the license and to NRC regulations. On those occasions, Mr. Roudebush acted as a subordinate to Mr. Hosack, thereby reversing the ordinary lines of responsibility and accountability. Had he chosen to, he could have used these occasions to audit Mr. Hosack.

I was always concerned about Mr. Hosack's conscientiousness in finishing necessary paperwork because I frequently had to nag him about turning in information necessary to prepare invoices. I spent a considerable amount of energy reminding Mr. Hosack to make sure that his paperwork was complete and up-to-date.

Furthermore, he never had to nag Mr. Tercey, whom he knew to be up to date (Tr. 303). Interestingly enough, in an answer designed to show that he did not know how to verify utilization logs, Mr. Roudebush showed that he knew that these logs could be verified by comparison to billing records. His testimony on this point, ff. Tr. 940, at 10-11, was:

Q19: What is your involvement with PSI Inspection's utilization logs?

A: I have never reviewed these logs in connection with any of PSI's RSOs. I have no basis — even if I tried to review the utilization logs — for judging the completeness or accuracy of the utilization logs. To "verify" these logs, I would have to pull all of PSI's various billing files and other client information and compare these materials with the utilization logs. [Emphasis added.] Even if I took this step, I'm not sure I would really be able to tell if the utilization logs were complete and accurate.

As we have already stated, we are convinced that Mr. Roudebush knew how to fill out the utilization log. This included the requirement that it be done simultaneously with the work reported on the log. We also conclude that if the utilization logs were up to date there was no valid reason to pull all the billing for the purpose of verifying utilization logs. Hence, we conclude that when Mr. Roudebush asked Mr. Garcia to pull billing files so that utilization logs could be updated, Mr. Roudebush knew there were serious deficiencies in those files.

We accept the testimony of both Mr. Hosack and Mr. Garcia, bookkeeper for PSI, that Mr. Roudebush personally asked that the billing records be pulled and given to Mr. Hosack on the eve of the NRC's Fall 1991 inspection. Tr. 453, 460, Deposition of Jesse Garcia (Tr. 10-11). We are convinced that this request showed that he knew there were serious deficiencies in the records. It also shows that he knew that checking the daily log against billing records was one way to audit it. Consequently, we accept as true the testimony of Mr. Hosack that Mr. Roudebush knew that the records were not being maintained properly. Exhibit 8 to the OI Report at 18-19.

6. Licensee Knew Work Was Done Without Badges

Mr. Roudebush denied knowledge that work had been scheduled at times that badges were not available for personnel that were required to have them.

However, records of PSI's radiography company indicate that the dosimetry service was allowed to lapse from August 8 to December 19, 1990.⁴¹ We accept as true Mr. Hosack's testimony that it was Mr. Roudebush's responsibility to pay for this service but he nevertheless allowed it to lapse. Exhibit 19 (payment by Roudebush); Tr. 398-99, 407.⁴² Furthermore, work continued during the period of lapsed coverage, and Mr. Roudebush — as owner — necessarily knew that the work was continuing without badges, which Mr. Roudebush knew were required by regulations. Tr. 665 ff., 676 (Hiersche). Nor was this the first time badging had lapsed; it had occurred when Mr. Tercey was RSO. Tr. 327-29.

Given the small amount of money involved in having current badges, we are puzzled why these lapses were permitted to occur; but we conclude that despite the irrationality of this occurrence, it did happen.

7. *Licensee Acted as a Radiographer's Assistant*

Although he knew he was not listed on the license as a radiographer or radiographer's assistant, Mr. Roudebush knowingly acted as an assistant.⁴³ In a sworn deposition, found in Exhibit 18 to the OI Report at 33, Mr. Roudebush correctly reported the Staff's action against PSI in 1988. He said:

You come back and says, "you cannot, cannot approve any radiographer unless it comes through us first because we're taking that away from you. . . ." I should have been put on the license in 1988.

Nevertheless, in March 1991, Mr. Roudebush assured Mr. Samuel J. Mulay of the NRC that he had not acted as a radiographer's assistant. Mulay Direct, ff. Tr. 116, at 22-23. Then, at Tr. 626-27, we learn from NRC inspector Kurth that Mr. Roudebush admitted during the September 17-18, 1991 inspection that he had undertaken activities involving the source. It was Mr. Kurth's opinion, which is consistent with other testimony, that when Mr. Kurth told Mr. Roudebush that he should not be doing that, "He didn't appear surprised."

The next significant event concerning activities as assistant radiographer occurred immediately after the inspectors left. Here is what occurred, according to Mr. Roudebush, ff. Tr. 940 at 16:

⁴¹ Exhibit 19 to the OI Report.

⁴² In Licensee's Brief at 75, finding 204, reference is made to a letter addressed to Roudebush, apparently relating to nonpayment for badging. Licensee's brief comments that "there was no testimony to support that Roudebush read the letter or would have understood its significance." We do not accept this defense argument. Licensee is responsible for reading his mail well enough to know whether he has failed to pay for essential safety services. Furthermore, we find that Roudebush did know that badges were required for licensed work.

⁴³ Amendment No. 02 to the license, April 27, 1989, made Mr. James A. Hosack the only person authorized either as a radiographer or a radiographer's assistant. OI Report at 79 of 187.

After the inspectors left [after the September 17-18 inspection], Jim Hosack told me that I had "killed him" by saying that I had touched the radiographic exposure device. I became upset because I didn't understand — and I'm not sure that I yet understand — how I could be receiving "on-the-job" training without ever touching the radiographic exposure device. . . .

We find that the portion of Mr. Roudebush's testimony concerning his lack of understanding is not credible. However, we do accept that he did not understand how serious this admission of his might prove to be. In light of that new understanding of seriousness, we do understand that he would perjure himself in October 1991 rather than continue to admit this damaging information. Here is what Mr. Roudebush said about his lying under oath:

Q: Well, you also went in there and lied, Mr. Roudebush, about whether you had ever been a helper or whether you had ever handled the camera.

A: Yes, I did.

Q: Why did you do that.

A: Well, I was a little bit nervous on that day naturally, and I just thought that this is the question I should answer in the way that Hosack would want me to answer it.

We know of one other instance in which Mr. Roudebush conspired with Mr. Hosack to cover up illegal activity. He also lied about that event under oath. (See note 44, below.) At Tr. 1094-95, Mr. Roudebush testified that he cooperated with Mr. Hosack to conceal the fact that the radioactive source was being stored in the PSI truck's safe, rather than in the office safe, where it was required to be kept. Here is what Mr. Roudebush had to say about the incident at Tr. 1095:

He [Hosack] says "Roudy, I don't have the camera in the vault. Can you stall Mr. Widemann?" And I said well I'll do the best I can. . . . So he [Hosack] came in late at night, that night, to put the camera in the vault, you know. . . . *But Mr. Hosack all the time had the camera in his truck and I didn't realize it [that it was illegal]. . . .* Tr. 1111 [emphasis added]. We always had in the truck a leaded box where the camera is sitting, you know, and he told me — Hosack told me that it's safe as long as it's locked up. We've got two locks on it and it was safe. . . .

On closer questioning, however, Mr. Roudebush admitted that he knew that having the camera in the truck was illegal.⁴⁴

⁴⁴Tr. 1109-11.

JUDGE BLOCH: Is that true as to his not having the source in the safe when the NRC inspector came for the wipe test?

A: Yes, sir.

(Continued)

8. Licensee Knew Reil Acted Illegally

Mr. Aaron Reil was hired to work for PSI, as a future radiographer, after interviews with Roudebush and Hosack, Tr. 206, 1032. Mr. Roudebush assumed that it was part of Mr. Reil's work to crank the source on the camera. Tr. 1033.

Testimony by Aaron Reil corroborates that Mr. Roudebush knew that Mr. Reil was operating a camera, in violation of the license. Reil Direct, ff. Tr. 204 at 4; Tr. 210. We also find that Mr. Reil requested a film badge directly from Mr. Roudebush but was not supplied with one. Tr. 208-09. In addition, based on the testimony of Mr. Hosack, whom we believe on this point, Mr. Roudebush knew that Mr. Reil was used as a radiographer's assistant. Hosack, ff. Tr. 204, at 5.

9. Conspiracy to Commit Perjury

Contrary to Staff's allegation, we are not persuaded that Mr. Hosack and Mr. Roudebush conspired, on the evening of October 15, to commit perjury. At Tr. 877-90, Mr. Hosack describes the entire October 15 meeting under cross-examination. The principal theme of his testimony is that he "just wanted to get out of there." Tr. 877, 888, 889. Generally, Roudebush asked questions. On one touchy question, Roudebush's work as an assistant radiographer, Hosack

JUDGE BLOCH: You thought that it was proper not to have it in the safe?

A: I didn't know — wasn't aware that it was not in the safe.

JUDGE BLOCH: At that point, did you know that he'd done something wrong?

A: No.

JUDGE BLOCH: Why is it that he asked you to delay the inspector so the inspector wouldn't find out about it?

A: I really don't know, sir. I mean in case that he wanted to be there when they came there, as far as I know. Do I understand this question?

JUDGE BLOCH: You think it's okay to leave the source outside the safe?

A: No, sir.

JUDGE BLOCH: So did you know something was wrong?

A: Yes, sir.

JUDGE BLOCH: But just a few moments ago you said you didn't know he'd done anything wrong.

A: I didn't understand the question, what you were referring to. I'm saying that yes, I do know that he was doing wrong, because he told me that this camera had to be in the safe each and every night after each shot.

In addition, Direct Testimony of Aaron Reil, ff. Tr. 204, at 3, indicates that Mr. Hosack may have regularly taken the source home in his truck. We find that Mr. Hosack did so during the time he worked with Mr. Reil, although we do not consider this finding necessary for the revocation of the license.

We note that taking the source home was contrary to License Condition 10, OI Report, Exhibit 1 at 83 of 187; it was also contrary to Item 9 of the License Application, OI Report, Exhibit 1 at 140 of 187 ("[t]he facility . . . will be used as the permanent STORAGE facility for all licensed radioactive materials when not located at (or being transported to) temporary job sites").

said he advised Roudebush to tell the truth. There is no testimony that Mr. Roudebush suggested lying about any particular issue.

10. Clear and Convincing Evidence

The parties have contested the appropriate standard for weighing the evidence in this case. The Staff would have us decide by a preponderance of the evidence. Licensee would have us decide against it only based on clear and convincing evidence.

The ordinary rule in Commission proceedings is to determine a case by the preponderance-of-the-evidence standard. The only exception brought to our attention was in *Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification*, LBP-87-15, 25 NRC 671 (1987), *aff'd*, CLI-88-2, 27 NRC 335 (1988). In that case, in which there were issues that could reflect on the reputation of an individual — as in this case — there also was a 7- to 8-year delay before the matter came to trial. In that case, the Board used its discretion to apply a "clear and convincing evidence" standard.

We do not choose to follow this precedent in this proceeding. In this case, there is no substantial delay in time to muddy the waters. In addition, we are convinced that the public interest in safety should be weighed heavily in this case and should cause us serious concern about changing the standard of evidence to protect an owner-licensee whose actions could have serious safety repercussions.

However, the dispute about the standard of evidence is not important to the outcome of this case. Every finding we have reached is based on clear and convincing evidence. Additionally, we find that the evidence fits together in a fabric that compels the result we have reached.

VI. OVERALL CONCLUSIONS

We conclude that there have been extensive failures on the part of PSI and Mr. Forrest Roudebush to comply with NRC regulations. The Board finds that the Licensee has failed to act as a reasonable manager of licensed activities, failed to detect and correct violations caused by an employee, willfully attempted to conceal violations from NRC Staff, and given untruthful information to the Staff during its inspections and investigations. Moreover, we find that Mr. Roudebush was untruthful in some aspects of his testimony both during a formal investigation and before this Licensing Board.

The Board therefore concludes that the Staff has carried its burden of proof and has shown that there is no adequate assurance that the Licensee can be relied upon to conduct safe radiographic testing operations and to comply with

Commission regulations. If these conditions had been known at the time of original license application, the Staff would have been justified in denying the application. The Atomic Energy Act of 1954, as amended, and NRC enforcement policy, set forth in 10 C.F.R. Part 2, Appendix C, provide that the Staff may revoke a license for any reason that would cause it to deny a license in the original application. Accordingly, this license should be revoked. The Board finds that the Director's decision to revoke the byproduct materials license of PSI and Mr. Forrest Roudebush should be sustained.⁴⁵

VII. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 8th day of September 1992, ORDERED, that:

1. The Order of the Staff of the Nuclear Regulatory Commission, dated April 22, 1992, and titled "Order Modifying Order Suspending License (Effective Immediately) and Order Revoking License,"⁴⁶ is *sustained*.
2. Byproduct Material License No. 24-24826-01 is *revoked*.
3. This Initial Decision is effective immediately. In accordance with 10 C.F.R. § 2.760 of the Commission's Rules of Practice, this Order shall become the final action of the Commission forty (40) days from the date of its effectiveness, unless any party petitions for Commission review in accordance with 10 C.F.R. § 2.786 or the Commission takes review *sua sponte*. See 10 C.F.R. § 2.786, as amended effective July 29, 1991 (56 Fed. Reg. 29,403 (June 27, 1991)).
4. Within fifteen (15) days after service of this Decision, any party may seek review of this Decision by filing a petition for review by the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of a petition for

⁴⁵ We uphold the Director's decision to revoke the PSI license. Our reasoning and findings generally agree with those of the Director, though they are different in some minor respects.

We find that the Staff did not prove that the meeting between Mr. Hissack and Mr. Roudebush on the evening of October 15, 1991, was held for the purpose of conspiring to lie to NRC investigators on October 16, 1991. The Board nevertheless is persuaded that Licensee admissions and evidence produced by the Staff warrant revocation of PSI's license.

It is not likely that, after a lengthy evidentiary hearing, a Board would agree with the Director in every detail. Nor is that necessary in order to sustain the Director's decision. *Ailanic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 848-49 (1980) (the adjudicatory hearing in a civil penalty proceeding is essentially a trial *de novo*, subject only to the principle that the Board may not assess a greater penalty than the Staff); *compare Hurley Medical Center* (One Hurley Plaza, Flint Michigan), ALJ-87-2, 25 NRC 219, 224-25 (1987).

The Licensing Board concludes, as precedent permits, that the Licensee has had fair notice of the charges against it and an opportunity to contest those charges; it also concludes, after weighing all the evidence before us, that the Staff has carried its burden of proof and has persuaded us that there is inadequate assurance of safety to permit this Licensee to continue to operate.

⁴⁶ The Staff's October 17, 1991 Order, "Order Suspending License (Effective Immediately)," is no longer relevant once we have decided to revoke the license.

review is mandatory for a party to exhaust its administrative remedies before seeking judicial review. 10 C.F.R. § 2.786(b)(1).

5. The petition for review shall be no longer than ten (10) pages and shall contain the information set forth in 10 C.F.R. § 2.786(b)(2). Any other party may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. Such an answer shall be no longer than ten (10) pages and, to the extent appropriate, should concisely address the matters in section 2.786(b)(2). The petitioning party shall have no right to reply, except as permitted by the Commission.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

APPENDIX

REGULATIONS AND LICENSING CONDITIONS

The regulations and license conditions that the Staff alleges were violated are set forth in this Appendix.

1. Section 30.9(a) of 10 C.F.R., which requires that information provided to the Commission, by a licensee, or information required by statute or by the Commission's regulations, orders, or license conditions, to be maintained by the licensee, be complete and accurate in all material respects;

2. Section 34.27 of 10 C.F.R., which requires that each licensee maintain current logs, kept available for 3 years from the date of the recorded event, for inspection by the Commission and that these logs show for each sealed source: (a) a description (or make and model

number) of the radiographic exposure device or storage container in which the sealed source is located; (b) the identity of the radiographer to whom assigned; and (c) the plant or site where used and dates of use;

3. Section 34.33(a) of 10 C.F.R., which requires that a licensee not permit any individual to act as a radiographer or a radiographer's assistant unless, at all times during radiographic operations, such an individual wears a direct-reading pocket dosimeter and either a film badge or a thermoluminescent dosimeter (TLD);

4. Section 34.33(b) of 10 C.F.R., which requires that pocket dosimeters be read and exposures recorded daily and that the licensee retain each record of these exposures for 3 years after the record is made;

5. Section 34.43(c) and (d) of 10 C.F.R., which requires that a licensee ensure that a survey with a calibrated and operable survey instrument is made at any time a radiographic exposure device is placed in a storage area to determine that the sealed source is in the shielded position and that a record of the required storage survey be made and retained for 3 years when that storage survey is the last one performed in the work day;

6. Section 34.31(b) of 10 C.F.R., which requires that a licensee not permit an individual to act as a radiographer's assistant⁴⁷ until such an individual has received copies of and instruction in the licensee's operating and emergency procedures, and has demonstrated competency to use (under the personal supervision of the radiographer) the radiographic equipment, and has demonstrated understanding of those instructions by successfully completing a written or oral test and a field examination on the subjects covered and that records of training, including copies of written tests and dates of oral tests and field examinations, be maintained for 3 years;

7. Section 20.203(b) and (c) of 10 C.F.R., which requires that each radiation area be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words "Caution Radiation Area" and that each high-radiation area be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words "Caution High Radiation Area;"

8. Section 20.201(a) and (b) of 10 C.F.R., which requires, when appropriate, surveys that may be necessary for the licensee to comply with the regulations in Part 20 and that are reasonable under the

⁴⁷ A radiographer's assistant is defined by 10 C.F.R. §34.2 as any individual who under the personal supervision of radiographer, uses radiographic exposure devices, sealed sources or related handling tools, or radiation survey instruments in radiography.

circumstances to evaluate the extent of radiation hazards that may be present; and

9. Section 34.42 of 10 C.F.R., which requires that areas in which radiography is being performed to be conspicuously posted as required by 10 C.F.R. § 20.203(b) and (c)(1).

The following violations of the NRC and Department of Transportation regulations also are alleged:

1. Section 173.25 of 49 C.F.R. and 10 C.F.R. § 71.5 (failure to properly mark and label radioactive material shipment containers as of September 18, 1991);

2. Sections 177.817(a), 172.201(d), 172.203(d) of 49 C.F.R. and 10 C.F.R. § 71.5 (failure to ship radioactive materials accompanied by properly completed shipping papers as of October 4, 1991);

3. Section 34.26 of 10 C.F.R. (failure to maintain complete records of quarterly physical inventories of sealed sources as of September 18, 1991);

4. Section 34.42 of 10 C.F.R. (failure to conspicuously post high-radiation areas on October 4, 1991);

5. Section 19.11 of 10 C.F.R. (failure to post required documents as of September 18, 1991); and

6. Section 34.43 of 10 C.F.R. (failure to perform surveys between April 1990 and September 1991).

In addition, the following violations of a license condition are alleged:

- PSI License Condition 11.B has been violated. Condition 11.B of Byproduct Material License No. 24-24826-01, Amendment No. 2 (April 27, 1989), named Mr. James Hosack as the only person authorized by the license to act as a radiographer and indicated that no person was authorized by the license to act as a radiographer's assistant.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Charles N. Kelber
Dr. Jerry R. Kline

In the Matter of

Docket No. 50-336-OLA
(ASLBP No. 92-665-02-OLA)
(Spent Fuel Pool Design)
(FOL No. DPR-65)

NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Unit 2)

September 17, 1992

MEMORANDUM AND ORDER
(Imposing Sanctions upon CCMN and Striking Petitions)

INTRODUCTION

Co-operative Citizen's Monitoring Network, Inc. (CCMN), represented by Ms. Mary Ellen Marucci, has repeatedly failed to comply with NRC regulations and the Licensing Board's directives pertaining to the filing and service of pleadings. As a consequence, two intervention pleadings filed by CCMN were not served timely upon members of the Board, Licensee, and the NRC Staff. The purpose of this Order is to impose appropriate sanctions upon CCMN by striking the noncomplying pleadings, to admonish CCMN that continued noncompliance may result in more severe sanctions, and to memorialize a background record against which possible future sanctions may be considered.

In a related determination, the Board also rules that the two pleadings that were not timely served may not be entertained because CCMN failed to address the regulatory factors that must be considered in granting or denying nontimely petitions.

DISCUSSION

In our Memorandum and Order (Establishing Pleading Schedule), July 29, 1992 (LBP-92-17, 36 NRC 23), we noted that the petitioners are responsible for serving their papers directly upon members of the Board and other parties pursuant to the provisions of 10 C.F.R. § 2.701. We warned that petitioners must carefully follow the Rules of Practice in future pleadings. LBP-92-17, *supra*, 36 NRC at 29 n.10. That order also reminded petitioners that nontimely filings would not be entertained absent a balancing of the five factors specified in 10 C.F.R. § 2.714(a)(1)(i)-(v). As a courtesy to petitioners, the order set out the text of those factors. LBP-92-17, *supra*, 36 NRC at 28 n.7.

The *Federal Register* notice of this proceeding also cautioned that "nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions, and/or requests for hearing will not be entertained absent a determination . . ." that the petitions or requests should be granted based upon a balancing of the five pertinent factors. 57 Fed. Reg. 17,834, 17,835 (Apr. 28, 1992). Our order of July 29 also reminded petitioners of that *Federal Register* guidance. LBP-92-17, *supra*, 36 NRC at 29.

On August 3, 1992, Mrs. Doris M. Moran, Clerk to this Licensing Board, wrote to Ms. Marucci and other petitioners reminding them of the Board's order of July 29 respecting service of papers. At the Board's direction, Mrs. Moran provided petitioners with a then-complete service list and instructions pertaining to Certificates of Service.¹

On August 12, 1992, Ms. Marucci, on behalf of CCMN, moved for an extension of time to file contentions. That motion also contained substantive intervention arguments. There was no Certificate of Service for this pleading nor did CCMN serve it upon the other participants.²

¹The service list provided by Mrs. Moran did not include Frank X. Lo Sacco and Don't Waste Connecticut whose petitions were filed after Mrs. Moran's letter. Ms. Marucci has complained orally to Mrs. Moran that serving all of the parties is expensive. Ms. Marucci may eliminate from her service list those petitioners who expressly authorized CCMN to represent their interests if she chooses.

²By order dated August 18, 1992, the Board granted to CCMN an extension of time to August 24, 1992, to file amended and supplemental petitions. The Board will not consider the substantive intervention arguments made in the motion.

On August 14, 1992, CCMN filed an "Amendment to Intervention and Hearing Request" dated August 13, 1992. Again, there was no Certificate of Service. Other participants were not served.³

On August 24, 1992, Ms. Marucci timely filed CCMN's contentions and supporting documents. She served Judge Smith but failed to serve Judges Kline and Kelber. Her Certificate of Service does not reflect service upon the NRC Office of General Counsel or upon several of the other petitioners in this proceeding.

Also on August 24, Ms. Marucci mailed to the Secretary of the Commission a packet of papers including a letter dated August 7, 1992, from Mr. Kacich of Northeast Utilities to Ms. Marucci. This communication had no Certificate of Service, nor were other participants and Board members served by Ms. Marucci.

On August 25, 1992, Judge Smith reminded Ms. Marucci that petitioners are required to serve their pleadings on all other participants in the proceeding. Judge Smith explained to Ms. Marucci that the Licensee and the NRC Staff must be given an opportunity to respond to late-filed petitions. See Memorandum, August 25, 1992 (unpublished). Since this discussion, Ms. Marucci filed the two pleadings in question with a Certificate of Service showing service consistent with the service list provided by Mrs. Moran on August 3.

If this recent compliance were to provide assurance that CCMN would comply with filing requirements in the future, one of the three reasons for the sanctions we impose below would disappear. However, Ms. Marucci has never acknowledged her earlier errors in failing to comply with servicing requirements. In fact, her most recent communication suggests that she still does not understand these requirements.⁴ Further, as we explain below, the failure to timely serve the most recent pleadings rendered them effectively nontimely within the meaning of the intervention rule. Ms. Marucci has not evinced any understanding of that problem.

On September 8, 1992, Ms. Marucci mailed "CCMN Contentions regarding Millstone 2 — FINAL VERSION." This document, dated August 24, 1992, purports to replace the similar "draft" contentions, also dated August 24, 1992,

³On September 11, 1992, Ms. Marucci served an *unsigned* copy of CCMN's August 13 "Amendment to Intervention and Hearing Request" and other papers. She also served a copy of a U.S. Postal Service Certificate of Mailing, dated August 14, 1992. Although the Postal Service Certificate states that the addressee was the "Atomic Safety and Licensing Board," the letter was actually addressed to the Atomic Safety and Licensing Board *Panel* — exactly as indicated on the inside address of the amendment letter. Papers addressed to the Panel are filed in a central docket file. Docket personnel assume that individual Board members receive their own service copy of any pleading, as required by NRC practice, and do not normally inform the Board members of the mailing. In this case the members of the Board did not become aware of the August 13 amendment letter until Ms. Marucci inquired about it on September 10. See attached memoranda from Ms. Hughes and Ms. Donovan (not published). Even if the August 13 amendment letter had been delivered promptly to a member of the Board, service would not have been complete.

⁴See note 3, *supra*. Ms. Marucci's note to Judge Smith of September 11, 1992, suggests that she expects the Board to serve her papers.

setting out CCMN's contentions.⁵ The "FINAL VERSION" differs materially from the "draft" version. The problem of course is that the Licensee⁶ and the NRC Staff⁷ have already filed lengthy and painstakingly prepared answers to CCMN's "draft" set of contentions.

As noted in footnote 3, above, Ms. Marucci, for the first time, served on September 11, 1992, an unsigned version of CCMN's August 13, 1992 "Amendment to Intervention and Hearing Request." Again, the Licensee and the NRC Staff were unable to address the August 13 pleading in their respective answers to CCMN contentions.

Neither the "FINAL VERSION" of CCMN's contentions nor the memo covering the late service of the August 13, 1992 amendment letter contains any discussion of the reasons for the failure to properly file and serve those pleadings on time. The Board, the NRC Staff, and the Licensee have already spent considerable time evaluating CCMN's "draft" set of contentions under the assumption that they were CCMN's last and complete position on the intervention issues.

CCMN's undisciplined approach to intervention is wasteful of NRC and Licensee resources — resources that could be better expended for improvements in safety. These errors also delay the resolution of the intervention issues notwithstanding CCMN's repeated requests for an early hearing.

The Board has decided on its own motion to strike CCMN's late-filed petitions for the following independently sufficient reasons:

1. The Board may not entertain the nontimely petitions absent a determination by the Board that the petitions should be granted based upon a balancing of the five factors set out in section 2.714(a)(1)(i)-(v). Since CCMN has not addressed those factors, and since the Board cannot on its own find any good cause for the late filings, it cannot make such a determination.
2. Striking the petitions is the least onerous remedy to mitigate the harm that would arise from repeating the effort invested by the NRC Staff and Licensee in responding to CCMN's "draft" contentions.
3. Striking the petitions is an appropriate sanction to educate CCMN to the need to comply with NRC Rules of Practice and Board directives and to improve future compliance. In this respect, the Board advises CCMN that similar or more severe sanctions may be imposed in the future in the event CCMN fails to meet its obligations as a participant in this proceeding. Such sanctions would

⁵ Ms. Marucci telephoned Mrs. Moran on September 4, 1992, stating that the August 24, 1992 pleading was mistakenly filed in draft form and that she intended to file a corrected version. Mrs. Moran's memorandum is attached.

⁶ Northeast Nuclear Energy Company's (1) Answer to the Licensing Board's Questions and (2) Answers to Petitions and Supplemental Petitions to Intervene, September 8, 1992. The Board would appreciate succinct titles to pleadings in order to simplify citations.

⁷ NRC Staff Response to Supplemental Petitions and CCMN Contentions, September 14, 1992.

be tailored to mitigate any harm caused by noncompliance and could range in severity up to dismissing CCMN as a party to the proceeding.⁸

ORDER

The Board strikes from the record of this proceeding (1) CCMN's Contentions Regarding Millstone 2 — FINAL VERSION, dated August 24, 1992, and served September 8, 1992; and (2) CCMN's Amendment to Intervention and Hearing Request dated August 13, 1992. CCMN is admonished as above stated.

THE ATOMIC SAFETY AND LICENSING BOARD

Charles N. Kelber
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 17, 1992

[The attachments have been omitted from this publication but can be found in the NRC Public Document Room, 2120 L Street, NW, Washington, DC 20555.]

⁸See the Commission's *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

In the Matter of

Docket Nos. 50-275-OLA-2
50-323-OLA-2
(ASLBP No. 92-669-03-OLA-2)
(Construction Period Recovery)
(Facility Operating Licenses
Nos. DPR-80, DPR-82)

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

September 24, 1992

In a proceeding concerning the proposed extension of operating licenses to recover or recapture into those licenses the period of construction of the reactors, the Licensing Board determines that a petition requesting a hearing and leave to intervene is deficient but permits, in accordance with the Rules of Practice, the Petitioner to file an amended petition, other parties to respond, and schedules a prehearing conference.

RULES OF PRACTICE: INTERVENTION PETITION

A petitioner for intervention may amend its intervention petition without leave of the licensing board up to 15 days prior to the first prehearing conference. The licensing board may alter that 15-day period. 10 C.F.R. §§ 2.714(a)(3), 2.711(a).

RULES OF PRACTICE: STANDING

Merely because a petitioner may have had standing in an earlier proceeding does not automatically grant standing in subsequent proceedings, even if the scope of the earlier and later proceedings is similar.

MEMORANDUM AND ORDER (Filing Schedules and Prehearing Conference)

Pending before us is a request for a hearing and petition for leave to intervene with respect to an application by Pacific Gas and Electric Co. ("Applicant" or "Licensee") to extend the life of the operating licenses for the Diablo Canyon Nuclear Power Plant, Units 1 and 2, its two pressurized water reactors located near San Luis Obispo, California. For the reasons that follow, we are permitting the Petitioner to supplement its petition and the Applicant and the NRC Staff to respond. We also are scheduling a prehearing conference to consider these filings.

1. Background

The proposed operating license amendments would "recover" or "recapture" into the operating licenses the period of construction for the reactors. The licenses, which are limited to a term of 40 years by section 103c of the Atomic Energy Act, 42 U.S.C. § 2133(c), were issued consistent with a Commission policy under which that 40-year life extended from the date of issuance of the construction permit for a particular unit — for Unit 1, a term running from April 23, 1968, to April 23, 2008, and for Unit 2, a term running from December 9, 1970, to December 9, 2010.

In 1982, the Commission began issuing the 40-year operating licenses measured from the date of issuance of the license. It has also approved license amendments for many reactors conforming the earlier licenses to this new policy. The Licensee is here seeking to amend its operating licenses to take advantage of the newer practice. As proposed, the extended expiration dates for Diablo Canyon would be September 22, 2021, for Unit 1 (more than a 13-year extension) and April 26, 2025, for Unit 2 (almost a 15-year extension).

In response to a notice of opportunity for hearing on the proposed amendments (57 Fed. Reg. 32,575 (July 22, 1992)), a group titled San Luis Obispo Mothers for Peace ("MFP" or "Petitioner") filed a timely request for a hearing/petition for leave to intervene, dated August 18, 1992. The petition consists of a brief one-page letter setting forth in general terms MFP's reasons for wishing to take part in the proceeding. On September 4, 1992, and September 8,

1992, respectively, the Applicant and Staff filed responses: the Applicant seeks outright denial of the petition, whereas the Staff asserts that the petition in its present form is deficient but recommends that we defer any decision pending receipt and consideration of any revised MFP petition. On September 10, 1992, this Licensing Board was established to rule on the request/petition and to preside over the proceeding in the event that a hearing is ordered. 57 Fed. Reg. 43,035 (Sept. 17, 1992).

2. General Requirements

Under the NRC Rules of Practice, specifically 10 C.F.R. § 2.714, a petitioner must establish its standing, must indicate the aspects of the proceeding in which it seeks to participate, and must proffer at least one acceptable contention in order to be admitted as a party to the proceeding. MFP advises that, beginning in 1973, it participated in earlier proceedings involving the Diablo Canyon facility. However, merely because a petitioner may have had standing in an earlier proceeding does not automatically grant standing in subsequent proceedings, even if the scope of the earlier and later proceedings is similar. See *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, LBP-92-4, 35 NRC 114, 125-26 (1992). Moreover, because of recent revisions to the Rules of Practice, contentions are subject to much more stringent requirements than they once were.

For reasons we spell out later, MFP's one-page letter-petition is deficient in many respects. In particular, it fails adequately to demonstrate that MFP has standing. However, by generally referencing certain concerns of MFP, the petition correctly presents "aspects" of the proceeding in which MFP wishes to participate. And, notwithstanding the Applicant's extensive discussion of defects in the submitted "issues," their failure to satisfy contention requirements is not disqualifying because contentions are not yet required to be filed.

Thus, as the Staff observes, under governing rules, a petitioner may amend its petition without prior approval of the Licensing Board at any time up to 15 days prior to the holding of the first prehearing conference. 10 C.F.R. § 2.714(a)(3). That same time frame governs the initial submission of contentions. Utilizing our authority to alter those 15-day periods, 10 C.F.R. § 2.711(a), we are here establishing dates for MFP to file a revised petition, including contentions, for the Applicant and Staff to file responses, and for a prehearing conference, at which both Petitioner's standing and the sufficiency of its contentions will be considered.

3. Standing

The standing requirement stems from section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a), which provides, in pertinent part, that the Commission shall grant a hearing upon the request of "any person whose interest may be affected" by a proceeding (emphasis supplied). To the same effect, see 10 C.F.R. § 2.714(a)(1). To determine whether a petitioner has the requisite standing, the Commission utilizes contemporaneous judicial concepts of standing. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

Under those standards, the petitioner must demonstrate (1) that it has suffered or will likely suffer "injury in fact" from the proposed licensing action, (2) that the injury is arguably within the zones of interest sought to be protected by the statute being enforced, and (3) that the injury is redressable by a favorable decision in the proceeding in question. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991).

Here, the "concerns" set forth by MFP concerning radiological health and safety and impact upon the environment clearly fall within the zones of interest sought to be protected by the Atomic Energy Act or NEPA. Nor is there any doubt that, to the extent litigable in this proceeding, those "concerns" would be redressable in this proceeding. The real standing question before us is whether MFP has made a satisfactory showing of injury in fact. That showing must be real, but it need not be "substantial." *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff'd*, ALAB-549, 9 NRC 644 (1979).

There are several ways for a group such as MFP to demonstrate that it has suffered or will likely suffer injury in fact. It can assert either organizational injury or injury to a member that it represents. From the general reference in the letter-petition to the residences of MFP members, we presume that MFP is seeking to take the latter course and rely on representational injury. The general reference in the letter-petition, however, is insufficient.

To assert representational injury in fact, MFP must specifically identify one or more of its individual members by name and address, identify how that member may be affected (such as by activities near the plant site) and show (preferably by affidavit) that it is authorized to request a hearing on behalf of the member. *South Texas*, ALAB-549, *supra*, 9 NRC at 646-47; *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 392-97 (1979). Further, the organization must demonstrate that the person signing the petition has been authorized by the organization to do so. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979). An organization has sufficiently demonstrated its standing if its

petition is signed by a ranking official whose own personal interest supports intervention. *Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979).

Residence of a particular organization member within 50 miles of a power plant site has, in construction permit and operating license proceedings, been recognized as sufficient to confer standing. This 50-mile presumption does not apply in every operating license amendment proceeding, however, but only in those involving "significant" amendments involving "obvious potential for offsite consequences." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CL1-89-21, 30 NRC 325, 329-30 (1989). In other amendments, a petitioner must demonstrate a particular injury in fact that will result from the action for which authorization is sought.

The Applicant takes the position that specific injury in fact must be demonstrated in this type of proceeding, and that mere residence within 50 miles of the site is insufficient. Response at 11-14. The Staff does not address the question.

At this stage, we take no specific position on this question, other than to note that the Applicant has cited no cases involving operating-license extension amendments (or, for that matter, construction-permit extension applications) in support of its claim that the 50-mile presumption does not apply. In contrast, the Licensing Board in an earlier operating license extension proceeding required no direct showing of injury in fact. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90 (1990). See also the comments of the Appeal Board in *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 564 (1980).

To the extent that MFP in its revised pleading may intend to rely only on the residence of named members in support of its standing claim, we will discuss with the parties and petitioner at the prehearing conference the validity of the Applicant's position and, in particular, the significance of the license amendment before us. (If MFP should specifically demonstrate injury in fact through another method, we will not need to address this issue.)

4. Contentions

As mentioned earlier, to be admitted as a party, a petitioner must proffer at least one valid contention. The requirements for contentions have been significantly upgraded in recent years. Each contention "must consist of a specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R. § 2.714(b)(2). That statement must raise an issue falling within the scope of the subject matter of the particular proceeding.

In addition, the following information must be provided:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely.
- (iii) Sufficient information (including that listed above) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including environmental report and safety report) that the petitioner disputes and supporting reasons for each such dispute; or, if the petitioner believes that the application fails to contain relevant information, the identification of each such omission and supporting reasons. On NEPA issues, the contentions are to be based on the Applicant's Environmental Report but are subject to amendment based on later-issued Staff documents.

In ruling on contentions, we are to take into account factors set forth in 10 C.F.R. § 2.714(d)(1), as well as whether the contention, if proven, would be of consequence in the proceeding and entitle the petitioner to relief, 10 C.F.R. § 2.714(d)(2).

5. *Filing Dates*

Because MFP will be required to make extensive revisions in its petition to conform to current NRC requirements, we are setting filing dates accordingly. MFP shall file (mail) its revised petition no later than Monday, October 26, 1992. The Applicant may respond by Wednesday, November 18, 1992. The Staff may respond by Monday, November 30, 1992.

A prehearing conference will be scheduled during the week of December 7-11, 1992, in or around San Luis Obispo, California. We will announce the exact day, time, and location in an order to be issued at a later date.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 24, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Charles N. Kelber
Dr. Jerry R. Kline

In the Matter of

Docket No. 50-336-OLA
(ASLBP No. 92-665-02-OLA)
(Spent Fuel Pool Design)
(FOL No. DPR-65)

NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Unit 2)

September 30, 1992

MEMORANDUM AND ORDER
(Ruling on Petitions for Leave to Intervene)

I. SYNOPSIS

This is a spent fuel pool design proceeding occasioned by Amendment 158 to the Millstone Unit 2 facility operating license. In this Order the Board rules that the Co-operative Citizen's Monitoring Network (CCMN) has filed a timely petition for leave to intervene and request for hearing, has standing to intervene in the proceeding, and has submitted an acceptable contention. Therefore, CCMN has satisfied all of the requirements to intervene in NRC proceedings and is admitted as a party. A hearing is ordered. Other petitions for leave to intervene are rejected.

II. BACKGROUND

On April 16, 1992, Northeast Nuclear Energy Company, the Licensee herein, submitted Millstone Nuclear Power Station Unit 2 Proposed Revision to Technical Specifications, Spent Fuel Pool Reactivity (Amendment 158). The Amendment modified administrative controls over the use of the spent fuel pool so as to impose additional restrictions upon use of the pool. Prior to Amendment 158, fuel storage racks in the spent fuel pool were administratively partitioned into two regions. The Amendment authorized Licensee to divide the same racks into three regions and, by installation of blocking devices, reduced the number of fuel bundles that can be stored in one of the three regions. As a result, the overall fuel storage capacity of the Unit 2 spent fuel pool was reduced from 1112 to 1072 fuel bundles. According to the Licensee, Amendment 158 is restrictive in nature — a point giving rise to an important legal issue in this proceeding.

Amendment 158 was preceded by circumstances reported in Licensee Event Report (LER) 92-003-00, dated March 13, 1992. There the Licensee reported the discovery of criticality analysis calculational errors with respect to the Millstone Unit No. 2 spent fuel pool. The Licensee reported that:

The safety consequence of this event is a potential uncontrolled criticality event in the spent fuel pool. Upon consideration of the following factors, a significant margin to a critical condition was always maintained and, therefore, the safety consequences of this event were minimal: [factors omitted].

As Licensee explains the event, the actual K_{eff} in the spent fuel pool was still subcritical and less than the Technical Specification limit of 0.95 when the calculational error was discovered. However, a revised calculation of K_{eff} assuming a spent fuel pool at full capacity and other conservatism, determined a maximum K_{eff} to be 0.963 rather than the previously calculated 0.922. This result was inconsistent with previous safety analyses. Licensee's Answer at 4-5.¹

Further, according to Licensee:

Amendment 158 ensures that K_{eff} will be less than 0.95 in all cases, by requiring that a portion of the existing fuel racks be designated for spent fuel that has undergone a specified burnup, and that blocking devices be installed in a portion of the existing racks to reduce the amount of fuel to be stored in these racks. This increases the distance between fuel bundles, which results in a lower K_{eff} .

Licensee's Answer at 5. This claim is the focus of the contention accepted by the Board, below.

¹Northeast Nuclear Energy Company's (1) Answer to the Licensing Board's Questions and (2) Answer to Petitions and Supplemental Petitions to Intervene (Licensee's Answer), September 8, 1992.

On April 28, 1992, the NRC Staff, for the Commission, issued a preliminary determination that Amendment 158 involved "no significant hazards consideration," and published a Notice of Opportunity for Hearing.² The notice required that written requests for hearing and petitions for leave to intervene in accordance with 10 C.F.R. § 2.714 be filed by May 28, 1992. On June 4, 1992, the NRC Staff issued Amendment No. 158 after considering comments from intervention petitioners in accordance with 10 C.F.R. § 50.92.

Petitions for leave to intervene and requests for hearing were filed by several entities.³ The petition granted by this Order was filed by Mary Ellen Marucci on behalf of herself and CCMN on May 28, 1992. Other petitions remain significant only because some petitioners authorize CCMN to represent their interests. See "Preliminary Ruling," Section III, *infra*.

By Memorandum and Order of July 29, 1992 (LBP-92-27, 36 NRC 23), the Board established a schedule for the filing of amended and supplemental intervention petitions. The Order stated that each petitioner was to file by August 14, 1992, a list of contentions,⁴ and set forth the main requirements that contentions must satisfy. The Order further set forth regulatory provisions applicable to nontimely petitions (those filed after May 28, 1992) and cited the five factors to be balanced in evaluating nontimely petitions. See 10 C.F.R. § 2.714(a)(1). The Board also invited the parties to address three questions related to standing to intervene in NRC proceedings. On August 24, 1992, CCMN filed its contentions.⁵

The Licensee filed its answer opposing the petitions on grounds of lateness, no standing to intervene, and failure to file an acceptable contention. Licensee's Answer, *passim*. The NRC Staff opposed all petitions on the last two grounds.⁶

III. PRELIMINARY RULING

By letter dated May 27, 1992, Patricia R. Nowicki filed an intervention petition and request for hearing on behalf of Earthvision, Inc. By letter dated

²"Northeast Nuclear Energy Co., Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for Hearing," 57 Fed. Reg. 17,934 (Apr. 28, 1992).

³The NRC Staff and Licensee filed answers to the earliest petitions, but as intervention pleadings continued to be filed, the Board reduced the number of pleadings by deferring further Staff and Licensee answers until the final round of petitioning. Orders of June 30 and July 15, 1992.

⁴By Memorandum and Order of August 18, 1992 (unpublished), CCMN was given until August 24, 1992, to file amended and supplemental petitions containing contentions.

⁵By Memorandum and Order of September 17, 1992 (LBP-92-26, 36 NRC 191), the Board, on its own motion, struck from the record CCMN's "Final Version" of its contentions dated August 24, 1992, and CCMN's Amendment to Intervention and Hearing Request dated August 13, 1992, as nontimely and not in compliance with service requirements.

⁶NRC Staff Response to Supplemental Petitions and CCMN Contentions (Staff's Answer), September 14, 1992.

July 29, 1992, Ms. Nowicki advised the Board that Earthvision, Inc., lacked corporate status in Connecticut and that she wished to continue to participate in this proceeding as an individual. Michael J. Pray filed intervention pleadings on May 29 and July 2, 1992. Rosemary Griffiths filed a petition on June 29. On August 13, Ms. Griffiths clarified that she wanted CCMN to represent her interests. Joseph M. Sullivan filed a petition on July 6. Don't Waste Connecticut filed on June 26 and Frank X. Lo Sacco petitioned on August 13. However, none of these petitioners filed contentions by August 14, 1992, the date set by the Board Scheduling Order of July 29 (LBP-92-17, *supra*), or at any time until the issuance of this Order. The intervention rule states that any petitioner who fails to file at least one contention will not be permitted to participate as a party to a proceeding. 10 C.F.R. § 2.714(b)(1). Accordingly, in our Order below, the Board rejects the Nowicki, Pray, Griffiths, Sullivan, Don't Waste Connecticut, and Lo Sacco intervention petitions.

However, Mr. Pray and Ms. Griffiths are members of CCMN. Mr. Sullivan is associated with CCMN. Each expressly authorize CCMN to represent their interests in this proceeding. We take these authorizations into account in assessing whether CCMN has standing to intervene. See Section V.D, *infra*.

IV. TIMELINESS OF CCMN'S PETITION

The Licensee challenges CCMN's petition on the ground of lateness. The NRC Staff does not. Since the Board may not entertain nontimely petitions absent a balancing of the traditional five factors of section 2.714(a)(1)(i)-(1)(v), we address the issue of timeliness at the threshold.

The broad factual issue is whether Ms. Marucci filed a timely petition to intervene as an agent and officer of CCMN.

As noted above, the *Federal Register* notice set May 28, 1992, as the last date for filing timely petitions for leave to intervene and requests for hearing. Ms. Marucci filed an undated petition letter received by the Secretary of the Commission on Monday, June 1, 1992. Licensee states that the petition was postmarked May 29 and was, therefore, late. The NRC Staff states that Ms. Marucci filed on May 28, 1992, and that she filed timely.

In the worst case, Ms. Marucci's filing was only slightly late. Therefore the burden of satisfying the five factors for granting nontimely petitions would be commensurately lightened. For reasons that follow, we rule that Ms. Marucci's petition was timely. Therefore, we need not address the balancing factors with respect to that pleading.

Under NRC practice, filing is deemed complete as of the time it is deposited in the mail — not postmarked. 10 C.F.R. § 2.701(c). Normally the postmark would establish the date of deposit, but, necessarily, the postmark must follow

the deposit. A common experience is that the date of a postmark may fall on a date after the date of actual deposit. The Board is not inclined to deny intervention on circumstances that involve, at most, a matter of hours.

Licensee also makes an argument that CCMN's petition is nontimely because CCMN, as an organization, did not act until it filed its petition on June 23, 1992.⁷ If so, it follows that CCMN must prevail on the five balancing factors before its nontimely petition can be entertained. Since CCMN did not satisfy, or even address these factors, its petition, according to Licensee, may not be entertained. Licensee's Answer at 36-41.

The key to resolving this factual issue is the nature and effect of Ms. Marucci's timely filing of May 28, and CCMN's motions of June 23. On May 28, Ms. Marucci explained in separate paragraphs that:

I am using this format to *request a hearing* also. I am co-ordinator for Co-operative Citizen's Monitoring Network and need time to approach my organization on what part they wish to play.

I as a concerned citizen wish to intervene and as an individual am *requesting a hearing*.

Petition Letter (emphasis added).

Licensee misperceives Ms. Marucci's action in the May 28 petition letter. Licensee states "Ms. Marucci submitted a nontimely petition which, she emphasized, was filed on her own behalf and not on behalf of CCMN." Licensee's Answer at 36.

Ms. Marucci emphasized nothing of the sort. The best and fairest inference is that Ms. Marucci requested a hearing in two respects — once in connection with her role as CCMN's coordinator and once as an individual.

In its June 23 motion, CCMN describes Ms. Marucci's action on May 28 as: "She made that request as an individual pending the approval of our board." Ms. Marucci's personal intervention was then abandoned. *Id.*

In both the May 28 or June 23 pleadings, it is evident that, on May 28, Ms. Marucci acted on behalf of, but without advance express authority from CCMN.

Neither intervention pleading would qualify as a learned treatise on principal/agent law. We understand that CCMN, as an environmental group, does not ponder the nuances of agency law. Our responsibility is to apply the law to the facts before us.

Under either of two general principal/agent legal concepts, Ms. Marucci's May 28 petition constituted timely petitioning by CCMN. First, Ms. Marucci was the coordinator and the highest ranking officer of CCMN at the time of her May 28 petitioning. The action she took was well within the mission and purposes

⁷ CCMN Motion to Amend Petition to Intervene and Motion for Leave to File Additional Affidavit, June 23, 1992.

of CCMN.⁸ Her general authority to act on behalf of CCMN without immediate express authority should be inferred — at least pending CCMN approval. One of the important purposes of having corporate officers is to act broadly for the corporation within its charter and bylaws without express consent. Under this theory, Ms. Marucci would be empowered to intervene on behalf of CCMN until CCMN's official approval or disapproval.

Second, even assuming that the policies of CCMN did not permit Ms. Marucci to bind CCMN on May 28, CCMN's June 23 petition plainly ratified that act. The effect of ratification by a principal of its agent's previous acts is to adopt those acts as the principal's own as of the time the agent acted.

The tenuous nature of the May 28 intervention petition could not injure Licensee, nor is it offensive to orderly intervention procedure. NRC intervention rules provide for later-filed intervention pleadings as a matter of course. 10 C.F.R. § 2.714(a)(3). Licensee and the NRC Staff were timely apprised that CCMN was a likely player in the proceeding.

We rule that Ms. Marucci's May 28 intervention for CCMN was valid and timely on May 28 but voidable at the option of CCMN. CCMN supported the petition on June 23. CCMN's petition is timely.

V. STANDING TO INTERVENE

A. General Principles

Not everyone has a right to intervene in NRC proceedings. This is fundamental law. It derives from section 189(a)(1) of the Atomic Energy Act which states that the "Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."

The intervention rule implementing section 189 of the Act provides that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene." 10 C.F.R. § 2.714(a)(1). Section 2.714(a)(2) states that such petitions:

shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

⁸ See Articles of Incorporation attached to the June 13, 1992 CCMN motions.

Under section 2.714(d)(1), a petition for leave to intervene must also address the following factors:

- (i) The nature of the petitioner's right under the Act to be made a party to the proceeding.
- (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

The Commission has applied judicial concepts of standing in determining whether a petitioner has sufficient interest in an NRC proceeding to be entitled to intervene. It has been generally recognized that these judicial concepts involve a showing that "(a) the action will cause 'injury in fact' and (b) the injury is arguably within the 'zone of interests' protected by the statutes governing that proceeding." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989), citing *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). These principles have most recently been reaffirmed by the Commission in *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992).

B. Causation and Standing

Amendment proceedings initiated by NRC licensees where the amendment is designed to improve safety seldom create intervention issues. This is because there must be a causal nexus between the licensing action in issue and any injury in fact. In their respective answers to the initial petitions, Licensee and the NRC Staff seemed to argue that, if the amendment reduces risks from the pre-amendment condition, the amendment itself cannot cause "injury in fact" within the scope of the notice of opportunity for a hearing. The Board could find no decisional precedents for this position.

Therefore in our Order of July 29, 1992 (LBP-92-17, *supra*), we requested the participants to answer questions about the injury-in-fact and causation issue. In answering, they were to assume that the amendment simply imposes additional restrictions on the use of the Unit 2 fuel pool and therefore would not increase risks from the pre-amendment condition. To better focus the analysis, we requested the pleaders to assume even that the amendment actually decreases the risk of offsite releases from a spent fuel pool accident at Unit 2.

The key question, No. 1, was:

Assuming as above stated, could an allegation that the technical specifications, as amended, do not bring the spent fuel pool up to the licensing basis and do not satisfy NRC criticality requirements, establish injury-in-fact? In simpler terms, can nearby Petitioners suffer injury-in-fact from postulated offsite releases if the amendment increases safety, but not enough?

36 NRC at 26.⁹

With respect to the first part of Question No. 1, the Staff answered:

Yes. A specific allegation, meeting the requirements of 10 C.F.R. § 2.714(b)(2), that a spent fuel pool's criticality requirements were not being met, would raise sufficient public health and safety concerns to constitute injury-in-fact, since this would call into question the adequacy of a safety margin. [Footnote omitted.] To establish standing to intervene in a particular proceeding, as distinguished from a generic matter applicable to all plants, a petitioner would have to show possible harm to one or more of its protected interests arising from a spent fuel pool's criticality requirements not being met.

Staff Answer at 3-4.

Addressing the second part of the question, the Staff added that "if a petitioner could show that a license amendment, while improving safety, left a plant system outside its design basis, this would constitute injury-in-fact." *Id.* at 4.

However, the Staff also cautioned that "nearby petitioners would have to show a causal relationship between the licensing action at issue and harm to their protected interests in order to establish their standing to intervene." *Id.* The Staff went on to argue that CCMN has failed to make this showing. *Id.* at 10-11.

Licensee argues that the issuance of a license amendment imposing restrictions designed to increase safety cannot cause injury in fact. Licensee's position can be summed as follows:

While it is true, under the hypothesis of Question 1, that the potential concern is not rectified by the license amendment, neither is it caused by the license amendment. For standing, the licensing action (i.e., issuance of the license amendment) must cause the injury in fact. [Citation omitted.] In our case, a prior calculational error, not the Amendment at issue, caused a reduced margin of safety. The Amendment itself will not cause an injury, and in fact is intended to reduce the risk of potential offsite exposures.

Licensee's Answer at 20.

Licensee argues further that the issue of whether the amendment will return the spent fuel pool to the design-basis level of safety is simply not before

⁹ Question No. 2 asked what relief would be available from post-amendment risks to nearby residents if Question No. 1 is answered in the negative. Question No. 3 alluded to a discussion of the "no significant hazards consideration" procedures where the Commission provided examples of amendments that are considered likely, and examples that are considered unlikely to involve significant hazards considerations. 36 NRC at 26 & n.4 citing Final Procedures and Standards on No Significant Hazards Consideration, 51 Fed. Reg. 7744, 7751 (Mar. 6, 1986). Based upon Licensee's and Staff's answers, we agree that Question No. 3 is not relevant.

the Board; that the Commission alone has the authority to define and to limit the scope of a proceeding under section 189(a) of the Atomic Energy Act. Licensee's Answer at 21-22, citing *Bellotti v. Nuclear Regulatory Commission*, 725 F.2d 1380 (D.C. Cir. 1983).

The *Bellotti* decision turned on the issue of where the authority to define the scope of a proceeding lies; that is, does it lie with a petitioner or with the Commission? The petitioner in *Bellotti*, the Attorney General of Massachusetts, appealed the Commission's denial of his petition to intervene in a proceeding to determine whether a Commission enforcement order to the Pilgrim Nuclear Station licensee should be sustained. That order, issued by the NRC Staff, directed the licensee to develop a plan to improve management functions. *Id.*, 725 F.2d at 1381-82. Attorney General Bellotti challenged the adequacy of the corrective action ordered by the Commission and requested intervention on that issue.

Part of the discussion in *Bellotti* seemingly supports Licensee's argument that intervention must be denied here:

The Commission's power to limit the scope of a proceeding will lead to denial of intervention only when the Commission amends a license to require additional or better safety measures. Then, one who . . . wishes to litigate the need for still more safety measures, perhaps including the closing of the facility, will be remitted to Section 2.206's petition procedures.

Licensee's Answer at 21-22, citing *Bellotti*, 725 F.2d at 1383. But the *Pilgrim* enforcement proceeding discussed in *Bellotti* was unlike the license amendment proceeding here.

As Licensee here notes, the *Pilgrim* order considered in *Bellotti* had narrowly defined the scope of the proceeding to encompass only the question of whether the order imposed by the Staff on the Pilgrim licensee should be sustained. This is typical language in license-modification enforcement actions brought by the NRC Staff. However, in the instant proceeding, it is the Licensee, not the Staff, who seeks the amendment. The Notice of Opportunity for Hearing on Amendment 158 places no express restrictions on the issues to be raised in a respective hearing. Any hearing must, of course, be within the scope of the Amendment 158 notice. That notice describes the scope simply as "with respect to issuance of the amendment." 57 Fed. Reg. at 17,934-35.

Fatal to Licensee's argument is the fact that, in *Bellotti*, the Attorney General's petition was in response to the Notice of an Order Modifying License which offered a hearing to the Pilgrim licensee, *but to no one else*.¹⁰ The Pilgrim licensee did not request a hearing. *Bellotti*, 725 F.2d at 1835. Here the petitions are in response to the notice of an opportunity to petition for a hearing

¹⁰ Order Modifying License Effective Immediately, 47 Fed. Reg. 4171, 4173 (Jan. 18, 1982).

and to intervene in a proceeding brought about by the Licensee's application for Amendment 158. The opportunity to intervene was expressly afforded to anyone whose interests may be affected by the proceeding, specifically petitioners under 10 C.F.R. § 2.714. 57 Fed. Reg. at 17,934-45.

Despite the peripheral discussion by the Court of the nature of the issues that *do not support* a request for intervention, *see* p. 210, *supra*, the essence of *Bellotti* was simply that the Commission, as it deems best, may offer a hearing to potential petitioners or leave them to seek redress under 10 C.F.R. § 2.206.

Also related to the Licensee's causality arguments, is "the companion mandate that the injury is 'likely to be redressed by a favorable decision in the proceeding.' *Seabrook*, CLI-91-14, 34 NRC at 267." Licensee's Answer at 19. According to Licensee, if the licensing action challenged in the proceeding is not the cause of the potential injury, a favorable decision cannot redress the injury. Thus, in a license amendment proceeding limited in scope to whether the amendment should be issued, a decision in favor of the petitioners (i.e., to not issue the amendment) would not redress the potential injury.

We do not believe that the Notice established the scope of the proceeding to be as restrictive as "whether the amendment should be issued," as Licensee states. But, practically speaking, denying the amendment may be the outer reach of any order the Board might issue in the proceeding. For the sake of argument, we accept the premise.

We return to Licensee's argument that it was the prior calculational error, not the amendment, which caused a reduced margin of safety, therefore any injury in fact. That argument depends too heavily on compartmentalized reasoning. The potential for reduced safety here (injury in fact) is both the prior calculational error and an amendment that does not redress that error but permits operation of the spent fuel pool according to its terms. The two concepts are logically inseparable.

Assuming that the record of the proceeding were to demonstrate that the risk from the calculational error is not abated by Amendment 158, interested persons may have redress by a denial of that amendment.¹¹ True, as Licensee states, that action would not correct the prior calculational error, but it would remove the authority to operate the spent fuel pool under an inadequate amendment. Such a denial would return the matter to the Licensee and the NRC enforcement staff for a proper resolution of the problem.

¹¹ In the real world of NRC adjudications, applicants for licenses and amendments to licenses accept modification as a condition of issuance. Seldom are NRC adjudicators faced with an up or down choice.

C. Standing Based upon Proximity

Often in NRC proceedings, whether a petitioner would sustain an "injury in fact" as a result of an action covered by a proceeding has been determined by whether the petitioner lives or engages in activities near the nuclear plant in question. Thus a petitioner may demonstrate the potential for injury if the petitioners live, work, or, as here, have children in school, in an area that might be affected by the release of nuclear radiation from the plant. A leading case on this point is *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56-57 (1979), where the proceeding involved a proposed operating license amendment that would authorize the expansion of the spent fuel pool capacity. There the Appeal Board would not rule out as a matter of law derivative standing where a member of the petitioning organization lived about 35 miles from the facility, and where another member lived 45 miles away but engaged in canoeing in close proximity to the plant. *Id.* at 57.

Also, in *North Anna*, the Appeal Board noted that it had *never required* a petitioner in close proximity to a facility in question to specify the:

causal relationship between injury to an interest of a petitioner and the possible results of the proceeding [footnote omitted]. Rather, close proximity has always been deemed to be enough, standing alone, to establish the requisite interest.

Id. at 56, citing, e.g., *Gulf States Utilities Co.* (River Bend, Units 1 and 2), ALAB-183, 7 AEC 222, 223-24 (1974), and cases there cited. See also *Armed Forces Radiology Research Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982).

However, as the Commission noted in *St. Lucie*, *supra*, cases conferring standing based on a specific distance from the plant "involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences." CLI-89-21, *supra*, 30 NRC at 329. The Commission contrasted such cases with those involving minor license amendments: "Absent situations involving such obvious potential for offsite consequences, a petitioner *must allege some specific 'injury in fact'* that will result from the action taken . . ." *Id.* at 329-30 (emphasis added).

D. Whether CCMN Has Derivative Standing

Both the Licensee and NRC Staff acknowledge that an organization may establish injury in fact and standing to intervene if it represents and identifies members who have such injury and standing.¹²

Mr. Pray is a member of CCMN and authorizes that organization to represent him. He lives within 5 miles of Millstone. He is worried about an accident at the Millstone 2 spent fuel pool and is concerned that Amendment 158 does not protect him and his family. He is particularly concerned about offsite releases reaching him and his family by the groundwater pathway. Letters, May 29 and July 2, 1992.

Ms. Griffiths is a member of CCMN and authorizes CCMN to represent her in this proceeding. She lives about 1.5 miles from Millstone, and her children attended school 2 miles from the plant. She too is concerned about a spent fuel pool accident and shares Mr. Pray's concern that Amendment 158 does not afford safety to her and her family. Letter, June 29, 1992.

Mr. Sullivan is "associated" with CCMN and authorizes that organization to represent him. He lives 3 miles from the plant and his children attend school 2 miles from the plant. He is concerned about inadvertent criticality at the spent fuel pool. Letter, July 6, 1992.

If Mr. Pray, Ms. Griffiths, or Mr. Sullivan have demonstrated injury in fact from the proposed licensing action in their own right, CCMN has derivative standing to intervene. As noted above, we learned from the Commission's decision in *St. Lucie, supra*, that "[a]bsent situations involving such offsite potential for offsite consequences, a petitioner must allege some specific 'injury in fact' that will result from the action taken." *Id.*, 30 NRC at 329-30. In other words, we may not infer injury in fact solely from proximity to the facility unless the licensing action implies such potential.

In this case CCMN, through its members, meets both *St. Lucie* standards, i.e., injury in fact may be inferred *and* they allege such injury.

They and their families reside and live very close to the facility. As Licensee reported in the LER, "[t]he safety consequences of the [calculational error] is a potential uncontrolled criticality event in the spent fuel pool." LER, *supra*, at 3. As discussed in *St. Lucie*, such an event presents "clear implications for the offsite environment." Although the corrective redesign of the pool may not be regarded as a "major alteration to the facility," operation authorized by an amendment that fails to correct a calculational error carries with it "a clear potential for offsite consequences." This injury in fact is inferred from proximity to the plant.

¹² NRC Staff Answer at 8, citing, e.g., *Waris v. Seldin*, 422 U.S. 490, 511 (1975); Licensee's Answer at 28, citing, e.g., *Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4)*, ALAB-952, 33 NRC 521, 529 (1991).

However, even if such were not the case, the petitioners meet the second *St. Lucie* test. They have specifically alleged concerns that, if well founded, constitute injury in fact. One must look to CCMN's contentions to determine whether the concerns are well founded.

We find that by virtue of injury in fact, both inferred and as alleged by CCMN members, CCMN has standing to intervene in this proceeding.

VI. CONTENTIONS

A. General Principles

As pertinent here, 10 C.F.R. § 2.714(b) provides:

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

54 Fed. Reg. 33,168, 33,180 (Aug. 11, 1989).

The Statement of Considerations for the rule, as amended in 1989, provided additional explanation:

This requirement [to provide information] does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.

In addition to providing a statement of facts and sources, the new rule will also require intervenors to submit with their list of contentions sufficient information (which may include the known significant facts described above) to show that a genuine dispute exists between the petitioner and the applicant or licensee on a material issue of law or fact. This will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, and to state the applicant's position and the petitioner's opposing view. When the intervenor believes the application and supporting

material do not address a relevant matter, it will be sufficient to explain why the application is deficient.

54 Fed. Reg. 33,170.

The Licensee especially directs our attention to the Commission's decision in *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149 (1991). There the Commission reversed a licensing board decision that had applied rules of construction to infer a challenge by a petitioner when none was explicitly stated.¹³ The Commission stated that section 2.714(b)(2) (i)-(iii) is to be interpreted strictly: "If any one of these requirements is not met, a contention must be rejected." 34 NRC at 155 (citing the Statement of Considerations, 54 Fed. Reg. at 33,168, 33,171).

B. CCMN's Contentions

CCMN submitted four contentions.¹⁴ Only Contentions 1 and 2 are arguably within the scope of the proceeding on Amendment 158.

1. Contention 1

That there is no basis for the NRC to contend that no significant risk is involved in the issuance of the design change that was issued to address the criticality errors found at Millstone 2.

CCMN explained that Contentions 1 and 2 were supported by additional Sections A, B, and C and by the attached affidavits of Dr. Gordon Thompson and Dr. Michio Kaku. *Id.* Contention 1, it turns out, depends entirely upon the affidavit of Dr. Kaku, which we deem to be a part of the contention itself.¹⁵ Sections A, B, and C of the CCMN Contention pleading and the affidavit of Dr. Gordon Thompson were of no value in explaining either Contention 1 or 2.

¹³ *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397 (1991).

¹⁴ CCMN's "FINAL VERSION" of its contentions dated August 24, 1992, and served September 8, 1992, was struck by Board Order. Note 5, *supra*. Contentions covered by this Order were also dated August 24, 1992, and were served by the Office of the Secretary (for CCMN) on August 28, 1992.

¹⁵ In requesting an extension of time to file contentions, CCMN explained that its experts would actually be filing the contentions. CCMN Letter, August 12, 1992, at 1. Consistent with that plan, CCMN's contentions are terse descriptions of its concern while the essence of the contentions were set out in the experts' affidavits.

a. *Dr. Kaku's Affidavit*

Dr. Michio Kaku is a full professor of theoretical nuclear physics at the Graduate Center of the City University of New York and the City College of New York. He received his Ph.D. in theoretical physics from the Lawrence Livermore Radiation Laboratory at the University of California, Berkeley. Kaku Affidavit, ¶ 1. He discusses the calculational errors and corrective measurements pertaining to Amendment 158. *Id.*, ¶¶ 5-12.

Licensee, however, does not even refer to Dr. Kaku's discussion except to state that:

The "Background" material, including the accompanying affidavits, obviously asserts a great many purported problems with the spent fuel pool design and the accident analyses used to support that design. However, these concerns are never coherently articulated in a contention. It is not incumbent upon either the Licensee or the Licensing Board to comb through the material provided by a would-be intervenor to find what are the "real" proposed contentions.

Licensee's Answer at 50-51.

Licensee's failure to address Dr. Kaku's affidavit on the grounds that it required too much effort deprived the Board of the benefit of its views on important aspects of CCMN's case. As we explain below, the affidavit was well organized. The Board did not have to "comb" through it to locate the relevant sections.

Dr. Kaku begins with his understanding of the fuel pool rearrangement (Kaku Affidavit, ¶ 2); accurately describes Licensee's main argument in the proceeding (*id.*, ¶ 3); and states that he will address three main areas including "(a) reanalysis of the criticality study, showing that the calculation of neutron reactivity may not be as rigorous as previously thought" (*id.*, ¶ 4).

Dr. Kaku, next clearly identified his discussion as "Errors in Criticality Analysis." *Id.*, ff. ¶ 4. Then in consecutive, logically progressing paragraphs, Dr. Kaku explains exactly what may be wrong with the criticality analysis and why he believes that the analysis does not adequately address all that should be addressed. *Id.*, ¶¶ 5-12. His cohesive discussion tracks the amendment application and raises a genuine dispute with Licensee as to the Amendment 158 criticality analysis. *Id.*

As noted above the Commission has stated, "[w]hen the intervenor believes the application and supporting material do not address a relevant matter, it will be sufficient to explain why the application is deficient." 54 Fed. Reg. 33,170. Contention 1 must be considered with this guidance in mind.

Dr. Kaku provided a summary of his concerns:

The previous reactivity study by CE done on the spent fuel pool was in error by 5%, mainly because of the difficulty in modeling the Boroflex boxes by the neutron diffusion equation. I am not convinced that the newer neutron reactivity study is sensitive enough to

truly calculate the effect of neutron absorption by the Boroflex boxes, especially because of the degradation and unexpected erosion of the boxes (whose full extent has never been determined by the utility). The neutron reactivity calculations using Monte [Carlo] techniques studies have inherent uncertainties in them (given the assumptions inherent within the model) that may be too large to make reliable estimates of K_{eff} for the fully loaded pool.

Kaku Affidavit, ¶ 30.

b. Summary and Proposed Issues Regarding Contention 1

Dr. Kaku's main argument is that Licensee's belief that the rearrangement can only reduce the pool's storage capacity and hence make the pool less dangerous, represents premature optimism. *Id.*, ¶ 4. More information is required. *Id.*, *passim*. A reanalysis of the criticality study is needed and should address the following issues:

1. What is the actual state of the Boroflex box degradation, and what is the corresponding disposition of the water gaps? *Id.*, ¶ 8. According to Dr. Kaku, the licensee examined only 16% of the Boroflex boxes. *Id.*, ¶ 7.¹⁶ If the sample is not representative, the gaps may be larger than expected, or locally concentrated. A concentration of gaps would cause local enhancement of the neutron distribution with an effect of increasing K_{eff} .
2. To what extent are the benchmark data used by the Licensee representative of the arrangement of Boroflex boxes, fuel boxes, and water in the storage pool? *Id.*, ¶ 9.
3. Have the Monte Carlo calculations incorporated enough iterations to provide a good estimate of the pool's reactivity? *Id.*, ¶ 10(d).
4. If a vertical buckling term has been used, has it been used correctly? *Id.*, ¶ 10(c).

The foregoing summary and proposed issues will constitute a basis for discussion at the forthcoming prehearing conference.

The Staff argues that Dr. Kaku fails to specify how the Licensee's revised criticality calculations are not conservative, or how gaps concentrated in certain areas would significantly affect the calculations. Staff Answer at 19. Dr. Kaku states that one suspects that an unusually large number of iterations will be necessary to provide any reasonable approximation. Kaku Affidavit, ¶ 10. The specific claim is that, barring an unusually large number of iterations the

¹⁶ Apparently, Dr. Kaku is mistaken about the sampling. The NRC Staff notes that the defect rate is 16%. The sampling consisted of approximately half of the poisoned rack cells. Staff Answer at 19, citing Licensee's Application, Attachment 2, at 1-3.

If Dr. Kaku agrees that he is mistaken, we expect him to promptly inform the Board and parties, through CCMN, whether the error changes his conclusions.

calculation of K_{eff} will be uncertain. There is no indication that Dr. Kaku expects the estimated value to be biased in one direction or the other; simply that it will be uncertain. Dr. Kaku points out that a local concentration of gaps in the Boroflex will lead to a local distribution of neutrons much higher than the computer calculation for the entire pool. *Id.*, ¶ 7. This is a well-known phenomenon; and clearly a high local concentration of neutrons near a group of fuel boxes would affect the calculation.

c. Significant Risk Versus NSHC Determination

Both the Licensee and the NRC Staff construe Contention 1 as a legal argument challenging the Staff's authority to make a "No Significant Hazards Consideration" (NSHC) determination. To support this construction, however, each asserts that CCMN intended to say "no significant hazards consideration" in the language of the pertinent NSHC regulations, rather than "no significant risk" as the contention states. Licensee's Answer at 49-50; Staff's Answer at 16-17.

We have learned from the Commission's decision in *Palo Verde*, CLI-91-12, *supra*, that a licensing board may not infer missing thoughts to find that a contention is acceptable. 34 NRC at 155. By the same reasoning, the Board may not impute different wording to a contention in order to reject it. More important, the entire tenor of Contention 1, as explained by Dr. Kaku, is a factual expression of concern about risk. The contention is void of the legal meaning ascribed to it by Licensee and the Staff.

d. Dr. Thompson's Affidavit

Dr. Gordon Thompson's affidavit (apparently in support of Contention 1) generally advocates alternative means of storing spent fuel such as onsite dry-cask storage. Thompson Affidavit at 1, attached to CCMN Contentions. His discussion is entirely beyond the scope of Amendment 158. That amendment does not bring into question whether the use of pool storage is generally appropriate for Millstone 2. Dr. Thompson does not cite any NRC requirements for dry-cask storage in any event.

Contention 1 is accepted based upon Dr. Kaku's affidavit.

2. Contention 2

That an environmental and health study needs to be done so we can know the effects from releases of varying amounts of the current allowable radioactive inventory of the spent fuel pool.

We look to Dr. Kaku's discussion of "Maximum Credible Accidents" to determine whether Contention 2 raises an issue suitable for hearing. Kaku Affidavit, ff. ¶ 12, ¶¶ 13-28. Dr. Kaku starts out well enough by stating: "[t]he rearrangement advocated by NU will increase the fission product inventory of the spent fuel pool, so it is vital that one analyze the maximum credible accident." *Id.*, ¶ 13. His argument fails, however, when he challenges the original FSAR design-basis accident. *Id.*, ¶¶ 14-28. He makes no further connection between Amendment 158 and the FSAR accident. *Id.* We agree with the Licensee that we may not revisit the original exploration of environmental issues without some showing that the amendment itself would result in significant effects. Licensee's Answer at 52-53. Contention 2 is rejected.

3. Contention 3

That the removal of requirements for neutron flux monitors in the Millstone spent fuel pool was improper in light of the fact that before the license amendment was issued to allow no inpool criticality monitors the NRC was aware that the criticality safety margins were being questioned. Therefore we contend that without criticality monitors in that pool we will have no prior warning if a dangerous neutron multiplication were to occur.

CCMN has not explained how neutron flux monitors relate to Amendment 158. See CCMN Contentions, Sections A, B, and C. We have examined Licensee's amendment papers and the Staff's SER and can find no connection. CCMN has not correlated its discussion with the amendment papers. CCMN seems to be referring to an event before Amendment 158. See Licensee's Answer at 53-54. The Staff argues that the issue is beyond the scope of the notice of opportunity for hearing. Staff's Answer at 19-20. We agree. There is no basis for admitting Contention 3. It is therefore rejected.

4. Contention 4

That immediate action should be taken to stop NU from contaminating the new steam generators until our concerns for the safe storage of the spent and new fuel is addressed.

Contention 4 is clearly beyond the scope of the proceeding on Amendment 158 and is, therefore, rejected.

VII. ORDER

A. CCMN Contention 1, based upon the respective parts of Dr. Kaku's affidavit, is admitted to be heard in this proceeding.

B. CCMN's petition is granted and CCMN is admitted as a party to the proceeding.

C. A hearing is ordered. A notice of hearing and notice of prehearing conference will be issued.

D. The petitions for leave to intervene and requests for hearing submitted by Patricia R. Nowicki, Michael J. Pray, Rosemary Griffiths, Joseph M. Sullivan, Don't Waste Connecticut, and Frank Lo Sacco are wholly denied.

VIII. APPEALS

A. Appeals from this Order to the Commission may be taken in accordance with the provisions of 10 C.F.R. § 2.714a.

B. The Nowicki, Pray, Griffiths, Sullivan, Don't Waste Connecticut, and Lo Sacco Petitioners may appeal on the question whether each of their petitions should have been granted in whole or in part.

C. The Licensee, Northeast Nuclear Energy Company, and the NRC Staff may appeal on the question whether the petition of Co-operative Citizen's Monitoring Network should have been wholly denied.

D. Appeals shall be asserted by the filing of a notice of appeal and accompanying supporting brief within 10 days of the service of the order from which the appeal is taken.

E. Any other party may file a brief in support of or in opposition to the appeal within 10 days after the service of the appeal.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles N. Kelber
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 30, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket No. 030-20693
(License No. 29-18205-02)

GEO-TECH ASSOCIATES
(Geo-Tech Laboratories)

October 21, 1992

The Commission refers to its Atomic Safety and Licensing Board Panel (ASLBP) a late-filed and deficient request by Geo-Tech Associates for a hearing on an order revoking its materials license for failure to pay the annual license fee required by 10 C.F.R. Part 171. The Commission directs the presiding officer to consider the hearing request under the criteria for late filings in 10 C.F.R. § 2.714(a)(1), in the absence of regulations governing late-filed and deficient hearing requests on enforcement orders.

The Commission also provides guidance on any hearing held on this issue, because this is the first hearing request on enforcement sanctions for failure to pay license fees. The Commission suggests that the scope of any hearing should be limited to whether the Licensee's fee was properly assessed and that challenges to the fee schedule or its underlying methodology would not be proper in this type of proceeding.

MEMORANDUM AND ORDER

On August 11, 1992, the NRC's Deputy Chief Financial Officer/Controller issued an order to Geo-Tech Associates (Geo-Tech) revoking its materials license

for failure to pay its annual fee, as required by 10 C.F.R. Part 171. Under the terms of the order, the license revocation would take effect 30 days from the date of the order. Geo-Tech was directed to submit an answer to the order within 30 days after its issuance. The answer was to specifically admit or deny each allegation or charge made in the order and set forth the matters of fact and law on which Geo-Tech or any other person adversely affected relied and the reasons why this order should not have been issued. Any answer filed within 30 days could include a request for a hearing.

Geo-Tech filed its answer requesting a hearing more than 30 days after issuance of the order. Additionally, the Licensee did not provide the specific information required to be included in the answer by the terms of the order.

The Commission is referring the hearing request to the Chief Administrative Judge, Atomic Safety and Licensing Board Panel, for assignment to a presiding officer. In the absence of regulations directly governing late-filed and deficient hearing requests on enforcement orders, the Commission directs the presiding officer to apply the criteria for considering late filings set forth in 10 C.F.R. § 2.714(a)(1). The designated presiding officer shall determine whether the hearing request should be granted despite its deficiencies using these criteria.

Because this is the first request by a licensee for a hearing on an order revoking a license for failure to pay user fees, the Commission believes that it is appropriate to provide guidance regarding the scope of any hearing held on enforcement sanctions imposed for failure to pay user fees.

The hearing scope shall be quite narrow. Neither the fee schedule nor its underlying methodology may be properly challenged in this type of proceeding. They have been fixed by rulemaking which this proceeding cannot amend. Instead, we would expect that in most cases the only pertinent issues would be: (1) Was the Licensee placed in the proper fee category? (2) If the answer to the first question is yes, then the Board must next determine if the Licensee was charged the proper fee established for that category. (3) If the answer to this is also in the affirmative, the Board should find if the Licensee has been granted a partial or total exemption from the fee by the NRC Staff. And (4) If the Licensee did not receive an exemption, the Board must determine if the Licensee paid the fee charged. If a Board determines that a hearing of substantially broader scope is warranted, it must receive authorization from the Commission before proceeding further.

It is so ORDERED.

For the Commission,¹

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of October 1992.

¹Commissioners Rogers and Remick were unavailable for the affirmation of this order. If they had been present, they would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. Frank F. Hooper
Dr. Charles N. Kelber

In the Matter of

Docket No. 50-320-OLA-2
(ASLBP No. 91-643-11-OLA-2)
(Re: License Amendment)
(Post-Defueling Monitored
Storage)

GENERAL PUBLIC UTILITIES NUCLEAR
CORPORATION, *et al.*
(Three Mile Island Nuclear Station,
Unit 2)

October 5, 1992

The Licensing Board dismisses this proceeding, prior to admitting any party, in response to a joint motion of all Petitioners to withdraw the only pending contentions. Although the joint motion requested a dismissal "with prejudice," the Licensing Board refused to act on this request because it had not seen the settlement agreement, nor had it been given legal argument or factual evidence to persuade it to take the requested action.

**RULES OF PRACTICE: SETTLEMENT; DISMISSAL "WITH
PREJUDICE"**

A licensing board may refuse to dismiss a proceeding "with prejudice," even though all the participants jointly request that action, unless it is persuaded by legal and factual arguments in support of that request.

MEMORANDUM AND ORDER
(Dismissing Proceeding)

I. MEMORANDUM

On September 28, 1992, the Licensing Board received a "Jointly Stipulated Motion to Dismiss the Petition of Eric J. Epstein." The motion, filed by all participants in this case, requests permission for Mr. Epstein to withdraw his petition and requests us to dismiss the petition *with prejudice*.

We shall dismiss the petition. Although the parties may have a mutually binding contractual agreement that would prevent refiling of this case, we have not seen that agreement and have not been persuaded by legal authority or evidence to determine whether or not the dismissal is "with prejudice." A motion of a party for reconsideration of our decision — if a party still desires a dismissal with prejudice — may be filed within 10 calendar days of the date of issuance of our Order.

II. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 5th day of October 1992, ORDERED that:

The Petition of Eric J. Epstein is *dismissed*.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Frank F. Hooper (by PBB)
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. Frank F. Hooper
Dr. Charles N. Kelber

In the Matter of

Docket No. 50-320-OLA-2
(ASLBP No. 91-643-11-OLA-2)
(Re: License Amendment)
(Post-Defueling Monitored
Storage)

GENERAL PUBLIC UTILITIES NUCLEAR
CORPORATION, *et al.*
(Three Mile Island Nuclear Station,
Unit 2)

October 16, 1992

The Licensing Board, having been provided the text of the settlement reached by the participants, reconsidered its previous dismissal order and modified it to be a dismissal with prejudice.

RULES OF PRACTICE: PETITION; DISMISSAL WITH PREJUDICE

A petition may be dismissed with prejudice providing that a board reviews the settlement and finds, consistent with 10 C.F.R. § 2.759, that it is a "fair and reasonable settlement."

MEMORANDUM AND ORDER
(Reconsidering Order Dismissing Proceeding)

I. MEMORANDUM

On October 5, the Board issued LBP-92-29 (36 NRC 225), dismissing this proceeding. On October 8, 1992, the Licensing Board received a "Joint Motion for Reconsideration" in which all the participants submitted additional information and legal argument and requested that we revise our Order so that the proceeding would be dismissed "with prejudice."

Settlement in this case is encouraged by 10 C.F.R. § 2.759, providing that it is a "fair and reasonable settlement of contested initial licensing proceedings" or, by inference, of amendment proceedings.¹ Now that we have seen the settlement agreement, we have no reason to conclude that it is other than a fair and reasonable settlement. Hence, a dismissal of the Epstein petition with prejudice is appropriate.² *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-92-15, 35 NRC 209 (1992) (settlement agreement approved after examination); *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-79-3, 9 NRC 107 (1979) (dismissal with prejudice after study and modification of the proposed settlement); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-89-24, 30 NRC 152 (1989) (dismissal with prejudice after finding that the agreement is not inconsistent with applicable statutes and regulations); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-85-26, 22 NRC 118 (1985) (dismissed with prejudice after a prehearing conference and preliminary evidentiary hearing to consider the effects of the settlement).

II. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 16th day of October 1992, ORDERED that:

¹Our jurisdiction is to determine whether or not to admit a party. We consider that the dispute before us is subject to settlement under the cited rule.

²We have no opinion concerning the merits of the Epstein petition.

The Petition of Eric J. Epstein is *dismissed with prejudice*.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. Frank F. Hooper
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber (by PBB)
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-498
50-499

HOUSTON LIGHTING AND POWER
COMPANY

(South Texas Project, Units 1
and 2)

October 5, 1992

The Director of the Office of Nuclear Reactor Regulation grants in part and denies in part a Petition submitted pursuant to 10 C.F.R. § 2.206 by Mr. Thomas J. Saporito (Petitioner) requesting action with regard to the South Texas Project (STP), Units 1 and 2, of the Houston Lighting and Power Company (Licensee).

Petitioner requested the NRC to initiate swift and effective actions to cause the Licensee to adequately train all STP employees in Security Procedures, use of the Work Process Program, Maintenance Work Practices and Requirements, and use of the Planner's Guide, as well as all STP Security Force personnel in the use of security procedures. In response to the Petition, a special NRC team inspection was conducted which substantiated some of the Petitioner's concerns and resulted in corrective actions by the Licensee. Those aspects of the Petition substantiated by the NRC and corrected by the Licensee are granted.

With regard to the Petitioner's request for action pursuant to section 2.206 for the institution of proceedings pursuant to 10 C.F.R. § 2.202 and for immediate revocation of all escorted access at the STP site, and for an immediate shutdown of all maintenance activity there, the Director finds minimal safety significance associated with the concerns raised in the Petition and denies those portions of the Petition.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On February 10, 1992, Mr. Thomas J. Saporito, Jr. (the Petitioner), filed a Petition with the U.S. Nuclear Regulatory Commission (NRC) pursuant to 10 C.F.R. § 2.206 requesting actions be taken regarding the South Texas Project (STP), Units 1 and 2, of the Houston Lighting and Power Company (HL&P or Licensee). Specifically, the Petitioner requested the NRC to institute a proceeding pursuant to 10 C.F.R. § 2.202 and to take swift and effective actions because of the Petitioner's concerns in the areas of physical security, maintenance activities, compliance with technical specifications and procedures, and training at STP.

In the area of physical security, the Petitioner requested that the NRC cause the Licensee to revoke all escorted access to the South Texas site and to adequately train all employees and security force personnel in using relevant security procedures. With regard to maintenance activities, the Petitioner requested that the NRC cause the Licensee to invoke an immediate stand-down of all maintenance activities, to adequately train personnel in the use of Revision 3 of the Work Process Program, Revision 0 of the Maintenance Work Practices and Requirements, and Revision 0 of the Planner's Guide. The Petitioner also requested that the NRC take swift and effective actions to cause the Licensee to comply with the South Texas Project's technical specifications and procedures. On February 18, 1992, the Petitioner met with the NRC Staff in the Region IV offices to discuss certain issues presented in the Petition and other concerns.¹

On March 24, 1992, I informed the Petitioner that the Petition had been referred to my Office for the preparation of a Director's Decision. I further informed the Petitioner that, after receiving the Petition, the NRC Staff immediately evaluated reactor safety at STP and performed a special team inspection to evaluate the concerns raised in the Petition. As a result of the evaluation and inspection, the NRC Staff found that the concerns either could not be substantiated, or if they were substantiated did not involve nuclear safety, or were not safety concerns of such importance to warrant the immediate and swift actions requested in the Petition. Therefore, I denied the Petitioner's request for the NRC to take immediate action. I also informed the Petitioner that the NRC would take appropriate action within a reasonable time regarding the specific concerns raised in the Petition.

¹At this meeting, the Petitioner raised a number of concerns other than those set out in the Petition. Those other concerns have been handled separately by the NRC Staff.

The Licensee also responded to the issues raised in the Petition. The Licensee voluntarily submitted information to the NRC on March 11 and May 1, 1992, regarding the issues raised by the Petitioner.

My Decision in this matter follows.

II. DISCUSSION

In response to the Petition and other concerns raised by the Petitioner, the NRC Staff conducted a special team inspection at STP which included an evaluation of the concerns raised in the Petition. The five-member team was on site during March 9-13, March 23-27, and April 14, 1992. On June 1, 1992, the NRC Staff issued Inspection Report 50-498/92-07, 50-499/92-07 documenting the results of the inspection. In a letter of June 18, 1992, to the NRC Chairman, the Petitioner commended the NRC Staff inspection effort as extremely definitive with very comprehensive results.

While the inspection team considered all of the concerns of the Petitioner, this Director's Decision responds only to those issues raised in the Petition, specifically the twelve items listed in the "Basis and Justification" section of the Petition.

In evaluating the physical security concerns during the recent NRC special team inspection, the NRC Staff gathered specific information on the training and implementation of the security plan for the areas of concern to the Petitioner, including the control of visitors, the transfer of visitors between escorts, and tailgating. The NRC inspectors reviewed general employee training (GET) lesson plans, the qualification and size of the instructional staff, and the examinations taken by individuals at the end of instruction. The inspectors reviewed lesson plans for both the initial training and requalification training of security personnel. In this way, the team could determine the manner in which the material was presented to the employees and could determine if the employees understood the requirements. In determining how effectively the requirements were implemented, the inspectors reviewed security plans, procedures, and records governing the access and control of the visitors at STP. The team also interviewed employees who were trained as escorts and those who had been escorted because they had at one time been classified as visitors.

The inspection team found the Licensee's staffing for conducting the GET program marginally acceptable. The allocated number of instructors, which had been recently decreased, could cause significant stress on the Licensee's staff, especially when large groups of people must be trained within a short time period. The Licensee's GET adequately covered the escort requirements that were in effect at the time of the NRC inspection. The Licensee addressed the issue of escort changes in the initial training for security personnel, although this

issue was not reinforced during requalification training. However, the inspection team noted that most of the employees and security officers interviewed could not successfully explain all of the aspects of visitor access and escort control.

The NRC inspectors reviewed the records and found that, on numerous occasions between January 15 and February 19, 1992 (the time period selected for inspection), visitors were transferred from assigned escorts to other escorts, but the visitor escort change logs did not reflect the escort changes. In some instances, the visitors telephoned security badging locations and requested escort changes at the request of the assigned or new escorts. Some security force members admitted they knew that visitors were requesting changes and did not realize such actions conflicted with specific procedural requirements. Some plant employees who directed visitors to contact security for escort changes also indicated that they did not realize this conflicted with the Licensee's procedures.

Through interviews, it was confirmed that visitors were not always adequately controlled. It was apparently routine practice in the Instrumentation and Control (I&C) shop to leave visitors within the protected area in the shop while escorts went to adjacent areas (such as restrooms). In one instance, an escort exited the protected area ahead of a visitor. In that instance, the security officer apparently did not realize that this act conflicted with the Licensee's procedures and did not take the procedurally required action in response to the incident.

On March 13, 1992, the NRC Staff first informed the Licensee of the team's initial findings concerning the apparent security violations. After this notification, the Licensee briefed security officers in the proper way to conduct escort transfers. During a meeting on April 14, 1992, the NRC Staff and the Licensee discussed the complete results of the inspection and the apparent violations. Licensee senior management's immediate response to the inspection findings was to discontinue all visitor access. In a letter of May 1, 1992, the Licensee informed the NRC that, until making a permanent change, "the supervision of GET training has been temporarily assigned to report to the same manager that directs HP training." This action, the Licensee asserted, would allow control and coordination to quickly and easily support additional GET instructors as required. The Licensee further informed the NRC that it had revised its escort procedures to require the following: (1) specially qualified escorts, (2) visual contact with the visitor at all times, (3) a card carried by the visitor with the escort's name, and (4) provisions for changing escorts by requiring the new escort to sign the visitor's card. The procedures no longer require the notification of security regarding the transfer of visitor escorts. The NRC Staff has concluded that the organizational changes and revised procedures address the deficiencies noted by the inspection team and will assess their implementation in future routine inspections.

On June 1, 1992, the NRC issued a Notice of Violation to the Licensee for two violations based on the aforementioned security inspection results. One violation

was for the failure of the Licensee's employees to comply with the physical security plan's implementing procedure governing escort view and control of visitors. The second violation was for the failure of the Licensee's employees to comply with the procedure governing the transfer or exit of visitors from the protected area.

In evaluating the maintenance concerns of the Petitioner, the NRC special inspection team reviewed both the training and implementation aspects of the concerns. The inspectors reviewed the training procedures listed by the Petitioner, the lesson plans upon which instruction was based, the qualification of the instructors, and the results of tests at the end of the instruction sessions. The inspectors also interviewed other Licensee personnel whose jobs were influenced by the maintenance instruction. The inspectors reviewed completed work packages and interviewed Licensee personnel, some of whom were associated with the work packages. Others were interviewed to permit the inspection team to assess maintenance implementation at STP.

The inspection team determined that the Licensee had a good maintenance work control process program. This program enabled the Licensee to find equipment problems, evaluate the effect of these problems on operability and the technical specification limiting conditions of operation, prioritize work activities, plan work orders, conduct maintenance activities, and close packages. The inspection team concluded that the training provided on Station Procedure OPGP03-ZA-0090, Revision 3 (concern identified by the Petitioner), was appropriate to meet the course objectives. The inspection team concluded that course objectives were based on procedure requirements. In meeting the objectives, the Licensee ensured that the fundamental program requirements could be implemented by the I&C technicians, planners, owners (i.e., the Licensee's assigned system representatives), and supervisory personnel.

While overall implementation of maintenance activities was adequate, there were instances where personnel did not fully comply with some procedural requirements. For example, there were instances where individuals did not obtain work-start authority before giving work packages to craft people, individuals did not use the configuration control change log for lifting leads, and in two instances technicians worked on work requests without signing the work orders. However, the majority of the procedural requirements were being met.

The identified instances of less than full compliance with maintenance procedures only concerned maintenance performed on nonsafety equipment. Examples are the conductivity instrumentation for the makeup demineralized water and the level switches for the sodium hypochlorite dissolver tank. None of the equipment was required for safe shutdown of the plant, mitigation of accidents, or would affect offsite radiological exposure to the public. Consequently, there was no violation of NRC requirements, the STP licenses, or the technical specifications. Nevertheless, the NRC Staff was concerned about two aspects

of the findings. First, the procedural violations of the Licensee's requirements while performing nonsafety-related activities could also occur while performing safety-related activities because a single set of administrative controls applied to all maintenance activities. However, during interviews with personnel, they indicated that their awareness was enhanced with regard to procedural requirements for safety-related activities and those requirements that could affect personnel safety. There were indications of poor morale (e.g., worker attitudes) among some maintenance workers, but there was no evidence that poor morale had adversely impacted safety-related work.

The inspection team found that the work order planning process has been improved to provide uniform guidance on developing work instructions. The work instructions have become more detailed and appeared to restrict some types of work activities that had previously been performed by the "skill of the craft." The planning process provided (1) for review of work instructions and, in some cases, an independent technical review, (2) for foremen or planners to make revisions to work instructions depending on scope of the work activity, and (3) for a means of providing feedback on work instructions to the planners and owners. These improvements should not only enhance worker efficiency, but also improve safety in that they should provide additional barriers to human error.

The inspection team ascertained that guidance provided to the plant staff on implementation of equipment clearance orders (ECOs) was not properly received or was not well understood. The Licensee's staff, responsible for implementing the equipment clearance program, indicated that the program was generally carried out in accordance with the procedural requirements. Within the scope of the inspection, the team did not find instances of improper execution of ECOs for safety-related equipment. Consequently, there were no cited violations. Because of the potential impact on safety-related activities, the team recommended that the Licensee consider including guidance on implementing the program within the procedure. The Licensee's representatives stated that they would review the guidance and expected to conduct training on this matter.

Some signatures and corresponding dates on completed maintenance work packages appeared inconsistent with the times when the packages should have actually been signed and dated. During interviews of I&C technicians, foremen, supervisors, and management, it became clear that the Licensee had not established a policy for late signing of a completed work package. The inspection team informed the Licensee that this lack of a consistent policy for backdating signatures was a weakness. The Licensee subsequently issued a station procedure to instruct employees in the acceptable method for the late signing of documents.

The Petitioner expressed concern with maintenance, primarily regarding the use of the Work Process Program (OPGP03-ZA-0090) Revision 3, which at the

time was a recent procedure. On March 9, 1992, the Licensee issued Revision 4 of this procedure, in which it had corrected problems that it found in the previous revision. In July 1992, the Licensee issued Revision 5, which was intended to further improve use of the procedure. While the Petitioner's major concerns related to Procedure OPGP03-ZA-0090, Revision 3, he also had concerns regarding Maintenance Procedure OPM01-ZA-0040, "Maintenance Work Practices and Requirements," and the Planner's Guide, Revision 0. Through interviews, the inspection team concluded that I&C technicians demonstrated that they understood the program requirements referenced in the procedures. Although the Planner's Guide is not required by the NRC and is not a controlled document, the NRC Staff determined that maintenance activities were being improved through its use.

The inspection team findings related to physical security and maintenance were discussed with Licensee senior management on April 14, 1992, and are documented in the special team inspection report IR 50-498/92-07, 50-499/92-07. The NRC Staff will continue to monitor Licensee performance in these areas as a part of the routine inspection program activities.

The following are the issues raised by the Petitioner, each followed by the NRC Staff's evaluation.

A. Current Established Licensee Policies and Procedures Do Not Provide Reasonable Assurances for the "Physical Control of STPEGS"

In 10 C.F.R. Part 73, the NRC specifies the requirements for establishing and maintaining a security program for the physical protection of plants and materials. Before a plant can be licensed, the applicant must submit to the NRC a security plan addressing the requirements of Part 73 and the licensee's policies for the physical protection of the plant. Approval of the security plan is a requirement for plant licensing. Such a plan was submitted by the Licensee and approved by the NRC Staff. In its Supplement 4 to NUREG-0781, "Safety Evaluation Report Related to the Operation of the South Texas Project, Units 1 and 2," the NRC Staff concluded that the protection provided against radiological sabotage by implementing the Licensee's plan met the requirements of Part 73 and that the health and safety of the public would not be endangered. Licensees are permitted to make changes to the plan pursuant to 10 C.F.R. § 50.54(p) as long as the changes do not decrease the effectiveness of the security plan.

The NRC periodically inspects each Licensee's security program to determine if it is being maintained and implemented in a satisfactory manner. In the most recent Systematic Assessment of Licensee Performance (SALP) for the period ending May 31, 1991, the NRC Staff concluded that the Licensee management continued to demonstrate a strong commitment to implementing the security

program (IR 50-498/91-99, 50-499/91-99). In August 1991, the NRC conducted a team inspection of the security program at STP. The inspection found that, with isolated exceptions, the Licensee was meeting its plans and implementing an effective program to protect its facility against radiological sabotage (IR 50-498/91-21, 50-499/91-21).

The recent NRC special inspection team, as discussed above, found instances of improper control of visitors, improper transfer of visitors from one escort to another, and an improper exiting sequence of a visitor and escort, all of which were violations of the Licensee's procedures. The team found that certain maintenance workers and security officers had a relaxed attitude toward visitor escort requirements and that certain personnel failed to comply with the implementing procedures for the security plan. The team documented this failure in its Inspection Report (IR 50-498/92-07, 50-499/92-07), and the NRC issued a Notice of Violation with the report. In part the Petitioner's concern was substantiated. However, the NRC Staff found no indications of a programmatic breakdown in the plant physical security such that the Licensee could not reasonably ensure that it was in full control of the site.

On March 13, 1992, the NRC inspection team initially informed the Licensee of apparent violations regarding the visitor escort procedure. In a meeting on April 14, 1992, the NRC Staff further discussed these issues with the Licensee. The Licensee senior management immediately discontinued all escorted access until it revised the procedures and trained the personnel. In its letter of May 1, 1992, the Licensee informed the NRC Staff that its revised procedures for escorting individuals took effect on April 15, 1992. The revised procedures required the following: (1) specifically qualified escorts, (2) visual contact with the visitor at all times, (3) a card carried by the visitor with the escort's name, and (4) provisions for changing escorts by requiring the new [receiving] escort to sign the visitors' cards. The Licensee trained the identified escorts and implemented the new procedure. Upon conducting the reviews and inspections, the NRC Staff concluded that the Licensee's policies and procedures for physical security, properly implemented, would provide reasonable assurance that the South Texas Project is adequately protected. Implementation will be monitored through future NRC inspections.

B. Licensee Employees Are Not Adequately Trained and Knowledgeable of Existing STPEGS Security Procedures That Address Escort Responsibilities

In reviewing the Licensee's GET program, the special inspection team reviewed security training including staffing, lesson plans, student materials, and tests. The Licensee's GET adequately addressed the requirements for visitor escorts.

The inspectors reviewed the Licensee's GET tests and found that they typically included two to four questions pertaining directly to escort responsibilities. Conceivably, individuals could miss one particular area of the test year after year and still receive a passing grade. However, upon reviewing successive test results for selected individuals, the inspectors found no patterns suggesting that individuals did not know the requirements. Moreover, as part of the training program, the trainees signed statements affirming that they had been informed of the correct answers to the questions that they had missed. In spite of this information, the inspection team noted that most of the employees interviewed could not successfully explain all of the necessary aspects of visitor access and escort control. The Petitioner's concern was substantiated. However, the NRC Staff concluded that implementing the revised procedures as discussed in Section A, above, will adequately satisfy the escort requirements.

C. Licensee Employees Are Not Adequately Trained and Knowledgeable of Existing STPEGS Security Procedures That Address Tailgating into Protected and Vital Station Areas

The special inspection team found the Licensee's GET training, which included instructions for properly entering and exiting the plant, acceptable. However, the team found that the staffing levels for providing the training were marginal. The Licensee addressed this issue in its May 1, 1992 letter through organizational changes that will provide for additional instructors as discussed above.

Further, the inspection team reviewed the access control records from the period of January 1, 1992, through February 15, 1992. The NRC Staff found only one possible tailgating event in the records reviewed. The records of this event did not show that a visitor entered a vital area but indicated that the assigned escort had entered that vital area. However, at the next vital door requiring access, both the visitor and escort badges were recorded. Consequently, the visitor apparently did not attempt to surreptitiously enter a vital area. The Petitioner's concern was not substantiated.

D. Licensee's Security Force Personnel Are Not Adequately Trained and Knowledgeable of Existing STPEGS Security Procedures That Address Escort Responsibilities

The Licensee's security personnel were initially trained through the GET followed by training specific to the security staff. The special inspection team also reviewed the specific training for security personnel and found it to contain all the requirements necessary for a security officer to understand

and effectively perform duties concerning visitor access and escort control requirements. However, the team noted that, during the requalification training, the Licensee did not reinforce the training objectives from the initial training regarding escort transfers. As discussed above, the team found that members of the security force had failed to comply with the procedures for escorting visitors. During interviews, the team found that some security personnel did not fully understand all aspects of the procedures for escorting visitors. The Petitioner's concern was substantiated.

Responding to the NRC findings, the Licensee briefed all security officers on the proper way to transfer visitors between escorts and posted signs to remind personnel of escort requirements. The Licensee revised the procedures for escorting visitors and completed training on the new procedures. The NRC Staff concluded that the changes in escort procedures are acceptable. Initial implementation has been satisfactory. The continued implementation will be monitored by the NRC Staff through the routine inspection program.

E. Licensee's Security Force Personnel Willfully and Intentionally Falsified STPEGS Security Documents

During the February 18, 1992 meeting, the Petitioner gave the NRC Staff the date of the alleged willful falsification, a reference to the falsified document, and the identity of the responsible person. The inspection team inspected the subject document, interviewed the involved personnel, and found no indication of the escort record being falsified. The Petitioner's concern was not substantiated.

F. Licensee's Security Force Personnel Willfully Violated STPEGS Security Procedure

As noted in the response to Concern D, examples were found where security personnel were not fully knowledgeable of all aspects of the procedures regarding the escorting of visitors. The staff determined that, for some instances of notification of escort transfer by telephone, security force members did not know that it was the visitors who requested the changes. The security force members documented the transfers because all of the information provided concerning badge numbers and names appeared correct. Some security force members admitted knowing that visitors were requesting changes and did not realize such actions conflicted with specific procedural requirements. It appeared to the NRC inspection team that instances of failure to adhere to procedures by security personnel regarding transfer of escorts resulted from a lack of reinforcement during requalification training, cumbersome procedure, and difficulty in verifying personnel identities on the telephone. However, there were no indications

the actions of the security personnel were willful or that the security personnel intentionally tried to compromise physical security at STP. The Petitioner's concern that security procedures were violated was substantiated. However, the inspection team did not substantiate that the Licensee willfully violated procedures.

The Licensee was first informed of the team's findings on March 13, 1992. On March 27, 1992, the Licensee briefed security officers in the proper way to conduct escort transfers. Subsequently, the Licensee temporarily discontinued visitor access, then made organizational and procedural changes and conducted training on the procedural changes. The corrective actions as described above are considered adequate.

G. Licensee's Employees Willfully and Intentionally Violated STPEGS Security Procedures

The inspection team found instances where employees violated security procedures for controlling visitors. As mentioned earlier, there were instances where the receiving escort telephoned security to transfer a visitor or where visitors telephoned security badging locations at the request of the assigned or new escort to request escort changes. Also, there were instances in the I&C shop when visitors were left within the protected area in the shop while the escorts went to adjacent areas. However, during interviews with plant personnel, it did not appear that there was an effort made to specifically subvert the security procedures, and the special inspection team noted that the personnel believed that they maintained adequate control of their visitors. Instead, the NRC Staff found that employees did not fully comply with procedures because they did not completely understand them or believed that they were complying with the intent of the procedures in escorting their visitors. The inspection team did substantiate that there were procedural violations in this area. However, the team did not substantiate that the procedures were willfully and intentionally violated with the intent to subvert the security at STP. As mentioned previously, the escort procedures have been revised adequately to address the concerns.

H. Your Licensee's Current Work Practices Do Not Provide Reasonable Assurance for the Safe Operation of STPEGS and, Therefore, the Health and Safety of the General Public

The maintenance portion of the special team inspection was in response to Petitioner's Concerns H through L, addressed in this Decision, and specific information obtained during a meeting of February 18, 1992, with the Petitioner regarding other concerns. The inspection team concluded that the Licensee had

established a good maintenance work control process for finding equipment problems, evaluating the effect of these problems on equipment operability and the technical specification limiting conditions for operation, prioritizing work activities, planning work orders, conducting maintenance activities, and closing maintenance work packages. Some personnel did not fully adhere to some procedural requirements as noted previously. However, most of the procedural requirements were being met. The Licensee adequately completed work activities. In general, the personnel interviewed believed that shift turnovers were adequate and that their awareness was enhanced for procedural adherence with regard to procedural requirements for safety-related activities and those requirements that could affect personnel safety. During interviews with some maintenance employees, the inspection team found some evidence of poor morale. This issue was previously discussed in NRC Inspection Report 50-498/91-16, 50-499/91-16. Principal issues adversely affecting maintenance workers' attitudes were the move to a new building, upcoming realignment of and duration of shift schedules, and the perceived limited training opportunities for journeymen. There was no evidence that the concerns had adversely impacted safety-related work. These matters were discussed in general terms with the Licensee's senior management on April 14, 1992. The Petitioner's concern was not substantiated.

Although the maintenance activities described by the Petitioner during the February 18, 1992 meeting were conducted on nonsafety-related systems, the team expressed concern that the Licensee used the same administrative controls for both safety-related and nonsafety-related activities. Carryover problems from nonsafety- to safety-related maintenance have not been identified. Nevertheless, the NRC Staff will continue to monitor Licensee performance in this area as part of the routine inspection program activities.

I. Licensee Employees Are Not Adequately Trained and Knowledgeable of the Current STPEGS Work Process Program (OPGP03-ZA-0090) Revision 3

During the first part of 1992, the Licensee made several changes to its work process program. The principal change was to consolidate into one procedure the various procedures for finding and requesting work activities and for conducting and closing out work packages. The Licensee revised Station Procedure OPGP03-ZA-0090, "Work Process Program," several times. Revision 3 of Station Procedure OPGP03-ZA-0090 became effective January 31, 1992.

During interviews, the I&C technicians described the training as appropriate to meet the course objectives. When completing the training, many I&C technicians believed that they could properly implement the procedural requirements of the maintenance process. However, when called upon to use the procedure,

several I&C technicians said they had to use the maintenance process flow chart (distributed during training) to assist them in implementing the procedure.

To assess the quality of training given regarding this procedure, the inspection team reviewed the procedure, lesson plans used by the instructors, student materials, examinations, and course critiques. The team interviewed instructors, numerous planners, I&C technicians, and supervisory personnel who had received training on the procedure.

In the meeting on February 18, 1992, the Petitioner stated several concerns with training on the Work Process Program Procedure. The Petitioner alleged that the training was insufficient and included incorrect information in some cases, that testing was inadequate, and that instructors did not resolve concerns. The Petitioner objected to the Licensee's definition of "unplanned exposure to radiation" and stated that (1) the Licensee gave incorrect information to the class regarding the composition of lubricants used at the plant, (2) the Licensee's policy of adherence to procedures was vague, and (3) training was inadequate to test the worker's knowledge because the workers were allowed to complete the examination using materials distributed previously.

The inspection team confirmed that the Licensee gave incorrect information regarding the lubricant composition. As part of maintenance equipment qualification training (on January 30, 1992, following Lesson Plan MSS108.01), the class watched a film on the use of lubricants at nuclear power facilities that was produced by the Electric Power Research Institute. The film included a statement that oils consisted of 80 to 98% base oil and the remainder was additive. The examination following the training contained a test question asking the percentage of base oil required at the Licensee's facility. The correct answer, 90%, was not discussed by the instructor during the training. Possible answers to the examination question regarding site-specific requirements included multiple choices that were within the range of values given in the film. Consequently, four to five trainees answered the examination question incorrectly. As a result of student comments on the course critique, the Licensee agreed to take action to emphasize that the information in the film was general and to highlight the site-specific value, which was within the range given in the film.

During interviews, the team found that some individuals did not fully understand the Licensee's policy on procedural compliance. The Petitioner contended that guidance involving instruction on the Licensee's policy of adherence to procedures was vague. Revision 1 of the trainee handout used with Lesson Plan MSS108.01 stated: "Verbatim compliance allows no deviation from procedural steps. . . . Procedural adherence implies meeting the intent. . . . Deviation is expected in cases where: A. Personnel safety B. Equipment safety" [is placed at risk]. No other discussion was included. Workers receiving work process program training had mixed responses when questioned about their understanding of these terms and as to which term

described the policy in effect at the Licensee's facility. While all understood that the Licensee's policy was that there should be procedural adherence, some were not sure about verbatim compliance and one stated that verbatim compliance was expected. Instructors pointed out that the issue was not listed as an objective in that specific training; therefore, no examination questions addressed the issue to test (and document) workers' knowledge of the policy.

In response to the uncertainty of some employees regarding the definitions of procedural compliance and verbatim compliance, the Licensee's Revision 2 of the trainee handout (dated February 28, 1992) expanded the discussion of the terms and defined verbatim compliance as "[a] term used in the past to demand that the performance of steps in a procedure were done exactly as they were written; without deviation," and added, "STPEGS will no longer use the term." It stated: "Field application of procedural adherence implies every individual responsible for independent performance of a procedure controlled task shall meet the intent of the procedure. . . . Anyone SHALL perform the steps of that procedure as written unless such performance would violate the intent of the procedure." These concerns of the Petitioner were substantiated; however, the Licensee took acceptable action to resolve this matter.

The team questioned Licensee personnel, including members of the health physics organization, about the definition of "unplanned exposure," as referred to in the lesson plans. Licensee personnel stated that, while the term had not been explicitly defined, the meaning was clear when considered in the context of the examples of industry events given in the student materials. The team reviewed the industry events described in the student materials and noted that they were consistent with the manner in which the term was applied at the STP. Other workers who had received the training expressed no misunderstandings or concerns regarding this training. The Petitioner's concerns were not substantiated.

With regard to the use of reference materials during examinations, Licensee personnel stated that they designed the examinations to test the ability of the individuals to work within the work control process, not their ability to memorize the procedure. They also stated that if workers have access to references or procedures in the field, it is appropriate to allow them to demonstrate the use of such references during the examination. The NRC Staff considers this testing method to be acceptable.

The team found that, in general, the classroom training on Station Procedure OPGP03-ZA-0090 Revision 3 was appropriate to meet the course objectives, which were based on the procedural requirements. The team did not substantiate the Petitioner's concern that the employees were not adequately trained.

J. Licensee Employees Are Not Adequately Trained and Knowledgeable of the Current STPEGS Maintenance Work Practices and Requirements (OPMP01-ZA-0040) Revision 0

On January 31, 1992, the Licensee implemented Maintenance Procedure OPMP01-ZA-0040, Revision 0, "Maintenance Work Practices and Requirements." This procedure contained the guidelines for conducting corrective and preventive maintenance activities in accordance with applicable site procedures and policies, conducting testing activities after maintenance to verify function and operability, and performing minor maintenance activities.

The procedure included a summary of maintenance practices and requirements and included appropriate references to supporting maintenance programs, supporting procedures, and applicable sections. The training on procedure OPMP01-ZA-0040 was incorporated with the training for OPG03-ZA-0090, which was discussed in the response to Item I, above. The training was found to be appropriate to meet the course objectives, which were based on the procedure requirements.

Two of the I&C technicians interviewed about the requirements and guidance in Maintenance Procedure OPMP01-ZA-0040 could not recall having reviewed the procedure, and the remaining I&C technicians could not recall the details in the procedure. However, I&C technicians demonstrated that they understood the program requirements referenced in the procedure, including the requirements for equipment clearance orders, configuration control, and plant labeling. The concern of the Petitioner that employees were not adequately trained and knowledgeable with regard to this procedure was not substantiated.

K. Licensee Employees Are Not Adequately Trained and Knowledgeable of the Current STPEGS Planner's Guide, Revision 0

The Licensee issued the Planner's Guide to enhance the maintenance program. The guide was not required by the NRC and was not a controlled document. The Licensee developed the Planner's Guide to document good practices, guidance, and reference material in the different maintenance disciplines for performance standards, the planning and writing of work documents, material requirements, computer applications available to planners, and scheduling and expediting.

During informal group meetings, supervisors would instruct I&C technicians in using the Planner's Guide and Station Procedure OPGP03-ZA-0090 in writing work packages. The I&C technicians would review selected areas by reading them and discussing them in groups. Many I&C technicians noted that the work packages were more uniform since the Licensee implemented the Planner's Guide. All the individuals interviewed indicated that the Licensee had increased

the detail in the work instructions. While some believed that the increased detail limited use of the "skill of the craft," many believed that management had done this to reduce the number of personnel errors. The inspection team found that there was more consistent use of cautionary statements in work packages than before implementation of the Planner's Guide.

The Licensee's managers established maintenance planning expectations, one of which was that the planners would "walk down" the work orders as part of the planning process for safety-related and most other work packages. I&C technicians noted seeing planners more frequently in the plant and indicated that the quality of the work packages had improved. This indicated the successful use of the Planner's Guide.

NRC does not require use of the Planner's Guide, which was developed to enhance the maintenance process. Although the Guide was not a controlled document, the Licensee appeared to be using it to improve maintenance. The Licensee provided acceptable training on the document and used it properly.

Training and knowledge of the STP Planner's Guide is not required. The Planner's Guide was being implemented at STP and appeared to be enhancing the maintenance process. This concern was not substantiated.

L. Licensee Employees Are Engaged in Continuing Work Practices That Are in Violation of the STPEGS Work Process Program (OPGP03-ZA-0090) Revision 3

In implementing the work process program, the Licensee at times did not comply with its procedures. As mentioned in the introductory portion of the Discussion, examples included work start authority not obtained before work packages were given to crafts people, inadequate use of configuration control change log, and not following procedure regarding signing onto work orders. However, the majority of the procedural requirements were being met. Further, with one exception (the boric acid tank level transmitter calibration), the maintenance for the work packages reviewed was performed on nonsafety equipment (e.g., equipment not required for safe shutdown of the plant, mitigation of accidents, or equipment that could affect offsite radiological exposure to the public). During its inspection, the inspection team determined that because of the administrative nature of deficiencies in procedure implementation coupled with the application to nonsafety equipment, it did not find indications of a compromise in the quality of work or of a threat to the public health and safety. The Licensee identified the need to make some improvements through its own evaluations. Before the special inspection, the Licensee had issued Revision 4 to the procedure to address several implementation difficulties. To clarify the maintenance process, the Licensee issued Revision 5 to OPGP03-ZA-0090 in

July 1992. The inspection team found no evidence that current work failed to adhere to the maintenance work process program.

III. CONCLUSION

In responding to the concerns raised by the Petitioner, the NRC Staff conducted a special team inspection.

The NRC special inspection team concluded that training for both the plant employees and the security personnel was appropriate although the security requalification training did not address escort transfers. However, the team did substantiate some of the Petitioner's concerns. The Licensee did not adequately implement the procedures for controlling visitors, and particularly those for escorting visitors. The team concluded that procedures governing the transfer of visitor escorts were not always followed, visitor control in the I&C shop area was sometimes not rigorous, and, in one instance, an escort exited the protected area ahead of a visitor. These conclusions prompted the NRC to issue a Notice of Violation to the Licensee. The team did not substantiate the Petitioner's concerns that security documents had been intentionally falsified and that Licensee personnel (both general and security) willfully violated security procedures. The violations that were cited did not indicate a programmatic breakdown of security and did not significantly compromise the security at STP. Responding to the inspection team's findings, the Licensee took corrective actions that appear to be acceptable.

In reviewing the maintenance program, the NRC Staff concluded that the Licensee had a good maintenance work control program and appropriate training. However, there were two instances (oil composition and procedural adherence) that were identified by the Petitioner, where instructional information presented in the classroom was confusing. The Licensee made changes to the lesson plans to clarify the information. The inspection team did recommend to the Licensee a refinement of the methods for reviewing course content to ensure that conflicting or inadequate information was not presented to workers. The team reviewed the implementation of maintenance procedures and found that the implementation was done in general compliance with the procedures. However, the team did find examples of less than full compliance in the implementation of maintenance procedures as applied to nonsafety equipment and substantiated some of the Petitioner's concerns. The examples of less than full compliance with procedures were essentially administrative in nature. Because they were administrative in nature or were applied to equipment not required for safe shutdown of the plant, mitigation of an accident, or equipment that could affect offsite radiological releases, there were no violations of regulatory requirements associated with the affected maintenance activities. The NRC Staff did note a

concern that the same administrative controls on procedural compliance were in place for both safety and nonsafety maintenance. However, the NRC Staff has not found instances where maintenance on safety equipment has been compromised as a result of the commonly applied administrative procedures. In response to its own findings as well as those of the inspection team, the Licensee took actions to resolve these matters. Several implementation difficulties were addressed in Revision 4 to OPG03-ZA-0090 (April 1992). Revision 5 to OPG03-ZA-0090 was issued in July 1992 to improve usage of the procedure. Training on the new revision was also conducted in July. The actions appear to be acceptable. Routine inspection of maintenance activities at STP by the NRC Staff will continue on an ongoing basis and will monitor the implementation of the new revision as well as the general conduct of maintenance at the site.

Several of the Petitioner's concerns were substantiated. When informed of the concerns, the Licensee took corrective action to revise procedures and retrain employees, as needed, in the proper implementation of the procedures.

The institution of proceedings pursuant to 10 C.F.R. § 2.202, as requested by the Petitioner, is appropriate only where substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975), and *Washington Public Power System* (WPPS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). As discussed above, there is reasonable assurance the South Texas Project, Units 1 and 2, are being operated with adequate protection of the public health and safety. Therefore, I find no basis for instituting a proceeding pursuant to section 2.202 to modify, suspend, or revoke the NRC licenses held by HL&P in the areas stated by the Petitioner. This Decision is based on the minimal safety significance of the concerns stated by the Petitioner and substantiated and the adequacy of corrective actions initiated by the Licensee. For these reasons also, I have concluded that it is not necessary for the NRC to cause the Licensee to revoke all escorted access at the South Texas site or for the NRC to cause the Licensee to invoke an immediate stand-down of all maintenance activities, as requested by the Petitioner. To this extent, I have decided to deny the Petitioner's request for action pursuant to 10 C.F.R. § 2.206.

However, the Petitioner also requested that the NRC take swift and immediate actions to cause the Licensee to comply with facility technical specifications and procedures and to ensure adequate procedures and training in the areas of physical security and maintenance. Based on the NRC inspection activities discussed above, which substantiated a number of the concerns raised by the Petitioner, a Notice of Violation was issued to the Licensee to provide assurance that the Licensee will comply with regulatory requirements. In addition, in response to the NRC inspection findings, the Licensee temporarily discontinued all visitor access at South Texas, revised procedures and conducted additional

training of its staff in the physical security and maintenance areas. To this extent, the Petitioner's request for action pursuant to section 2.206 has been granted.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 5th day of October 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gall de Planque

In the Matter of

Docket No. 30-31758-EA
(Byproduct Material License
No. 34-26201-01)

RANDALL C. OREM, D.O.

November 2, 1992

The Commission directs the Staff to answer a question pertaining to Staff's rationale for assenting to a term of a settlement agreement between Staff and the Licensee which would resolve and terminate a license revocation proceeding. Pending further order, the Commission continues the time within which it may review the Licensing Board's order, LBP-92-18, 36 NRC 93 (1992), approving the settlement agreement.

MEMORANDUM AND ORDER

The Atomic Safety and Licensing Board has approved a settlement agreement submitted by the Nuclear Regulatory Commission (NRC) Staff and Dr. Randall C. Orem and, absent Commission review, has thereby terminated the enforcement proceeding in which these two parties were engaged. LBP-92-18, 36 NRC 93 (1992); *see* 10 C.F.R. § 2.203 (1992). The Licensing Board's order is presently pending before the Commission for possible review in accordance with 10 C.F.R. § 2.786(a) (1992).

The proceeding was initiated upon Dr. Orem's request for a hearing on Staff's order revoking Dr. Orem's materials license. *See* 56 Fed. Reg. 63,986 (Dec.

6, 1991). As described in the order, the Staff had discovered that Dr. Orem's original application for the license contained inaccurate information concerning the existence of a facility at which he proposed to use and store radioactive material and that the listed location of the facility was a personal residence. According to the order, the Staff sought revocation of the license, because Staff would not have issued the license if Staff had known that the Applicant's proposed facility was a private residence and did not have adequate facilities for the safe receipt, handling, and storage of radioactive material. *Id.* at 63,987. Dr. Orem did not contest the basic facts that the listed facility location was his personal residence and that the facility described in his application did not exist.

While the proceeding was pending, the Staff also initiated an investigation into the circumstances surrounding Dr. Orem's submission of inaccurate information on his application. The Licensing Board granted Dr. Orem's motion for a continuance of the instant proceeding pending the outcome of the investigation or until July 1, 1992. On June 15, 1992, the Staff submitted a status report to the Board indicating that its investigation was continuing. Shortly thereafter, on July 1, 1992, the Staff reported that the investigation was nearly complete and that no referral would be made to the Department of Justice. The parties submitted their joint motion for settlement to the Board on July 28, 1992.

According to the settlement agreement, the NRC Staff has decided not to take any further action against Dr. Orem. Settlement Agreement at 2. In addition, paragraph 4 of the agreement contains the following stipulation:

The NRC staff agrees that none of the facts associated with this proceeding will be held against him in the event Dr. Orem submits another application for a specific license on his own behalf or a license amendment application is submitted to name Dr. Orem as an authorized user. If such application is in compliance with the Atomic Energy Act and the Commission's regulations, such application shall be granted.

Id. at 3.

Staff has not provided an explanation for agreeing to forgo further action against Dr. Orem, and such reasons are not readily apparent from the settlement agreement or the record of this proceeding. Therefore, in order to assist the Commission in determining whether to take review of the Licensing Board's order approving the settlement agreement, the Staff is directed to answer the following question:

What are Staff's reasons for agreeing not to pursue any further action against Dr. Orem, including its agreement not to hold the facts associated with this proceeding against Dr. Orem in the event that he submits another application for a license?

Staff shall file its answer to this question on or before November 16, 1992.

The time within which the Commission may review the Licensing Board's order (LBP-92-18) approving the settlement agreement is hereby continued pending further order.

Commissioner Remick disapproved this Order.

It is so *ORDERED*.

For the Commission¹

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 2d day of November 1992.

¹Commissioners Rogers and Remick were not present for the affirmation of this Order. If Commissioner Rogers had been present, he would have approved the Order; if Commissioner Remick had been present, he would have disapproved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

G. Paul Bollwerk, III, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket No. 70-135-DCOM
(ASLBP No. 92-667-03-DCOM)
(Decommissioning Plan)
(Materials License No. SNM-145)

BABCOCK AND WILCOX
(Apollo, Pennsylvania Fuel
Fabrication Facility)

November 12, 1992

In this informal adjudication under 10 C.F.R. Part 2, Subpart L, the Presiding Officer denies the Petitioners' request to stay ongoing decommissioning activities as (1) untimely, and (2) failing to satisfy the four-factor test for stays specified in 10 C.F.R. §§ 2.788, 2.1263.

**RULES OF PRACTICE: INFORMAL HEARINGS (STAY OF
AGENCY LICENSING ACTION); STAY OF AGENCY ACTION
(LICENSING)**

As 10 C.F.R. § 2.1205(f) makes clear, for a requested materials (or reactor operator) licensing action that is subject to challenge in a Subpart L informal adjudication, the pendency of a hearing request or an ongoing proceeding does not preclude the Staff (acting under its general authority delegated by the Commission, see NRC Manual, ch. 0124-032) from granting a requested licensing action effective immediately. As a counterbalance, section 2.1263 provides that if a requested licensing action is approved and is made effective immediately by

the Staff, then any participant in an ongoing informal adjudication concerning that action can request that the presiding officer stay the effectiveness of the licensing action.

RULES OF PRACTICE: INFORMAL HEARINGS (TIMELINESS OF REQUEST FOR STAY OF AGENCY LICENSING ACTION); STAY OF AGENCY ACTION (TIMELINESS OF REQUEST)

Section 2.1263 specifies that a stay request must be submitted promptly, at the later of either (1) the time a hearing or intervention petition is due to be filed, or (2) 10 days from the Staff's grant of the requested licensing action. The first time limit generally applies if a Staff licensing action is taken more than 10 days before a hearing or intervention petition is due to be filed.

RULES OF PRACTICE: INFORMAL HEARINGS (TIMELINESS OF REQUEST FOR STAY OF AGENCY LICENSING ACTION); STAY OF AGENCY ACTION (TIMELINESS OF REQUEST)

The application of the time limits in 10 C.F.R. § 2.1263 for filing a stay request presumes that a hearing petitioner or intervenor has some kind of reasonably prompt notice, either actual or constructive, that a contested request for licensing action has been approved and made effective. *Compare* 10 C.F.R. § 2.1205(c)(2).

RULES OF PRACTICE: EXTENSIONS OF TIME; INFORMAL HEARINGS (EXTENSIONS OF TIME)

A presiding officer's determination to permit a hearing petition concerning a licensing action to be supplemented does not automatically extend the time for filing a stay request regarding that action. A litigant that wishes to extend the time for making a filing must do so by making an explicit request. *See* 10 C.F.R. §§ 2.711, 2.1203(d).

RULES OF PRACTICE: INFORMAL HEARINGS (CRITERIA FOR STAY OF AGENCY LICENSING ACTION); STAY OF AGENCY ACTION (CRITERIA)

The standard for obtaining a stay, which is set forth in 10 C.F.R. § 2.788 and is incorporated into the Subpart L Rules of Practice by section 2.1263, specifies that the movants must demonstrate (1) a strong showing that they are likely to prevail on the merits; (2) that unless a stay is granted they will be irreparably

injured; (3) that the granting of the stay will not harm other parties; and (4) where the public interest lies.

RULES OF PRACTICE: INFORMAL HEARINGS (STAY OF AGENCY LICENSING ACTION); STAY OF AGENCY ACTION

In addressing the stay criteria, a litigant must come forth with more than general or conclusory assertions in order to demonstrate its entitlement to relief. *See United States Department of Energy (Clinch River Breeder Reactor Plant)*, ALAB-721, 17 NRC 539, 544 (1983).

RULES OF PRACTICE: INFORMAL HEARINGS (STAY OF AGENCY LICENSING ACTION); STAY APPLICATION

In stay litigation, the participants should use affidavits to support any factual presentations that may be subject to dispute. *See* 10 C.F.R. § 2.788(a)(3).

RULES OF PRACTICE: INFORMAL HEARINGS (STAY OF AGENCY LICENSING ACTION); STAY OF AGENCY ACTION

Because no one of the four stay criteria, of itself, is dispositive, the strength or weakness of a movant's showing on a particular factor will determine how strong its showing must be on the other factors. *See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-820, 22 NRC 743, 746 n.8 (1985).

RULES OF PRACTICE: INFORMAL HEARINGS (STAY OF AGENCY LICENSING ACTION — IRREPARABLE INJURY); STAY OF AGENCY ACTION (IRREPARABLE INJURY)

The second stay factor — irreparable injury — is so central that failing to demonstrate irreparable injury requires that the movant make a particularly strong showing relative to the other factors. *See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, CLI-90-3, 31 NRC 219, 260 (1990).

RULES OF PRACTICE: INFORMAL HEARINGS (STAY OF AGENCY LICENSING ACTION — LIKELY TO PREVAIL ON THE MERITS); STAY OF AGENCY ACTION (LIKELY TO PREVAIL ON THE MERITS)

A movant's reliance upon a listing of areas of concern in its hearing petition, along with the otherwise unexplained assertion that it expects to prevail on those issues, is inadequate to meet its burden under the first stay criteria to establish a likelihood of success on the merits. *See Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 270 (1990).

RULES OF PRACTICE: INFORMAL HEARINGS (STAY OF AGENCY LICENSING ACTION); STAY OF AGENCY ACTION

A movant's failure to make an adequate showing relative to the first two stay criteria makes an extensive analysis of the third and fourth factors unnecessary. *See Long Island Lighting Co.* (Shorcham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985).

RULES OF PRACTICE: INFORMAL HEARINGS (STAY OF AGENCY LICENSING ACTION — ECONOMIC HARM); STAY OF AGENCY ACTION (ECONOMIC HARM)

An applicant's showing regarding extensive, additional financial expenditures it must make if a stay is granted is a relevant consideration under the third stay criterion — harm to other parties. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985).

MEMORANDUM AND ORDER
(Denying Petitioners' Request for Immediate
Cessation of Site Cleanup Activities)

This informal adjudicatory proceeding has been convened under 10 C.F.R. Part 2, Subpart L, to consider the challenges of individual petitioners Cynthia Virostek, Virginia Trozzi, William Whitlinger, and Helen and James Hutchison (Petitioners) to an amendment sought by Babcock & Wilcox (B&W) for the 10 C.F.R. Part 70 license of its nuclear fuel fabrication facility in Apollo, Pennsylvania. The requested amendment, which the NRC Staff approved and made effective on June 25, 1992, authorizes B&W to decommission its Apollo

site in accordance with the B&W-prepared Apollo Decommissioning Plan, Rev. 2 (May 11, 1992, as supplemented May 19 and 22, 1992, and June 11, 1992).

In a recent filing supplementing their initial hearing request, the Petitioners ask that an order be issued requiring that B&W immediately cease its ongoing cleanup activities at the Apollo site. For the reasons detailed herein, the Petitioners' request for a stay of B&W's decommissioning authorization is denied.

I. BACKGROUND

By notice issued on June 18, 1992, the Staff declared that it was considering issuing a Licensee-requested amendment permitting extensive decommissioning activities at B&W's Apollo facility and that interested persons could request a hearing relative to the pending amendment within 30 days of publication of the notice in the *Federal Register*.¹ On June 25, 1992, the same day that the notice regarding the pending amendment request was published, the Staff issued the amendment, effective immediately. This license revision, denoted Amendment No. 21, authorizes B&W to conduct decommissioning activities at the site consistent with its previously submitted Apollo Decommissioning Plan.

On July 27, 1992, the Petitioners, both individually and as the apparent representatives of an organization called Save Apollo's Future Environment (SAFE), filed a hearing request challenging the proposed licensing action. In an August 11, 1992 response to the hearing request, B&W argued that the petition should be dismissed because the Petitioners and SAFE lacked standing to intervene and had failed to present any "areas of concern . . . germane to the subject matter of the proceeding" in accordance with 10 C.F.R. § 2.1205(g). Thereafter, at the Presiding Officer's request, the Petitioners and SAFE, B&W, and the Staff (which pursuant to 10 C.F.R. § 2.1213 had declared its intention to be a party to the proceeding) addressed the issue of the Presiding Officer's authority under Subpart L to permit supplementation of a hearing request. After reviewing those filings, the Presiding Officer on September 4, 1992, issued a memorandum and order (LBP-92-24, 36 NRC 149) that permitted SAFE and the Petitioners to amend or supplement their hearing request by October 9, 1992, and provided B&W and the Staff with an opportunity to respond to any supplemental filing by October 26, 1992.

In their October 9, 1992 hearing petition supplement, the Petitioners, now without SAFE,² have attempted to describe more completely the grounds sup-

¹ See 57 Fed. Reg. 28,539 (1992).

² In their supplement, the Petitioners declare that because they comprise the active members of SAFE, there is no reason for SAFE to continue as a party and, therefore, it is being dropped as a participant. See Supplement to Petitioners' Request for Hearing and Request to Immediately Cease Site Cleanup Activities (Oct. 9, 1992) at 1 [hereinafter Petitioners' Hearing Petition Supplement].

porting their individual standing to intervene in this proceeding as well as establish that the twenty-some-odd "areas of concern" they wish to litigate are germane to this proceeding. They also declare, without further elaboration, that because the issues they wish to raise are "significant," it is appropriate that the Presiding Officer order an immediate halt to further cleanup activities at the Apollo site pending resolution of these matters.³

By order dated October 16, 1992 (unpublished), the Presiding Officer directed that B&W and the Staff respond to that portion of the Petitioners' hearing petition supplement requesting a stay of decommissioning activities. In their October 21 responses,⁴ B&W and the Staff both assert that the request should be denied as untimely under 10 C.F.R. § 2.1263, and as failing to address the four factors necessary to obtain a stay, as specified in 10 C.F.R. § 2.788. In addition, both B&W and the Staff represent that, as a result of the ongoing decommissioning work authorized by the grant of the amendment in June, at least 60% of the cleanup work has been completed, with the possibility that all significant decommissioning activities at the Apollo site will be finished by the end of 1992.

On October 26, 1992, the Presiding Officer convened a telephone conference with the participants regarding the pending stay request.⁵ During that conference, the Presiding Officer determined that the Petitioners would be permitted to file a reply to the B&W and Staff responses in opposition to their stay request. Additionally, given the conclusory nature of the initial statements presented by the Petitioners in support of their stay request, the Presiding Officer granted the requests of B&W and the Staff to respond to any additional information and arguments provided by the Petitioners in their replies.

In an October 29 filing, the Petitioners assert that their stay request was timely and that the criteria in section 2.788 support the issuance of a stay.⁶ In their November 5 responses (as supplemented on November 9 by additional information provided pursuant to the Presiding Officer's November 6 request), B&W and the Staff continue to maintain that the Petitioners' stay request should be denied as untimely and as failing to meet the section 2.788 criteria.⁷

³ *Id.* at 10.

⁴ See Licensee's Opposition to Petitioners' Request for Stay (Oct. 21, 1992) [hereinafter Licensee's Response]; NRC Staff Response to Petitioners' Request to Immediately Cease Site Cleanup Activities (Oct. 21, 1992) [hereinafter Staff's Response].

⁵ See Tr. 1-45.

⁶ See Petitioners' Reply to Opposition Responses Requesting Immediate Cessation of Cleanup Activities (Oct. 29, 1992) [hereinafter Petitioners' Reply].

⁷ See Licensee's Response to Petitioners' Supplemental Replies (Nov. 5, 1992) [hereinafter Licensee's Reply]; NRC Staff Response to Petitioners' Replies Supplementing Petitioners' Request to Immediately Cease Site Cleanup Activities (Nov. 5, 1992) [hereinafter Staff's Reply]; Licensee's Answer to Presiding Officer's Question (Nov. 9, 1992) [hereinafter Licensee's Answer]; NRC Staff Response to Presiding Officer's November 6, 1992 Memorandum and Order (Requesting Information) (Nov. 9, 1992) [hereinafter Staff's Answer].

II. DISCUSSION

A. Timeliness of the Petitioners' Stay Request

Both B&W and the Staff rely upon the language of 10 C.F.R. § 2.1263 to establish that the Petitioners' stay request, which was filed on October 9 by posting it in the regular mail, was out of time. That section provides in pertinent part:

Applications for a stay of any decision or action of the Commission, a presiding officer . . . or any action by the NRC staff in issuing a license in accordance with § 2.1205(f) are governed by § 2.788, except that any request for a stay of staff licensing action pending completion of an adjudication under this subpart must be filed at the time a request for a hearing or petition to intervene is filed or within ten (10) days of the staff's action, whichever is later.⁸

Applicant B&W and the Staff maintain that because License Amendment No. 21 was issued on June 25, the language of section 2.1263 mandates that any request by Petitioners to stay that amendment's effectiveness had to be filed on July 27 with their original hearing petition. In response, the Petitioners assert that the opportunity afforded them to supplement their hearing petition had the effect of extending the time within which they could file a stay request. In their replies, both B&W and the Staff assert that the Petitioners never requested an extension of the time for filing their stay request and that the Presiding Officer's discretionary action allowing them to provide additional information relative to their hearing petition did not have the effect of extending the time for filing a stay request.

As 10 C.F.R. § 2.1205(f) makes clear, for a requested materials (or reactor operator) licensing action that is subject to challenge in a Subpart L informal adjudication, the pendency of a hearing request or an ongoing proceeding does not preclude the Staff (acting under its general authority delegated by the Commission, see NRC Manual, ch. 0124-032) from granting a requested licensing action effective immediately. As a counterbalance, section 2.1263 provides that if a requested licensing action is approved and is made effective immediately by the Staff, then any participant in an ongoing informal adjudication concerning that action can request that the presiding officer stay the effectiveness of the licensing action. Section 2.1263 specifies that a stay request must be submitted promptly, at the later of either (1) the time a hearing or intervention petition is

⁸ 10 C.F.R. § 2.1263. Section 2.1205(f) referenced in section 2.1263 provides that "[t]he filing or granting of a request for a hearing or petition for leave to intervene need not delay NRC staff action regarding an application for a licensing action covered by this subpart." Essentially, this authorizes the Staff to grant and make immediately effective a requested materials (or reactor operator) licensing action without awaiting the conclusion of any adjudicatory proceeding that may be convened regarding that action.

due to be filed, or (2) 10 days from the Staff's grant of the requested licensing action.

The first time limit in section 2.1263 generally applies if a Staff licensing action is taken more than 10 days before a hearing or intervention petition is due to be filed. On its face, therefore, section 2.1263 requires that a request for a stay of Amendment No. 21 should have been filed on July 27, 1992, the date a hearing petition regarding the amendment was due.⁹ Further, assuming that a presiding officer has the authority to extend the time within which a section 2.1263 stay request must be filed,¹⁰ there is no merit to the Petitioners' argument that a presiding officer's determination to permit supplementation of a hearing petition concerning a licensing action extends the time for filing a stay request regarding that action. A litigant that wishes to extend the time for making a filing must do so by making an explicit request.¹¹ Accordingly, the Petitioners cannot correct their failure to apply for a filing extension relative to their stay request by trying to tie it to another, unrelated request for relief.

B. Sufficiency of the Petitioners' Stay Request

The Petitioners' failure to submit a timely stay request is sufficient grounds, in and of itself, to deny their petition. Alternatively, the Petitioners' request can be denied as insufficient to satisfy their substantive burden under the four-pronged standard governing the grant of a stay.

This standard, which is set forth in 10 C.F.R. § 2.788 and is incorporated into the Subpart L Rules of Practice by section 2.1263, specifies that in order to obtain a stay, the movants, i.e., the Petitioners, must demonstrate (1) a strong showing that they are likely to prevail on the merits; (2) that unless a stay is granted they will be irreparably injured; (3) that the granting of the stay will not harm other

⁹ The application of the time limits in 10 C.F.R. § 2.1263 presumes that a hearing petitioner or intervenor has some kind of reasonably prompt notice, either actual or constructive, that a contested request for licensing action has been approved and made effective. Compare 10 C.F.R. § 2.1205(c)(2). Because the June 25, 1992 *Federal Register* notice indicated only that the Staff was considering whether to grant the B&W request for an amendment, see 57 Fed. Reg. at 28,539, it is not readily apparent when the Petitioners had notice of the issuance of Amendment No. 21 so as to trigger the section 2.1263 time limits for filing a stay. As it turns out, however, this notice question need not be resolved here because the Petitioners have made no challenge to those time limits based upon a lack of notice of the Staff's licensing action. Moreover, resolving this notice question would not effect the disposition of the Petitioners' stay request because they have been afforded a full opportunity to make a substantive showing on the merits of their request and, as is described *infra*, have failed to sustain their burden in order to obtain a stay.

¹⁰ See 10 C.F.R. §§ 2.711, 2.1203(d).

¹¹ As is reflected in a September 28, 1992 letter from petitioner Virostek to the Office of the Secretary that was recently referred to the Presiding Officer, petitioner Virostek apparently is aware that a filing extension request must be specific. In her September 28 letter, she makes reference to a July 21, 1992 letter requesting an extension of the time for filing a hearing petition regarding B&W's license amendment request. The referenced request for an extension of the hearing petition filing date, which is moot because Ms. Virostek and the other Petitioners filed their hearing petition in late July, apparently makes no mention of suspending licensed activities or extending the time for filing such a stay request.

parties; and (4) where the public interest lies. In addressing these stay criteria, a litigant must come forth with more than general or conclusory assertions in order to demonstrate its entitlement to such relief.¹² Further, because no one of the four stay criteria, of itself, is dispositive, the strength or weakness of a movant's showing on a particular factor will determine how strong its showing must be on the other factors.¹³

This latter point is particularly significant in the case of the second stay factor, which has been held to be so central that failing to demonstrate irreparable injury requires that the movant make a particularly strong showing relative to the other factors.¹⁴ In this instance, the Petitioners' stay request is substantially undermined by their failure to establish that the injury they allege they will suffer is both "great and certain."¹⁵

The Petitioners first assert that they are irreparably injured so long as the "illegal 'cleanup plan' is permitted to continue,"¹⁶ and rely upon the "areas of concern" set forth in their hearing request, as supplemented,¹⁷ as evidence that in various respects the B&W decommissioning plan is deficient and that the NRC has failed to implement assorted federal and state environmental and public health statutes. As B&W and the Staff note, these conclusory statements of potentially litigable issues clearly are insufficient to establish any kind of irreparable injury.¹⁸

The Petitioners also claim that they are being irreparably injured because the physical removal and alternation of the soil and other site materials, and their concomitant exposure to contaminants from the cleanup work, cannot be undone.¹⁹ They have, however, failed to provide any support for this asserted injury. Instead, B&W has put forth uncontroverted evidence indicating that any

¹² See *United States Department of Energy* (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983).

As B&W points out, see Licensee's Reply at 4, the Rules of Practice also indicate that in stay litigation the participants should use affidavits to support any factual presentations that may be subject to dispute. See 10 C.F.R. § 2.788(a)(3). See also Tr. 12-13. The Petitioners have submitted their reply information without affidavits. While their reliance upon unsworn factual information might be an additional ground for rejecting certain of their claims, as is detailed *infra*, even with this information the Petitioners' have failed to demonstrate that they are entitled to a stay.

¹³ See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985).

¹⁴ See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLJ-90-3, 31 NRC 219, 260 (1990).

¹⁵ See *Perry*, ALAB-820, 22 NRC at 747.

¹⁶ Petitioners' Reply at 2.

¹⁷ See Petitioners' Hearing Petition Supplement at 2-9.

¹⁸ Whether the concerns specified in the Petitioners' hearing petition are adequate to meet the requirement in 10 C.F.R. § 2.1205(g) that they must allege matters "germane" to this proceeding has not yet been resolved. This is, however, a very different question from whether their concerns as stated are adequate, without more, to establish irreparable injury sufficient to justify a stay.

¹⁹ See Petitioners' Reply at 2.

releases from its cleanup activities have been within regulatory limits.²⁰ Thus, on the cardinal factor of irreparable injury, the Petitioners have failed to meet their burden.²¹

The first factor — the likelihood of success on the merits — presents the same problem for the Petitioners. Certainly, their reliance in their October 9 stay request upon the list of concerns in their hearing petition, along with the otherwise unexplained assertion that they expect to prevail on those issues,²² is inadequate to meet their burden to establish a likelihood of success on the merits.²³

Nor do they meet their burden by the marginally more detailed discussion of some of these areas of concern set forth in their October 29 reply. In an effort to establish that Amendment No. 21 was authorized in violation of the National Environmental Policy Act of 1969 (NEPA),²⁴ the Petitioners first allege that the Staff improperly failed to complete a full environmental impact statement (EIS) prior to decommissioning. Yet, contrary to their assertion that the Staff's noncompliance with NEPA is "clear,"²⁵ it is not apparent that the Staff's choice to prepare an environmental assessment (EA) rather than an EIS violated the controlling regulatory standards in 10 C.F.R. §§ 51.20, 51.21.

The Petitioners' additional attempt to bolster their claim of NEPA deficiencies by contending that the Staff's EA failed to characterize offsite contamination properly also falls far short of the mark. As proof of their mischaracterization assertion, the Petitioners offer as an exhibit sampling documentation from the Pennsylvania Department of Environmental Resources (PADER) that they maintain shows radiological contamination in local sewer lines.²⁶ They also have submitted sampling documentation from the Pennsylvania Bureau of Laboratories that they allege shows radiological contamination on the property of petitioner Virostek and another local citizen located near the facility.²⁷ As the B&W and Staff responses detail, however, the Petitioners' sampling documentation exhibit designed to show inadequate characterization of sewer line contamination apparently indicates nothing more than the presence of naturally occurring uranium or atomic weapons testing-related cesium at the local sewage treatment

²⁰ See Licensee's Response at 6; Licensee's Reply at 11.

²¹ The Petitioners' ability to make an adequate showing relative to this factor undoubtedly has been made more difficult by their failure to act promptly to request a stay. Because the decommissioning work has been going on for some time and has not, as B&W has shown without contradiction, been the source of any releases above regulatory limits, see *supra* note 20 and accompanying text, the Petitioners were confronted with an even harder task establishing that the continuation of those activities will cause them injury, irreparable or otherwise.

²² See Petitioners' Hearing Petition Supplement at 10.

²³ See *Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility)*, ALAB-928, 31 NRC 263, 270 (1990).

²⁴ 42 U.S.C. § 4321 *et seq.*

²⁵ Petitioners' Reply at 1.

²⁶ *Id.*, Exh. A.

²⁷ *Id.*, Exh. B.

plant.²⁸ So too, as the Staff's response demonstrates, the radiation analyses the Petitioners put forth to show contamination on local offsite property can be satisfactorily explained in terms of naturally occurring uranium or cesium deposition resulting from atomic weapons testing.²⁹ Consequently, neither of these exhibits is sufficient to establish their likelihood of success on the merits regarding NEPA or other regulatory violations.

Also on the issue of compliance with NEPA, the Petitioners maintain that "several hazardous chemicals have been found on site exceeding [Environmental Protection Agency (EPA)] Standards,"³⁰ and that this, along with the recent unearthing of drums of unidentified waste, demonstrates that the NRC has failed to conduct an adequate assessment or to obtain the assistance of other federal and state agencies to ensure that chemical contamination is properly assessed and cleaned up. The Petitioners, however, have provided no substantiation for their statement about the existence of "hazardous chemicals," other than their reference to the recently excavated drums of chemicals. And with respect to these materials found during excavation of a former industrial facility adjacent to the B&W site, B&W indicates that they are being tested, PADER is being kept fully aware of the sampling results, and any hazardous materials can be dealt with under the contingency measures specified in the decommissioning plan for handling chemical wastes.³¹ Again, the Petitioners have failed to provide sufficiently compelling information to establish the likelihood they will prevail on the merits regarding purported NEPA violations.

As their final example of NEPA-related violations regarding the decommissioning amendment, the Petitioners assert that the EA inadequately discusses alternatives to the decommissioning methods set forth in the proposed cleanup plan. On the matter of decommissioning alternatives, the EA declares:

Alternative soil decontamination methods using chemical or mechanical means were considered, but there is no laboratory or industrial scale experience that would suggest that chemical or mechanical methods could achieve the desired level of soil cleanup for the Apollo site.

The NRC Staff also examined the details of the proposed action searching for alternative methods for implementing the basic digging, deconstruction, and crushing strategy.

²⁸ See Licensee's Reply at 6; Staff's Reply at 8-9. In this regard, B&W provides evidence that the information the Petitioners provide on supposed sewage treatment plant contamination has previously been considered by responsible officials in the Pennsylvania Department of Environmental Resources (PADER) and found to be attributable to natural causes rather than the Apollo facility. See Licensee's Reply, Attach. 2.

²⁹ See Staff's Reply at 9. Although the Staff's November 9 supplemental response recognizes there may be some lingering question about the possibility of uranium contamination relative to one of the samples, see Staff's Answer, Affidavit of Dr. Jerry J. Swift Responding to Presiding Officer's November 6, 1992 Memorandum and Order (Requesting Information) at 2-4, as B&W points out, the validity of the sampling methods used creates some doubt about the validity and significance of the results from the analyses of those samples, see Licensee's Answer at 4.

³⁰ Petitioners' Reply at 2.

³¹ See Licensee's Reply at 9 & n.10.

No alternatives were identified that warranted investigation given the minimal impacts of the proposed action.³²

In the face of this statement on alternatives, in order to sustain their burden the Petitioners had to provide some indication of particular alternative decommissioning methods that the Staff should have considered. By failing to do so, they have not demonstrated a likelihood of success on this issue either.

Finally, in an attempt to demonstrate that the Petitioners are likely to prevail on their arguments that the decommissioning process is being conducted improperly so as to be hazardous to local citizens and the environment, Petitioners James and Helen Hutchison provided a series of twenty-four photographs of the site taken at various times between August 15 and October 24, 1992. Among the deficiencies in the decommissioning work the photos allegedly highlight are failure to cover contaminated materials on site while they are being hauled by truck and stored in piles; failure to take proper measures to contain dust from the demolition and decontamination of the former main processing building; gaps in the security fencing surrounding the site; rail cars loaded with contaminated materials that are located too close to nearby residential/commercial property and/or a main highway; and operation of smashing and crushing equipment without adequate dust control measures. Applicant B&W, however, has countered with an explanation for each photograph demonstrating that the purported problems are, in all significant respects, attributable to the Petitioners' misunderstanding or misinterpretation of the situations pictured.³³ In this light, the photographs are not the kind of solid evidence necessary to establish a likelihood of success on the merits.

The Petitioners thus have not made an adequate showing relative to the first two factors. This arguably makes an extensive analysis of the third and fourth factors unnecessary.³⁴ Nonetheless, as to each, the Petitioners have failed to show that they support the imposition of a stay.

On the matter of harm to other parties, B&W asserts, and the Staff agrees, that B&W will suffer significant economic harm if a stay is granted.³⁵ Applicant B&W estimates that a stay of decommissioning will cause it to sustain a minimum of \$790,000 in shutdown, demobilization, and remobilization costs. In addition, B&W and the Staff note that B&W has been shipping wastes containing greater than 2000 picocuries per gram (pCi/g) of uranium to one of the three existing low-level wastes sites at Barnwell, South Carolina; Beatty, Nevada;

³² Environmental Assessment for Decommissioning the [B&W] Apollo Site (June 12, 1992) at 6-1. See also 57 Fed. Reg. at 28,540.

³³ See Licensee's Reply, Attach. 1, at 1-27.

³⁴ See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-E10, 21 NRC 1616, 1620 (1985).

³⁵ See Licensee's Response at 7-8; Staff's Response at 7.

and Hanford, Washington. Both assert that under the provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985,³⁶ if these three sites still remain available after January 1, 1993, B&W likely will face significantly increased fees to dispose of some 250 cubic feet of material above the 2000-pCi/g level that, absent a stay, it intends to excavate and ship for disposal prior to the end of the year. The Petitioners have labeled these extensive additional financial expenditures irrelevant because the decommissioning plan is inadequate and illegal.³⁷ Nonetheless, those expenses, the measure of which the Petitioners do not dispute, are a pertinent and significant concern under the third factor of harm to other parties.³⁸

As to the fourth factor of where does the public interest lie, the Petitioners do little to advance their position by putting forth the conclusory argument that the public interest rests with ensuring that there is a proper cleanup of all onsite and offsite contaminants consistent with all legal requirements.³⁹ Rather, the showing by B&W and the Staff that the present cleanup actions meet all regulatory requirements and will result in the removal of a substantial volume of contaminated materials from Apollo for disposal in licensed waste facilities, is consistent with what the Commission recently has recognized as the public interest in seeing that the site is promptly and effectively remediated.⁴⁰ Thus, as with the other three factors, the Petitioners have not shown that this public interest criterion weighs in favor of a stay.

Under the terms of 10 C.F.R. § 2.1263, the Petitioners' stay request is untimely. Moreover, based upon a consideration of the four factors specified in 10 C.F.R. § 2.788, it is apparent that the Petitioners have failed to sustain their burden to demonstrate that a stay of the Staff's action approving Amendment No. 21 is appropriate. Accordingly, the Petitioners' October 9, 1992 request that an order be issued directing that B&W immediately cease site cleanup activities is *denied*.

Because this concludes the Presiding Officer's consideration of the Petitioners' stay request, in accordance with 10 C.F.R. §§ 2.788, 2.1263, within 10 days of service of this Memorandum and Order, the Petitioners may apply to the Commission for a stay of the Staff's action approving Amendment No. 21.

³⁶ 42 U.S.C. § 2021b *et seq.*

³⁷ See Petitioners' Reply at 2.

³⁸ See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985).

³⁹ See Petitioners' Reply at 2.

⁴⁰ See 57 Fed. Reg. 13,389, 13,390, 13,392 (1992).

It is so ORDERED.⁴¹

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 12, 1992

⁴¹ Copies of this Memorandum and Order are being provided to B&W, the Staff, and petitioner Virostok (for distribution to the other Petitioners) by facsimile transmission this date.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Marshall E. Miller, Chairman
Charles Bechhoefer
G. Paul Bollwerk, III

In the Matter of

Docket Nos. 50-440-A
50-346-A
(ASLBP No. 91-644-01-A)
(Suspension of
Antitrust Conditions)
(Facility Operating License
Nos. NPF-58, NPF-3)

OHIO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1)

CLEVELAND ELECTRIC ILLUMINATING
COMPANY and
TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1; Davis-Besse Nuclear Power
Station, Unit 1)

November 18, 1992

In this Decision, the Licensing Board rules on cross-motions for summary disposition on the "bedrock" legal issue of whether the Commission has authority under section 105c of the Atomic Energy Act (AEA), 42 U.S.C. § 2135(c), to retain antitrust conditions in a nuclear facility's operating license if the actual cost of nuclear facility electricity is higher than alternative sources.

RULES OF PRACTICE: COLLATERAL ESTOPPEL; LACHES; LAW OF THE CASE; RES JUDICATA

The repose doctrines of res judicata, collateral estoppel, laches, and law of the case are applicable in NRC adjudicatory proceedings generally. *See, e.g., Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159-60 (1992) (law of the case); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303, 1321 (1977) (laches); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203, 203-04 (1974) (res judicata and collateral estoppel).

RULES OF PRACTICE: ANTITRUST PROCEDURE; COLLATERAL ESTOPPEL; LACHES; LAW OF THE CASE; RES JUDICATA

The repose doctrines of res judicata, collateral estoppel, laches, and law of the case all may be applied in antitrust proceedings because "[l]itigation has the same conclusive power in antitrust as elsewhere." II P. Areeda & D. Turner, *Antitrust Law* ¶ 323, at 106 (1978).

RULES OF PRACTICE: COLLATERAL ESTOPPEL; LACHES; LAW OF THE CASE; RES JUDICATA

In applying the repose doctrines of res judicata, collateral estoppel, laches, and law of the case, particular attention must be paid to changed circumstances, either factual or legal. *See id.* at 106-19, 125-28. *See also Farley*, CLI-74-12, 7 AEC at 203-04 (nonantitrust context).

RULES OF PRACTICE: LAW OF THE CASE

The repose doctrine of law of the case acts to bar relitigation of the same issue in subsequent stages of the same proceeding. *See, e.g., Arizona v. California*, 460 U.S. 605, 618 (1983). *See generally* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478 (1981).

RULES OF PRACTICE: COLLATERAL ESTOPPEL; RES JUDICATA

The repose doctrines of res judicata and collateral estoppel are somewhat related. As described by the Supreme Court:

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the

doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979) (citations omitted). Both doctrines thus bar relitigation by the same parties of the same substantive issue. Res judicata also bars litigation of an issue that could have been litigated in the prior cause of action.

RULES OF PRACTICE: LACHES

To establish the defense of laches, which is an equitable doctrine that bars the late filing of a claim if a party would be prejudiced because of its actions during the interim were taken in reliance on the right challenged by the claimant, "the evidence must show both that the delay was unreasonable and that it prejudiced the defendant." *Van Bourg v. Nitze*, 388 F.2d 557, 565 (D.C. Cir. 1967) (quoting *Powell v. Zuckert*, 366 F.2d 634, 636 (D.C. Cir. 1966)).

RULES OF PRACTICE: JURISDICTION (TIMELY CHALLENGE)

The absence of "subject matter" jurisdiction may be raised at any time in a proceeding without regard to timeliness considerations. See generally 5A Wright & Miller, *Federal Practice and Procedure*, § 1350, at 200-04 (2d ed. 1990).

ATOMIC ENERGY ACT: ANTITRUST PROVISION; SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS

In making a determination under AEA section 105c about the antitrust implications of a licensing action, the Commission must act to ensure that two results do not obtain: Activities under the license must not (1) "maintain" a "situation inconsistent with the antitrust laws" or (2) "create" such a situation. In making its ultimate determination about whether an applicant's activities under the license will result in a "situation inconsistent with the antitrust laws," the term "maintain" permits the Commission to look at the applicant's past and present competitive performance in the relevant market whereas the word "create" envisions that the Commission's assessment will be a forward-looking, predictive analysis concerning the competitive environment in which the facility will operate. See *Alabama Power Co. v. NRC*, 692 F.2d 1362, 1367-68 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983).

**STATUTORY CONSTRUCTION OR INTERPRETATIONS:
GENERAL RULES**

For any statutory interpretation question, a licensing board must first look at the structure and wording of the provision in question in an effort to discern its "plain meaning."

ATOMIC ENERGY ACT: ANTITRUST PROVISION

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS

In specifying which federal antitrust laws are implicated in an NRC antitrust review, AEA section 105 references all the major provisions governing antitrust regulation, including the Sherman, Clayton, and Federal Trade Commission Acts.

ATOMIC ENERGY ACT: ANTITRUST PROVISION

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS

Under AEA section 105c it is not necessary that the "situation" under consideration in the NRC's antitrust review involve an actual violation of the specified antitrust laws before the Commission can act. The Commission has a broader authority that encompasses those instances in which there is a "reasonable probability" that those laws "or the policies clearly underlying those laws" will be infringed. *Alabama Power Co.*, 692 F.2d at 1368.

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS

It is a basic tenet that "the antitrust laws seek to prevent conduct which weakens or destroys competition." E. Kintner, *An Antitrust Primer* 15 (2d ed. 1973); see *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-560, 10 NRC 265, 279 & n.34 (1979) (principal purpose of Sherman, Clayton, and Federal Trade Commission Acts is preservation of and encouragement of competition).

**NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST
LAWS; MARKET POWER**

One of the cardinal precepts of antitrust regulation is that a commercial entity that is dominant in the relevant market (even if its dominance is lawfully gained) is accountable for the manner in which it exercises the degree of market power that dominance affords. See *Otter Tail Power Co. v. United States*, 410 U.S.

366, 377 (1973). See also A. Neal, *The Antitrust Laws of the United States* 126 (2d ed. 1970).

NRC ANTITRUST REVIEW: MARKET POWER; MONOPOLY POWER

"Market power" is generally defined as the "power of a firm to affect the price which will prevail on the market in which the firm trades." L. Sullivan, *Handbook of the Law of Antitrust* § 8, at 30 (1977). See also H. Areeda & Turner, *supra*, ¶ 501, at 322 ("Market power is the ability to raise price by restricting output.") If a firm possesses market power such that it has a substantial power to exclude competitors by reducing price, then it is considered to have "monopoly power." See Sullivan, *supra*, § 22, at 76-78.

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS; MARKET POWER

If an entity with market dominance utilizes its market power with the purpose of destroying competitors or to otherwise foreclose competition or gain a competitive advantage, then its conduct will violate the antitrust laws, specifically section 2 of the Sherman Act. See, e.g., *Eastman Kodak Co. v. Image Technical Services, Inc.*, 119 L. Ed. 2d 265, 294 (1992); *Otter Tail Power Co.*, 410 U.S. at 377.

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS; MARKET POWER

Under general antitrust principles, what is required relative to a particular competitive situation is an analysis of the existence and use of market power among competing firms to determine whether anticompetitive conditions exist. This assessment is, in turn, based upon a number of different factors that have been recognized as providing some indicia of a firm's competitive potency in the relevant market, including firm size, market concentration, barriers to entry, pricing policy, profitability, and past competitive conduct. See Sullivan, *supra*, §§ 22-32, at 74-93.

ATOMIC ENERGY ACT: ANTITRUST PROVISION

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS; MARKET POWER

Nothing in AEA section 105c, or in the pertinent antitrust laws and cases, supports the proposition that traditional antitrust market power analysis is

inapplicable in the first instance when the assessment of the competitive impact of a particular asset (i.e., a nuclear facility) is involved.

ATOMIC ENERGY ACT: ANTITRUST PROVISION

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS; MARKET POWER

Consistent with the antitrust laws referenced in AEA section 105c, what ultimately is at issue under that provision is not a competitor's comparative cost of doing business, but rather its possession and use of market power. And if a commercial entity's market dominance gives it the power to affect competition, how it uses that power — not merely its cost of doing business — remains the locus for any antitrust analysis under section 105c.

ATOMIC ENERGY ACT: ANTITRUST PROVISION; SITUATION INCONSISTENT WITH THE ANTITRUST LAWS (REMEDY)

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS; MARKET POWER; REMEDIAL AUTHORITY

During an antitrust review under AEA section 105c, if it can be demonstrated that market power has or would be misused, then with cause to believe that the applicant's "activities under the license would create or maintain a situation inconsistent with the antitrust laws" the Commission can intervene to take remedial measures. On the other hand, if the Commission reaches a judgment that an otherwise dominant utility has not and will not abuse its market power, i.e., that its "activities under the license" will not "create or maintain a situation inconsistent with the antitrust laws," then the Commission need not intercede.

ATOMIC ENERGY ACT: ANTITRUST PROVISION

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS

In reaching a judgment under AEA section 105c about a utility's "activities under the license," the Commission is permitted to undertake a "broad inquiry" into an applicant's conduct. See *Alabama Power Co.*, 692 F.2d at 1368.

ATOMIC ENERGY ACT: ANTITRUST PROVISION

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS; MARKET POWER

AEA section 105c directs that the focus of the Commission's consideration during an antitrust review must be whether, considering a variety of factors, a nuclear utility has market dominance and, if so, given its past (and predicted) competitive behavior, whether it can and will use that market power in its activities relating to the operation of its licensed facility to affect adversely the competitive situation in the relevant market.

STATUTORY CONSTRUCTION OR INTERPRETATIONS: GENERAL RULES; WEIGHT

"Absent a clearly expressed legislative intention to the contrary, [the language of the statute itself] must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The Supreme Court recently has gone even further, indicating that, when the words of a statute are unambiguous, no further judicial inquiry into legislative history of the language is permissible:

[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "Judicial inquiry is complete."

Connecticut National Bank v. Germain, 117 L. Ed. 2d 391, 397-98 (1992) (citations omitted).

STATUTORY CONSTRUCTION OR INTERPRETATIONS: LEGISLATIVE HISTORY

The "best source of legislative history" is the congressional reports on a particular bill. *See Alabama Power Co.*, 692 F.2d at 1368.

STATUTORY CONSTRUCTION OR INTERPRETATIONS: LEGISLATIVE HISTORY; WEIGHT

Statements of witnesses during a congressional committee hearing that are neither made by a member of Congress nor referenced in the relevant committee

report are normally to be accorded little, if any, weight. See *Kelly v. Robinson*, 479 U.S. 36, 50 n.13 (1986).

DUE PROCESS: EQUAL PROTECTION

An equal protection challenge to an economic classification is reviewed under the rational basis standard, which requires that any classifications established in the challenged statute must rationally further a legitimate government objective. See, e.g., *Nordlinger v. Hahn*, 120 L. Ed. 2d 1, 12 (1992).

ATOMIC ENERGY ACT: ANTITRUST PROVISION

AEA section 105 reflects the congressional concern that the unique technology underlying commercial power reactors, which in its crucial initial stages was largely government developed and financed, should not become a tool for increasing the competitive advantage of some private utilities at the expense of others. See *Alabama Power Co.*, *supra*, 692 F.2d at 1368-69. See also *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-452, 6 NRC 892, 1095 (1977).

STATUTORY CONSTRUCTION OR INTERPRETATIONS: DEFERENCE

A legislative body will be afforded a large measure of deference in its choice of which aspects of a particular evil it wishes to eliminate. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

BIAS OR PREJUDGMENT: STANDARDS

DISQUALIFICATION: STANDARDS

In reviewing an agency decision allegedly subject to bias, including improper legislative influence, the independent assessment of an adjudicatory decision-maker regarding the merits of the parties' legal (as opposed to factual) positions will attenuate any earlier impropriety. See *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 611-12 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978).

ATOMIC ENERGY ACT: ANTITRUST PROVISION

NRC ANTITRUST REVIEW: APPLICATION OF ANTITRUST LAWS

Rooted as it is in existing antitrust law principles, a previous agency finding under AEA section 105c(5) that a "situation inconsistent with the antitrust laws"

exists and requires the imposition of remedial license conditions cannot be abrogated merely because of financial adversity. Compare *I P. Areeda & D. Turner, Antitrust Law* ¶ 104, at 7-8. ("[T]he courts have given almost undeviating priority to competition over claims that restrictive agreements are necessary to mitigate economic distress. The reasoning has been clearly stated: given the competitive mandate of the antitrust laws, such claims must be addressed to Congress rather than the courts" (footnotes omitted).)

APPEARANCES

- Deborah B. Charnoff**, Washington, D.C. (with whom **Gerald Charnoff**, **Margaret S. Spencer**, and **Mark A. Singley**, Washington, D.C., were on the pleadings) for Applicant Ohio Edison Company.
- James P. Murphy**, Washington, D.C. (with whom **Colleen Conry**, Washington, D.C., was on the pleadings) for Applicants Cleveland Electric Illuminating Company and Toledo Edison Company.
- Reuben Goldberg**, Washington, D.C. (with whom **Channing D. Strother, Jr.**, **David C. Hjelmfelt**, and **B. Victoria Brennan**, Washington, D.C., and **Danny R. Williams**, **June W. Wiener**, and **William T. Zigli**, Cleveland, Ohio, were on the pleadings) for Intervenor City of Cleveland, Ohio.
- David R. Straus**, Washington, D.C. (with whom **Scott H. Strauss**, Washington, D.C., and **John Bentine**, Columbus, Ohio, were on the pleadings) for Intervenor American Municipal Power-Ohio, Inc.
- D. Biard MacGuineas**, Washington, D.C. (with whom **Bennett Boskey** and **Morris Klein**, Washington, D.C., were on the pleadings) for Intervenor Alabama Electric Cooperative, Inc.
- Gregg D. Ottinger** and **John P. Coyle**, Washington, D.C., and **David A. Lambros**, Brook Park, Ohio, for Intervenor City of Brook Park, Ohio.
- Janet R. Urban**, Washington, D.C. (with whom **James F. Rill**, **J. Mark Gidley**, **Mark C. Schechter**, and **Roger W. Fones**, Washington, D.C., were on the pleadings) for Intervenor United States Department of Justice.

Steven R. Hom (with whom Sherwin E. Turk was on the pleadings) for the Nuclear Regulatory Commission Staff.

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DECISION

(Granting Summary Disposition in Favor of
NRC Staff and Intervenors on "Bedrock" Legal
Issue and Denying Applicants' Requests to
Suspend Antitrust License Conditions; Dismissing
Contentions on Staff Bias; and Terminating Proceeding)

This proceeding involves a challenge by licensees Ohio Edison Company (OE), Cleveland Electric Illuminating Company (CEI), and Toledo Edison Company (TE) (hereinafter referred to collectively as "the Applicants") to the NRC Staff's denial of their applications to suspend certain antitrust conditions

in the operating licenses for the Perry Nuclear Power Plant, Unit 1, and the Davis-Besse Nuclear Power Station, Unit 1.¹ As a consequence of administrative litigation over a decade ago,² those conditions were imposed based upon a finding that, in accordance with section 105c(5) of the Atomic Energy Act (AEA),³ the Applicants' "activities under the[ir] license[s] would create or maintain a situation inconsistent with the antitrust laws."

Now pending before us are summary disposition motions and responses filed by the Applicants, the Staff, and various intervening parties addressing what has come to be known as the "bedrock" legal issue in this proceeding. As posited by the parties, this issue involves the question whether the Commission has the authority to continue to impose antitrust conditions in the face of what the Applicants claim are existing circumstances that render those limitations inappropriate, i.e., in which the cost of electricity generated at a nuclear facility is greater than that from other competing sources. In addition, some of the parties pose the subsidiary issue whether, in light of the previous administrative litigation regarding the application of section 105c to the Applicants' activities, the Applicants now are barred from raising the "bedrock" issue by various legal doctrines of repose.

For the reasons explained in Part IV of this Decision, we conclude that none of the cited repose principles precludes the litigation of the "bedrock" legal issue in this proceeding. Further, in Part III we find against the Applicants and in favor of the Staff and the various intervening parties on the merits of the "bedrock" issue. Finally, we conclude in Part IV that, as a result of our legally grounded resolution of this central substantive issue, we need give no further consideration to several previously admitted contentions regarding alleged improper Staff bias against applicant OE's license condition suspension request resulting from purported inappropriate congressional interference in the Staff's decisional process. The upshot of these determinations is that, in accord with the Staff's assessment, the suspension applications are denied and this proceeding is terminated.

I. BACKGROUND

The genesis of this litigation was the Staff's April 24, 1991 denial of the Applicants' requests for suspension of the antitrust conditions in the Perry and

¹ OE is an investor-owned electric utility and is a part owner of the Perry plant. CEI and TE are wholly owned subsidiaries of Centennial Energy Corporation, a public utility holding company, and part owners of the Perry and Davis-Besse facilities. The two other co-owners of the Perry facility, Pennsylvania Power Company and Duquesne Light Company, have not joined in the requests of OE, CEI, and TE for suspension of the antitrust conditions in the Perry license.

² See *Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3)*, LBP-77-1, 5 NRC 133 (1977), *aff'd as modified*, ALAB-560, 10 NRC 265 (1979).

³ 42 U.S.C. § 2135(c)(5).

Davis-Besse operating licenses.⁴ As is detailed in our October 7, 1991 Prehearing Conference Order,⁵ hearing requests contesting this Staff action were filed by the Applicants. The Staff filed a response stating that it did not oppose the requests so long as litigation was limited to issues raised previously before the Staff. In addition, other interested organizations including the City of Cleveland, Ohio (Cleveland), American Municipal Power—Ohio, Inc. (AMP—Ohio), the City of Brook Park, Ohio (Brook Park) (all of which are actual or potential customers or competitors of the Applicants), Alabama Electric Cooperative, Inc. (AEC), and the United States Department of Justice (DOJ) sought to intervene in any adjudicatory proceeding that might be convened. All of these Intervenor expressed support for the Staff's denial of the applications.

After conducting a prehearing conference in October 1991, we granted party status to the Applicants and all Intervenor except Brook Park, whose intervention request we denied principally for lack of standing.⁶ Additionally, at the parties' suggestion, we provided an opportunity to submit a joint statement delineating the so-called "bedrock" legal issue concerning the Commission's authority under section 105c, the merits of which would then be addressed in motions for summary disposition.⁷

In a letter to the Board, dated November 7, 1991, the parties framed the "bedrock" legal issue as follows:

Is the Commission without authority as a matter of law under Section 105 of the Atomic Energy Act to retain the antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared?⁸

The parties further agreed to litigate the following subsidiary matter:

Are the Applicants' requests for suspension of the antitrust license conditions barred by res judicata, or collateral estoppel, or laches, or the law of the case?⁹

With regard to the "bedrock" legal issue, the Applicants have recognized that, if they prevail in their position that the Commission lacks such authority as a matter of law, they could then proceed to present evidence establishing that the electricity being produced at their facilities is, in fact, higher in cost than that available from alternative sources. On the other hand, if they do not prevail on

⁴ See 56 Fed. Reg. 20,057 (1991).

⁵ See LBP-91-38, 34 NRC 229, 236-37 (1991), *aff'd*, CLI-92-11, 36 NRC 47 (1992), *petition for review filed*, No. 92-1552 (D.C. Cir. Oct. 9, 1992).

⁶ See *id.*, 34 NRC 237-54.

⁷ See *id.* at 258-59.

⁸ Letter from R. Goldberg to [Licensing Board] (Nov. 7, 1991) at 1-2.

⁹ *Id.* at 2.

this question, their substantive challenge to the Staff's refusal to suspend the conditions, at least before us, will be at an end.¹⁰

Acting in accord with our unpublished scheduling orders of November 14, 1991, February 7, 1992, and March 20, 1992, the Applicants, the Staff, and Intervenor DOJ, Cleveland, AMP-Ohio, and AEC filed summary disposition motions and responses to such motions. In their joint summary disposition motion, the Applicants have urged that we answer the "bedrock" legal issue in the affirmative and enter judgment in their favor.¹¹ The Staff and Intervenor DOJ, Cleveland, AMP-Ohio, and AEC in their responses and/or cross-motions contend that a negative response to that question is required and that judgment should be in their favor.¹² In addition, Intervenor Cleveland asserts that summary disposition in its favor is appropriate on the basis of the previously specified repose doctrines, a position championed in part by Intervenor AEC and challenged by both the Applicants and the Staff.¹³

The parties presented oral argument on the pending motions on June 10, 1992.¹⁴ At the conclusion of the argument, counsel for Brook Park came forward to advise the Board that it once again would seek to intervene in this proceeding.¹⁵ Thereafter, in a June 15, 1992 filing Brook Park sought to intervene out of time.¹⁶ The Applicants opposed Brook Park's request; the Staff supported it.¹⁷ In an August 6, 1992 decision, we granted Brook Park's petition,

¹⁰ See LBP-91-38, 34 NRC at 258-59. In addition to the "bedrock" legal issue, we also admitted for litigation a contention proffered by licensee OE alleging that the Staff's decisionmaking process on its application to suspend the antitrust conditions in the Perry operating license had been subjected to improper congressional influence, thereby resulting in an inappropriate, continuing Staff bias against its suspension request. See *id.* at 255-58. In a November 20, 1991 order, the Commission suspended discovery on that issue and directed that we take no further action to resolve it, pending our resolution of the "bedrock" legal issue. See CLJ-91-15, 34 NRC 269, 271 (1991). As we explain in Part IV of this Decision, our resolution of the "bedrock" legal issue makes it unnecessary that we give further consideration to the merits of this bias issue.

¹¹ See Applicants' Motion for Summary Disposition (Jan. 6, 1992) [hereinafter Applicants' Motion].

¹² See NRC Staff's Answer in Opposition to Applicant[s'] Motion for Summary Disposition and NRC Staff's Cross-Motion for Summary Disposition (Mar. 9, 1992) [hereinafter Staff's Cross-Motion]; Response of [DOJ] to Applicant[s'] Motion for Summary Disposition (Mar. 9, 1992); Motion for Summary Disposition of [Cleveland] and Answer in Opposition to Applicants' Motion for Summary Disposition (Mar. 9, 1992) at 16-64 [hereinafter Cleveland's Cross-Motion]; Brief of [AMP-Ohio] in Opposition to Applicants' Motion for Summary Disposition and Cross-Motion for Summary Disposition (Mar. 9, 1992) [hereinafter AMP-Ohio's Cross-Motion]; [AEC's] Combined Cross-Motion for Summary Disposition and Response to Applicants' Motion for Summary Disposition (Mar. 9, 1992) [hereinafter AEC's Cross-Motion].

¹³ Cleveland's Cross-Motion at 64-80; AEC's Cross-Motion at 5-6; Applicants' Reply to Opposition Cross-Motions for Summary Disposition and Responses to Applicants' Summary Disposition Motion (May 7, 1992) at 90-110 [hereinafter Applicants' Reply]; NRC Staff's Answer to the Motion for Summary Disposition of Intervenor [Cleveland] (May 7, 1992) [hereinafter Staff's Answer]; Reply of [Cleveland] to Arguments of Applicants and NRC Staff with Respect to the Issues of Law of the Case, Res Judicata, Collateral Estoppel and Laches (May 26, 1992) [hereinafter Cleveland's Reply].

¹⁴ See Tr. 237-447.

¹⁵ See Tr. 446-47.

¹⁶ See Amended Petition of [Brook Park] for Leave to Intervene Out of Time (June 15, 1992).

¹⁷ See Applicants' Answer in Opposition to the Amended Petition of [Brook Park] for Leave to Intervene Out of Time (June 30, 1992); NRC Staff's Answer to Amended Petition of [Brook Park] for Leave to Intervene Out of Time (July 6, 1992).

concluding that recent developments regarding the city's establishment of a municipal electrical system had cured the earlier standing deficiency and that intervention was appropriate under a balancing of the five factors governing late intervention, as set forth in 10 C.F.R. § 2.714(a)(i)-(v).¹⁸ Thereafter, in accordance with a directive in our August 6 determination, Brook Park submitted a filing designating those portions of the other parties' previously filed summary disposition pleadings it wishes to adopt. From this designation, it is clear Brook Park generally supports the positions of the Staff and the other intervenors on the "bedrock" legal issue, as well as Cleveland's position on the application of the repose doctrine of law of the case and AEC's arguments on res judicata and collateral estoppel.¹⁹

II. APPLICABILITY OF VARIOUS REPOSE DOCTRINES

At the outset, we turn to the motion of Cleveland that would preclude, for essentially procedural reasons, our consideration of the merits of the Applicants' requests to suspend the Perry and Davis-Besse antitrust license conditions. As set forth earlier,²⁰ this question encompasses whether the Applicants' requests for suspension of these antitrust license conditions are barred by the repose doctrines of res judicata, collateral estoppel, laches, or the law of the case.

In its cross-motion for summary disposition, Cleveland claims with respect to these subjects that each is applicable in NRC licensing proceedings and should bar consideration of the Applicants' amendment requests at this time.²¹ AEC asserts a similar position with respect only to res judicata and collateral estoppel.²² In each case, Cleveland's claim (supported by AEC) is that the "bedrock" legal issue in this proceeding has already been litigated or, if not, should have been litigated at an earlier date.²³

Cleveland deems this purported litigation to have taken place in 1976-1979, during the *Davis-Besse* proceeding that resulted in the antitrust conditions now at issue being placed into the operating license for the Davis-Besse facility and the construction permits for the Perry facility.²⁴ Specifically, Cleveland declares that, in appealing the imposition of antitrust conditions by the Licensing Board, the Applicants contended that there was no nexus between the conditions and

¹⁸ See LBP-92-19, 36 NRC 98 (1992).

¹⁹ Designation of [Brook Park] of Adopted Portions of Summary Disposition Pleadings (Aug. 17, 1992) at 1-3.

²⁰ See *supra* note 9 and accompanying text.

²¹ Cleveland's Cross-Motion at 64-80. See also Cleveland's Reply, Tr. 376-78, 379-80, 424-27.

²² AEC's Cross-Motion at 5-6.

²³ Recently admitted intervenor Brook Park has adopted the arguments of Cleveland with respect to law of the case but not with respect to res judicata, collateral estoppel, or laches; however, Brook Park has adopted AEC's essentially similar arguments on res judicata and collateral estoppel. See *supra* note 19 and accompanying text.

²⁴ See *supra* notes 2-3 and accompanying text.

the facility unless the facility were lower in cost than its competition. Given the failure of the Appeal Board to accept that argument and the consequent lack of any finding of lower cost, Cleveland asserts that the Applicants already have had the "bedrock" legal issue resolved against them.²⁵

The Applicants and the Staff each respond to the claims of Cleveland and AEC in this regard. Both assert that the "bedrock" legal issue has not yet been decided and should be resolved on the merits at this time.²⁶

We note initially that all of these principles of repose are applicable in NRC adjudicatory proceedings generally.²⁷ Further, all may be applied in antitrust proceedings such as this one because "[l]itigation has the same conclusive power in antitrust as elsewhere."²⁸ In so applying these principles, however, we must pay particular attention to changed circumstances, either factual or legal.²⁹

With these precepts in mind, we turn to the particular repose arguments advanced by Cleveland.

A. Law of the Case

The repose doctrine of law of the case acts to bar relitigation of the same issue in subsequent stages of the same proceeding.³⁰ According to Cleveland, the doctrine includes all issues that were resolved "in substance," and even incorporates legally significant issues of fact that have already been decided by a reviewing body, i.e., the Appeal Board or the Commission.³¹

For law of the case to be applicable here, however, the "bedrock" issue that Cleveland claims has been resolved had to be litigated and decided in this very proceeding. Cleveland asserts that the present applications for "amendment" are clearly one part of an ongoing, sequential, multistage license proceeding that is the same as the proceeding in which the conditions were originally imposed. As support for this claim, Cleveland cites a footnote from an Appeal Board decision in the *Farley* operating license proceeding that posits — but explicitly does not decide — that for res judicata purposes, there is a basis for treating an operating license proceeding as involving the same "cause of action" as a

²⁵ See Cleveland's Cross-Motion at 65-66.

²⁶ See *supra* note 13 and accompanying text; Tr. 272-75, 306-10, 320-24. See also Tr. 383 (statement of AMP-Ohio).

²⁷ See, e.g., *Safety Light Corp. (Bloomsburg Site Decontamination)*, CLI-92-9, 35 NRC 156, 159-60 (1992) (law of the case); *Houston Lighting and Power Co. (South Texas Project, Units 1 and 2)*, CLI-77-13, 5 NRC 1303, 1321 (1977) (across); *Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2)*, CLI-74-12, 7 AEC 203, 203-04 (1974) (res judicata and collateral estoppel).

²⁸ *Il P. Arreda & D. Turner, Antitrust Law* § 323, at 106 (1978).

²⁹ See *id.* at 106-19, 125-28. See also *Farley*, CLI-74-12, 7 AEC at 203-04 (nonantitrust context).

³⁰ See, e.g., *Arizona v. California*, 460 U.S. 605, 618 (1983). See generally 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478 (1981).

³¹ Cleveland's Reply at 5-6.

construction permit proceeding.³² It also cites the Licensing Board's observation in the *South Texas* antitrust proceeding that construction permit and operating license proceedings may not always have to be viewed rigidly as falling into separate, insulated boxes.³³ In addition, Cleveland relies on the circumstance that the Commission has utilized the same docket number for this proceeding as for the construction permit and operating license proceedings.³⁴

None of the cited appeal board or licensing board authority persuades us that this amendment proceeding is the same proceeding as that in which the antitrust license conditions at issue here were imposed. The *Farley* precedent is dicta and, in any event, by its terms applies to res judicata and not "law of the case." Also, the *Farley* proceeding resulted in litigation of the issues in question based on "changed circumstances." The *South Texas* observation was in essence reversed by the Appeal Board — not so much on "other grounds," as Cleveland asserts, but by reliance on the "jurisdictional-box" concept that was rejected by the Licensing Board.³⁵

As to Cleveland's "identity of docket numbers" concept, in our Prehearing Conference Order, we already rejected this as a valid foundation for concluding that this proceeding is a continuation of the proceeding that resulted in the imposition of the antitrust conditions at issue.³⁶ Our ruling there thus became the "law of the case" and, having been provided with no reason that would cause us to change our views here, we adhere to it now.³⁷

B. Res Judicata and Collateral Estoppel

The repose doctrines of res judicata and collateral estoppel are somewhat related. As described by the Supreme Court:

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause

³² See *Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2)*, ALAB-182, 7 AEC 210, 215 n.7, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974).

³³ See *Houston Lighting and Power Co. (South Texas Project, Units 1 and 2)*, LBP-76-41, 4 NRC 571, 575 (1976).

³⁴ As additional support for its position that the "bedrock" issue has been resolved in this proceeding, Cleveland cites a prehearing conference colloquy between one Board member and one of the counsel for the Applicants. See Cleveland's Reply at 5-6 (citing Tr. 150-51). That discussion, however, did not relate to a determination about the "bedrock" issue of cost, but only to the question of anticompetitive conduct and, in any event, did not represent a Board ruling.

³⁵ See *Houston Lighting and Power Co. (South Texas Project, Units 1 and 2)*, ALAB-381, 5 NRC 582, 590-91 (1977).

³⁶ See LBP-91-38, 34 NRC at 244 n.43.

³⁷ The Applicants have also pointed to the discretionary nature of the "law of the case" doctrine. See Applicants' Reply at 107-08. As a matter of sound policy, we would not preclude the litigation of the "bedrock" legal issue on law of the case grounds because, as we shall see, *see infra* p. 285, the "bedrock" issue is not sufficiently similar to those matters litigated in the earlier proceeding in light of changed circumstances.

of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.³⁸

Both doctrines thus bar relitigation by the same parties of the same substantive issue. *Res judicata* also bars litigation of an issue that could have been litigated in the prior cause of action.

In claiming that the "bedrock" legal issue was in fact resolved in the *Davis-Besse* licensing proceeding that resulted in the antitrust conditions being imposed on the Applicants, Cleveland references an argument by the Applicants before the Appeal Board that there could be no nexus between the "activities under the license" and the anticompetitive "situation," as required by section 105c, unless nuclear power were cheaper than any other type of power. The Applicants there presented evidence to the effect that nuclear power was not necessarily cheaper than other forms of power. Because the Appeal Board found the requisite nexus, Cleveland asserts, it must have determined that low cost was not a factor in determining applicability of the antitrust licensing provisions of section 105c.

As the Applicants and the Staff point out here, the issue litigated earlier was not the same as the "bedrock" legal issue now before us. In the earlier proceeding, the Applicants' testimony appears to have recognized not only the possible erosion of economic benefits but also that there were still cost advantages to nuclear plants. Thus, the "bedrock" issue of whether license conditions could be imposed absent a showing of lower comparative costs was not squarely raised by the Applicants or any other parties to that proceeding and, more importantly, was not addressed or decided by the Licensing Board or the Appeal Board. Moreover, given the evidence of the possible advantage of nuclear power to which we have referred, we are hard pressed to find that the Applicants were under an obligation to litigate the "bedrock" legal issue during the earlier licensing proceeding.

Without detailing all aspects of the two doctrines, it is clear to us that under these circumstances their central feature — the identity of issues — has not been met. Beyond that, it is apparent that the Applicants here are asserting "changed circumstances" — an exception to the application of both doctrines³⁹ — as a foundation for their current applications. Thus, neither *res judicata* nor collateral estoppel bars litigation of the "bedrock" legal issue at this time.

C. Laches

The final repose doctrine asserted by Cleveland as precluding litigation of the "bedrock" legal issue is laches. Cleveland portrays laches as "an equitable

³⁸ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (citations omitted).

³⁹ See *Farley*, ALAB-182, 7 AEC at 215.

doctrine that bars the late filing of a claim if a party would be prejudiced because of its actions during the interim in reliance on the right challenged by the claimant.⁴⁰ For their part, the Applicants note that to "establish the defense of laches 'the evidence must show both that the delay was unreasonable and that it prejudiced the defendant.'⁴¹

Cleveland bases its laches claim on the following circumstances: (1) each of the events cited by the Applicants as the basis for their current applications occurred no later than 1977 ("i.e., changes in regulatory requirements and adverse economic conditions"⁴²); (2) the Licensing Board initial decision first imposing antitrust conditions was issued in 1977; (3) that decision was affirmed (with minor modifications) by the Appeal Board in 1979; and (4) the current applications were not filed until September 1987 (by OE) and May 1988 (by CEI and TE), 10 years or more after the cited events. Cleveland asserts that, given this sequence of events, it acted in reasonable reliance on the antitrust conditions in making certain capital investments (e.g., interconnections, substations, and transmission and distribution lines) and thus was injured by the delay in the Applicants' filings.⁴³

The licensing board and appeal board decisions cited by Cleveland related to the antitrust conditions to be applied to the Davis-Besse operating license and to the Perry construction permits. Operation of the Davis-Besse reactor was authorized in April 1977, with commercial operation achieved in July 1978. Operation of the Perry facility was authorized in November 1986, with commercial operation achieved by November 1987.⁴⁴ The question thus becomes one of the reasonableness of the May 1988 CEI/TE application with respect to Davis-Besse (almost 10 years after the initiation of commercial operation) and of OE's November 1987 Perry application (simultaneous with commercial operation) and the May 1988 CEI/TE Perry application (some 6 months after commercial operation).

The Applicants have stressed the importance of commercial *operating* cost data in reaching their conclusion about the high costs of the reactors.⁴⁵ Consequently, because the Perry facility did not begin operation until 1987, all the essential information backing their amendment requests regarding that facility was not, contrary to Cleveland's claims, available by 1977. The OE and CEI/TE applications regarding Perry thus were clearly not unreasonably delayed. While

⁴⁰ Cleveland's Cross-Motion at 77.

⁴¹ Applicants' Reply at 108 n.253, (quoting *Van Bourg v. Nitz*, 388 F.2d 557, 565 (D.C. Cir. 1967) (quoting *Powell v. Zucker*, 366 F.2d 634, 636 (D.C. Cir. 1966))).

⁴² Cleveland's Cross-Motion at 79.

⁴³ See *id.* at 79-80.

⁴⁴ See Applicants' Reply at 108. See also NRC Information Digest, NUREG-1350, Vol. 4, App. A at 81, 86 (1992 ed.). (Cleveland cites the 1991 edition of NUREG-1350. See Cleveland's Reply at 13.)

⁴⁵ See Applicants' Reply at 109.

the CEI/TE application with respect to Davis-Besse might conceivably have been filed somewhat earlier, because the same "bedrock" legal issue is presented by all of the applications before us, we decline to invoke an equitable doctrine to bar litigation of a particular portion of the amendment requests.⁴⁶

III. THE "BEDROCK" LEGAL ISSUE

Having determined that the preclusion doctrines Cleveland seeks to interpose are not applicable in this instance, we turn to the merits of the "bedrock" legal issue presented by the parties. The Applicants contend that "the NRC's antitrust authority does not extend to situations where a licensed nuclear facility produces high-cost electricity."⁴⁷ In support of this proposition, they rely upon what they characterize as the "logical" interpretation of the terms of section 105c, which they also assert is consistent with both existing Commission and DOJ interpretations of the meaning of section 105c. In addition, they contend that the legislative history of the 1970 amendments to the Atomic Energy Act that fashioned section 105c in its present form supports their interpretation of this statutory provision. Finally, they declare that a failure to apply the statute in the manner they espouse would violate their right to equal protection under the laws, as guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution. We consider each of these grounds in turn.

A. The "Plain Meaning" of Section 105c

As the parties' pleadings make clear, the central focus of this litigation is the meaning of several particular portions of AEA section 105c(5)-(6). These merit some brief description.

Section 105c mandates that as part of its consideration of a pending application for a facility construction permit or, in some instances, an operating license, the Commission is to give consideration to the antitrust implications of the proposed licensing action. If the Commission finds in accordance with section

⁴⁶One further matter regarding laches should be noted. The Staff states that if the Applicants are correct that the Commission lacks legal authority to retain antitrust license conditions when nuclear power is higher in cost than alternative sources, Cleveland has failed to explain how laches, which requires a showing of untimeliness, can be utilized to preclude the Applicants from contesting such a "jurisdictional" void in the Commission's authority. See Staff's Answer at 8. It is, of course, well established that the absence of "subject matter" jurisdiction may be raised at any time in a proceeding without regard to timeliness considerations. See generally 5A Wright & Miller, *supra*, §1350, at 200-04 (2d ed. 1990). Because we reject the substance of the Applicants' claims concerning the "bedrock" legal issue, see Part III, *supra*, we need not reach the issue of whether they are "jurisdictional" in this sense, a matter about which the Applicants themselves apparently are not in agreement. Compare Tr. 273-74 (Charnoff) with Tr. 308-09 (Murphy). Nonetheless, if the "bedrock" issue is indeed a "jurisdictional" matter, this would provide another reason for declining to bar any of the claims before us on the ground of laches.

⁴⁷Applicants' Motion at 12.

105c(5) that, based on advice from the Justice Department and the results of any hearing it might convene, the "activities under the license would create or maintain a situation inconsistent with the antitrust laws," then section 105c(6) authorizes it to condition the construction permit or operating license to address the adverse antitrust aspects that may arise from permit or license issuance.⁴⁸ It is apparent that the statutory language "create or maintain a situation inconsistent with the antitrust laws" requires that in making a determination under section 105c, the Commission must act to ensure that two results do not obtain: Activities under the license must not (1) "maintain" a "situation inconsistent with the antitrust laws" or (2) "create" such a situation.

As the Applicants point out,⁴⁹ this gives the Commission a Janus-like field of vision in antitrust matters. In making its ultimate determination about whether an applicant's activities under the license will result in a "situation inconsistent with the antitrust laws," the term "maintain" permits the Commission to look at the applicant's past and present competitive performance in the relevant market whereas the word "create" envisions that the Commission's assessment will be a forward-looking, predictive analysis concerning the competitive environment in which the facility will operate.⁵⁰ Ultimately, based upon its findings about what the competitive circumstances in the relevant economic environment were, are, and will be, the Commission must determine whether the applicant's activities under the license in those circumstances will result in a "situation inconsistent with the antitrust laws."

1. *The Parties' Positions*

The Applicants assert in their initial motion and their reply brief that under section 105c the Commission is assigned the very specific task of determining

⁴⁸ In full, paragraphs (5) and (6) of AEA section 105c provide:

(5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects [in the issuance of a facility construction permit or an operating license] and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a.

(6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

⁴⁹ 42 U.S.C. § 2135(c)(5)-(6).

⁴⁹ See Applicants' Reply at 14-15.

⁵⁰ See *Alabama Power Co. v. NRC*, 692 F.2d 1362, 1367-68 (11th Cir. 1982), *cert. denied*, 464 U.S. 816 (1983).

the impact of the introduction of a particular nuclear facility on the competitive "situation" in the relevant market. They further declare that in making this determination the Commission's initial analysis must be directed to the issue of whether the facility to be licensed will provide a "competitive advantage." In this regard, the Applicants maintain that a facility that produces high-cost electricity affords no "competitive advantage" vis-a-vis other alternative sources because it can never have an anticompetitive impact upon actual or potential "lower-cost" competitors. This is so, the Applicants declare, because the owner of a "high-cost" facility is in no position to visit competitive harm upon its rivals who, with lower costs, can charge a lower price for the same commodity. And, they assert, because it provides no "competitive advantage," as a matter of "logic" a high-cost facility cannot "create or maintain a situation inconsistent with the antitrust laws" within the meaning of AEA section 105c. Therefore, if it can be shown that the nuclear facility in question is "high cost" as compared to other competitors, the Commission then lacks authorization under section 105 to undertake any further inquiry into the facility owner's competitive activities or to impose, or continue in effect, remedial license conditions like those at issue in this proceeding.

The Staff and the intervening parties are unanimous in their condemnation of the Applicants' interpretation of section 105c. Among other things, they assert that this provision says nothing about cost, cost advantages, or cost comparisons so as to lend any credence to the Applicants' interpretation. They declare that the statute refers only to the "antitrust laws" of the United States, enactments they contend do not incorporate the Applicants' cost-based theory of "competitive advantage." As a consequence, they find no support in the language of section 105c for the Applicants' position.

With this understanding of the parties' positions, we turn to the statutory interpretation problem they pose.

2. Discussion Regarding "Plain Meaning"

As with any other statutory interpretation question, we must first look at the structure and wording of section 105c in an effort to discern its "plain meaning."⁵¹ In this instance, as we have already noted, the critical language is that in section 105c(5) governing the finding that the Commission must make in order to take remedial action.

On its face, the statutory directive to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws" contains no explicit endorsement of what, as a shorthand reference, we

⁵¹ See *infra* notes 96-97 and accompanying text.

label the Applicants' "cost comparison" competitive advantage theory.⁵² Instead, by its terms this phrase provides the Commission with authority to act when it determines that the competitive "situation" that presents itself regarding the facility in question is inconsistent with, or might otherwise violate, any of the major federal antitrust legislative enactments.⁵³ Given the uncircumscribed reference in section 105c(5) to the "antitrust laws," we are compelled in the first instance to see if the regulatory scheme under the relevant antitrust statutes, and their underlying policies, in any way sanctions the Applicants' "cost comparison" analysis.⁵⁴

It is a basic tenet that "the antitrust laws seek to prevent conduct which weakens or destroys competition."⁵⁵ The Applicants incorporate this notion into their "cost comparison" theory by asserting that if operation of a nuclear facility entails higher costs, and therefore an actual higher cost for the electricity it produces relative to alternative sources, then as a matter of "logic" that facility cannot enhance the utility's competitive position so as to be in contravention of the antitrust laws.⁵⁶ The problem with their "logic," however, is that it is not consonant with the "logic" underlying general antitrust principles.

One of the cardinal precepts of antitrust regulation is that a commercial entity that is dominant in the relevant market (even if its dominance is lawfully gained) is accountable for the manner in which it exercises the degree of market power that dominance affords.⁵⁷ Further, it is well established that if an entity with market dominance utilizes its market power with the purpose of destroying competitors or to otherwise foreclose competition or gain a competitive advan-

⁵² At various points in their initial motion and reply brief, the Applicants also characterize their interpretation of section 105c in terms of the congressional desire to ensure that nonnuclear competitors had "access" to nuclear electrical generation sources, thereby ensuring that a nuclear utility would not have a competitive advantage because of its facility. As presented by the Applicants, this "access protection" interpretation complements their "cost comparison" theory in that competing nonnuclear utilities, if they otherwise have access to low-cost electricity, generally will not be interested in access to a high-cost nuclear facility.

⁵³ As we noted in our Prehearing Conference Order, in specifying which federal antitrust laws are implicated, section 105 references all the major provisions governing antitrust regulation, including the Sherman, Clayton, and Federal Trade Commission Acts. See LBP-91-38, 34 NRC at 240.

⁵⁴ It is clear that under section 105c it is not necessary that the "situation" under consideration involve an actual violation of the specified antitrust laws before the Commission can act. The Commission has a broader authority that encompasses those instances in which there is a "reasonable probability" that those laws "or the policies clearly underlying those laws" will be infringed. *Alabama Power Co.*, 692 F.2d at 1368.

⁵⁵ E. Kintner, *An Antitrust Primer* 15 (2d ed. 1973); see *Davis-Besse*, ALAB-560, 10 NRC at 279 & n.34 (principal purpose of Sherman, Clayton, and Federal Trade Commission Acts is preservation and encouragement of competition).

⁵⁶ See Applicants' Reply at 7-8.

⁵⁷ See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973). See also A. Neal, *The Antitrust Laws of the United States* 126 (2d ed. 1970).

"Market power" is generally defined as the "power of a firm to effect the price which will prevail on the market in which the firm trades." L. Sullivan, *Handbook of the Law of Antitrust* § 8, at 30 (1977). See also H. Arveda & Turner, *supra*, § 501, at 322 ("[m]arket power is the ability to raise price by restricting output"). If a firm possesses market power such that it has a substantial power to exclude competitors by reducing price, then it is considered to have "monopoly power." See Sullivan, *supra*, § 22, at 76-78.

tage, then its conduct will violate the antitrust laws, specifically section 2 of the Sherman Act.⁵⁸ Under general antitrust principles, therefore, what is required relative to a particular competitive situation is an analysis of the existence and use of market power among competing firms to determine whether anticompetitive conditions exist. This assessment is, in turn, based upon a number of different factors that have been recognized as providing some indicia of a firm's competitive potency in the relevant market, including firm size, market concentration, barriers to entry, pricing policy, profitability, and past competitive conduct.⁵⁹

For their part, the Applicants recognize that "[a] Section 105(c) antitrust review does rely on general principles of antitrust law to assess market conditions and competitive behavior and, in that regard, the Federal antitrust laws are applied by the NRC (and DOJ) in reaching determinations under section 105(c)."⁶⁰ They, however, reject any interpretation of section 105c that includes an *ab initio* application of general antitrust principles with a focus on market power. Instead, they maintain that consideration of a potential licensee's competitive position and activity in the relevant market is appropriate under section 105c only as a second stage in the analytical process mandated by that provision.⁶¹ It takes place, they contend, only after an initial determination focusing on the narrow question of whether the nuclear facility itself is "competitively advantageous," i.e., that it is not a high-cost facility, as appropriately compared to alternative competing sources.

It thus is the Applicants' core proposition that, regardless of its market power, if a nuclear utility's cost of doing business at a particular facility causes it to produce higher cost electricity as compared to rival producers, the nuclear utility's competitive activities relative to that facility are excused from further antitrust scrutiny under section 105c.

Faced nonetheless with the unadorned reference in section 105c(5) to the "antitrust laws" that, as we have seen, fully embrace an apparently broader market power analysis, the Applicants suggest several justifications to explain why their "cost comparison" evaluation is appropriate in the first instance. They contend that, in contrast to the federal antitrust laws, section 105c is uniquely concerned with the impact of only one asset of a competitor.⁶² The Applicants

⁵⁸ See, e.g., *Eastman Kodak Co. v. Image Technical Services, Inc.*, 119 L. Ed. 2d 265, 294 (1992); *Otter Tail Power Co.*, 410 U.S. at 377.

⁵⁹ See Sullivan, *supra*, §§ 22-32, at 74-93.

⁶⁰ Applicants' Reply at 20.

⁶¹ Although the Applicants at one point appear to suggest that their "cost comparison" competitive advantage theory is within the body of general antitrust law principles, see *id.* at 21 (facility that detracts from owners' competitive position presents no issue under the federal antitrust laws), ultimately they recognize that their analysis is, in fact, one that is unique to section 105c, see *id.* at 22 (purpose of analysis under the federal antitrust laws is different from that involving NRC under section 105c).

⁶² See *id.* at 21.

further declare that antitrust cases that concern the acquisition of a particular asset in fact support the use of their "cost comparison" analysis.⁶³ The Applicants also argue that the general antitrust law principle of market power cannot trigger NRC antitrust authority because virtually all license applicants are dominant in their service areas, which would make consideration of "activities under the license" for each nuclear facility irrelevant.⁶⁴

We find no merit in the Applicants' attempt to distinguish the agency's section 105c authority from the principles governing antitrust enforcement generally on the basis that section 105c is concerned with a particular asset — a nuclear facility. Nothing in section 105c, or in the pertinent antitrust laws and cases, supports the proposition that traditional antitrust market-power analysis is inapplicable in the first instance when the assessment of the competitive impact of a particular asset is involved.

Certainly, the only case discussed by the Applicants as supporting this assertion, a recent decision by the Federal Energy Regulatory Commission (FERC), does not suggest a different result. In *Northeast Utilities Service Co.*,⁶⁵ at issue was the appropriate manner under the Federal Power Act for determining the effect upon competition of a proposed merger of several nuclear utilities. The FERC stated that the relevant analysis involved an initial comparison of the premerger competitive situation with the competitive situation that would result from an unconditioned merger, followed by consideration of proposed "remedial" commitments made by the merging utilities to assess whether those commitments would mitigate any anticompetitive effects that were found.

The Applicants maintain that the FERC's "before and after" analysis is analogous to the "cost comparison" theory they advocate because it also calls for consideration of the effects on the competitive situation of a change in circumstances. This may well be true, but does little to advance the Applicants' cause. More to the point is that FERC's consideration of the competitive situation embraces the traditional market-power analysis of the antitrust laws, without any endorsement, by analogy or otherwise, of the Applicants' "cost comparison" theory. Thus, the FERC's *Northeast Utilities* decision is entirely consistent with an interpretation of section 105c that looks to the competitor's market dominance and the use of that dominance, rather than focusing narrowly and exclusively on a comparison of the relative costs involved.

Similarly, the adjudicatory proceeding that resulted in the imposition of the license conditions now at issue, although not dispositive of the issue before us, carries with it the clear suggestion that the Applicants' "cost comparison" analysis is not in harmony with section 105c. In the *Davis-Besse* proceeding,

⁶³ See *id.*

⁶⁴ See *id.* at 22-23.

⁶⁵ Opinion No. 364-A, 58 FERC ¶¶ 61,070, 61,189-92 (Jan. 29, 1992).

in light of the Applicants' apparent market dominance,⁶⁶ both the Licensing and Appeal Boards concluded that the generally recognized antitrust principles were applicable and would render their actions subject to scrutiny under section 105c for anticompetitive effects that would "create or maintain a situation inconsistent with the antitrust laws." Ultimately, the Boards found the record replete with evidence of anticompetitive behavior on behalf of the Applicants.

Because these findings precipitated the portions of the existing license conditions involving "wheeling" that are a major source of the Applicants' dissatisfaction,⁶⁷ we see as particularly germane the Boards' consideration of whether a violation of the antitrust laws occurred relative to certain activities of Applicant CEI to limit Intervenor Cleveland's access to cheaper or more reliable sources of electricity.

The Licensing Board's findings in the *Davis-Besse* proceeding established that CEI and Cleveland were engaged in an ongoing campaign for customers in their shared service area. In that competition, Cleveland had the advantage of lower electricity rates. Applicant CEI, on the other hand, had the advantage of greater system reliability, an advantage it was using in a longstanding attempt to force Cleveland to either raise its prices to CEI's level (and thus be less competitive) or accept acquisition (and thus be eliminated as a competitor).⁶⁸ To attain these ends, CEI engaged in various types of anticompetitive behavior such as providing promotional considerations (e.g., free internal wiring or free electrical facility upgrades) only to customers in areas in which it competed with Cleveland and refusing to allow Cleveland to interconnect with its system, which would improve the municipal system's reliability, unless Cleveland would fix its rates at the level set by CEI.⁶⁹

Also prominent among CEI's methods for attempting to gain dominance over Cleveland was its refusal to allow Cleveland access to cheap, plentiful power supplies that would be available to Cleveland, but not to CEI as a private utility, through wheeling arrangements from other public utilities outside their service areas. Because Cleveland's service area was completely surrounded by Applicant CEI, Cleveland's access to these sources needed to bolster the

⁶⁶ See LBP-77-1, 5 NRC at 153-54, 158-59. For purposes of presenting their arguments on the "bedrock" legal issue, the Applicants have accepted the conclusions previously reached by the Licensing and Appeal Boards regarding their market position and their anticompetitive behavior, with the caveat that they believe those findings are irrelevant to the matters before us. See Applicants' Reply at 10 & n.19.

⁶⁷ "Wheeling" is the transportation of electricity by a utility over its lines for another utility, and includes the receipt from and delivery to another system of like amounts of (but not necessarily the same) energy. See *Davis-Besse*, ALAB-560, 10 NRC at 405 n.480. The Perry and Davis-Besse license conditions on wheeling compel the Applicants to provide local municipalities and cooperatives with power that those competing entities are able to obtain from other generating utilities, thereby relieving them of any need to buy the power from the Applicants at purportedly higher prices. While not the only restrictions about which they complain, these wheeling provisions nonetheless are a major source of the Applicants' displeasure with the existing license conditions. See Tr. 311-14.

⁶⁸ See LBP-77-1, 5 NRC at 166.

⁶⁹ See *id.* at 166-67.

reliability of its system was possible only over CEI's transmission lines.⁷⁰ The Licensing Board found, apparently without regard to the fact that CEI might be at a competitive disadvantage because of its higher-cost electricity, that CEI was utilizing its market dominance in an attempt to impede competition.⁷¹

The Appeal Board in *Davis-Besse* upheld the Licensing Board's findings that, by refusing to interconnect on reasonable terms, CEI had attempted to use its reliability advantage to force Cleveland to raise its rates in violation of the antitrust laws.⁷² Further, in responding to CEI's challenges to the Licensing Board's conclusions regarding its refusal to wheel power to Cleveland, the Appeal Board made note of the holding of the United States Court of Appeals for the Fourth Circuit in *American Federation of Tobacco Growers v. Neal*,⁷³ that "a refusal to make monopoly facilities available to a competitor was not justified on the ground that the competitor had lower costs."⁷⁴ The Appeal Board went on to highlight the court's pronouncement that

[a] restraint of trade involving the elimination of a competitor is to be deemed reasonable or unreasonable on the basis of matters affecting the trade itself, *not on the relative cost of doing business of the persons engaged in competition*. One of the great values of competition is that it encourages those who compete to reduce costs and lower prices and thus pass on the saving to the public; and the bane of monopoly is that it perpetuates high costs and uneconomic practice at the expense of the public.⁷⁵

On this basis, the Appeal Board upheld both the Licensing Board's determination that CEI's refusal to permit access was a violation of the antitrust laws and the Licensing Board's imposition of the wheeling requirements, finding the latter appropriate to ensure that those infractions did not continue or increase relative to the new nuclear facility.⁷⁶

In making these findings in the *Davis-Besse* proceeding about CEI's anti-competitive behavior, both Boards had before them evidence suggesting that the competitive advantage CEI enjoyed over Cleveland was not based upon a lower cost of doing business. In fact, the cost of CEI's electricity, as reflected in the rates it charged, was higher. Nonetheless, in reaching the conclusion that CEI had engaged in various actions that violated the antitrust laws, this "higher cost" had no apparent impact upon either Board's analysis of antitrust principles involved. Indeed, the *Neal* case cited by the Appeal Board suggests that such a

⁷⁰ See *id.* at 173-74.

⁷¹ See *id.* at 176.

⁷² See ALAB-560, 10 NRC at 364-65.

⁷³ 183 F.2d 869 (4th Cir. 1950).

⁷⁴ ALAB-560, 10 NRC at 329.

⁷⁵ *Neal*, 183 F.2d at 872 (emphasis supplied).

⁷⁶ See ALAB-560, 10 NRC at 328.

factor is not a basis for abrogating the traditional market-power analysis utilized to determine whether an antitrust violation exists.

Thus, the analytical framework employed by the Boards in their *Davis-Besse* decisions supports the conclusion that, consistent with the antitrust laws referenced in section 105c, what ultimately is at issue under that provision is not a competitor's comparative cost of doing business, but rather its possession and use of market power. And if a commercial entity's market dominance gives it the power to affect competition, how it uses that power — not merely its cost of doing business — remains the locus for any antitrust analysis under section 105c.⁷⁷

Finally, equally unavailing is the Applicants' additional argument that, because all license applicants are likely to be dominant in their service areas, general antitrust principles must give way to its "competitive advantage" analysis to avoid overextending the Commission's remedial authority under section 105c. This argument is itself an overextension. Many of the public utilities that have ownership interests in nuclear facilities undoubtedly would be considered, under general antitrust law principles, to have market dominance in their service areas. Nonetheless, there is still the critical question of how the utility has or will exercise that dominance, i.e., under section 105c, what is the reasonably probable outcome of its "activities under a license." If, as was shown to be the case in the *Davis-Besse* proceeding, that market power has been or would be misused, then with cause to believe that the applicant's "activities under the license would create or maintain a situation inconsistent with the antitrust laws" the Commission can intervene to take remedial measures.⁷⁸ On the other hand, if the Commission reaches a judgment that an otherwise dominant utility has not and will not abuse its market power, i.e., that its "activities under the license" will not "create or maintain a situation inconsistent with the antitrust laws," then the Commission need not intercede. Therefore, because a utility is dominant in its service area does not necessarily mean that, applying general antitrust law principles, the agency's finding regarding its "activities under a license" is irrelevant.⁷⁹

As we have seen, in delineating the basis for the Commission's antitrust remedial authority, the language of section 105c makes reference only to any "situation inconsistent with the antitrust laws." The antitrust laws, in

⁷⁷ It may well be that the Applicants' "cost comparison" analysis would involve considerations similar to the "pricing policy" and "profitability" factors that are implicated in the market-power analysis generally applicable under the antitrust laws. See *supra* note 59 and accompanying text. The apparent deficiency in the Applicants' analysis is that it emphasizes such matters to the exclusion of other factors that are equally relevant in determining whether a firm has market power.

⁷⁸ See *infra* note 106 and accompanying text.

⁷⁹ Of course, in reaching a judgment about a utility's "activities under the license," the Commission is permitted to undertake a "broad inquiry" into an applicant's conduct. See *Alabama Power Co.*, *supra*, 692 F.2d at 1368.

turn, incorporate a market-power analysis that is not dependent solely upon a determination about the cost of doing business or a "cost comparison" analysis of competitors. As a consequence, under any "logical" reading of this provision, to accept the Applicants' position we would have to superimpose their "cost comparison" analysis onto an otherwise unambiguous statute that, on its face, does not incorporate that analysis. We cannot do this consistent with established principles of statutory interpretation.

3. *NRC and DOJ Precedent Interpreting Section 105c*

Based on our conclusion that the language of section 105c clearly does not sustain the interpretation given to it by the Applicants, we would be justified in ending our statutory construction endeavors at this juncture. Nonetheless, so that none of the Applicants' interpretational stones is left unturned, we address their additional argument that their "cost comparison" interpretation of section 105c has already been endorsed and adopted by the Commission and the Justice Department in previous issuances on antitrust matters before this agency.

The crux of this claim is that various agency adjudicatory decisions and DOJ advice letters to the Commission regarding the antitrust aspects of licensing particular facilities reflect that the premise upon which the Commission and the DOJ acted was that the facilities involved would be producers of low-cost electricity.⁸⁰ It undoubtedly is true that at one time the Commission and the DOJ (to say nothing of the Congress, as we will detail in Part III.B, *infra*) anticipated that the electricity produced at nuclear facilities would be lower cost as compared to alternative sources. Commission cases and the DOJ advice letters reflect that supposition. Nonetheless, we see nothing in the cited cases or letters that establishes that this premise caused the Commission or the DOJ to conclude that "cost" was so fundamental to the section 105c regulatory scheme that the Applicants' constricted "cost comparison" analysis must be utilized prior to, and exclusive of, undertaking the broader market-power analysis generally applicable under the antitrust laws.

Certainly, the Appeal Board's *Fermi* decision,⁸¹ upon which the Applicants place their heaviest reliance, does not support their "cost comparison" theory. At issue in that proceeding was whether an electric cooperative owner/ratepayer had standing to intervene in a section 105 proceeding regarding the licensing

⁸⁰ Among the cases discussed by the Applicants in their summary disposition motion and in their reply brief are *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-73-25, 6 AEC 619 (1973); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892 (1977); and the Appeal and Licensing Board decisions in *Davis-Besse* discussed in Part III.A.2, *supra*. They also reference the DOJ advice letters for the Davis-Besse facility, 36 Fed. Reg. 17,888 (1971); the Zimmer plant, 37 Fed. Reg. 14,247 (1972); the proposed Forked River facility, 36 Fed. Reg. 19,711 (1971); and the Susquehanna plant, 37 Fed. Reg. 9410 (1970).

⁸¹ *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-475, 7 NRC 752 (1978).

of an investor-owned utility's nuclear facility. This intervenor wished to contest the acquisition of an ownership interest in the investor-owned utility's nuclear facility by a cooperative that was, in turn, the sole power supplier to the electrical cooperative of which the intervenor was a member. According to the intervenor, the requisite injury in fact arose from the private utility's alleged use of its monopoly power to force the cooperatives to buy a share in the nuclear facility, an action that ultimately would raise her rates. In affirming the Licensing Board's rejection of her intervention petition, the Appeal Board declared:

Mrs. Drake may or may not be correct in her allegations; for purposes of her petition and this appeal we must accept them. But doing so cuts against her. They place beyond dispute that her asserted injuries stem from sources unrelated to the denial of access to, or competitive advantage flowing from, the use of nuclear power. Boiled down, Mrs. Drake's arguments amount to dissatisfaction with the cooperatives' management decision to satisfy an expected need for more baseload power by acquiring part of the Fermi nuclear plant. She would prefer some other course; she fears this one will raise her electrical rates inordinately.

But the Nuclear Regulatory Commission and its adjudicatory boards do not sit to supervise the general business decisions of the public utility industry nor to second-guess the judgment of those who do; that task is entrusted to others. Injuries from those causes are beyond the zone of interests that Section 105c of the Atomic Energy Act was designed to protect or regulate.⁸²

The Applicants assert that this case confirms that section 105c "does not encompass antitrust 'injuries' ostensibly caused by high-cost nuclear power plants."⁸³ They declare that, given the ratepayer's claim that the alleged anti-competitive activities would result in her participation in a high-cost facility, the Appeal Board's decision establishes that such alleged anticompetitive actions are irrelevant under section 105c unless they occur with respect to a low-cost facility.

We cannot agree. The Appeal Board rejected the intervenor's claims because they did not involve the employment of competitive advantage flowing from the use of nuclear power. It concluded instead that her alleged grievances were merely an attack upon the business judgment of the cooperative considering nuclear facility ownership that was not cognizable under the Atomic Energy Act. More to the point, there is nothing in the *Fermi* case that is inconsistent with or undermines the Appeal Board's subsequent *Davis-Besse* decision indicating that the possession of a competitive advantage by an entity with market power need not be related to that entity's cost of doing business.

⁸² *Id.* at 757-58 (footnotes omitted).

⁸³ Applicants' Motion at 63.

4. Conclusion

In sum, the Applicants' argument is this: Regardless of its market dominance, a utility whose nuclear facility has higher costs relative to nonnuclear competitors cannot achieve a competitive advantage and so is not a matter of concern to the Commission under its section 105c mandate to determine whether "activities under the license would create or maintain a situation inconsistent with the antitrust laws." Ultimately, the strongest "logic" behind this proposition may be (as the Applicants argue) that if a utility knows that a nuclear facility it proposes to build and operate will have higher costs, it will never choose to construct that facility.⁸⁴ Yet, there are other readily identifiable factors, such as the desire to have additional baseload power for the purpose of ensuring power supply availability and reliability or the need for baseload power that is generated in a more environmentally benign manner, that could lead a utility to construct a nuclear facility that would produce higher-cost power relative to nonnuclear competitors.⁸⁵ By the same token, as the *Davis-Besse* cases suggest, simply because an entity with market power has a higher product cost than its competitors does not mean that its competitive activities are no longer subject to regulation under the antitrust laws specified in section 105c.

The Applicants thus are incorrect in their assertion that the comparative high cost associated with a nuclear facility that a utility chooses to construct (or continue to operate) is an initial and potentially dispositive factor in any Commission analysis under section 105c. Instead, that provision directs that the focus of the Commission's consideration must be whether, considering a variety of factors,⁸⁶ a nuclear utility has market dominance and, if so, given its past (and

⁸⁴ See Tr. 432-33.

⁸⁵ See *infra* pp. 303-05. As the Staff notes, the Appeal Board in the *Midland* case also made reference to competitive factors other than "cost" in making a determination under section 105c. See Staff's Cross-Motion at 24-25. Recognizing that the Commission's antitrust responsibility was limited to acting in situations in which it found that the activities under the license "would create or maintain a situation inconsistent with the antitrust laws," the Appeal Board went on to explain:

We have no difficulty in making the requisite connection on the basis of this record. One reason we have written at length — perhaps prolixly — is precisely to demonstrate that nexus between the existing anticompetitive situation and the introduction of the *Midland* generating capacity. Without repeating our findings chapter and verse, fair access to efficient, dependable and economical baseload generation is at the heart of the competitive situation before us. In the modern era of generating technology, this means resort to power plants of a size only dreamed of a generation ago. These plants, because of the economies inherent in their large scale operations, are efficient to use but costly to build.

Midland, ALAB-452, 6 NRC at 1094-95 (footnotes omitted). The Applicants suggest that the Appeal Board's conjunctive reference to "efficient, dependable and economical baseload generation," was a recognition that in the absence of an initial showing regarding low-cost power production, other competition-enhancing factors are not relevant to the Commission's determination under section 105c. See Applicants' Reply at 65 n.152. To the degree this statement can be considered any more than a recognition of the importance of economies of scale to baseload power production, we do not find the same significance in its conjunctive linkage, given that the Appeal Board's findings clearly were based upon the adjudicatory record before it regarding the *Midland* facility, which reflected that the facility would provide dependable, efficient, and economical baseload power. See *Midland*, ALAB-452, 6 NRC at 1095-97 & n.722.

⁸⁶ See *supra* note 59 and accompanying text.

predicted) competitive behavior, whether it can and will use that market power in its activities relating to the operation of its licensed facility to affect adversely the competitive situation in the relevant market. Accordingly, because it is not in accord with the established antitrust regulatory scheme that the Congress placed in section 105c, we must reject the Applicants' "cost comparison" interpretation of that provision, as embodied in the "bedrock" legal issue.⁸⁷

B. Legislative History of Section 105c

The remaining interpretational claim advanced by the Applicants in support of their construction of section 105c of the Atomic Energy Act is that their "cost comparison" interpretation of the statute is compelled by the legislative history of that section. As succinctly stated in the heading to the portion of their motion discussing this issue, they assert that

The Legislative History of Section 105(c) Establishes that the Congress Decided to Vest the NRC with Antitrust Authority Because of the Commonly-Held Understanding that the Nuclear Facilities the NRC Licenses Would Produce Low-Cost Electricity.⁸⁸

They claim that this history leads to a conclusion that section 105c should be construed as permitting antitrust conditions to be imposed by NRC *only* if the nuclear facility in question produces power at a lower cost than alternative sources of power. As the Staff, DOJ, and the other intervenors have observed, however, that conclusion is derived only through a highly selective perusal of that history. Indeed, they contend that, when viewed as a whole, that history supports the contrary theory that this congressional grant of authority to impose antitrust conditions reflected a variety of considerations and was intended to be used in a variety of situations.

I. The Parties' Positions

The Applicants acknowledge initially the "basic tenet" of legislative-history usage upon which the Staff and DOJ rely, i.e., that "the express language of

⁸⁷ As part of their challenge to the Applicants' "cost comparison" interpretation of section 105c, both the Staff and Intervenor AMP-Ohio suggest that adoption of the Applicants' position would create an administrative nightmare whereby the effectiveness of antitrust license conditions would be subject to frequent changes based upon swings in the cost of electrical power production. See Staff's Cross-Motion at 8 n.12, 13 n.19, 17-18 & nn.26-27; AMP-Ohio's Cross-Motion at 4-5. The Applicants respond that this purported "yo-yo" effect (as they label it, see Tr. 280) is irrelevant in the context of this proceeding because any anticipation that the Perry and Davis-Besse facilities would be "low cost" has not materialized, and is not likely to do so in the future. See Applicants' Reply at 77-78. Because we conclude that the "plain meaning" of section 105c mandates rejection of the Applicants' "cost comparison" concept, we need not delve into the impact of any purported difficulties in administering section 105c consistent with their theory.

⁸⁸ Applicants' Motion at 34.

a statute is the primary source of its meaning.”⁸⁹ But they go on to assert that “primary” does not mean “exclusive,” and that if a statute does not provide a conclusive source of understanding, resort to other indicia of legislative intent is appropriate.⁹⁰

Next, the Applicants concede that, as asserted by the Staff and the DOJ, the report of the Joint Committee on Atomic Energy on the 1970 amendments to section 105c of the Atomic Energy Act fails to deal with the importance of cost of the nuclear facility in a section 105c analysis.⁹¹ Although they acknowledge that the Joint Committee Report is an appropriate “starting point” for determining the legislative history, the Applicants urge that other sources of legislative history — such as statements of members of Congress or witnesses at congressional hearings urging the adoption of the amendments — should also be consulted.⁹²

Acting in this vein, the Applicants reference the testimony of a number of witnesses in the hearings before the Joint Committee on the 1970 amendments,⁹³ all to the effect that the antitrust provisions were needed in order to facilitate the access of various entities to “low-cost” nuclear power. In particular, they quote or describe statements by Joseph Hennessey, General Counsel of the Atomic Energy Commission; Walter B. Comegys, Deputy Assistant Attorney General, Antitrust Division, Department of Justice; S. David Freeman, Director of the Energy Policy Staff, Office of Science and Technology; Roland W. Donnem, Director of Policy Planning, Antitrust Division, Department of Justice; and William C. Wise, counsel for the Mid-West Electric Consumers Association, Inc. The Applicants conclude that the legislative history of section 105c “leaves no doubt that the *only* reason why nuclear powered plants, in contrast to other sources of electricity, required precicensing antitrust reviews by the NRC was the expectation that these facilities would provide substantial sources of low-cost electricity.”⁹⁴

With respect to the legislative-history arguments of the Applicants, the Staff, DOJ, and the other Interveners take the position that the statutory language of section 105c is clear (in not requiring any finding of comparative cost advantage prior to the imposition of antitrust conditions) and that no resort to legislative history is required. In the alternative, each urges that there is no legislative history to indicate that the antitrust provisions of section 105c are to be applied

⁸⁹ *Id.* at 34 n.76 (quoting *Alabama Power Co.*, 692 F.2d at 1367).

⁹⁰ *Id.* (citing *Chesapeake & Ohio Railway Co. v. United States*, 571 F.2d 1190, 1194 (D.C. Cir. 1977)).

⁹¹ *Id.* at 35.

⁹² *Id.* at 36.

⁹³ See *Prelicensing Antitrust Review of Nuclear Powerplants: Hearings on S. 212, H.R. 8289, H.R. 9647, and S. 2768 Before the Joint Comm. on Atomic Energy*, 91st Cong., 1st & 2d Sess. (1969-70) [hereinafter *Joint Committee Hearings*].

⁹⁴ Applicants' Motion at 45 (emphasis added).

only if the nuclear power produced from a facility were low-cost. Rather, they claim that the legislative history strongly supports the conclusion that Congress intended section 105c to provide broad antitrust authority, unencumbered by a low-cost condition precedent.

In making these arguments, they rely primarily on the Report of the Joint Committee on Atomic Energy,⁹⁵ which they assert fails to include any reference to "low cost" as a predicate for imposition of antitrust license conditions. They also cite statements before the Joint Committee hearing by certain individuals, including Philip Sporn, retired president and consultant for American Electric Power Company; Harrison Ward, Chairman of the Board of Commonwealth Edison Company; William R. Gould, Senior Vice President, Southern California Edison Company; and Senator Joseph Pastore.

2. Discussion Regarding Legislative History

As the Staff points out, it is clear that "[a]bsent a clearly expressed legislative intention to the contrary, [the language of the statute itself] must ordinarily be regarded as conclusive."⁹⁶ Indeed, the Supreme Court recently has gone even further, indicating that, when the words of a statute are unambiguous, no further judicial inquiry into legislative history of the language is permissible:

[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "Judicial inquiry is complete."⁹⁷

In our view, the statutory language of section 105c is clear and unambiguous: it makes no reference to low cost or the Applicants' "cost comparison" theory as a condition precedent for imposing or retaining antitrust license conditions. Thus, there appears to be no permissible reason for searching the legislative history to discern a contrary intent.

Nonetheless, because of the importance that the Applicants have placed on the alleged differing legislative history, we will assume, for purposes of discussion, that the statute is somehow ambiguous. In this connection, only if the legislative history were to indicate that the *only* reason why the Congress

⁹⁵ H.R. Rep. No. 1470, 91st Cong., 2d Sess. (1970) [hereinafter Joint Committee Report]. An identical report was issued in the Senate. See S. Rep. No. 1247, 91st Cong., 2d Sess. (1970).

⁹⁶ Staff's Cross-Motion at 15 (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

⁹⁷ *Connecticut National Bank v. Germain*, 117 L. Ed. 2d 391, 397-98 (1992) (citations omitted).

authorized the Commission to impose antitrust license conditions under section 105c was because of the anticipated cost advantages of nuclear facilities can the Applicants prevail in their legislative-history argument.⁹⁸ If other factors also entered the congressional consideration, then the legislative history cannot be relied on for interpreting the statute as authorizing antitrust conditions only where the cost of nuclear-produced power is lower than that produced from other sources.

The "best source of legislative history" is, of course, the congressional reports on a particular bill. Here, that is the previously mentioned Joint Committee Report.⁹⁹ That report makes no reference whatsoever to expected low cost as a predicate to the imposition or retention of any antitrust licensing provisions. Rather, it makes clear that the Commission is to make decisions about such license conditions based on what the factual record reflects about probable future inconsistencies with the antitrust laws and their underlying policies arising from "activities under the license."¹⁰⁰ At best, therefore, the report cannot be characterized as a "clearly expressed legislative intention" sufficient to depart from the seemingly clear wording of the statute.

In an attempt to bolster their claims, the Applicants rely on statements of several witnesses who testified regarding the desirability of antitrust conditions. Of course, to the extent they were neither made by a member of Congress nor referenced in the Joint Committee Report, such statements are normally accorded little, if any, weight.¹⁰¹ In any event, the witnesses relied on by the Applicants, although referring to the expected low cost of nuclear power, did not do so as the only or even a necessary predicate for antitrust conditions.

The Atomic Energy Commission and DOJ witnesses in question expressed concern with a broad array of anticompetitive considerations — in particular, undue economic concentration and the use of market domination to stifle competition. For example, General Counsel Hennessey emphasized the importance of deterring "monopolistic or other anticompetitive tendencies or unfair competitive practices."¹⁰² He stressed particularly that "very large [nuclear or fossil-fueled] plants" are "the most economical source of energy" so that small utilities should have access to both types of facilities.¹⁰³ In that context, he referenced nuclear facilities as a "cheap source of power," but no more so than large fossil plants.¹⁰⁴ Mr. Hennessey found "no logic" in distinguishing between the two

⁹⁸ See Applicants' Motion at 38, 45.

⁹⁹ See *Alabama Power Co.*, 692 F.2d at 1368.

¹⁰⁰ See Joint Committee Report at 14.

¹⁰¹ See *Kelly v. Robinson*, 479 U.S. 36, 50 n.13 (1986).

¹⁰² Joint Committee Hearings at 75.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

types of facilities, stating that "the treatment should be the same for both types of plant."¹⁰⁵

As we interpret it, therefore, the thrust of Mr. Hennessey's testimony was not that nuclear plants were low cost but, rather, that large plants (nuclear or fossil) were low cost because of economies of scale. Certainly, his concern in this regard was echoed by the United States Court of Appeals for the Eleventh Circuit in the leading AEA section 105(c) case, *Alabama Power Co. v. NRC*: "Size carries with it an opportunity for abuse which is not to be ignored when the opportunity is proved to have been utilized in the past."¹⁰⁶

The testimony of two DOJ witnesses also relied on by the Applicants — Deputy Assistant Attorney General Walter B. Comegys and Roland W. Donnem, Director of Policy Planning in the Antitrust Division — is even less supportive of the Applicants' position. When he spoke of a "large, low-cost power facility," the phrase quoted by the Applicants,¹⁰⁷ Mr. Comegys was addressing large size *per se*, whether nuclear or fossil-fueled. Mr. Donnem also was addressing "economies of scale associated with such large plants," fossil-fueled as well as nuclear.¹⁰⁸ And, as Cleveland points out, one of the quoted witnesses, William C. Wise, observed that hydro power was also "low-cost" power.¹⁰⁹

Although the witnesses cited by the Applicants did make certain references to the low cost of power to be produced by nuclear facilities, they also referenced other factors, particularly the importance of large size generally in achieving low cost. Not only did they fail to convey any clear legislative intent that the low cost of power to be produced by a nuclear facility was the only factor in imposing antitrust conditions, but they and other witnesses expressed differing reasons for giving the Commission the authority to impose antitrust conditions.

A primary example of this is the testimony of Charles A. Robinson, Jr., Staff Counsel to the General Manager, National Rural Electric Cooperative Association, who favored the antitrust provisions in the 1970 amendments because of both cost and environmental considerations:

[P]resuming that relative economics or the necessity to reduce atmospheric sulfur and nitrogen oxides, or both, will establish nuclear generation as our principal source of electricity in the future, the small system must be afforded some means to enforce such participation or purchase in the event that other sources of equivalent wholesale energy are unavailable.¹¹⁰

¹⁰⁵ *Id.*

¹⁰⁶ 692 F.2d at 1368 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932)). Before us at oral argument, counsel for the Department of Justice emphasized this same point, declaring "[w]hether or not applicant's nuclear plant is expensive or cheap, it can still contribute to a situation inconsistent [with the antitrust laws] because it is large-scale baseload generation . . ." Tr. 327.

¹⁰⁷ Applicants' Motion at 39 (quoting Joint Committee Hearings at 128).

¹⁰⁸ Joint Committee Hearings at 9.

¹⁰⁹ Cleveland's Cross-Motion at 30.

¹¹⁰ Joint Committee Hearings at 419.

By the same token, although opposed to the statutory antitrust review provisions, William R. Gould, Senior Vice-President, Southern California Edison Company, emphasized the environmental benefits that could be achieved through nuclear facilities. He noted that "nuclear plants generally are not economic bonanzas," that for his system nuclear plants did not have a cost advantage, but that his company was building only nuclear plants "because air pollution control considerations dictate that after 1975, under existing air pollution control regulations, large fossil-fueled generating units may not be built in this coastal basin."¹¹¹

Mr. Robinson's and Mr. Gould's testimony establishes that the Joint Committee had before it information clearly indicating that a significant factor other than projected low cost of nuclear facilities recommended enactment of section 105c. Consequently, the Applicants' assertions to the contrary notwithstanding, it is apparent that adoption of that provision need not have been based only upon the anticipated low cost of nuclear facilities.

The Applicants, however, have offered an explanation for any seeming Committee reliance on environmental considerations as a basis for enacting the 1970 revisions to section 105c. In response to our inquiries, they characterized environmental impacts of different types of facilities as a subset of economic costs.¹¹² In doing so, they claim that "environmental costs to a significant extent can be translated into financial costs."¹¹³ They maintain that this establishes that section 105c is not focused on costs other than financial costs.

No doubt, this and other factors relevant to facility construction and operation theoretically can be assigned an economic "cost." In attempting to do so, however, the Applicants are merely engaging in a classification artifice intended to immunize their "low-cost" argument from the clear import of the testimony before the Congress that section 105c was necessary to provide, *inter alia*, smaller entities with a choice of power source, irrespective of "cost," capable of achieving the differing environmental impacts such entities might seek.

Alex Radin, General Manager of the American Public Power Association, provided still another, albeit related, reason for the antitrust provisions. He testified that small utilities, particularly municipals, needed alternative power suppliers, i.e., "the opportunity to have a variety of sources of power supply."¹¹⁴ Quoting a former member of the Federal Power Commission, Mr. Radin noted that "[t]he very existence of this possibility is just as important in holding down

¹¹¹ *Id.* at 436. J. Harris Ward, Chairman of the Board of Commonwealth Edison Company, also testified with respect to the need, for environmental reasons, to use both nuclear power and power supplied by scarce low-sulfur coal. *See id.* at 385-86.

¹¹² *See* Tr. 261-71, 285-90, 297-98.

¹¹³ Tr. 262.

¹¹⁴ Joint Committee Hearings at 352.

power rates as hearings that a public service commission might hold."¹¹⁵ He advocated the precicensing antitrust review provisions as a means for small utilities to achieve these goals. He also noted that the problem is just as significant in the case of fossil-fired plants, but that "[t]he issue comes to the surface here because there is a licensing procedure required for nuclear plants and not for fossil-fired plants."¹¹⁶

Beyond that, there was testimony before the Joint Committee indicating that nuclear power was not necessarily low in cost. In particular, a report prepared by Philip Sporn, then-retired president of and consultant to American Electric Power Co., states that, in the preceding 2 years, there has been "a remarkable and ominous retrogression in the economics of our nuclear power technology."¹¹⁷ Similarly, in the course of a dialogue with George H.R. Taylor, Secretary of the AFL-CIO Staff Committee on Atomic Energy and Natural Resources, Senator John Pastore expressed the view that "without a lot of these built-in subsidies . . . [nuclear power] is not as profitable as some people are imagining. . . . [I]t is competitive only because of the subsidies that are built-in. The price of fuel, and a lot of other things . . ."¹¹⁸

3. Conclusion

The language of section 105c is clear in not requiring a low-cost finding prior to imposition or maintenance of antitrust license conditions. Resort to legislative history is thus not warranted or, indeed, permissible. But even conceding (for purposes of discussion) a potential lack of clarity in the statutory language, the best source of legislative history — the Joint Committee report — makes no reference to low cost as a predicate to the applicability or maintenance of antitrust license conditions.

Going to the next level, the statements of hearing witnesses before the Joint Committee are not unanimous in describing the low cost of nuclear power. They center, rather, on the low cost of power from large facilities, whether nuclear or coal-fired. They also describe other benefits to be achieved from nuclear power, such as environmental benefits or diversification of power sources. On the basis of the hearing testimony, it can be persuasively argued that all of these factors entered into the congressional determination to enact the 1970 revisions to section 105c.

In sum, as detailed in Part III.A, *supra*, the language of section 105c seems clear on its face, thus precluding any reference to legislative history. In any

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 353.

¹¹⁷ *Id.* at 300.

¹¹⁸ *Id.* at 551.

event, from the legislative history there does not appear to be the "clearly expressed legislative intention to the contrary" necessary to override this clear statutory language.¹¹⁹ Indeed, the legislative history as a whole supports the clear meaning of the statutory language by demonstrating that, in accord with the established market-power analysis under the antitrust laws, many factors relating to the potential competitive advantages of nuclear facilities, not simply whether the facility was "low cost," entered into the congressional decision to subject nuclear plants to precensuring antitrust review. The Applicants' legislative-history arguments thus are unpersuasive, and we decline to adopt them.

C. Equal Protection Requirements and Section 105c

As an additional ground supporting their reading of section 105c, the Applicants assert that any interpretation of that provision that fails to incorporate the "cost comparison" analysis they champion will run afoul of the guarantee of equal protection under the laws, as embodied in the Fifth Amendment's Due Process Clause.¹²⁰ The Staff and the Intervenors assert that this argument likewise is based upon flawed reasoning. We agree and conclude that the Applicants' equal protection claim is without merit.¹²¹

In making this argument, the Applicants acknowledge that an equal-protection challenge to an economic classification such as that drawn by section 105c is reviewed under the rational basis standard, which requires that any classifications established in the challenged statute must rationally further a legitimate government objective.¹²² They assert, nonetheless, that section 105c falls short of complying with this standard because its classification criteria are improperly (1) overinclusive, thereby making the provision applicable to some who, consistent with its legitimate legislative objective, should not be covered; and (2) underinclusive, so as to result in the statute failing to reach some who, consistent with its appropriate governmental objective, should be subject to the statute's restrictions. According to the Applicants:

The imposition of antitrust conditions under Section 105(c) is overinclusive, since it applies to utilities enjoying no cost advantages from nuclear power, the underlying principle of the statute. The conditions are also underinclusive, because they are imposed only on nuclear

¹¹⁹ *GTE Sylvania, Inc.*, 447 U.S. at 108.

¹²⁰ See *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

¹²¹ The Staff and Intervenor Cleveland also declare that the Applicants' equal protection argument is an attempt to have this Board declare a statute unconstitutional, an act that they maintain is beyond our (and the Commission's) authority. See Staff's Cross-Motion at 29 & n.39; Cleveland's Cross-Motion at 62-63. The Applicants in response assert that they are not asking us to violate this precept, but merely want to ensure that we interpret the statute in a constitutional manner. See Applicants' Reply at 81-83. Because we find that section 105c as we interpret it does not violate any equal protection principles, we need not resolve this dispute.

¹²² See, e.g., *Nordlinger v. Hahn*, 120 L. Ed. 2d 1, 12 (1992).

utilities, and not on other types of electrical generating plants the operation of which might "create or maintain a condition inconsistent with the antitrust laws."¹²³

The Applicants' "overinclusion" argument is based upon the premise that the "underlying principle" of section 105c is that a utility is not subject to regulation under its terms unless its nuclear facility enjoys a cost advantage. As we have explained in detail in Parts III.A and III.B, *supra*, this is not the principle upon which section 105c is grounded. Rather, consistent with the antitrust laws and the policies underlying those laws, that statute is intended to provide the Commission with the authority to consider and remedy any anticompetitive impacts that reasonably may be expected to arise as a result of the operation of a nuclear facility by a utility with market power, regardless of a utility's cost of doing business relative to that facility. Thus, consistent with our interpretation of the scope of section 105c, the imposition of the existing antitrust conditions under that provision does not deny the Applicants equal protection of the laws.

As to the Applicants' "underinclusion" claim, the "rational basis" underlying the congressional determination, as reflected in section 105, to afford a distinctive antitrust treatment to nuclear utilities (as compared to those utilities generating electrical power without using the atom) has previously been underscored. As the court recognized in the *Alabama Power* case, section 105 reflects the congressional concern that the unique technology underlying commercial power reactors, which in its crucial initial stages was largely government developed and financed, should not become a tool for increasing the competitive advantage of some private utilities at the expense of others.¹²⁴ This justification, considered in tandem with the well-recognized principle that a legislative body will be afforded a large measure of deference in its choice of which aspects of a particular evil it wishes to eliminate,¹²⁵ provides a complete answer to the Applicants' claim that there is no rational basis to explain the difference in antitrust treatment afforded nuclear as compared to nonnuclear utilities.¹²⁶

Thus, we conclude that the Applicants' constitutional arguments do not mandate any change in our conclusion that the "bedrock" legal issue should be resolved in favor of the Staff and Intervenors.

¹²³ Applicants' Motion at 28.

¹²⁴ See *Alabama Power Co.*, *supra*, 692 F.2d at 1368-69. See also *Millard*, ALAB-452, 6 NRC at 1095.

¹²⁵ See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

¹²⁶ The Applicants also attempt to buttress their equal protection argument by relying upon a line of cases, illustrated by *Milnot Co. v. Richardson*, 350 F. Supp. 221 (S.D. Ill. 1972), and *Weissinger v. Southern Railway Co.*, 470 F. Supp. 930 (D.S.C. 1979), for the proposition that a change in circumstances may render irrational a statute's previously rational basis, thus placing it in violation of equal-protection principles. They assert that in this instance, the previous rational basis for imposing antitrust regulation under section 105c — the congressional recognition that nuclear power would have a competitive advantage based upon its low cost — no longer obtains, thereby rendering its continued application to high-cost facilities unconstitutional. This argument, of course, is also based upon the premise that "cost comparison" is the fundamental basis for antitrust regulation under section 105c, a proposition we found in Parts III.A and III.B, *supra*, is not correct.

IV. STAFF BIAS CONTENTIONS

With the "bedrock" legal issue thus resolved, one additional matter remains relative to our disposition of this entire proceeding. Previously, in our Prehearing Conference Order, we admitted several contentions proffered by Applicant OE regarding alleged Staff bias resulting from supposed congressional interference in the Staff's decisional process intended to cause OE's license condition suspension application to be rejected.¹²⁷ Subsequently, citing the lack of Commission precedent and guidance for the consideration of this type of issue, the Commission *sua sponte* directed that we "suspend our consideration of all matters in this proceeding other than the so-called 'bedrock' legal issue."¹²⁸

In our Prehearing Conference Order, we referenced judicial authority to the effect that in reviewing an agency decision allegedly subject to bias, including improper legislative influence, the independent assessment of an adjudicatory decisionmaker regarding the merits of the parties' legal (as opposed to factual) positions will attenuate any earlier impropriety.¹²⁹ In light of our independent, adjudicative resolution of the "bedrock" legal issue, consistent with this authority, we would be justified in declining to consider the pending bias contentions further, thereby resolving all matters in controversy before us and making our rulings subject to Commission review in accordance with 10 C.F.R. § 2.786.¹³⁰

Before doing so, however, we must ensure that this step is consistent with the Commission's order that we "suspend" our consideration of "all matters" other than the "bedrock" legal issue. A fair reading of that directive evinces a clear concern that, given the lack of Commission guidance on what we recognized was a subject to be approached with "trepidation,"¹³¹ we forego any resolution of the merits of the bias charge. If, however, our disposition of the bias matter does not involve a ruling on the merits of OE's claims to that effect, it seems apparent that this Commission concern is not implicated.

We thus do not perceive the Commission's order as necessarily precluding us from taking action that results in a nonmerits disposition of Applicant OE's bias claim. In this light, because we have resolved the dispositive "bedrock" issue in

¹²⁷ See LBP-91-38, 34 NRC at 255-58.

¹²⁸ See CLJ-91-15, 34 NRC at 271.

¹²⁹ See LBP-91-38, 34 NRC at 256 & n.87 (citing *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 611-12 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978)).

¹³⁰ To leave the bias issue pending complicates the question of whether and how an aggrieved party can gain review of our determinations regarding the "bedrock" legal issue and the application of the various repose doctrines, should it elect to do so. See *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, ALAB-807, 21 NRC 1195, 1198 n.3 (1985) (licensing board's order disposing of some but not all of a party's contentions is considered interlocutory, and appeals from such an order must await issuance of a board decision disposing of the remaining issues). If, however, this Decision is conclusive as to all matters in this proceeding, our resolution of those matters (including our decision to resolve the bias matter) will be subject to immediate Commission review.

¹³¹ LBP-91-38, 34 NRC at 257.

this proceeding (as well as the related repose claims) as a matter of law based upon our independent review of the legal principles involved,¹³² we conclude that OE's claims of Staff bias resulting from improper congressional interference in the Staff decisional process now are immaterial to our disposition of the merits of this proceeding. Accordingly, we are dismissing those contentions without further consideration.

V. CONCLUSION

As the Commission has recently made clear, the agency is authorized to suspend antitrust license conditions such as those in the Perry and Davis-Besse licenses.¹³³ For the reasons we have detailed, however, the Applicants' interpretation of section 105c, as embodied in the "bedrock" legal issue they set before us, is not the appropriate vehicle for obtaining such relief. In so finding, we are not oblivious to what are the apparently industry-wide financial considerations that have brought the Applicants to the agency's door.¹³⁴ Yet, rooted as it is in existing antitrust law principles, a previous agency finding under section 105c(5) that a "situation inconsistent with the antitrust laws" exists and requires the imposition of remedial license conditions cannot be abrogated merely because of financial adversity.¹³⁵

Under the present statutory scheme, it is apparent that the continuing validity of the Perry and *Davis-Besse* antitrust conditions should not be measured under the crabbed, somewhat mechanistic "cost comparison" formula incorporated in

¹³² During the June 1992 oral argument on the parties' summary disposition motions, a number of apparent "factual" allegations regarding various matters were made and disputed. Because of our concern that any material factual disputes be identified relative to the resolution of the "bedrock" issue on summary disposition, we afforded the parties an opportunity to explain why any significant factual assertions made by counsel should or should not be considered by the Board. See Order (Schedule for Submissions Regarding Factual Assertions Made During Oral Argument and Proposed Transcript Corrections) (June 12, 1992) at 1-2 (unpublished); Order (Granting Opportunity to Respond to Filings on "Significant Factual Assertions") (July 1, 1992) at 1-2 (unpublished). In response, the Applicants filed a request that we disregard certain statements of counsel during the oral argument, to which the Staff, Cleveland, and AMP-Ohio filed responses. See Applicants' Request That the Licensing Board Disregard Factual Issues Discussed During Oral Argument (June 29, 1992); NRC Staff's Statement Concerning Matter Not to Be Considered by the Licensing Board and Request for Leave to Respond (June 29, 1992); Letter from S. Horn to [Licensing Board] (July 7, 1992); Reply by [AMP-Ohio] to Applicant[s]' Request That the Board Disregard Factual Issues (July 7, 1992); [Cleveland's] Opposition to Applicants' Request That the Licensing Board Disregard Certain Arguments of Cleveland's Counsel in Oral Argument (July 8, 1992). As is apparent from our disposition of the "bedrock" issue in Part III, *supra*, we did not find any of the disputed "factual allegations" pertinent to our resolution of that matter. Accordingly, we are dismissing the Applicants' request as moot.

¹³³ See CL1-92-11, *supra*, 36 NRC at 59.

¹³⁴ See generally D. Stellfox, "Ray Admits Nuclear is More Costly, Urges Emphasis on Other Benefits," *NuclearWeek* (Aug. 27, 1992) at 1, 7-8.

¹³⁵ Compare *1 F. Areeda & D. Turner, supra*, §104, at 7-8. ("[T]he courts have given almost undeviating priority to competition over claims that restrictive agreements are necessary to mitigate economic distress. The reasoning has been clearly stated: given the competitive mandate of the antitrust laws, such claims must be addressed to Congress rather than the courts" (footnotes omitted).)

the "bedrock" legal issue.¹³⁶ Rather, as was done when the conditions were imposed, their legitimacy must be assessed in terms of the broad realities of the market place in which the Applicants and their competitors vie. Before the Board, the Applicants have tendered their erroneous "cost comparison" analysis as the exclusive basis supporting their requests to suspend those conditions.¹³⁷ Hence, consonant with the Staff's determination, their applications properly are denied and this proceeding is terminated before us.

VI. ORDER

For the foregoing reasons, it is, this 18th day of November 1992, ORDERED that:

1. Regarding the issue (as specified in the parties' November 7, 1991 letter to the Board) whether certain doctrines of repose preclude the Applicants from litigating the "bedrock" legal issue in this proceeding, having concluded that there are no material issues of fact in dispute between the parties, the motions for summary disposition of Intervenors Cleveland, AEC, and Brook Park (as it adopts Cleveland's and AEC's arguments in its August 17, 1992 filing) are *denied*.

2. Regarding the "bedrock" legal issue (as specified in the parties' November 7, 1991 letter to the Board), having concluded that there are no material issues of fact in dispute between the parties, the Applicants' joint motion for summary disposition is *denied* and the cross-motions of the Staff and Intervenors Cleveland, AMP-Ohio, AEC, and Brook Park (as it adopts the arguments of other parties in its August 17, 1992 filing) are *granted*.

3. The Applicants' June 29, 1992 request that the Board disregard certain factual issues discussed during the oral argument is *dismissed* as moot.¹³⁸

4. The contentions of Applicant OE regarding alleged Staff bias (as specified in our October 7, 1991 Prehearing Conference Order, *see* LBP-91-38, 34 NRC at 257 n.92) are *dismissed*.

5. With this resolution of all issues before the Board, in accord with the Staff's April 24, 1991 determination (*see* 56 Fed. Reg. 20,057 (1991)), the Applicants' requests that the Perry and Davis-Besse operating licenses be

¹³⁶ Compare *Eastman Kodak Co.*, 119 L. Ed. 2d at 283-84 ("[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law").

¹³⁷ Section 105c(6) also declares that if an appropriate paragraph c(5) finding about a utility's "activities under the license" has been made, then the Commission may consider "in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest." 42 U.S.C. § 2135(c)(6). The Applicants have not tried to invoke this "public interest" element before us and we express no opinion as to whether it is applicable to antitrust license condition suspension requests such as theirs.

¹³⁸ See *supra* note 132.

amended to suspend the applicable antitrust conditions contained therein are *denied* and this proceeding is *terminated*.

6. In accordance with 10 C.F.R. § 2.786(b)(1), Commission review of this Decision may be sought by filing a petition for review within 15 days after service of this Decision. Requirements regarding the length and content of a petition for review and the timing, length, and content of an answer to such a petition are specified in 10 C.F.R. § 2.786(b)(2)-(3).

THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Charles Bechhoefer
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 18, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Dr. Walter H. Jordan

In the Matter of

Docket No. 030-20693-EA
(ASLBP No. 93-670-01-EA)
(Materials License
No. 29-1822205-02)

GEO-TECH ASSOCIATES, INC.
(Geo-Tech Laboratories,
43 South Avenue,
Fanwood, New Jersey 07023)

November 18, 1992

MEMORANDUM AND ORDER
(Providing for Geo-Tech's Answer to Revocation Order)

BACKGROUND

The background of this proceeding is set out in the Commission's Memorandum and Order of October 21, 1992, CLI-92-14, 36 NRC 221. For the purpose of this Order, it is sufficient to note that, on August 11, 1992, the NRC's Deputy Chief Financial Officer/Controller issued an Order revoking the material licenses of Geo-Tech Associates for an alleged failure to pay its annual license fee in accordance with the provisions of 10 C.F.R. Part 171. The Revocation Order, issued pursuant to the provisions of 10 C.F.R. § 2.202, directed

Geo-Tech to submit within 30 days an answer to the Order admitting or denying each charge.¹

More than 30 days later, on September 16, 1992, Geo-Tech responded through its counsel by briefly requesting a hearing in that "it wishes to appeal the fee assessed."² The response failed to address the charges underlying the Revocation Order or any other legal or factual aspect of the case.

Reciting Geo-Tech's failure to provide the information required of it, the Commission referred the hearing request to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel who designated this Board as the Presiding Officer. CLI-92-14, *supra*, 36 NRC at 222.

Noting the absence of criteria directly governing late-filed hearing requests on enforcement orders, the Commission directed the Presiding Officer to apply the criteria for entertaining late-filed petitions for leave to intervene in NRC proceedings. *Id.*, citing 10 C.F.R. § 2.714(a)(1).³

The Commission also observed that, because this is the first request for a hearing by a licensee on an order revoking a license for failure to pay user fees, it is appropriate to provide guidance regarding the scope of any respective hearing. *Id.* In that respect, the Commission requires that the "hearing scope be quite narrow." Challenges to the fee schedule rulemaking may not be entertained. In particular:

[W]e would expect that in most cases the only pertinent issues would be: (1) Was the Licensee placed in the proper fee category? (2) If the answer to the first question is yes, then the Board must then determine if the Licensee was charged the proper fee established for that category. (3) If the answer to this is also in the affirmative, the Board should find if the Licensee has been granted a partial or total exemption from the fee by the NRC Staff. And (4) if the Licensee did not receive an exemption, the Board must determine if the Licensee paid the fee charged.

Id.

¹Section 2.202(b) was amended on August 15, 1991, to provide that a licensee to whom the Commission has issued an order under its terms "must respond to the order." 56 Fed. Reg. 40,684. Previously the rule provided that a licensee subject to such an order "may respond to the order." An answer filed pursuant to the rule may demand a hearing.

²Letter, Robert F. Varady to NRC License Fee & Debt Collection Branch, September 16, 1992.

³As pertinent, 10 C.F.R. § 2.714, states:

(e)(1) . . . Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d)(1) of this section:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

NRC STAFF RESPONSE TO HEARING REQUEST

On November 6, 1992, the NRC Staff responded to Geo-Tech's September 16 hearing request, urging the Board to deny the request. As grounds, the Staff argues first that Geo-Tech failed to address the five factors for considering late-filed petitions, although it had a duty to do so in its request for hearing. Therefore, according to the Staff, factor (i), good cause for failure to file on time, has not been established and the request should be dismissed on that ground alone. Staff Response at 4-5.⁴

As its second argument for dismissing the hearing request, the Staff notes that the request failed to address the charges in the Revocation Order as required by the Order. *Id.* at 5-6. This is correct. As noted, the hearing request was quite terse and ignored the respective requirements of the Order and of the underlying section 2.202(b). The Staff also suggests that Geo-Tech's hearing request is deficient because it failed to address the four pertinent issues set out in CLI-92-14. We read the Staff's Response to assert that the hearing request is now ripe for dismissal without further process. We disagree with the Staff on this point.

DISCUSSION

The Staff's November 6 Response to Geo-Tech's hearing request is a hybrid pleading, not squarely covered by the NRC Rules of Practice. It was filed 51 days after the hearing request, compared to the 15 days provided for filing Staff answers to petitions for leave to intervene. 10 C.F.R. § 2.714(c). However, the Staff had no clear obligation to respond to the hearing request until a hearing was ordered, which we deem to be authorized by the Commission's Order in CLI-92-14.

To the extent the Staff's November 6 Response was filed as a consequence of CLI-92-14, as seems to be the case, the Response is both inadequate and premature. It is inadequate because it attempts to resolve factual issues without affidavits or any other appropriate factual presentation.

Staff's Response is premature because CLI-92-14 clearly implies that Geo-Tech should be given an opportunity to address the legal and factual criteria set out in that Order. We infer this from several indications. First, Geo-Tech's September 16 filing was plainly a default; the Commission was well aware that Geo-Tech's counsel did not discuss the five late-filing factors or the four

⁴The Staff also states that the four other factors to be considered in entertaining late-filed hearing requests weigh in favor of granting the request, albeit insufficiently. Staff Response at 5. The Board deems this to be a binding concession by the Staff. We also believe that the concession is reasonable, and for both reasons, we accept it.

pertinent issues set out in CLI-92-14. The Commission knew that we could not resolve those issues on the record as it existed when CLI-92-14 issued. By referring the matter to a presiding officer, the Commission expects more than a simple ministerial dismissal of the hearing request. It could easily have done as much itself.

Moreover, we do not believe that the Commission intended to provide new guidance for entertaining late-filed requests for a hearing on enforcement orders without providing an opportunity for the party most affected to respond under that guidance. In fact, the Commission specifically stated: "The designated presiding officer shall determine whether the hearing request should be granted despite its deficiencies using these criteria." CLI-92-14, 36 NRC at 222. Nor did the Commission intend to apply *ex post facto* the new guidance for limiting the scope of any hearing on nonpayment-of-fee revocation orders.

ORDER

1. Within 20 days following the service of this Order, Geo-Tech must respond, by answer in writing and under oath or affirmation, to the Order dated August 11, 1992, revoking the materials license held by it. The answer shall specifically admit or deny each allegation or charge made in the Order, and shall set forth the matters of fact and law upon which Geo-Tech relies. The answer shall state any reasons why Geo-Tech believes the Order should not have been issued or should be set aside, provided, however, that the Board will not entertain any reason barred from consideration by the Commission's Memorandum and Order of October 21, 1992, CLI-92-14. Geo-Tech's answer shall state its position, if any, with respect to each of the four pertinent issues set out in CLI-92-14.

2. The answer shall demonstrate good cause, if any, why Geo-Tech's hearing request and answer to the Order revoking its license was not filed on time. For the purpose of this requirement the Board makes the following distinction:

a. The request for hearing and answer to the charges was due on September 10, 1992. A request for hearing, but not an answer to the charges, was filed on September 16, 1992. State the good cause, if any, why the request for hearing was filed 6 days late.

b. Geo-Tech has yet to file an answer admitting or denying the charges in the Revocation Order and the other information required by the Revocation Order and by 10 C.F.R. § 2.202(b). Any such answer

filed after September 10, 1992, is late.⁵ Geo-Tech shall state any good cause for such late filing.⁶

3. Before or at the time of filing an answer or other pleading, counsel for Geo-Tech shall file a notice of appearance in accordance with the provisions of 10 C.F.R. § 2.713.

4. The NRC Staff may respond to Geo-Tech's answer within 15 days following its service.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 18, 1992

⁵The Board tolls the time for calculating the lateness of Licensee's answer as of October 21, 1992, the date of issuance of CLI 92-14. Geo-Tech's counsel could then have reasonably awaited a further order of the Presiding Officer for filing pleadings.

⁶See notes 3 & 4, *supra*. Geo-Tech need not, but may, address factors (ii)-(v) to be weighed in entertaining late-filed answers.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Peter S. Lam
Dr. George F. Tidey

In the Matter of

Docket Nos. 030-00320-EA
999-90003-EA
(ASLBP No. 93-672-02-EA)

ST. JOSEPH RADIOLOGY
ASSOCIATES, INC., and
JOSEPH L. FISHER, M.D.
(*d.b.a.* ST. JOSEPH RADIOLOGY
ASSOCIATES, INC., and FISHER
RADIOLOGICAL CLINIC)

November 20, 1992

In this Memorandum and Order, the Licensing Board denies the Petitioner's motion, pursuant to 10 C.F.R. § 2.202(c)(2)(i), to set aside the immediate effectiveness of an NRC Staff enforcement order.

RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS REVIEW

Pursuant to 10 C.F.R. § 2.202(c)(2)(i), a person to whom the Commission has issued an immediately effective enforcement order may move to set aside the immediate effectiveness of the order on the ground that "the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error."

RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS REVIEW

Pursuant to 10 C.F.R. § 2.202(c)(2)(i), a set-aside motion must state with particularity the reasons why the enforcement order is not based upon adequate evidence and the motion must be accompanied by affidavits or other evidence relied upon by the movant.

RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS REVIEW

Pursuant to 10 C.F.R. § 2.202(c)(2)(i), the Licensing Board must "uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness" and the adequate evidence test is met when the "facts and circumstances within the NRC staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety, or interest." 57 Fed. Reg. 20,194, 20,196 (May 12, 1992).

MEMORANDUM AND ORDER (Denying Request to Set Aside Immediate Effectiveness of Enforcement Order)

On October 16, 1992, the NRC Staff issued an immediately effective order to Joseph L. Fisher, M.D., directing him to transfer within 45 days all byproduct material in his possession to an authorized recipient.¹ The Staff's order was accompanied by a cover letter explaining the major provisions of the enforcement order.² In a short five-sentence, five-paragraph letter dated October 22, 1992, Dr. Fisher responded stating, *inter alia*, that he had received the Staff's letter.³ In the last sentence and paragraph of the letter, he stated "I pray for the Presiding Officer to set aside the immediate effectiveness of the Order so that I can have more time to attempt to comply with all of your regulations."⁴ On November 2, 1992, the Staff filed a response with the Secretary of the Commission to Dr. Fisher's request to set aside the immediate effectiveness of the order.⁵

¹ See 57 Fed. Reg. 48,404 (Oct. 23, 1992).

² Letter from Hugh L. Thompson, Jr., Deputy Executive Director for Nuclear Materials Safety, Safeguards and Operations Support, to St. Joseph Radiology Associates, Inc., and Joseph L. Fisher, M.D. (Oct. 16, 1992) [hereinafter Thompson Cover Letter].

³ Letter from Joseph F. Fisher, M.D., to Hugh L. Thompson, Jr. (Oct. 22, 1992).

⁴ *Id.*

⁵ NRC Staff's Response to Joseph L. Fisher's, M.D. [sic] Request to Set Aside the Immediate Effectiveness of the Order to Transfer Byproduct Material to Authorized Recipient (Nov. 2, 1992) [hereinafter NRC Response].

Thereafter, on November 9, 1992, the Secretary forwarded these filings to the Chief Administrative Judge⁶ who, on November 12, 1992, established this Licensing Board to conduct the proceeding in this enforcement action.⁷

For the reasons that follow, Dr. Fisher's request to have the immediate effectiveness of the Staff's order set aside is *denied*.

I.

A. Pursuant to 10 C.F.R. § 2.202(c)(2)(i), a person to whom the Commission has issued an immediately effective enforcement order may move to set aside the immediate effectiveness of the order within 20 days of the date of the order. That section also provides that an immediate effectiveness order may be challenged on the ground that "the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error."⁸ The regulation further directs that a set-aside motion must state with particularity the reasons why the order is not based upon adequate evidence and the motion must be accompanied by affidavits or other evidence relied upon by the movant.

The regulation gives the Staff 5 days to respond to a set-aside motion and provides that the Licensing Board "will uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness."⁹ In the statement of considerations accompanying this amendment to its Rules of Practice, the Commission indicated that the adequate-evidence test is met when the "facts and circumstances within the NRC Staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety, or interest."¹⁰

B. The Staff's October 16, 1992 order states that Dr. Fisher currently possesses, without a license, byproduct material consisting of approximately 600 curies of cobalt-60 as a sealed source in a Picker Corporation Model 6202 (V/3000) teletherapy unit located in a medical office suite occupied and controlled by Dr. Fisher at 702 Jules Street, St. Joseph, Missouri. The order then recites the licensing history of the byproduct material. In brief, Dr. Fisher first sought and received a byproduct material license for the teletherapy unit in

⁶ Memorandum from Samuel J. Chilk, Secretary, to B. Paul Cotier, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Nov. 9, 1992).

⁷ 57 Fed. Reg. 54,864 (Nov. 20, 1992).

⁸ 57 Fed. Reg. 20,194, 20,198 (May 12, 1992) (to be codified at 10 C.F.R. § 2.202(c)(2)(i)).

⁹ *Id.*

¹⁰ *Id.* at 20,196.

1959. That license was renewed in 1969 under the name of Fisher Radiological Group. In 1980, the license, Byproduct Material License No. 24-05592-01, was again renewed under the name of St. Joseph Radiology Associates, Inc. That license, which lists Dr. Fisher as radiation safety officer, expires on July 31, 1993. According to the order, St. Joseph Radiology Associates now has been dissolved and, since its dissolution, Dr. Fisher has retained control over the byproduct material.¹¹

The Staff's order also details the enforcement history leading up to the October 16 immediately effective order. In this regard, it states that the Staff first contacted Dr. Fisher in June 1991 to ascertain the status of the byproduct material and, at that time, learned that Dr. Fisher intended to divest himself of the byproduct material. In a followup contact on March 6, 1992, Dr. Fisher informed the Staff that the Licensee, St. Joseph Radiology Associates, Inc., had been dissolved, that the Licensee had no funds to dispose of the byproduct material, that he had made no plans to dispose of it, and that the byproduct material was stored and secured in the medical offices at 702 Jules Street. The order states that, on March 17, 1992, the Staff again contacted Dr. Fisher to verify the status of the Licensee. At that time, Dr. Fisher confirmed that the Licensee had been dissolved, but he refused to provide the Staff with any information as to how to contact any other former corporate owners.¹²

Thereafter, the order states that on May 18, 1992, the Staff issued a notice of violation to Dr. Fisher for possession of byproduct material without a license in violation of 10 C.F.R. § 30.3. Dr. Fisher responded to the notice in a May 27, 1992 letter asserting that he did not possess the byproduct material, that it belonged to the now defunct Licensee, and that the material was stored in a locked room in the building where he practices medicine. The order relates that the Staff then wrote to Dr. Fisher on July 10, 1992, seeking further information regarding his response to the violation notice. This letter also explained the difference between owning and possessing byproduct material and provided Dr. Fisher with information on the cost of obtaining a byproduct material license. The order next states that Dr. Fisher responded by a letter dated July 15, 1992, stating that the byproduct material was not stored on his property, that the property was owned by a building corporation from which he rented space, and that he did not have the funds to obtain a byproduct material license.¹³

According to the enforcement order, the Staff then telephoned Dr. Fisher on August 5, 1992, to discuss with him the subjects of security and control over the byproduct material. In that conversation, Dr. Fisher initially denied that he controlled the byproduct material and stated that he was unsure whether he had

¹¹ 57 Fed. Reg. at 48,405.

¹² *Id.*

¹³ *Id.*

a key to the door where the teletherapy unit was stored and did not know who else might have such a key. He did agree, however, to have the lock changed by a locksmith under his direct supervision and to maintain control over the new key. The order further states that the next week the Staff conducted an onsite inspection and verified that the unit containing the byproduct material was located in a locked room in a medical office suite occupied and controlled by Dr. Fisher. From that inspection, the Staff found that the control console key to the teletherapy unit had been lost and that the last known use of the console was in April 1990. Additionally, Dr. Fisher informed the Staff inspectors that he had contacted a vendor about removal of the unit and that he could not afford the estimated cost.¹⁴

On the basis of these facts, the enforcement order concludes that Dr. Fisher possesses regulated byproduct material without a license in violation of section 81 of the Atomic Energy Act, 42 U.S.C. § 2111, and 10 C.F.R. § 30.3. Additionally, the order asserts that this violation and Dr. Fisher's unwillingness to transfer the byproduct material to an authorized recipient demonstrates a disregard for NRC requirements and that these failures, in light of all the circumstances surrounding his possession of the byproduct material, preclude a finding that the public health and safety will be protected while Dr. Fisher remains in possession of radioactive material. Finally, the order declares that the significance of the violation and Dr. Fisher's conduct in this matter, require that the order be immediately effective.¹⁵ Accordingly, the order directs Dr. Fisher to (1) keep the byproduct material in locked storage and not use the material; (2) transfer all byproduct material in his possession to an authorized recipient within 45 days; (3) notify the agency at least 2 days prior to any transfer; and (4) confirm, in writing, the transfer and provide the agency a copy of the preshipment leak rate test and a copy of the recipient's certification of receipt.¹⁶

II.

A. The Commission's regulation, 10 C.F.R. § 2.202(c)(2)(i), that permits challenges to the immediate effectiveness of an agency enforcement order requires that the movant demonstrate that the order, and the need for immediate effectiveness, is based upon mere suspicion, unfounded allegation, or error and that it is not based upon adequate evidence. To make this mandatory showing, the regulation requires that the movant particularize the reasons why the order is flawed and support his challenge with affidavits or other evidence. Here, Dr.

¹⁴ *Id.*

¹⁵ *Id.* at 48,405-06.

¹⁶ *Id.* at 48,406.

Fisher's October 22, 1992 letter requesting that the immediate effectiveness of the Staff's enforcement order be set aside falls far short of meeting his burden under the rule.

The Staff's October 16, 1992 order details the full licensing and enforcement history of Dr. Fisher's alleged violation of the Atomic Energy Act and the Commission's regulations. It also recites the particular reasons why the Staff found it necessary to make the order immediately effective to protect the public health and safety. Indeed, the Staff's order even includes a section setting forth the basic requirements for a set-aside motion filed pursuant to section 2.202(c)(2)(i).¹⁷ Additionally, the Staff's cover letter accompanying the order provided the names and telephone numbers of the agency staff to whom Dr. Fisher could address any questions concerning the order.¹⁸ Here, however, Dr. Fisher's October 22, 1992 letter merely requests, without more, that the immediate effectiveness of the enforcement order be set aside. He provides no particularization of why the Staff's order is in error, much less any evidence to support such a claim. Accordingly, Dr. Fisher's request to set aside the immediate effectiveness of the Staff's enforcement order must be denied for his failure to comply with section 2.202(c)(2)(i) and meet his burden as the movant seeking to set aside the immediate effectiveness of the order.

B. Putting to one side Dr. Fisher's failure to meet his burden under section 2.202(c)(2)(i), we note that the Staff's October 16, 1992 enforcement order and immediate effectiveness determination are based upon adequate evidence. The Staff's November 2, 1992 response to Dr. Fisher's request to set aside the immediate effectiveness of the enforcement order generally reiterates the facts set forth in the order. That response also includes the supporting affidavit of a Staff enforcement specialist, who is an experienced health physicist, and copies of the correspondence between the Staff and Dr. Fisher. The Staff affiant states that the byproduct material in Dr. Fisher's possession is a high-energy gamma emitter and the 600 curies of cobalt-60 in the teletherapy unit is a source of sufficient magnitude to expose a person to a lethal dose of radiation if the unit is improperly used.¹⁹ Further, the Staff affiant explains the dangers involved if an untrained individual has access to the unit and outlines the significant contamination and exposure problems that will arise if disposal of the byproduct material is not done properly.²⁰ As the enforcement order, the Staff's response, and the Staff's exhibits make clear, the agency action is not grounded upon mere suspicion or unfounded allegation. Rather, the facts detailed by the Staff in its order, and supported by the affidavit of the Staff's

¹⁷ *Id.*

¹⁸ Thompson, Cover Letter at 2.

¹⁹ NRC Staff's Response, Attachment 1, Affidavit of Patricia A. Santiago (Nov. 2, 1992) at 2.

²⁰ *Id.* at 5.

enforcement specialist, and the correspondence between the Staff and Dr. Fisher, are fully sufficient to warrant a person of reasonable caution to believe that the charges specified in the October 16, 1992 order are true and that the order is necessary to protect the public health and safety.²¹ Accordingly, the Staff order and immediate effectiveness determination are based upon adequate evidence and are well-founded.

For the foregoing reasons, Dr. Fisher's October 22, 1992 request to set aside the immediate effectiveness of the Staff's October 16, 1992 order is *denied*.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Peter S. Lam* (by TSM)
ADMINISTRATIVE JUDGE

George F. Tidey* (by TSM)
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 20, 1992

²¹ See 57 Fed. Reg. at 20,196.

*Judges Lam and Tidey approved the Memorandum and Order but were unavailable to sign it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-445
50-446

TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*

(Comanche Peak Steam Electric
Station, Units 1 and 2)

November 19, 1992

The Director of the Office of Nuclear Reactor Regulation denies a petition filed by Ms. Sandra Long Dow, Disposable Workers of Comanche Peak Steam Electric Station, and Mr. R. Micky Dow. Specifically, the Petition alleged that Texas Utilities Electric Company (TUEC or Licensee) failed to demonstrate the necessary character and capability that are the primary factors to be considered in granting a license; that the Licensee has shown a "downward spiral" in violations, reportable incidents, and NRC Staff concerns; and that the NRC Staff failed to respond to requests for information about several incidents. Petitioners also offered, as they have previously, to give the Commission transcripts of sixteen reels of audio tapes that contain conversations between the Licensee and certain individuals that allegedly indicate duplicity between Region IV and the Licensee. Petitioners requested that the Commission order the immediate shutdown of Unit 1 of Comanche Peak Steam Electric Station, institute a proceeding to modify, suspend, or revoke the license held by TUEC for Unit 1, and suspend considering whether to extend or modify the construction permit for Unit 2 of the facility until resolution of any proceeding pertaining to the license for Unit 1.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On May 19, 1992, Ms. Sandra Long Dow, Disposable Workers of Comanche Peak Steam Electric Station, and Mr. R. Micky Dow (the Petitioners) filed a request (the Petition) with the Director, Office of Nuclear Reactor Regulation, requesting that the U.S. Nuclear Regulatory Commission (NRC) take action regarding the Comanche Peak Steam Electric Station (CPSES), Units 1 and 2.

Petitioners requested that the Commission order the immediate shutdown of Unit 1 of the Comanche Peak Steam Electric Station and institute a proceeding to modify, suspend, or revoke the license held by the Texas Utilities Electric Company (TUEC or Licensee) for Unit 1. They also requested that the NRC suspend considering whether to extend or modify the construction permit for Unit 2 of the facility until resolving any proceeding regarding the license for Unit 1. Petitioners allege, as a basis for this request, that the Licensee has failed to demonstrate the necessary character and capability that are the primary factors to be considered in granting a license, and has shown a "downward spiral" in violations, reportable incidents, and NRC Staff concerns. Petitioners allege that the NRC Staff failed to respond to requests for information about several of these incidents. Petitioners also offered, as they have previously, to give the Commission transcripts of sixteen reels of audio tapes that contain conversations between the Licensee and certain individuals that allegedly indicate duplicity between Region IV and the Licensee.

Previously, on February 20, 1992, Petitioners filed a motion for late intervention to reopen the CPSES operating license proceeding (Docket No. 50-445) and the construction permit amendment proceedings (Docket No. 50-446). On April 4, 1992, Petitioners filed a motion seeking to present oral argument before the Commission on their February 20, 1992 motions. On August 12, 1992, the Commission denied these requests. CLI-92-12, 36 NRC 62. Additionally, Petitioners' request to reopen the proceedings for the operating license for Units 1 and 2 because of alleged deficiencies in the labeling of pressure valves and limit switches was referred to the Staff for consideration as a petition submitted pursuant to 10 C.F.R. § 2.206. That issue will also be addressed herein.

In my letter of June 10, 1992, I acknowledged receipt of the May 19, 1992 Petition and stated that the NRC would take action on Petitioners' request within a reasonable time.¹ In an Order dated July 28, 1992, the Staff extended the construction completion date for CPSES Unit 2 to August 1995. This action

¹Because Petitioners assert wrongdoing by the NRC Region IV staff, the Petition was also referred to the Office of the Inspector General on June 10, 1992, for such action as it may deem appropriate.

constituted a partial denial of the Petition, specifically the request to suspend consideration of extension or modification of the construction permit for Unit 2. In a letter of July 28, 1992, I informed Petitioners of the partial denial. The Staff based its decision on 10 C.F.R. § 50.55(b), which states that the construction completion date may be extended for a reasonable period of time upon a showing of good cause. In its request dated February 3, 1992, the Licensee demonstrated that the delay in construction of Unit 2 was necessary to concentrate resources on the completion of Unit 1. The NRC agreed that a period of 3 years is necessary for construction and testing, plus a period for unanticipated delays.

I have evaluated the Petition and have determined, for the reasons set forth below, that no adequate basis exists to take action against the Licensee for CPSES, Units 1 and 2. Accordingly, the Petition is denied.

II. DISCUSSION

Petitioners support their request with several incidents that occurred since November 1991. Petitioners allege that the following matters demonstrate the inadequate character and capability of the Licensee to hold licenses:

1. A leak in a pressure tank caused 100-mile-per-hour (mph) winds in the access tunnel between Units 1 and 2, which resulted in a female employee being blown into a radiation area.
2. Resin spilled into the core because of personnel error and misaligned valves.
3. A "hot" valve in Unit 1 was cut in two, causing a radiation release and exposure to several individuals.
4. Sample lists of NRC documents available in the public document room were submitted with the Petition. The lists contain twenty-six documented "reportable incidents," numerous areas showing direct concern by Region IV, and at least six reactor trips.
5. The NRC proposed fines for violations by the Licensee totaling close to \$100,000 for 1992.
6. An additional reactor trip occurred, after which the spent fuel pool for Unit 1 was without cooling water for approximately 20 hours causing an abnormal rise in temperature. Petitioners submit this incident as evidence of a continuing problem involving the use of improperly trained control room personnel.
7. The Petitioners submitted, as an attachment to the petition, a photograph which they assert shows Comanche Peak control room staff to be asleep, which they state is known to be the "common manner" for control room personnel.

8. Petitioners allege that the Licensee has failed to label and mislabeled pressure valves and limit switches on both units.

Petitioners submitted several written statements from TUEC employees and local citizens expressing concern about safety of the plant in support of the Petition. The statements of Ron Jones and Dobie Hatley allege specific safety concerns, which the NRC previously evaluated when it considered the February 20, 1992 motion of Petitioners to reopen the record. The Commission found that these statements did not raise substantial safety concerns. CLI-92-12, *supra*. The remaining statements express a general concern for the safety of the plant or the treatment of employees but present no facts or evidence to support Petitioners' request. Sixteen signed statements express support for Petitioners' Motion to Reopen the Record but do not address issues raised by the Petition herein. Five affidavits or letters, addressed to whom it may concern, express general concern about the operation of Comanche Peak and about the presence of waste disposal sites containing toxic and radiation-contaminated materials. The NRC previously determined that waste disposal sites at Comanche Peak do not raise a substantial safety concern and denied a request for enforcement action under 10 C.F.R. § 2.206. DD-91-4, 34 NRC 2011 (1991).

Each of the issues raised in the Petition is summarized and evaluated below.

A. Employee Injured in Airlock

Petitioners claim that a leak in a pressure tank caused 100-mph winds in the access tunnel between Units 1 and 2 and resulted in a woman employee being injured when she was blown into a radiation area so hard that she bent welded piping.

In its review of this allegation, the NRC Staff found that the Licensee had informed the resident inspector of the incident and provided him with copies of a written report, Operations Notification Evaluation Form FX-91-1102. The incident occurred on October 6, 1991, in the personnel airlock between Unit 1 containment and the safeguards building. The airlock consists of two airtight doors which are only allowed to be opened individually during operation to preserve containment integrity. At the time of the incident, Unit 1 was shut down in preparation for a refueling outage. Under these conditions, both doors of the airlock are allowed to be open since the containment atmosphere has very low radiation levels. The operators were in the process of opening the airlock to provide access to containment. The outer door was open and the differential pressure across the inner door was measured to be 0.2 psid. A negative pressure in containment is desirable for containment integrity. The operators did not recognize this as a high pressure differential that could be dangerous. The operators also did not close the containment purge supply and exhaust dampers prior to defeating the door interlocks, contrary to operating

procedures. When the inner door was unlatched, the force swept the employee into containment. The actual speed of the wind is not known. The employee hit a 3-inch insulated pipe with her forearm and was then pulled around a corner where she struck more piping. There was no report of an overexposure of radiation to the employee. The employee was examined on site and returned to work when no injuries were found. Examinations and x-rays taken later by the employee's doctor revealed no broken bones or deformities.

The Licensee evaluated the incident to determine root causes. The Licensee took corrective action by informing all employees of the event, emphasizing the failure to close the purge dampers before opening the doors, and the failure to recognize the danger of opening a door against a differential pressure. The Licensee added this incident to the training program and revised the training to cover the potential danger of a differential pressure. The Licensee also changed the procedure for opening airlock doors to address these concerns.

Petitioners are concerned that Region IV treated this incident as unreportable. The NRC requires employee injuries to be reported only when a radioactively contaminated person is transported to an offsite medical facility for treatment. 10 C.F.R. § 50.72. The employee in this incident was treated at the site. The event did not result in damage to any safety equipment, did not change plant conditions, and did not affect the safety of the plant. Because it was not in any of the categories mentioned, the event is not required by regulations to be reported to the NRC. Moreover, the Licensee informed the resident inspector of the event and provided him with copies of the internal report containing several written statements by eye witnesses, a thorough review of the root causes, and copies of documents that implemented the corrective actions.

Although the event was not reportable, the NRC was informed of the event by the Licensee at the time of occurrence. The NRC Staff followed up to ensure that the Licensee took appropriate actions to correct deficiencies in its training and procedures. Petitioners provide no new information and no basis to conclude that the Licensee is unable or unwilling to operate CPSES in a safe manner. Accordingly, I conclude that the incident does not present a substantial public health or safety concern that justifies the requested action.

B. Resin in the Core

Petitioners contend that resin was spilled into the core as a result of personnel error. In its review of the incident, the NRC Staff found that on November 6, 1991, some fine particles of resin and three resin beads bypassed the resin traps on a demineralizer filter for the spent fuel pool. The demineralizer is part of the spent fuel pool cooling and purification system which has two redundant trains, each consisting of two cooling pumps, two coolers, two purification pumps, two demineralizers, and several filters and skimmers. At the time of the incident,

both trains of the purification system were running. When resin particles were discovered in a routine sample taken at the outlet of demineralizer 2, the Licensee shut down that train of the purification system and isolated it to avoid releasing any more resin into the spent fuel pool, the refueling cavity, and ultimately into the reactor coolant system. Train 1 continued to purify the refueling cavity. The cause of the resin release was a failed resin trap and not operator error as alleged by Petitioners. Shortly after the event, the Licensee informed the resident inspector and gave him a copy of the written report of this incident, Operations Notification Evaluation Form FX-91-1455.

As a short-term corrective action to maximize cleanup of the spent fuel pool and reactor coolant system, the operators increased the amount of reactor coolant sent through the chemical and volume control system and placed three temporary filters in service.

Westinghouse Electric Corporation evaluated the effect of resin in the reactor coolant system in a letter to the Licensee dated November 19, 1991. Westinghouse stated that the resin products are not considered to be corrosive to primary system piping and that normal use of the chemical and volume control system is adequate for control of system cleanup. Based on the small quantity of resin released, Westinghouse concluded that the material could have had no adverse consequences on fuel assembly integrity or operations. Upon review of the letter, the NRC Staff came to the same conclusion.

At the time of the incident, the NRC Staff determined that the Licensee took appropriate corrective actions and that the incident was not detrimental to the safety of the plant. Petitioners provide no facts to contradict these findings. Therefore, I conclude that Petitioners have not raised a substantial health or safety concern.

C. "Hot" Valve Cut in Two

Petitioners claim that a "hot" valve in Unit 1 was cut open, causing a radiation release and exposure to several individuals.

On March 17, 1992, a work request was written to have work performed on valve 2CS-7048A, a valve located in Unit 2. However, personnel disassembled and reassembled valve 1CS-7048A, in Unit 1, a valve similar to the Unit 2 valve which was the subject of the work request. Upon reviewing the work logs after maintenance was completed, a radiation protection technician thought the contamination levels appeared excessively high for what should have been a Unit 2 valve. The contamination levels were consistent with the normal levels in that area of Unit 1. Before the maintenance work was performed, a radiation protection technician had established a radiological barrier around the Unit 1 valve. Because of the barrier, personnel working on the valve took appropriate

precautions and did not receive an overexposure of radiation. After discovering the mistake, personnel performed the required maintenance on the Unit 2 valve.

On August 23, 1992, the NRC issued a Severity Level IV violation for failure to follow authorized work instructions, citing both this incident and a similar incident that occurred on February 23, 1992, in Unit 1. The NRC documented the incident in Inspection Report Nos. 50-445/92-08 and 50-446/92-08, April 23, 1992.

The NRC Staff found the Licensee's corrective action to be suitable. After the event, Unit 2 management suspended all activities to disassemble or reassemble components within the operations controlled area for permanent plant equipment in Unit 2 until the Licensee reviewed the incident. After reviewing the incident, the Licensee took short-term actions requiring double verification of component identification before beginning work. A Unit 1 task team had been formed previously in response to the February 23, 1992 incident. The team was exploring a number of corrective actions regarding procedural compliance to be implemented in Unit 1. The Staff found no reason to conclude that the Licensee could not or would not operate CPSES safely. Petitioners provide no facts to conclude otherwise. Therefore, I conclude that the event does not present a substantial health or safety concern.

D. Reportable Incidents and Reactor Trips

Petitioners submitted a sample of weekly reports which they claim contain reports of twenty-six reportable incidents and at least six reactor trips, which Petitioners find excessive. The weekly reports cover the period from January 19 to April 18, 1992, and consist of the Local Public Document Room list of correspondence between the NRC and TUEC, such as inspection reports, licensee event reports (LERs), periodic operating reports, and general correspondence.

Upon reviewing these documents and NRC records, the NRC Staff found that the Licensee submitted ten LERs during this period. These ten LERs are written reports of non-emergency incidents that occurred at CPSES. NRC regulations require that Licensees report shutdowns, deviations from technical specifications, and events that result in degradation of safety barriers or place the plant in a condition outside of its design basis. The Licensee is also required to include in the report an assessment of the safety consequences and a description of all corrective actions. 10 C.F.R. § 50.73. This reporting process ensures that the plant is in a safe condition after the event and that steps are being taken to avoid repeating the problem.

The sixteen other documents that Petitioners cite were updates or revisions to LERs of events that occurred several months (or years) earlier, and 10 C.F.R. Part 21 reports of defects in components that could affect performance.

The monthly operating reports for the period between January 19 and April 18, 1992, show that no reactor trips occurred during this period. The Licensee reduced power four times to make repairs but did not shut down the reactor. During the 19 months between January 1991 and July 1992, Unit 1 was shut down eleven times. The Licensee manually shut down the reactor four times for maintenance; once the unit was shut down for a refueling outage; twice the reactor automatically tripped because equipment failed; and four trips were caused by operator error. Therefore, nearly half of the shutdowns were initiated by the Licensee to improve plant performance or comply with regulations. The two automatic reactor trips that resulted from equipment failure were the result of problems with the main turbine and did not affect the nuclear or safety-related portion of the plant. In each case of operator-error-related trip, the Licensee evaluated the causes of the event and implemented appropriate corrective actions. Each event and corrective action was reviewed by the NRC resident inspectors and was found to have no safety significance. In each reactor trip, all systems functioned as expected to bring the plant to a safe shutdown condition.

The ten reportable incidents that occurred during the time period specified by Petitioners did not place the plant in an unsafe condition and the reactor did not trip during this period. The six automatic trips that occurred between January 1991 and July 1992 did not affect the safety of the plant. Petitioners have not provided any information to contradict this conclusion. The NRC was informed of each of the events at the time of occurrence and determined that the Licensee took appropriate corrective actions. Accordingly, I conclude that Petitioners have not raised a substantial safety concern.

E. Fines of \$100,000

Petitioners claim that civil penalties of approximately \$100,000 imposed for violations by the Licensee during 1992 demonstrate that the Licensee cannot safely operate the plant.

In evaluating violations to determine the appropriate enforcement action, the NRC Staff assesses the safety and regulatory significance of the violations, the Licensee's corrective actions to prevent future occurrences, and other relevant factors. During its review, the NRC considers whether a violation warrants shutting down a plant. In neither of these cases did the NRC Staff conclude that the Licensee was unable or unwilling to safely operate the facility, or that shutdown of the plant was warranted.

On December 4, 1991, the NRC proposed imposition of a civil penalty of \$25,000 on the Licensee. EA 91-189 (Dec. 27, 1991). This incident is documented in NRC Inspection Report Nos. 50-445/91-62 and 50-446/91-62, December 27, 1992. The violation involved a misalignment of the residual heat removal system which would have prevented the system from actuating

automatically in an emergency. The system was misaligned for 53 hours while the plant was in hot standby mode. No events occurred during this time that would have required the use of the residual heat removal system, and if this had been necessary, the system could have been properly aligned by opening two cross-tie valves. Therefore, while this was a violation of the operating license, the misalignment did not pose a serious safety concern. The NRC Staff concluded that the Licensee identified the misalignment, promptly corrected the lineup, and took appropriate actions to avoid recurrence and ensure proper control of plant configurations.

In July 1992, the NRC proposed imposition of a civil penalty of \$125,000 on the Licensee. EA 92-107 (July 23, 1992). The violation resulted from a loss of cooling to the spent fuel pool. The plant was never in an unsafe condition. This event is discussed in detail below in Section II.F.

The NRC Staff reviewed the Licensee's corrective actions for both of these violations and concluded that the Licensee's management adequately implemented its commitments and demonstrated the proper concern for safety to operate CPSES. Petitioners present no new information and no basis to change these conclusions. Therefore, I find that Petitioners' contention is without merit and does not present a substantial health or safety concern.

F. Loss of Cooling to Spent Fuel Pool

Petitioners claim that the spent fuel pool was without cooling for 20 hours, resulting in an abnormal rise in temperature which would have caused a meltdown if not detected by the resident inspector. Both the Licensee and the NRC evaluated this incident in great detail. The NRC proposed imposition of a civil penalty of \$125,000. EA 92-107 (July 23, 1992). This incident is documented in NRC Inspection Report Nos. 50-445/92-20 and 50-446/92-20, June 9, 1992.

The spent fuel pool is a large pool of water located outside the containment. Fuel bundles that are depleted of most of their uranium are stored in the pool after being removed from the core. The fuel emits a small amount of decay heat (less than 0.001 percent of the heat generated during operation) into the water of the spent fuel pool. The water is cooled by passing through heat exchangers that are cooled by the component cooling water system. At the time of this event, the pool contained only sixty-four fuel assemblies. The pool has a capacity of 554 fuel assemblies and, therefore, the heat in the pool was only a fraction of the design heat load.

On May 12, 1992, the spent fuel pool was without cooling for 17 hours because the component cooling water system was misaligned. This allowed the temperature to rise 5°F from 80°F to 85°F. The maximum fuel pool temperature allowed in the Final Safety Analysis Report is 152°F. Therefore, the pool was

never in danger of overheating. Since the spent fuel pool water is part of a system completely separate from the reactor coolant system, the fuel in the core was never in danger of a meltdown. The resident inspector discovered the problem upon finding a discrepancy in the alignment of valves on the control board, not by noticing a temperature rise as alleged by Petitioners. If the alignment discrepancy had not been discovered, the operators would have become aware of the problem when the temperature reached 139°F by an alarm in the control room.

Upon learning of the problem, the operators corrected it by aligning the Unit 2 cooling water to the heat exchanger. This action was a violation of the Unit 1 operating license since the Unit 2 cooling system was not under full control of the operations department and was not incorporated into the licensing basis for Unit 1.

The NRC assessed a civil penalty of \$125,000 for this violation, primarily because the event demonstrated that managers were not exercising proper control of licensed actions, not because of the safety significance of the event.

Petitioners also claim that the incident was caused by using undertrained operators and that this has been a continuing problem of concern to the NRC as evidenced by an NRC letter of December 15, 1989. This letter was a request for additional information about the operating experience of the control room staff. A request for additional information is the standard means of obtaining information needed for the NRC to complete reviews and does not imply that the NRC has a safety concern or that the Licensee has withheld information. The Licensee's response of December 28, 1989, demonstrated that the Licensee had satisfied all requirements for training and experience.

In reviewing this event, the NRC identified minor training deficiencies related to operator knowledge of design modifications and procedural changes. NRC Inspection Report Nos. 50-445/92-20 and 50-446/92-20, June 9, 1992. The Licensee took corrective actions that included developing more effective methods of informing operators of design changes, and providing operators with a list of systems that could be crosstied.

Petitioners also refer to a reactor trip that occurred 4 days before the loss of cooling to the spent fuel pool and which Petitioners allege was caused by undertrained personnel. This trip was not related to the loss-of-cooling event as implied by Petitioners. The trip on May 8, 1992, was caused by an inadvertent actuation of the reactor protection system when technicians opened an incorrect power supply breaker while calibrating the power monitor module. LER 92-009 (June 4, 1992); NRC Inspection Report Nos. 50-445/92-14 and 50-446/92-14 (July 1, 1992). The Licensee determined that the root cause was using personnel who were inexperienced in this type of calibration. To correct this problem, the Licensee now requires that an experienced technician supervise all sensitive tasks

being performed for the first time. This event generated no safety consequences since all systems responded as expected.

The July 23, 1992 enforcement action prompted the Licensee to evaluate the loss of cooling to the spent fuel pool thoroughly. The Licensee and the NRC found no substantial health or safety concern. Petitioners have presented no facts or basis to reach a different conclusion.

G. Photo of Sleeping Operators

Petitioners submitted a copy of a photograph allegedly showing a member of the CPSES control room staff asleep. Petitioners state that the photograph is the subject of in-plant humor, since sleeping is known to be the "common manner" for control room personnel. It cannot be ascertained from this poor-quality copy either whether the person is sleeping or whether the room shown is in fact the Comanche Peak control room.

The NRC considers inattentiveness by control room operators a very serious offense. The NRC requires control room operators to be fully attentive at the controls to monitor plant safety status and to take corrective action if abnormal circumstances arise. Random control room observations by the resident inspectors allow the NRC to check the adequacy of the Licensee's programs for enforcing this requirement. The senior resident inspector at CPSES confirmed that the four resident inspectors normally make control room observations several times during normal working hours and several times a month during night and weekend hours. The residents have never found an operator asleep or inattentive in the control room at CPSES.

I find that Petitioners have failed to demonstrate any merit to their contention and have not substantiated a health or safety concern.

H. Labeling Deficiencies

Petitioners allege that an employee of CPSES testified that the Licensee failed to label components and mislabeled pressure valves and limit switches on both units.

While conducting an inspection in October 1989, the NRC found minor labeling deficiencies. NRC Inspection Report Nos. 50-445/89-200 and 50-446/89-200 (Feb. 14, 1990). The inspectors found a number of valves without identification labels, unofficial hand-written tags used to label rooms, and small metal label tags on some components, which were difficult to read. The inspectors believed that this could cause operator errors. The Licensee had identified the missing labels earlier and was in the process of installing temporary tags. The Licensee had initiated a program to improve labeling in 1988 but had

delayed implementation. This inspection prompted the Licensee to implement the program sooner than planned. The Licensee also audited the labeling program and revised administrative procedures to give guidance to personnel on performing independent verification of labeling.

The Licensee labeled each of the rooms in Unit 1, and equipment containing both Unit 1 and Unit 2 components, before the licensing of Unit 1. The Licensee scheduled to complete the upgrade program during the first refueling outage in December 1991. The NRC inspected the labels four more times and found that the program was on schedule and was being implemented effectively. The NRC documented its findings in Inspection Report Nos. 50-445/90-20 and 50-446/90-20 (July 23, 1990); 50-445/91-32 and 50-446/91-32 (Aug. 22, 1991); 50-445/91-41 and 50-446/91-41 (Oct. 9, 1991); and 50-445/91-70 and 50-446/91-70 (Feb. 12, 1992). During the last inspection, documented in Report Nos. 50-445/91-70 and 50-446/91-70, the Staff found that the Licensee had completed 95% of the label upgrade in Unit 1 with the remaining labels to be handled by the ongoing label maintenance program.

The NRC considers this to be a closed item because the Licensee's labeling program exceeds NRC requirements. The components and systems in Unit 1 have been labeled with clear and informative labels that assist the plant operators and maintenance personnel to accurately identify equipment. On March 24, 1992, William D. Johnson, senior Resident inspector at Comanche Peak Unit 1, submitted an affidavit in support of the Staff's response to the Petitioners' February 21, 1992 motion to reopen the record. The affidavit summarizes the NRC Staff's evaluation of and conclusions about the effectiveness of labeling in the plant.

Therefore, I conclude that the Petitioners have presented no basis to change the NRC Staff's conclusion that the Licensee's labeling program meets NRC requirements. Petitioners have failed to raise a substantial safety concern.

III. CONCLUSIONS

The NRC Staff has reviewed the allegations in the Petition that the Licensee does not demonstrate the appropriate character or capability to operate a nuclear plant. The incidents described in the Petition, as examples of the Licensee's inability to operate the plant, are either events that had been evaluated and resolved by the NRC Staff or are unfounded accusations with no technical merit, and provide no basis for the requested action. The Staff assessed the inspections, enforcement actions, NRC documents, and evaluations conducted by both the Licensee and the Staff, related to Petitioners' concerns. The Staff evaluated the ten exhibits attached to the Petition. Most of these documents are NRC inspection reports or letters and therefore do not present any new

information. The remaining exhibits consist of statements written by TUEC employees or members of the public that either do not address safety issues or discuss events that do not relate to the issues of this Petition. Petitioners have presented neither any information nor any reason to question the continued safe operation of CPSES.

The institution of proceedings in response to a request in accordance with 10 C.F.R. § 2.206 is appropriate only when substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). I have applied this standard to determine if any action is warranted in response to the Petition. For the reasons discussed above, I find no basis for taking any action in response to the Petition as no substantial health or safety issues have been raised by the Petition. Accordingly, the NRC is taking no action pursuant to 10 C.F.R. § 2.206 in this matter.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 19th day of November 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket Nos. 50-528
50-529
50-530

ARIZONA PUBLIC SERVICE
COMPANY, *et al.*
(Palo Verde Nuclear Generating
Station, Units 1, 2, and 3)

November 24, 1992

The Director, Office of Enforcement, grants in part and denies in part a Petition filed pursuant to 10 C.F.R. § 2.206 by David Colapinto on behalf of Sarah C. Thomas and Linda E. Mitchell (Petitioners). The Petitioners alleged that they had been subjected to harassment, intimidation, discrimination, and a "hostile work environment" by the Arizona Public Service Company (APS) at the Palo Verde facility, in violation of the Commission's Employee Protection provisions. The Petitioners requested that the NRC initiate a proceeding directing APS to show cause why the Palo Verde licenses should not be revoked, modified, or suspended, and assess a civil penalty against APS in the amount of at least \$1.2 million. To the extent that the Petition requested that the NRC take enforcement action against APS, the Petition has been granted. To the extent that the Petition requested a civil penalty above \$130,000 and requested that proceedings be initiated to show cause why the license should not be revoked, modified, and/or suspended, it has been denied.

NRC: ENFORCEMENT ACTION IN DISCRIMINATION CASES

The NRC normally has deferred action on section 210 cases until after a final decision by the Secretary of Labor on the allegations of discrimination.

NRC: ENFORCEMENT ACTION IN DISCRIMINATION CASES

In the future, the NRC Staff will normally take enforcement action in significant cases of discrimination after an initial finding of discrimination by a Department of Labor Administrative Law Judge (ALJ). However, in light of the fact that all ALJ Recommended Decisions are automatically reviewed by the Secretary of Labor, the NRC will allow a licensee to defer a response to a Notice of Violation until after the final ruling by the Secretary.

NRC: ENFORCEMENT POLICY

The appropriate guidance for assessing a civil penalty is found in the Commission's Enforcement Policy. The Enforcement Policy classifies different types of violations by their relative severity, provides examples of the types of violations and the recommended severity levels for these violations, describes the circumstances in which formal sanctions, including orders, civil penalties, and notices of violation are appropriate, and provides factors that should be considered in determining whether the proposed civil penalty should be mitigated or escalated.

NRC: ENFORCEMENT ACTION IN DISCRIMINATION CASES

The NRC was and is concerned over *any* perception that an employee might suffer discrimination because of raising safety concerns.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On July 20, 1992, David K. Colapinto, an attorney with the National Whistleblower Center, filed a letter with the Chairman of the U.S. Nuclear Regulatory Commission ("NRC"), on behalf of two of his clients, Sarah C. Thomas and Linda E. Mitchell ("Petitioners"). The letter requests the NRC to take enforcement action against the Arizona Public Service Company ("APS"), Licensee for the Palo Verde facility, where Petitioners are employed, alleging violations of Commission's Employee Protection provisions. See 10 C.F.R. § 50.7. Specifically, Petitioners allege that they have been subjected to harassment, intimidation, discrimination, and a "hostile work environment" by Palo Verde management. Petitioners request that the NRC initiate a proceeding directing APS to show cause why the Palo Verde licenses should not be revoked, modified, or

suspended. In addition, Petitioners request the NRC to assess a civil penalty against APS in the amount of at least \$1.2 million. The letter is being treated as a petition under the NRC's regulations contained in 10 C.F.R. § 2.206, and has been referred to me for a response. By letter dated August 11, 1992, this Office acknowledged receipt of Petitioners' request for enforcement action and promised a response within a reasonable time.¹ After further review, the Petitioners' request has been granted in part and denied in part, as described below.

II. BACKGROUND

Petitioners' request is based upon two Recommended Decisions and Orders ("Recommended Decisions") issued by two Administrative Law Judges ("ALJs") in proceedings before the U.S. Department of Labor ("DOL"), pursuant to section 210 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851.² In each case, the DOL ALJs found that APS had discriminated against one of its employees for engaging in protected activity in violation of Section 210 of the Energy Reorganization Act ("ERA"). See *Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Apr. 13, 1989); *Mitchell v. Arizona Public Service Co.*, 91-ERA-9 (July 2, 1992). Both cases are now under review by the Secretary of Labor ("Secretary").

Briefly, the ALJ in the *Thomas* case found that Ms. Thomas' first-line supervisor reassigned her to a more demanding and less desirable job because she raised safety concerns to higher APS management. The ALJ also found that subsequent discriminatory actions by APS included denying Ms. Thomas a promotion, treating Ms. Thomas differently from another employee when they were both being considered for another promotion, requiring Ms. Thomas to complete unnecessary training, and suspending Ms. Thomas' certifications to conduct various tests.

In the *Mitchell* case, another ALJ found that Ms. Mitchell was discriminated against as a result of the presence of a "hostile work environment." Specifically, the ALJ found that Ms. Mitchell was subjected to a series of actions that comprised a hostile work environment, in retaliation for engaging in certain protected activities. The protected activities included raising safety concerns to APS management and to the NRC, including concerns regarding problems with emergency lighting at Palo Verde. The ALJ found that APS management failed to take prompt, effective remedial action to halt this harassment. The

¹ The letter also denied Petitioners' request that the NRC take enforcement action "within 30 days."

² Section 210 has recently been renumbered section 211 in amendments contained in section 2902 of the Energy Policy Act of 1992, H.R. 776, signed into law on October 24, 1992.

petition asks the NRC to take enforcement action against APS, notwithstanding the pendency of the Secretary's review of both cases.

III. DISCUSSION

A. Enforcement Action on the *Mitchell* and *Thomas* Cases

Upon receipt of the *Mitchell* decision, the NRC Staff began reviewing that action, as well as the *Thomas* case. The NRC had not taken enforcement action on the *Thomas* case because at the time that decision was issued, the NRC normally deferred action on section 210 cases until after a final decision by the Secretary of Labor on the allegations of discrimination.³ Recently, however, the NRC Staff completed an enforcement action involving the Byron facility based upon a decision by the Secretary of Labor issued more than 5 years after the discrimination occurred. See *Commonwealth Edison Co.*, EA 92-019 (Apr. 22, 1992), NUREG-0940, Vol. 11, No. 2, I.B-1; see also DOL Case No. 87-ERA-4 (Jan. 22, 1992). As a result of that action, the NRC Staff, after consultation with the Commission, concluded that more timely action was appropriate. Therefore, in the future, the NRC Staff will normally take enforcement action in significant cases of discrimination after an initial finding of discrimination against an NRC licensee by a DOL ALJ. However, in light of the fact that all ALJ Recommended Decisions are automatically reviewed by the Secretary of Labor, the NRC will allow a licensee to defer a response to a Notice of Violation until after the final ruling by the Secretary.

In accordance with this new policy, the NRC has now taken enforcement action against APS based upon the ALJ decisions in *Mitchell* and *Thomas*. On September 30, 1992, Mr. John B. Martin, Regional Administrator of NRC Region V, issued a Notice of Violation and Proposed Imposition of Civil Penalty to APS for the two violations in the combined amount of \$130,000. See Enforcement Action 92-139 (Sept. 30, 1992) ("EA 92-139"). This action was taken in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), 10 C.F.R. Part 2, Appendix C. In addition, the NRC asked APS to address (1) the actions taken to minimize any possible chilling effect resulting from the circumstances surrounding the *Thomas* and *Mitchell* cases; and (2) any actions taken to assess employee concerns related to reservations related to raising safety issues and actions taken to eliminate or minimize those reservations.

The NRC considered the violation in the *Thomas* case to be a Severity Level III violation because the discrimination involved principally Ms. Thomas' first-

³See, e.g., *General Electric Co.* (Wilmington, North Carolina Facility), DD-86-11, 24 NRC 325, 331-32 (1986); *General Electric Co.* (Wilmington, North Carolina Facility), DD-89-1, 29 NRC 325, 330 (1989).

line supervisor. See Enforcement Policy, Supplement VII. The NRC considered the violation concerning Ms. Mitchell to be a Severity Level II violation based primarily upon the actions of the individual who was employed by APS at that time as the Director of Quality Assurance (QA). Those actions are of particular concern to the NRC because, as the Director of QA, this person was responsible for the Employee Concerns Program and for protecting those persons who raised safety concerns from harassment and discrimination and whose position was above first-line supervisor. The issuance of EA 92-139 sends a strong message to the licensee that discrimination by APS management — at any level — will not be tolerated.

Petitioners suggest that the NRC assess a civil penalty of \$1,200,000 on APS. I have found that a civil penalty in that amount is not warranted. The appropriate guidance for assessing a civil penalty is found in the Commission's Enforcement Policy. The Enforcement Policy classifies different types of violations by their relative severity, provides examples of the types of violations and the recommended severity levels for these violations, describes the circumstances in which formal sanctions, including orders, civil penalties, and notices of violation are appropriate, and provides factors that should be considered in determining whether the proposed civil penalty should be mitigated or escalated. Petitioners did not address either the examples and severity levels or the escalation and mitigation factors in recommending a proposed civil penalty.⁴

In arguing that the NRC should assess a civil penalty of \$100,000 for each individual action that is alleged to be discrimination, Petitioners, in effect, are asking the NRC to treat each alleged APS act of harassment in both the *Thomas* and *Mitchell* cases as an individual Severity Level I violation. That treatment is not warranted for two reasons. First, under the Enforcement Policy, Supplement VII, the example provided of a Severity Level I violation is employment discrimination by senior corporate management. The only involvement by APS corporate management above the plant level in either case before me now is the tangential involvement of Mr. William Conway, at the time in question the incoming APS vice-president, in the *Mitchell* case. However, the ALJ generally complimented Mr. Conway's actions, see *Mitchell*, Slip Op. at 38-39 and 43, and I have no reason to disagree with the ALJ's analysis at this time. Thus, there is no reason to treat the "hostile work environment" in this case as a Severity Level I violation.

Second, in the NRC's judgment, the individual actions in the *Thomas* and *Mitchell* case, while serious, do not rise to the level of severity necessary to constitute separate violations of 10 C.F.R. § 50.7. In fact, the ALJ in the *Thomas* case specifically found that the individual "items" in that case would

⁴ In assessing the proposed civil penalty, the NRC reviewed the escalation and mitigation factors in the Enforcement Policy and concluded that no adjustment in the base civil penalty was appropriate.

not constitute employment discrimination in and of themselves; instead, it was only when those "items" were viewed in the context of the entire picture that they constituted discrimination. See *Thomas*, Slip Op. at 8. Accordingly, it was appropriate to treat the actions in the *Thomas* case in the aggregate. Likewise, the discrimination in the *Mitchell* case did not consist of separate individual violations; instead, the discrimination consisted of a hostile work environment which was a single aggregate action. Thus, it was not appropriate to treat each individual action in these two cases as a separate violation of section 50.7.⁵

Petitioners also justify the proposed \$1,200,000 civil penalty by reliance upon the NRC's actions in *Tennessee Valley Authority*, EA 89-201 (Apr. 12, 1990), NUREG-0940, Vol. 9, No. 4, I.A-66 ("EA 89-201"), in which the NRC issued a civil penalty of \$240,000. However, as that case clearly demonstrates, the NRC followed the Enforcement Policy described above. In EA 89-201, the NRC found that three employees of the Tennessee Valley Authority ("TVA") were reassigned to new positions in retaliation for raising safety concerns to an NRC Commissioner. The TVA official who was principally involved was a member of plant management above first-level supervisor. Therefore, each violation was classified as a Severity Level II violation for which the civil penalty under the Enforcement Policy was \$80,000. Thus, the aggregate civil penalty was \$240,000. Likewise, in this case, the NRC has based the proposed civil penalty upon the level of the individuals who were primarily or most effectively involved in the discrimination in the two actions involved in this petition.⁶

B. Additional Allegations of Employment Discrimination at APS

The petition alleges that Ms. Mitchell has suffered additional acts of employee discrimination at Palo Verde after the events that are the subject of the DOL Recommended Decision. Specifically, Petitioners assert that a recent finding by the DOL Wage and Hour Division requires an escalation of any civil penalty. On May 8, 1992, the Assistant District Director, Employment Standards Administration, Wage and Hour Division, DOL, issued a preliminary finding that Ms. Mitchell's April 1992 Performance Appraisal had been lowered because she engaged in protected activity. APS has filed an appeal from that finding.

⁵ While the NRC concludes that treatment of each action as a violation is not appropriate in this enforcement action, the NRC reserves the right to treat individual actions as separate violations in an appropriate case.

⁶ Petitioners also ask that the NRC take action against the former APS QA Director individually. At this time, however, there is not sufficient information to warrant enforcement action directly against that individual. See 10 C.F.R. Part 2, Appendix C, § V.E. While that individual's actions were a significant contribution to the hostile work environment, they may not have constituted a violation of 10 C.F.R. § 50.7, in and of themselves. Therefore, the NRC will not take enforcement action against this individual at this time. The NRC will review the Secretary's final decision in the *Mitchell* proceeding and determine at that time if additional action is warranted.

initiating the DOL hearing process. That appeal has been consolidated with other pending matters for hearing before a DOL ALJ.

The NRC has already taken prompt action in response to the DOL's finding. Initially, the NRC secured the DOL investigation file and reviewed it. Subsequently, on May 22, 1992, Mr. John Martin, Administrator, NRC Region V, issued a letter to APS, informing APS management that the NRC was concerned that this action might constitute a violation of 10 C.F.R. § 50.7 and that it might have a "chilling effect" on the willingness of employees or contractor personnel to raise safety concerns. Specifically, the letter asked APS to provide the NRC with the basis for the action taken against Ms. Mitchell and to explain what steps APS was taking to ensure that employees were fully informed of their rights to address safety concerns to the NRC or any other regulatory agency without fear of retaliation.

On June 23, 1992, APS responded to the NRC's May 22 letter. In its response, APS provided its version of the events in question and described the steps it was taking to ensure that all APS employees were aware of their rights under the ERA and the Atomic Energy Act ("AEA"). As I noted above, the NRC normally will await a decision by a DOL ALJ before taking enforcement action. After reviewing APS' response of June 23, the NRC Staff saw no need to deviate from the NRC's normal policy in this case at this time. The NRC will continue to monitor this case. Once the DOL ALJ issues a Recommended Decision, the NRC will consider whether enforcement action is warranted.

C. Allegations of a "Hostile Work Environment" at Palo Verde

The petition also alleges that APS has created a "hostile work environment" at Palo Verde which discourages Palo Verde employees from raising safety concerns. As a result of that allegation and the decisions in the *Thomas* and *Mitchell* cases, the NRC Staff recently conducted an unannounced special inspection at Palo Verde to gain insight into the perceptions and attitudes of workers at the site with regard to their ability to raise significant safety issues. See NRC Inspection Report No. 50-528/529/530/92-33 (Oct. 8, 1992) ("Inspection Report 92-33"). During this inspection, NRC personnel interviewed 314 site employees who were either APS direct employees or APS contractors. Inspection Report 92-33 at 2-4. These employees comprised a sample of Palo Verde employees who performed safety-significant work.

Of those employees interviewed, approximately 92% stated that they felt free to raise significant safety issues to their immediate supervisor, to higher levels of APS management, to the Employee Concerns Program or "Hotline," or to the NRC. *Id.* at 4. Approximately 6% of those interviewed indicated that they felt free to raise significant safety issues to their immediate supervisor but felt some reluctance to raise the issues higher. *Id.* Approximately 2% of

those interviewed felt some reluctance to raise significant safety issues to their immediate supervisors. *Id.* The survey did not determine the root cause for the reluctance that was expressed by 8% of those interviewed. *Id.* at 5.⁷

In its letter transmitting Inspection Report 92-33 to APS, the NRC concluded that

[w]hile these results are not indicative of a widespread problem with reluctance of APS employees to raise significant safety issues to their immediate supervisors or above, they do indicate that the environment at Palo Verde for raising significant safety concerns can be improved. Please advise us of your plans in this regard.

The NRC was and is concerned over *any* perception that an employee might suffer discrimination because of raising safety concerns. Therefore, the NRC Staff requested APS to advise it of the steps being taken to resolve this perception problem, in addition to the response required in reply to EA 92-139, concerning plans to assess the extent employees have reservations for raising safety concerns. On October 30, 1992, APS filed a consolidated response to both Inspection Report 92-33 and EA 92-139, detailing the steps that it is in the process of taking to address this concern. In light of the findings of the NRC special inspection at Palo Verde as expressed in Inspection Report 92-33, APS' response to the NRC's May 22, 1992 letter, and APS' response to EA-92-139 and Inspection Report 92-33, I have concluded that no further action is necessary at this time regarding Petitioners' allegation of a "hostile work environment" at Palo Verde.

D. Request for Institution of Proceedings Under Section 2.206

Petitioners request that the NRC initiate show-cause proceedings to revoke, modify, and/or suspend Palo Verde's operating license. The institution of proceedings in response to a request for action under 10 C.F.R. § 2.206 is appropriate only when substantial health and safety issues have been raised. See *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), DD-92-1, 35 NRC 133, 143-44 (1992). While the allegations contained in the instant petition are indeed serious, they do not raise substantial health and safety issues that would justify revocation, suspension, or modification of the Palo Verde licenses. Instead, I find that the NRC Staff's actions described above were the appropriate response to the DOL Recommended Decisions consistent with the Commission's Enforcement Policy.

⁷ Furthermore, five of those employees interviewed informed the NRC inspectors that they believed that they had suffered employment discrimination in retaliation for raising safety concerns. The NRC will review these claims through the NRC allegation process. See Inspection Report 92-33 at 5.

Accordingly, I have concluded that no basis exists for initiating a proceeding as requested by Petitioners.

IV. CONCLUSION

In conclusion, I have granted the petition insofar as it requests that the NRC take enforcement action against APS for the discrimination demonstrated in the *Thomas* and *Mitchell* cases. I have denied the request to the extent that the petition seeks a civil penalty above \$130,000 and requests that proceedings be initiated to show cause why the license should not be revoked, modified, and/or suspended.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by this regulation, this Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 23d day of November 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket No. 50-341

DETROIT EDISON COMPANY, *et al.*
(Enrico Fermi Atomic Power Plant,
Unit 2)

November 25, 1992

The Director, Office of Enforcement, grants in part and denies in part a Petition filed pursuant to 10 C.F.R. § 2.206 by Edwin A. Slavin, Jr., on behalf of Carolyn Larry (Petitioner). The Petitioner requested that enforcement action be taken against Detroit Edison Company (DECo) including assessment of a substantial civil penalty; that Petitioner and her counsel be allowed to be present during certain phone conversations or meetings between the NRC and DECo; that reasonable expenses incurred by Petitioner and her counsel relating to the enforcement action be paid by DECo; and that an enforcement conference previously held be reconvened to allow Petitioner and her counsel to participate. As bases for her requests, Petitioner asserts that the Court of Appeals for the Sixth Circuit has upheld a finding by the Secretary of Labor that DECo discriminated against her and deceived her about her rights regarding filing a complaint with the Department of Labor. The Petition has been granted to the extent that the Petitioner requested that enforcement action be taken, and denied to the extent that the Petitioner requested that a civil penalty be assessed and an enforcement conference be reconvened. (The Director of Enforcement denied Petitioner's request to be present during phone conversations or meetings in a letter issued prior to this Decision.)

NRC: ENFORCEMENT ACTION IN DISCRIMINATION CASES

The NRC normally withholds enforcement action until the completion of the DOL process.

NRC: ENFORCEMENT POLICY

A Severity Level II violation is one of very significant regulatory concern and normally results in a civil penalty.

NRC: ENFORCEMENT ACTION IN DISCRIMINATION CASES

While in the past, the NRC waited for the completion of the Secretary of Labor's review of a case before taking enforcement action, recent changes in the NRC's approach regarding the taking of enforcement action in such cases will result in enforcement action being taken in appropriate cases following the issuance of a Recommended Decision and Order by a DOL Administrative Law Judge.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letters dated April 21 and 23, 1992, Edwin A. Slavin, Jr., requested on behalf of Carolyn Larry (Petitioner) that the Commission take action with regard to Detroit Edison Company (DECo). In the April 21 letter, Petitioner requested that "vigorous" enforcement action be taken against DECo, including assessment of a substantial civil penalty; that Petitioner and her counsel be afforded an opportunity to be present during all enforcement, private, or "ex parte" phone conversations or meetings between NRC officials and DECo; and that reasonable expenses incurred by Petitioner and her counsel relating to the enforcement action be paid by DECo as part of its civil penalty. As bases for the request in that letter, Petitioner asserted that on April 17, 1992, the Court of Appeals for the Sixth Circuit upheld a finding by the Secretary of Labor that DECo intentionally discriminated against Petitioner for raising concerns about breaches of security for safeguards information at the Licensee's Fermi 2 facility and deceived her about her rights with regard to filing her discrimination complaint with the Department of Labor. In the April 23 letter, Petitioner requested that an enforcement conference that was held between DECo and NRC be reconvened to allow Petitioner and her counsel to attend and participate.

In a letter dated May 18, 1992, the Director, Office of Enforcement, responded to the Petitioner, denying the request that the Petitioner and her counsel be allowed an opportunity to be present during all enforcement, private, or "ex parte" phone conversations or meetings, while deferring a decision on the other

issues until completion of the Staff's consideration of enforcement on these matters.¹

II. DISCUSSION

This case arises out of an allegation in February 1986 from Petitioner that DECo had provided false information to an NRC inspector. Following her contact with the NRC, Petitioner was transferred to another job that she asserted was a lesser position. Petitioner filed a complaint with the Department of Labor based upon this action and the Secretary of Labor determined that discrimination was a factor in the action and found, further, that DECo had misled Petitioner and distracted her from pursuing other recourse, including filing a complaint with the Department of Labor. The Secretary's order was later affirmed by the Court of Appeals.²

The NRC first became aware of the complaint of discrimination in April 1986 when Petitioner informed NRC Region III staff. Since Petitioner had also filed a complaint with the Department of Labor, and since the NRC normally withholds enforcement action until the completion of the DOL process, the NRC did not initiate its own investigation on this subject. Following receipt of the June 28, 1991 Order by the Secretary of Labor, the NRC conducted an Enforcement Conference on August 22, 1991, with Detroit Edison Company to discuss the Secretary's findings, DECo's corrective actions and efforts to prevent other employees from being chilled by the threat of adverse action, and the potential for enforcement action still to be taken by the NRC. As the Secretary's Decision was appealed by DECo to the United States Court of Appeals for the Sixth Circuit, this enforcement action was deferred pending the Court of Appeals decision. This Decision, affirming the Secretary of Labor's decision, was issued on April 17, 1992.

After consultation with the Commission, the Staff issued a Notice of Violation to DECo on October 23, 1992, for discriminating against the Petitioner. The citation in the Notice of Violation was categorized at Severity Level II in accordance with the "General Statement of Policy and Procedure for NRC

¹ On May 27, 1992, another letter was sent to the Petitioner to forward a corrected copy of the notice of receipt of the petition that was filed with the Office of the Federal Register, deleting the erroneous reference in the heading of the *Federal Register* Notice that the May 18th letter constituted a "Partial Director's Decision."

² Specifically, the Secretary of Labor and the Court of Appeals found that when the Petitioner visited DECo's Equal Employment Opportunity (EEO) office regarding filing a complaint, she was misled in that: (1) the EEO specialist never told her that she (the EEO specialist) represented the interests of DECo; (2) although the EEO specialist assured the Petitioner that she would keep any disclosures in confidence, she subsequently discussed the case with DECo's legal department; (3) although the EEO specialist promised to pursue the Petitioner's grievance, she made almost no discernible progress in the 4 weeks after the Petitioner contacted her; and (4) although the EEO specialist admitted that she was aware that the Petitioner expressed confusion over when her 30-day filing period with DOL would begin to run, she did not attempt to clear up the Petitioner's confusion.

Enforcement Actions," 10 C.F.R. Part 2, Appendix C (1986). A Severity Level II violation is one of very significant regulatory concern and normally results in a civil penalty. A civil penalty was not proposed in this case only because the act of discrimination occurred more than 5 years ago. Were it not for the age of this issue, a substantial civil penalty would have been imposed upon DECo because the act of discrimination was committed by a senior plant manager of DECo and because the active attempts to mislead the Petitioner and cause her to file with DOL after the filing deadline had passed are considered particularly egregious.³

The Staff has determined that an additional enforcement conference is not necessary in this case since enforcement action has already been taken based on a decision by the Department of Labor (86-ERA-032), and additional information is not necessary. Therefore, the Petitioner's request to attend such a conference is moot.

III. CONCLUSION

Petitioner requests that the NRC take "vigorous" enforcement action against DECo, in the form of assessing a substantial civil penalty. To the extent that the Petitioner requests that the NRC take enforcement action, the Petition is granted, in that a Notice of Violation, Severity Level II, was issued to DECo for discriminating against Ms. Larry on October 23, 1992. For the reasons explained above, to the extent that the Petitioner requests that a substantial civil penalty be assessed against DECo, the Petition is denied. To the extent that the Petitioner requests that an enforcement conference be reconvened, the Petition is also denied.

A copy of the Petition is available for inspection at the Commission's Public Document Room at 2120 L Street, NW, Washington, DC 20555.

FOR THE NUCLEAR
REGULATORY COMMISSION

James Lieberman, Director
Office of Enforcement

Dated in Rockville, Maryland,
this 25th day of November 1992.

³While in the past, the NRC waited for the completion of the Secretary of Labor's review of a case before taking enforcement action, recent changes in the NRC's approach regarding the taking of enforcement action in such cases will result in enforcement action being taken in appropriate cases following the issuance of a Recommended Decision and Order by a DOL Administrative Law Judge.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket Nos. 030-29626-OM&OM-2
(License Revocation,
License Suspension)
(Byproduct Material License
No. 24-24826-01)

PIPING SPECIALISTS, INC., and
FORREST L. ROUDEBUSH,
d.b.a. PSI INSPECTION, and
d.b.a. PIPING SPECIALISTS, INC.
(Kansas City, Missouri)

December 1, 1992

The Commission denies the Licensee's petition for review of the Atomic Safety and Licensing Board's Final Initial Decision, LBP-92-25, which sustained Staff's order revoking Licensee's byproduct material license, because the Commission finds no clear error or other substantial questions of law or policy that would warrant Commission review pursuant to 10 C.F.R. § 2.786.

COMMISSION PROCEEDINGS: PETITIONS FOR REVIEW

In determining whether to grant, as a matter of discretion, a petition for review of a Licensing Board order, the Commission gives due weight to the existence of a substantial question with respect to considerations set forth in 10 C.F.R. § 2.786(b)(4).

MEMORANDUM AND ORDER

The Atomic Safety and Licensing Board (Licensing Board) issued a Final Initial Decision on September 8, 1992, which sustained the Nuclear Regulatory Commission (NRC) Staff's order revoking the byproduct material license issued to Piping Specialists, Inc. (Licensee or PSI). LBP-92-25, 36 NRC 156 (1992). The Licensee filed a petition for review of this order pursuant to 10 C.F.R. § 2.786. Staff opposed the petition. Upon consideration of these pleadings and the record of this proceeding, the Commission finds no clear error or legal or procedural issue requiring our review. Thus, the Licensee's petition is denied.

On October 17, 1991, the Staff issued an immediately effective order suspending PSI's byproduct material license for alleged violations of NRC regulations and license conditions, including deliberate falsification of utilization logs, providing false oral information to the NRC, and several other violations which collectively demonstrated a lack of effective oversight of the Licensee's radiation safety program. See 56 Fed. Reg. 55,514 (Oct. 28, 1991). Relying on a completed investigation into the Licensee's alleged misconduct, the NRC Staff issued another order continuing the suspension and revoking the license on April 22, 1992. The order more precisely identified the involvement of Mr. Roudebush, the Licensee's president, in the violations alleged in the original suspension order and also added an allegation that Mr. Roudebush engaged in a conspiracy with the Radiation Safety Officer (RSO) to lie to NRC investigators during the taking of sworn statements by the investigators. See 57 Fed. Reg. 18,191 (Apr. 29, 1992).

An evidentiary hearing was held from April 28 to May 1, 1992, and at that hearing the parties presented evidence regarding both the original suspension order and the revocation order. Subsequent to the hearing, the revocation case was consolidated with the suspension case without objection from the parties. The Licensing Board in its Final Initial Decision, LBP-92-25, *supra*, sustained all of Staff's allegations, except for the conspiracy charge, and ultimately sustained the revocation order.

In determining whether to grant, as a matter of discretion, a petition for review of a Licensing Board order, the Commission gives due weight to the existence of a substantial question with respect to considerations set out in 10 C.F.R. § 2.786(b)(4). The considerations set forth in section 2.786(b)(4) are: (i) a clearly erroneous finding of fact; (ii) a necessary legal conclusion that is without governing precedent or departs from prior law; (iii) a substantial and important question of law, policy, or discretion; (iv) a prejudicial procedural error; and (v) any other consideration deemed to be in the public interest.

The Licensee argues, in essence, that three of the five considerations enumerated in section 2.786(b)(4) exist here, asserting that the Licensing Board

based its decision on clearly erroneous findings of fact, legal conclusions without precedent, and prejudicial procedural errors. Licensee's Petition for Review at 1. The NRC Staff disagrees. According to NRC Staff, Licensee's arguments are not supported by the record developed in this proceeding and there exist no significant questions that would warrant Commission review. NRC Staff's Answer Opposing Licensee's Petition for Review at 4.

We agree that the Licensee has failed to identify clear error or other substantial questions of law or policy that would warrant Commission review. Review of Licensee's assertion that the Licensing Board should have applied the "clear and convincing" standard rather than the preponderance-of-the-evidence standard in this case is not essential to resolution of this proceeding. The Licensing Board specifically pointed out that all of its findings were supported by clear and convincing evidence. LBP-92-25, *supra*, 36 NRC at 186. Moreover, the Licensing Board's decision includes a detailed analysis, including numerous cites to the evidentiary record, in support of its findings. The Licensee has not demonstrated, and we do not find, any reason to take review of this determination.

The Licensee also suggests that the Licensing Board applied an erroneous standard in determining the extent of an employer's liability for willful acts of its employees. Licensee argues that Mr. Roudebush should not have been held responsible for the willful acts of the RSG, Mr. Hosack. However, the Licensing Board's decision contains ample support for revocation of PSI's license, especially in light of Mr. Roudebush's own willful acts, his participation and acquiescence in a number of the violations, and his untruthful testimony during an NRC investigation and before the Licensing Board.¹ Moreover, we do not see any substantial question with respect to the adequacy of notice to the Licensee of the charges leveled against him. The Licensee has had a full opportunity to defend against the Staff's orders. We believe that license revocation is authorized by law and was well within the Staff's discretion.

¹ Thus, we leave for another day our review of the question of whether a license may be revoked based solely on willful, deliberate acts of an employee irrespective of the employer's conduct.

For the reasons stated above, the Licensee's petition for review of the Licensing Board's Final Initial Decision, LBP-92-25, is *denied*.
It is so *ORDERED*.

For the Commission,²

JOHN C. HOYLE
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 1st day of December 1992.

²Chairman Selin was not present for the affirmation of this order. If he had been present, he would have affirmed it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

G. Paul Bollwerk, III, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket No. 70-135-DCOM
(ASLBP No. 92-667-03-DCOM)
(Decommissioning Plan)
(Materials License No. SNM-145)

BABCOCK AND WILCOX
(Apollo, Pennsylvania Fuel
Fabrication Facility)

December 10, 1992

The Presiding Officer denies a motion for reconsideration of LBP-92-31, 36 NRC 255 (1992), finding the movants failed to establish that decision denying their motion for a stay was in error.

RULES OF PRACTICE: INFORMAL HEARINGS (MOTION FOR RECONSIDERATION); MOTION FOR RECONSIDERATION

In accordance with 10 C.F.R. §§ 2.771, 2.1259(b), a dissatisfied litigant in a 10 C.F.R. Part 2, Subpart L informal adjudicatory proceeding can seek reconsideration of a final determination by the Commission or a presiding officer based on the claim that the particular decision was erroneous.

RULES OF PRACTICE: MOTION FOR RECONSIDERATION

A movant seeking reconsideration of a final decision must do so on the basis of an elaboration upon, or refinement of, arguments previously advanced,

generally on the basis of information not previously available. See *Central Electric Power Cooperative, Inc.* (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981); *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-418, 6 NRC 1, 2 (1977).

RULES OF PRACTICE: MOTION FOR RECONSIDERATION

A reconsideration request is not an occasion for advancing an entirely new thesis or for simply reiterating arguments previously proffered and rejected. See *Summer*, CLI-81-26, 14 NRC at 790; *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 2, 4 (1988).

RULES OF PRACTICE: INTERVENTION (INTEREST)

Individual legislators who seek to participate in NRC adjudicatory proceedings have standing to do so if they can show their personal interests are impacted by the particular licensing activity at issue; they do not have standing to represent their constituents' interests generally. See *Combustion Engineering, Inc.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989).

RULES OF PRACTICE: INFORMAL HEARINGS (PREMATURE REQUEST FOR STAY OF AGENCY LICENSING ACTION)

Although a hearing petition regarding a materials license amendment request generally can be filed as soon as an amendment application is submitted to the agency, a request for a stay relative to that amendment application is not appropriate until the Staff has taken action to grant the amendment request and to make the approved licensing action effective. See 10 C.F.R. §§ 2.1205(c), (f), 2.1263. See also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991).

RULES OF PRACTICE: INFORMAL HEARINGS (CONSIDERATION OF 10 C.F.R. § 2.206 PETITIONS)

A nonadjudicatory request for relief under 10 C.F.R. § 2.206 generally is not a matter within the province of a presiding officer in a Subpart L adjudicatory proceeding.

MEMORANDUM AND ORDER
(Denying Petitioners' Request for
Reconsideration of Stay Denial Order)

In a November 22, 1992 submission,¹ individual petitioners James and Helen Hutchison, Virginia Trozzi, Cynthia Virostek, and William Whitinger (Petitioners) have requested reconsideration of LBP-92-31, 36 NRC 255 (1992). In that memorandum and order, the Presiding Officer denied the Petitioners' October 9, 1992 request for a stay of decommissioning activities authorized under Amendment No. 21 to the 10 C.F.R. Part 70 license of applicant Babcock & Wilcox (B&W) for its Apollo, Pennsylvania fuel fabrication facility. As they did with respect to the stay request in submissions filed December 4, 1992, B&W and the NRC Staff have challenged the Petitioners' reconsideration request.²

In accordance with 10 C.F.R. §§ 2.771, 2.1259(b), a dissatisfied litigant in a Subpart L proceeding can seek reconsideration of a final determination by the Commission or a presiding officer based on the claim that the particular decision was erroneous. A movant seeking reconsideration of a final decision must do so on the basis of an elaboration upon, or refinement of, arguments previously advanced, generally on the basis of information not previously available.³ Against the backdrop of these controlling principles, it is apparent that the Petitioners' reconsideration entreaty fails to demonstrate that the Presiding Officer's stay denial determination was in error, and so must be denied.⁴

¹ Petitioners Request Reconsideration (Nov. 22, 1992) [hereinafter Petitioners' Reconsideration Request].

² See Licensee's Opposition to Request for Reconsideration (Dec. 4, 1992) [hereinafter Licensee's Reconsideration Response]; NRC Staff Response to Petitioners' Request for Reconsideration (Dec. 4, 1992) [hereinafter Staff's Reconsideration Response].

³ See *Central Electric Power Cooperative, Inc.* (Virgil C. Summer Nuclear Station, Unit 1), CLJ-81-26, 14 NRC 787, 790 (1981); *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-418, 6 NRC 1, 2 (1977).

⁴ In contesting the Petitioners' reconsideration request, B&W and the Staff lodge the general exceptions that (1) all the documentary materials submitted in support of the Petitioners' request, with the possible exception of the newspaper articles that constitute Exhibit J, should be disregarded as a basis for reconsideration because they were in existence and could have been provided in support of their stay motion, and (2) the Petitioners again have failed to provide affidavits in support of the factual allegations contained in their exhibits. See Licensee's Reconsideration Response at 3-5; Staff's Reconsideration Response at 3, 14. Both objections provide additional grounds for denying the Petitioners' reconsideration request. Moreover, a number of the Petitioners' claims come perilously close to violating the precept that a reconsideration request is not an occasion for advancing an entirely new thesis or for simply reiterating arguments previously proffered and rejected. See *Summer*, CLJ 81-26, 14 NRC at 790; *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLJ-88-3, 28 NRC 1, 2, 4 (1988). Nonetheless, as is explained *infra*, it also is apparent that the Petitioners' reconsideration claims and the accompanying exhibits fail to demonstrate that the Presiding Officer's stay denial decision was erroneous.

I. TIMELINESS ISSUES

A. Hearing Petition Extension Request

In LBP-92-31, the Presiding Officer found the Petitioners' stay request was untimely because (1) it was not filed within the time limits specified in 10 C.F.R. § 2.1263, and (2) the Petitioners had not made a specific request for an extension of the filing deadline.⁵ Regarding the second point, as an example that at least some of the Petitioners apparently are aware that extension requests must be specific, in a footnote the Presiding Officer referenced letters dated September 28, 1992, and July 21, 1992, from petitioner Virostek to the NRC Office of the Secretary and the Staff, respectively, concerning an extension of the date for filing a hearing petition.⁶ The Presiding Officer further observed that this particular extension request was moot because the Petitioners, including Ms. Virostek, had filed a timely hearing request.

In seeking reconsideration, the Petitioners now claim that the stay denial decision inaccurately characterized petitioner Virostek's extension request as moot.⁷ The exact basis for their quarrel with this finding is not altogether clear. Nonetheless, it is apparent that the hearing petition extension request provides no support for the Petitioners' argument that their stay motion was timely. As was noted in LBP-92-31, this extension request did not contain any reference to a stay or an extension of the time for filing a stay.⁸ Moreover, as was explained in LBP-92-31, the extension request clearly is moot.⁹

B. "Cease and Desist" Request

Also on the issue of timeliness, the Petitioners now present a May 11, 1992 letter written by petitioner Helen Hutchison to a member of the Staff asking that the agency order B&W to "cease and desist" from its apparent intent to use certain crushing technology in decommissioning activities at the Apollo site.¹⁰

⁵ 36 NRC at 261-62.

⁶ *Id.* at 262 n.11; see Petitioners' Reconsideration Request, *exh. A*.

⁷ See Petitioners' Reconsideration Request at 1.

⁸ See 36 NRC at 262 n.11.

⁹ See *id.* In this regard, the Petitioners seem to suggest that petitioner Virostek's extension request has some continuing vitality because it was made on behalf of her constituents in her role as a borough councilwoman. See Petitioners' Reconsideration Request at 1. Individual legislators who seek to participate in NRC adjudicatory proceedings have standing to do so if they can show their personal interests are impacted by the particular licensing activity at issue; they do not have standing to represent their constituents' interests generally. See *Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility)*, LBP-89-23, 30 NRC 140, 145 (1989). By the same token, petitioner Virostek's request to extend the date for filing a hearing petition need be considered no more than an extension request on her own behalf as an interested individual. As a consequence, when she filed a timely hearing petition along with the other individual petitioners, her extension request was rendered moot.

¹⁰ See Petitioners' Reconsideration Request at 1, *exh. B*.

The Petitioners' unstated premise is that, whatever the status of their October stay filing, this May correspondence is itself an operative, timely stay request.

Although a hearing petition regarding a materials license amendment request generally can be filed as soon as an amendment application is submitted to the agency, a request for a stay relative to that amendment application is not appropriate until the Staff has taken action to grant the amendment request and to make the approved licensing action effective.¹¹ In this instance, the April 15, 1992 B&W license amendment application that ultimately was granted by the Staff as Amendment No. 21 was pending but unapproved at the time of the May 1992 letter. Therefore, even if petitioner Hutchison's letter can be considered a stay request under 10 C.F.R. § 2.1263, which is not at all apparent, that request was altogether premature and so without effect.¹²

II. SUFFICIENCY ISSUES

In addition to these timeliness matters, the Petitioners also challenge certain facets of the overall conclusion in LBP-92-31 that they failed to make a sufficient showing under the four-factor test specified in 10 C.F.R. §§ 2.788 and 2.1263, so as to establish their entitlement to a stay. The Petitioners' additional arguments are addressed as they appear to relate to each stay factor.

A. Factor One — Likelihood of Success on the Merits

In attempting to establish a case under the first factor — likelihood of success on the merits — in support of their initial stay request the Petitioners made several broad claims regarding onsite and offsite radiological contamination and onsite chemical contamination. They asserted that these allegations established a likelihood that they would prevail on their charges that the Staff's Environmental Assessment (EA) was inadequate to meet the requirements of the National Environmental Policy Act of 1969 (NEPA). In LBP-92-31, the Petitioners' showing with regard to each of these allegations was found to be inadequate to

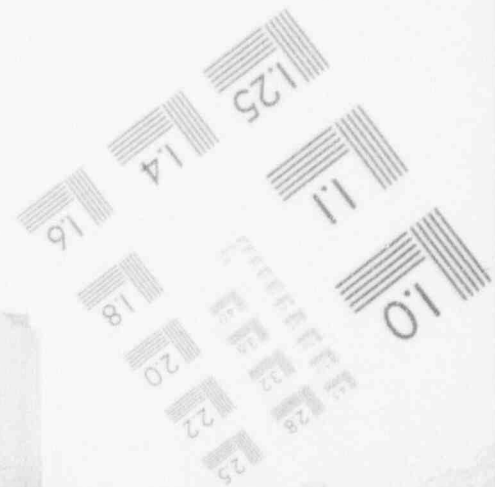
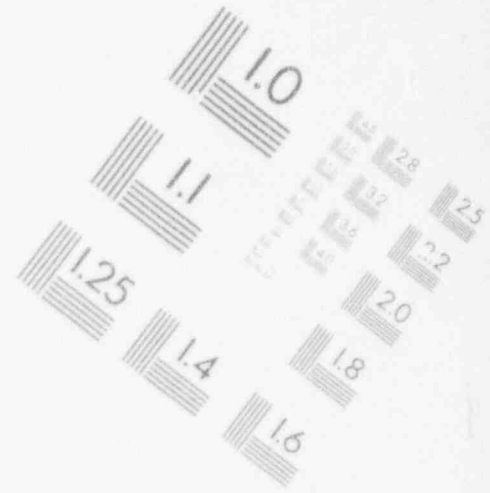
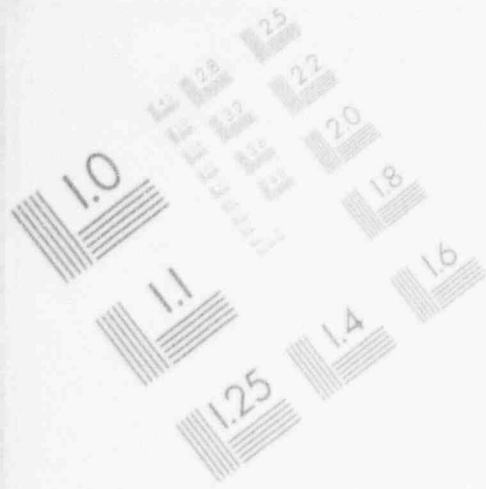
¹¹ See 10 C.F.R. §§ 2.1205(c), (f), 2.1263. See also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991).

¹² Because a hearing petition was not filed relative to B&W's amendment application until July 1992, to afford such a construction to petitioner Hutchison's May 1992 letter would mandate an additional finding that in some circumstances submission of a stay request can initiate a Subpart L adjudicatory proceeding. Compare 10 C.F.R. § 2.202(c)(2)(i).

B&W also appears to suggest that because petitioner Hutchison's letter was not directed to the Executive Director for Operations or the Director of the Office of Nuclear Material Safety and Safeguards, it does not constitute a proper request for relief under 10 C.F.R. § 2.206. See Licerao's Reconsideration Response at 7. Nonetheless, even if it were, such a nonadjudicatory request generally is not a matter within the province of a presiding officer in a Subpart L adjudicatory proceeding.

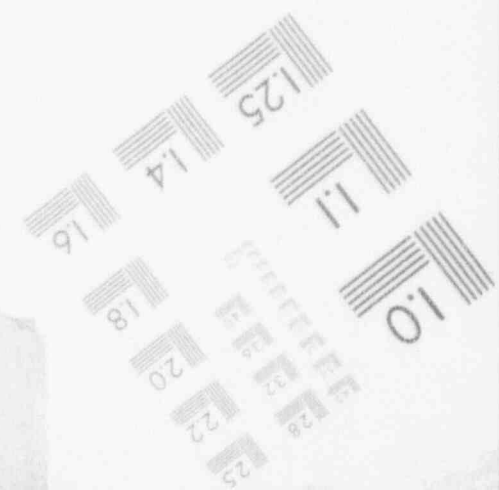
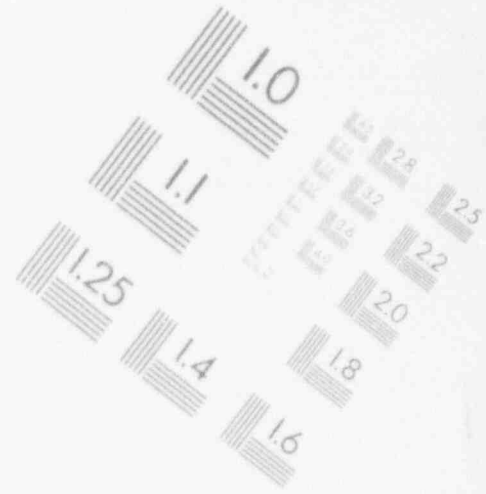
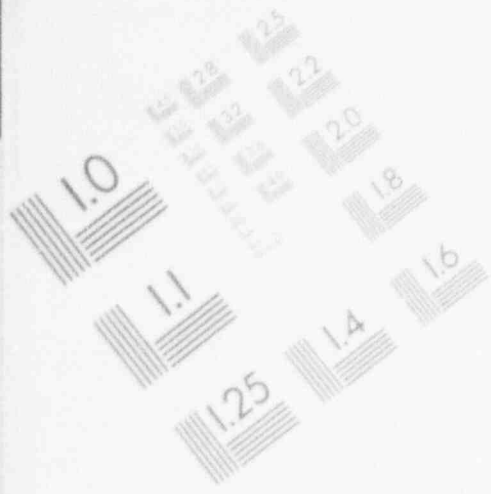
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IMAGE EVALUATION TEST TARGET (MT-3)



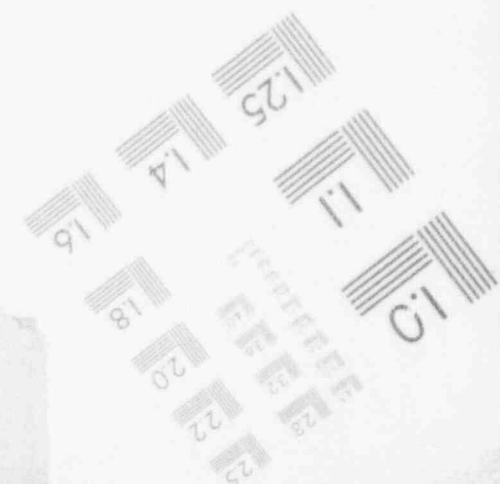
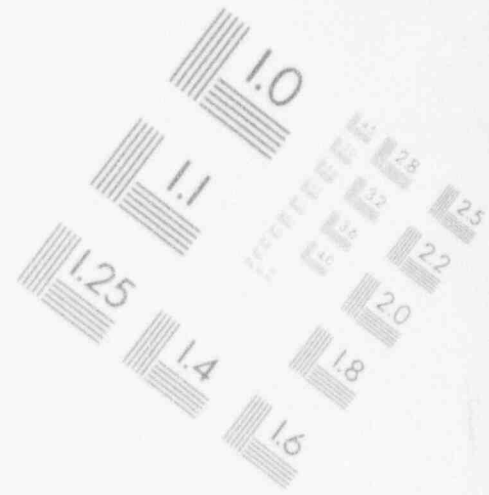
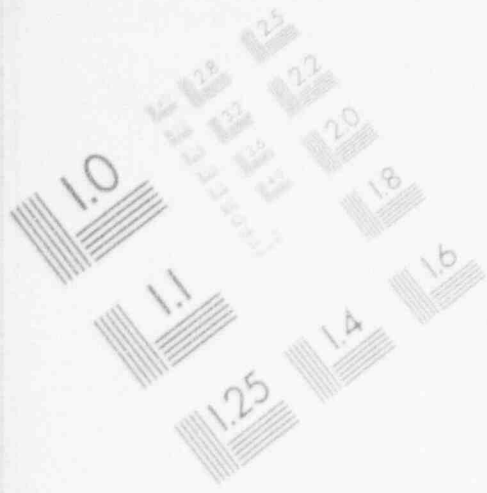
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IMAGE EVALUATION TEST TARGET (MT-3)



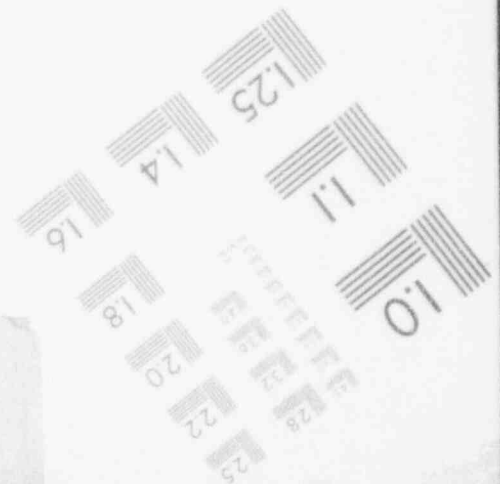
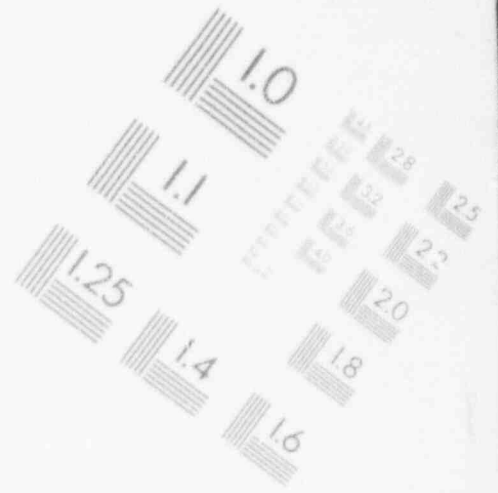
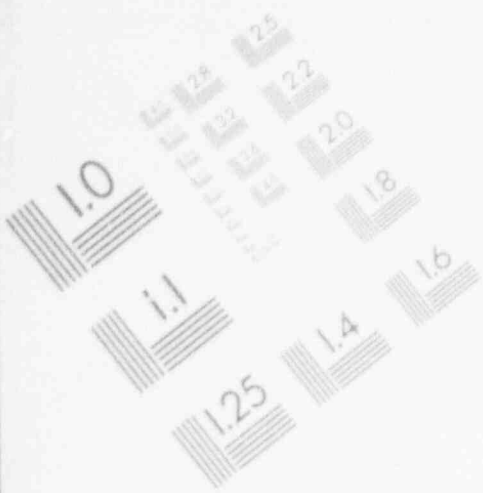
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IMAGE EVALUATION TEST TARGET (MT-3)



1

IMAGE EVALUATION TEST TARGET (MT-3)



meet their burden under this factor.¹³ With the caveat that the Presiding Officer was "mis[led]" or was "not aware" of certain information, the Petitioners now present additional information concerning each of these matters that they contend mandates a different result.

The Petitioners first challenge the validity of information presented by B&W and the Staff indicating that sewage plant contamination was attributable to naturally occurring uranium or atomic weapons testing-related cesium rather than the Apollo facility. They assert that the assessment by the Pennsylvania Department of Environmental Resources (PADER) relied upon to support this conclusion did not address all tests conducted.¹⁴ They also contend that certain statements by a PADER official reported in a local newspaper contradicted that conclusion.

A footnote in LBP-92-31 made note of a B&W-provided November 18, 1986 letter from the Director of the PADER Bureau of Radiation Protection to petitioner Virostek.¹⁵ In that letter, the director declared that, with reference to a PADER Bureau of Air Quality Control (BAQC) report analyzing May 7, 1986 air and water samples taken from the local sewage treatment plant, "[t]he radioactive component of gas emissions from the plant *does not indicate* an accumulation of radioisotopes beyond the range of what can normally be expected from natural causes" and there is "*no evidence* that B&W plant is responsible for dumping *any* radioactive waste into the sewage system."¹⁶ The Petitioners now suggest that because the BAQC report referenced in the November 18 letter also indicates that some water sampling was done on May 13, 1986, the PADER bureau director's letter does not support the Presiding Officer's conclusion in LBP-92-31 that the test report indicates "nothing more than the presence of naturally occurring uranium or atomic weapons testing-related cesium."¹⁷

Although the Petitioners are correct that some water sampling tests referenced in the BAQC report were conducted shortly after May 7, from all appearances the conclusions drawn by the PADER official in his November 18 letter were with respect to the report as a whole. What the Petitioners attempt to label as a substantive omission apparently is no more than an incomplete citation.¹⁸

So too, the Petitioners seek to attach unwarranted significance to the statements attributed to another PADER official in a newspaper story regarding the BAQC report. The official, identified as a regional air pollution control

¹³ See 36 NRC at 264-65.

¹⁴ See Petitioners' Reconsideration Request at 1-2, exhs. D & E.

¹⁵ See 36 NRC at 265 n.28.

¹⁶ Petitioner's Reconsideration Request, exh. D (emphasis in original).

¹⁷ 36 NRC at 264.

¹⁸ The source of this miscitation may be the report itself, which on the cover sheet provided by the Petitioners indicates a "test date" of May 7, 1992. See Petitioners' Reply to Opposition Responses Requesting Immediate Cessation of Cleanup Activities (Oct. 29, 1992), exh. A, at 1.

engineer, is quoted as saying that water samples from the sewage treatment facility contained radioactivity that "could have come from the plants."¹⁹ His reported statement, however, does not specifically attribute the contamination to the Apollo facility, as opposed to the nearby B&W Parks Township facility that also has been identified as a possible contamination source. Moreover, his declaration must be read in light of his overall conclusion that there was no evidence of contamination to the sewage treatment facility in excess of regulatory limits. Consequently, this unsworn press report is insufficient to establish any likelihood of success on the merits.

The Petitioners also contest the finding in LBP-92-31 that, based on B&W and Staff analyses of the sampling information submitted by the Petitioners in support of their stay request, it appeared that any radiological contamination existing on the property of petitioner Virostek or another local citizen was attributable to naturally occurring uranium or cesium deposition resulting from atomic weapons testing.²⁰ In seeking reconsideration, the Petitioners now reference an undated health and training manual prepared by a company that formerly operated the Apollo facility and assert it demonstrates that cesium-137 is an on-site, and thus presumably offsite, contaminant.²¹ The Petitioners also cite a June 1957 survey on background radiation levels in and around the B&W site and a September 1988 Staff letter describing soil sample surveys made during 1980 on Apollo area farms.²² They contend that this information on background levels should have been considered in determining whether the reported offsite contamination was, in fact, consistent with atomic weapons testing deposition.²³ In addition, the Petitioners maintain that the B&W and Staff conclusions are not consistent with a May 1987 report prepared for a local union purportedly showing a number of "hot spots" in the town of Apollo.²⁴

The Petitioners' claim regarding the training manual reference to cesium is misdirected. The manual does no more than list cesium as one of the radioisotopes that could present significant hazards from reactor or atomic weapons accidents. It provides no evidence that any offsite cesium deposition is attributable to the Apollo facility, as opposed to weapons testing.

The same is true for the Petitioners' exhibits relating to prior background testing. As B&W notes, the 1957 survey is of questionable utility because it was done using older testing techniques that render it incompatible with newer soil analyses regarding the facility.²⁵ Further, even that early survey supports

¹⁹ Petitioners' Reconsideration Request, exh. E.

²⁰ See *id.* at 2.

²¹ See *id.* at ch. F.

²² See *id.*, exhs. G-H.

²³ See *id.* at 2.

²⁴ See *id.* at 2, exh. I.

²⁵ See Licensee's Reconsideration Response at 13 n.7.

the basic B&W and Staff thesis; the authors of the survey declare that an increase in background levels over time might occur not because of facility operation but because of bomb testing and other programs.²⁶ As to the 1980 soil survey, the Petitioners have presented nothing that would indicate that its results are in anyway inconsistent with the B&W or Staff explanations of the source of any radioactive materials on these particular offsite properties.²⁷ Thus, neither of these exhibits provides any compelling information suggesting that the Presiding Officer was in error in concluding that the Petitioners failed to establish a likelihood of prevailing on the merits of their claims regarding onsite or offsite contamination.

With regard to the union report on purported "hot spots," the short excerpt from that document provided by the Petitioners indicates that B&W, under NRC supervision, was then taking steps to identify and clean up contaminated areas near the Apollo facility and elsewhere in the town of Apollo.²⁸ The report also states that the NRC was giving close attention to the matter of offsite contamination. It does not, however, provide any details indicating how, when, or where the "hot spots" were discovered, the level of contamination exhibited at the "hot spots," or the methodology used to conclude that the "hot spots" were the result of activities at the Apollo facility. Ultimately, the report excerpt is equally supportive of the B&W and Staff positions that any offsite contamination problem have been addressed. As such, it is hardly sufficient to establish that the Petitioners have a likelihood of success on the merits of their claims regarding such contamination.

Finally, the Petitioners assert that information not previously available to the public demonstrates that the Presiding Officer's conclusions in LBP-92-31 concerning chemical contamination are invalid.²⁹ The information they provide is local newspaper articles, dated November 7 and 11, 1992.³⁰ These press reports state that the Environmental Compliance Organization (ECO), an organization acting as a technical counselor to a local citizens advisory group, has raised concerns about onsite toxic chemical contamination and cleanup and is urging Environmental Protection Agency (EPA) involvement in the decommissioning process for the Apollo facility.

Assuming (contrary to the continuing assertions of B&W and the Staff³¹) that the NRC has jurisdiction over any of the Petitioners' concerns about Amendment

²⁶ See Petitioners' Reconsideration Request, exh. G.

²⁷ In fact, as B&W points out, the Staff's EA discussion regarding background levels in the Apollo area, which is supported by historical evidence dating back to 1968 — some 15 years before the Apollo facility ceased operations — indicates that radiation levels outside the immediate site have shown no increase. See Licensee's Reconsideration Response at 13-14.

²⁸ See Petitioners' Reconsideration Request, exh. I.

²⁹ See *id.* at 2.

³⁰ See *id.*, exh. J.

³¹ See Licensee's Reconsideration Response at 16; Staff's Reconsideration Response at 13.

No. 21 relating to nonradioactive chemical wastes, this unsworn press material is inadequate to demonstrate their likelihood of success on the merits of those claims. In response to the Petitioners' reconsideration request, B&W has provided a copy of a December 2, 1992 letter from the General Manager of B&W's Nuclear Environmental Services division to ECO's president.³² This correspondence outlines B&W's decommissioning plan as it relates to chemical issues and challenges the validity of the 1990 hydrogeological testing program whose results ECO relies upon for its apparent conclusion that there is significant hazardous chemical contamination onsite. According to the December 2 letter, the results of the 1990 program, which utilized test wells that were not properly developed for sampling, has been called into serious question by followup programs in 1991 and 1992 indicating that onsite soils do not contain hazardous constituents above the characteristic levels defined in EPA regulations. When considered in this context, the Petitioners' newspaper articles are insufficient to establish a likelihood of success on the merits of their chemical contamination-related claims.

B. Factor Two — Irreparable Injury

Relying upon uncontroverted B&W evidence that cleanup activities had resulted in no radiological releases above regulatory limits, in LBP-92-31, the Presiding Officer concluded that the Petitioners had failed to make a showing establishing any basis for their claim that they would suffer irreparable injury because of their exposure to contaminants from the decommissioning process. The Petitioners now contend that this conclusion was erroneous. As the basis for this claim, they reference monitoring data covering the nine-month period from January through September 1992 that they assert establishes there were missing radiation monitors at the Apollo site as well as missing monitoring data.³³

In its response, B&W acknowledges that some monitoring data are "missing" to the extent that, from time to time, a monitor malfunctions or otherwise does not provide useable information.³⁴ Nonetheless, the data submitted by the Petitioners indicate that during the nine-month period involved, on average, the nine environmental stations scattered in and around the Apollo facility collectively functioned over 97% of the time.³⁵ Moreover, the specific monitoring data submitted by the Petitioners regarding soil processing operations and environmental dosimetry indicate that during the periods covered by these

³² See Licensee's Reconsideration Response, attach. 1.

³³ See Petitioners' Reconsideration Request at 1, exh. C.

³⁴ See Licensee's Reconsideration Response at 9.

³⁵ See Petitioners' Reconsideration Request, exh. C at 1 (Table 2). Of the 21 instances of monitor malfunctions reflected in the data submitted by the Petitioners, only two lasted longer than four days, with the longest being six days. See *id.* Most monitor outages lasted two or three days.

data any releases resulted in very small fractions of maximum permissible concentrations.³⁶ This is not evidence sufficient to establish irreparable injury that is both "great and certain."³⁷

C. Factor Three — Harm to Other Parties

In his findings relative to the third stay factor of harm to other parties, the Presiding Officer concluded that it was proper to consider (1) the uncontroverted showing of B&W that it would sustain a minimum of \$790,000 in shutdown, demobilization, and remobilization costs if a stay was granted; and (2) B&W's showing, supported by the Staff, that if cleanup is delayed beyond December 31, 1992, under the provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, B&W likely would face significantly higher disposal costs at the South Carolina, Nevada, and Washington sites for waste at levels above 2000 picocuries per gram (pCi/g) of uranium.³⁸ The Petitioners now assert that, because of the size of B&W and its associated entities, as well as 29 million dollars in taxpayer funds being utilized in the cleanup efforts, these expenses are insignificant. In addition, they contend that B&W failed to establish that it will face significantly higher disposal fees on January 1, 1993, at the Envirocare site in Utah where disposal of the bulk of the decontamination material (i.e., material at levels between 30 pCi/g and 2000 pCi/g) is to take place.³⁹

There may well be instances in which the ability to pay is a significant factor in determining whether a litigant will suffer substantial economic harm from the grant of a stay. This, however, is not such a case. In this instance, stay-related costs of at least \$790,000 are an appreciable figure. Moreover, as B&W notes, this figure covers shutdown, demobilization, and remobilization costs. These costs, which the Petitioners have not challenged, would have to be absorbed by B&W regardless of whether Envirocare increases the amount it charges for disposal services.

D. Factor Four — Where Does the Public Interest Lie

Regarding the final factor — where does the public interest lie — in their reconsideration request the Petitioners simply repeat the assertion made in their initial stay motion: The public interest lies in following the law and ensuring

³⁶ See *id.*, exh. C, at 2-4.

³⁷ See *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-820, 22 NRC 743, 747 (1985).

³⁸ See LBP-92-31, 36 NRC at 266-67.

³⁹ See Petitioners' Reconsideration Request at 3.

that there is a proper cleanup process for all onsite and offsite contaminants.⁴⁰ While this general statement undoubtedly is true, as was noted in LBP-92-31, it is unavailing when compared to

the showing by B&W and the Staff that the present cleanup actions meet all regulatory requirements and will result in the removal of a substantial volume of contaminated materials from Apollo for disposal in licensed waste facilities, [which] is consistent with what the Commission recently has recognized as the public interest in seeing that the site is promptly and effectively remediated.⁴¹

Thus, the Petitioners have not put forth any information that gives cause to reconsider the determination in LBP-92-31 regarding this factor.

For the foregoing reasons, the Petitioners' November 22, 1992 request for reconsideration of LBP-92-31, 36 NRC 255 (1992), is *denied*.

It is so ORDERED.

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 10, 1992

⁴⁰ See *id.*

⁴¹ 36 NRC at 267 (footnote omitted).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Harry Foreman
Ernest E. Hill

In the Matter of

Docket No. 30-16055-OM
(ASLBP No. 87-555-01-OM)
(Decommissioning Order)

ADVANCED MEDICAL SYSTEMS, INC.
(One Factory Row,
Geneva, Ohio 44041)

December 14, 1992

In this case the Atomic Safety and Licensing Board dismisses the proceeding for the lack of a controverted issue.

MOOTNESS OF CONTROVERTED ISSUE: DISMISSAL OF PROCEEDING

In an enforcement proceeding, once the licensee has voluntarily complied with the Staff's enforcement order requiring cleanup and decontamination of the licensee's byproduct materials facility, the controverted issue upon which a proceeding may be based — whether the order was justified — has become moot.

MEMORANDUM AND ORDER
(Dismissing Proceeding)

On July 23, 1987, and again on November 3, 1987, the NRC Staff issued two immediately effective, license modification orders¹ demanding that Advanced Medical Systems, Inc. ("AMS") begin cleanup and decontamination of its byproduct materials facility located in Cleveland, Ohio. These orders were issued by the Staff because contamination and radiation levels were found to be "excessive and increasing" during Staff inspections of the facility, and because AMS failed to start cleanup and decontamination activities as scheduled in the first of the two orders.²

At the initial prehearing conference in this proceeding, an agreement was reached with counsel for AMS to hold the proceeding in abeyance pending satisfactory resolution of decontamination activities at the AMS facility.³ It now appears that AMS's decontamination efforts were successful and that "the Staff is satisfied that decontamination operations have been completed, as required by the NRC Orders."⁴ In other words, the issues giving rise to this proceeding are now moot. Regardless of this fact, however, Counsel for AMS now demands an evidentiary hearing.⁵

Our jurisdiction in this matter is established by the nature of the Staff's enforcement actions — "[i]f a hearing is requested . . . the issue to be considered at such hearing shall be whether th[ese] order[s] should be sustained."⁶

For the sake of argument, if Counsel for AMS prevailed in convincing the Board that the Director's decisions to issue the decommissioning orders could not be sustained, the Board could fashion a remedy, such as staying the immediate effectiveness of the orders, or, *absent*, even more appropriate, vacating, in essence, the decommissioning orders so that they would have no effect on AMS. However, the Board's ability to fashion such a remedy, or any remedy in this case, has been extinguished by intervening events.

¹ Order Modifying License, Effective Immediately, and Demand for Information (July 23, 1987); Confirmatory Order Modifying License, Effectively Immediately (Nov. 3, 1987).

² Order of July 23, 1987; Order of November 3, 1987.

³ See Tr. 35-47.

⁴ Letter from Colleen P. Woodhead, Office of the General Counsel, to Sherry J. Sutin, Advanced Medical Systems (Sept. 9, 1991); see also Letter from Charles E. Norelius, Director, Division of Radiation Safety and Safeguards, to Sherry Sutin, Advanced Medical Systems (Jan. 23, 1992); NRC Staff Motion for Termination of the Proceeding (Aug. 18, 1992) at 3; NRC Staff Response in Opposition to AMS' Combined Motion to Deny the Staff's Motion for Termination and Request for Order Compelling Staff Response to Interrogatories (Sept. 22, 1992) at 6.

⁵ See generally AMS Response to Issues Raised by the NRC Staff Response in Opposition to AMS' Combined Motion to Deny the Staff's Motion for Termination and Request for Order Compelling Staff Response to Interrogatories (Oct. 1, 1992).

⁶ Order of July 23, 1987, at 9; Order of November 3, 1987, at 6.

As stated previously, over the past 5 years, AMS has complied, voluntarily, with the two decommissioning orders. To the satisfaction of the Staff, AMS has completed the cleanup and decontamination of those areas of its facility that were of concern to the Staff when the orders were issued. We have no other alternative than to find moot the issue of whether or not the Director's decision can be sustained. His decision was based on his findings that the AMS facility had excessive and increasing contamination and radiation levels. Now that those radiation levels have been lowered or cleaned up, there is no controversy left for the Board to hear.⁷ There being no other litigable issues left for trial, we find this case to be ended.

ORDER

1. The AMS Motion "Decontamination Consolidation" (Aug. 29, 1991) requesting the Board to order the consolidation of three separate proceedings is DENIED;⁸

2. The "NRC Staff Motion for Termination of the Proceeding" is GRANTED; and

3. This proceeding is hereby DISMISSED.

In accordance with 10 C.F.R. § 2.786(b)(1), Commission review of this Order may be sought by filing a petition for review within 15 days after service of this Order. Requirements regarding the length and content of a petition for review and the timing, length, and content of an answer to such a petition are specified in 10 C.F.R. § 2.786(b)(2), (3).

⁷The mootness doctrine springs from the language in article III of the United States Constitution that limits federal court jurisdiction to "cases" or "controversies." This case or controversy limit mandates that questions be "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Circumstances sometimes shift during the course of litigation in a way that calls into question whether a concrete dispute between the parties exists any longer. . . . In deciding whether changed circumstances have rendered a case moot, the appropriate question is whether a live controversy between adverse parties still exists at the time the court reviews the case.

Center for Science in the Public Interest v. Regan, 727 F.2d 1161, 1170 (1984), citing *Franks v. Bowman Construction Co.*, 424 U.S. 747 (1976). See also *Kimball v. Kimball*, 174 U.S. 158, 162 (1898); *Heimuller v. Stokes*, 256 U.S. 359, 361 (1920); *Sanks v. Georgia*, 401 U.S. 144, 148 (1971). Moreover, we do not find this case to be within the exception to the mootness rule. See *Center for Science in the Public Interest*, 727 F.2d at 1170-71.

⁸Since two of the three proceedings that counsel for AMS sought to consolidate with this OM proceeding are under review by the Commission, the Board simply lacks the jurisdiction to consolidate those proceedings with any other proceeding.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

Harry Foreman
ADMINISTRATIVE JUDGE

Ernest E. Hill
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 14, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Dr. James H. Carpenter
Dr. Peter S. Lam

In the Matter of

Docket No. 50-446-CPA
(ASLBP No. 92-668-01-CPA)
(Construction Permit Amendment)

TEXAS UTILITIES ELECTRIC
COMPANY, *et al.*
(Comanche Peak Steam Electric
Station, Unit 2)

December 15, 1992

The Licensing Board denies petitions for leave to intervene and to hold hearings on the grounds that Petitioners did not have the requisite interest for standing as required by 10 C.F.R. § 2.714(a)(1) or Petitioners have failed to file an admissible contention as required by 10 C.F.R. § 2.714(b)(1).

RULES OF PRACTICE: STANDING TO INTERVENE

Petitioners' claims of injury based on alleged violations of employment rights do not provide the requisite interest for standing in an application proceeding to extend the construction permit completion date for Unit 2 of the Comanche Peak Steam Electric Station.

RULES OF PRACTICE: STANDING TO INTERVENE

Petitioners' claims of injury based on allegations that they were denied the right to appear as witnesses in a prior proceeding to extend the construction

completion date for Unit 1 of the Comanche Peak Steam Electric Station do not provide the requisite interest for standing in the subject application proceeding.

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

A contention filed in an application proceeding to extend the completion date of a construction permit is not admissible where it does not directly challenge the Applicant's alleged good-cause justification for the delay. Petitioners' allegations of corporate wrongdoing do not show that a genuine dispute exists with the Applicant on its justification for the delay.

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

Petitioners' contention is inadmissible under 10 C.F.R. § 2.714(b)(2)(iii) where the contention fails to contain sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact and does not include references to the specific portions of the application that Petitioners may dispute.

MEMORANDUM AND ORDER
(Ruling on Intervention Petitions
and Terminating Proceeding)

I. INTRODUCTION

We have before us for consideration two joint petitions for leave to intervene and to hold a hearing in the matter of the February 3, 1992 request by Texas Utilities Electric Company (Texas Utilities) to amend Construction Permit CPPR-127 for the Comanche Peak Steam Electric Station, Unit 2, by extending the construction completion date from August 1, 1992, to August 1, 1995. In this Memorandum and Order, we decide to deny the petitions and terminate the proceeding.

The petitions were filed in response to a June 23, 1992 NRC Staff (Staff) "Environmental Assessment and Finding of No Significant Impact" for the requested extension, which was published in the *Federal Register* on June 29, 1992. 57 Fed. Reg. 28,885. The Commission, on July 28, 1992, granted the amendment on a finding by Staff that good cause has been shown for the delay and that the amendment involves no significant hazards consideration. 57 Fed. Reg. 34,323 (Aug. 4, 1992). In accordance with Commission practice, if a

hearing is ordered, a final decision on the extension will await the outcome of the hearing.

The first joint petition for intervention and hearing, dated July 27, 1992, was filed by B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan. They filed a supplement to the petition on October 5, 1992, containing a contention. Texas Utilities and Staff filed responses seeking denial of the petition and contending that the Petitioners have failed to provide any supporting basis for the contention. Petitioners filed additional pleadings dated November 15 and 17, 1992, which Texas Utilities and Staff oppose. We rule on those pleadings in this Memorandum and Order.

The other joint petition, dated July 28, 1992, was filed in behalf of Sandra Dow Long, R. Micky Dow, and Disposable Workers of Comanche Peak Steam Electric Station. The request for intervention and hearing was opposed by Texas Utilities and Staff in responses dated August 14 and August 18, 1992, respectively.

In response to our order setting October 5, 1992, as the date for filing amended or supplemental petitions, the Dows filed a motion for an extension of time and for a further filing schedule. By Memorandum and Order, dated October 9, 1992 (unpublished), we denied the request for lack of a credible reason and good cause. R. Micky Dow filed a motion for rehearing, dated November 10, 1992, which is opposed by Texas Utilities and Staff. In this Memorandum and Order we rule on the motion.

II. THE APPLICATION

By letter dated February 3, 1992, as supplemented on March 16, 1992, Texas Utilities requests, pursuant to 10 C.F.R. § 50.55(b), the extension of the construction completion date of CPPR-127 from August 1, 1992, to August 1, 1995. As good-cause justification, Texas Utilities states that it was anticipated that there would be a 1-year suspension in construction beginning in April 1988. The purpose was to allow the permit holder to concentrate its resources on completion of Unit 1. However, Unit 1 was not licensed until February 1990 and Texas Utilities did not resume significant design activities for Unit 2 until June 1990. The delay was needed to complete construction and startup of Unit 1.

Texas Utilities also relied on the NRC's previous finding of good cause for the suspension of construction of Unit 2 based on allowing concentration of resources for the completion of Unit 1. Staff found good cause for the extension of the construction permit completion date to August 1, 1992, premised on Texas Utilities' justification that suspension of Unit 2 for 1 year, beginning in April 1988, would allow it time to make modifications that may be required for Unit

2, based upon knowledge gained from the reinspection and corrective action program applied to Unit 1. 53 Fed. Reg. 47,888 (1988).

III. PETITIONS FOR INTERVENTION

A. The Orr Petition to Intervene

1. *Requisite Interest for Standing*

The Commission's Rules of Practice provide that any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene. 10 C.F.R. § 2.714(a)(1). Section 2.714(a)(2) requires that the petition 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, including the reasons it should be permitted to intervene.

B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan each claim the requisite interest for standing to intervene in the proceeding under the provisions of 10 C.F.R. § 2.714.

The Orrs state that they reside at separate locations, within a 50-mile radius of Unit 2, that they eat food produced in an area that would be adversely affected by normal and accidental releases of radioactive materials from the construction of Unit 2, and that they came within Texas Utilities' rate base.

Joseph J. Macktal, Jr., states that he is a former employee of the Comanche Peak Steam Electric Station (CPSES) and is currently seeking reinstatement of his job. He asserts that he has been personally harmed due to management misconduct which has also contributed to the delay in the construction of Unit 2. Petitioner claims he was to be a direct fact witness in a construction permit amendment proceeding to extend the completion date for Unit 1. The proceeding, Docket No. 50-445-CPA (CPA-1), was settled and dismissed in July 1988. He asserts that he has information that is relevant to the determination of Texas Utilities' request to extend the Unit 2 completion date.

S.M.A. Hasan, a former engineer employed at the CPSES, states that he was to be a fact witness in CPA-1, but because of the payment of hush money by counsel for the utility to the intervenor he was precluded from testifying. He claims an interest in exposing the alleged management misconduct at CPSES which he says resulted in his removal from the CPSES site and directly contributed to the delay in constructing Units 1 and 2. He asserts a financial interest in the granting of the amendment request.

All Petitioners, without further explanation, claim to be similarly situated as the petitioners who were permitted to intervene in CPA-1 and request intervenor status on that basis.

Neither Texas Utilities nor Staff contests the Orrs' claim of having the requisite interest for standing. It is clear that their claim of residing within 50 miles of Unit 2 provides them with the status required for standing.

The same principles apply to establishing standing for a requested extension of an existing construction permit completion date as do to an application for a new construction permit or operating license. *Northern Indiana Public Service Co.* (Baily Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 563-65 (1980).

In the foregoing type of case, a petitioner may base standing on a claim that he or she resides within the geographic zone that might be affected by an accidental release of fission products. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979). Close proximity under those circumstances has been deemed to establish the requisite interest for intervention. In such a case, the petitioner need not show that the concerns are well founded in fact. Distances of as much as 50 miles have been held to fall within the zone. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).

The Orrs' claim that they are part of Texas Utilities' rate base does not provide them with an additional ground for standing. Economic concerns of this kind are best directed to the state regulatory body that has charge of rate setting and similar matters. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984).

Texas Utilities and Staff argue that Macktal and Hasan do not have the requisite interest for standing on the basis of their assertions that they are former employees who have suffered personal harm caused by management misconduct. They assert that Petitioners fail to meet the two-pronged test used by the Commission to establish standing to intervene in NRC proceedings. The test requires a petitioner to show that (1) the action proposed will cause some injury-in-fact to the person seeking to establish standing and (2) that such injury is within the zone of interests protected by the statutes governing the proceeding. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). They also claim that Petitioners failed to show that the injury-in-fact is concrete and particularized, actual, or imminent and is likely to be redressed by a favorable decision in the proceeding, citing *Lujan v. Defenders of Wildlife*. — U.S. — 112 S. Ct. 2130, 2136 (1992).

We agree that Macktal and Hasan have not demonstrated that they have the requisite interest for standing. Not having shown that they reside or work within close proximity to the plant they cannot claim, as the Orrs have successfully done, that they are presumed to have the requisite interest for standing. Under these circumstances a licensing board will apply judicial concepts of standing.

Pebble Springs, supra. A petitioner should allege in an NRC proceeding an injury-in-fact that is within the zone of interests protected by the Atomic Energy Act of 1956, as amended (AEA), or the National Environmental Policy Act of 1969, as amended (NEPA). This, Petitioners have failed to do.

The claim of personal injury that allegedly resulted from mismanagement was not shown to result from the proposed extension of the construction permit completion date. Neither was it established that the alleged injury was protected against under the AEA or NEPA. Petitioners' grievances are in the area of employment rights and would not be redressed by a decision favorable to them on the issue of the extension of the construction date. A desire to expose the alleged mismanagement is not an injury-in-fact and does not enhance their position for standing.

Similarly, Petitioners' claim that they were denied the right to appear as witnesses in another proceeding to extend the construction completion date of Unit 1 does nothing to provide the requisite interest for standing in this proceeding. Were Petitioners to prevail in the subject proceeding, it would not redress any alleged harm that was said to result from denying the Petitioners' right to testify in the Unit 1 proceeding. *Lujan v. Defenders of Wildlife, supra; Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988).

Hasan's claim of a financial interest in the application proceeding does not confer standing under the aegis of the AEA and in the absence of an environmental connection, as here, under NEPA. *Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-582, 11 NRC 239, 242 (1980).

No factual or legal justification was provided to grant Petitioners' standing request on the unsupported claim that they were similarly situated as the petitioners who were permitted to intervene in the Unit 1 extension proceeding.

We find that Macktal and Hasan have not demonstrated that they have the requisite interest for standing, as provided in section 2.714, and that their petition for intervention and to hold a hearing should be denied.

2. Aspects

The NRC's Rules of Practice provide that a petition for leave to intervene should set forth the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene. 10 C.F.R. § 2.714(a)(2). Texas Utilities and Staff in their responses to the Orr petition asserted that Petitioners were not entitled to a hearing because they had not addressed the aspect requirements of the regulations.

The issue has been rendered moot by the filing by the Orrs of a supplement to the petition to intervene which contains a contention they propose to litigate. The contention sets forth with particularity aspects of the subject matter of the

proceeding as to which Petitioners seek to intervene. Their pleadings are not now deficient in that respect. The Orrs have met the aspect requirement of section 2.714(a)(2).

3. *The Orrs' Contention*

a. *Standards for Contentions in Construction Permit Extension Proceedings*

All contentions must meet the requirements of 10 C.F.R. § 2.714(b)(2), amended August 11, 1989, which provides:

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute

Further, 10 C.F.R. § 2.714(d) provides that contentions shall not be admitted (i) if the contention and supporting material fail to meet the requirements of section 2.714(b), or (ii) should the contention be proven that it would be of no consequence in the proceeding because it would not entitle petitioner to relief.

In its comments on the amendments to section 2.714 the Commission explained that section 2.714(b)(2) does not call upon the petitioner to make its case at this stage of the proceeding. The petitioner is required to read the pertinent portion of the license application and to state the applicant's position and its opposing view. 54 Fed. Reg. 33,170 (1989). The Commission cited with approval *Connecticut Bankers Ass'n v. Board of Governors*, 627 F.2d, 245, 251 (1980), wherein the court stated that "a protestant does not become entitled to an evidentiary hearing merely on request or on a bald or conclusory allegation that such a dispute exists. The protestant must make a minimal showing that facts are in dispute thereby demonstrating that an 'inquiry in depth' is appropriate."

The Commission looks to petitioners to specifically fulfill the requirements of section 2.714(b)(2). A licensing board cannot infer a basis for a contention. *Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3)*, CLI-91-12, 34 NRC 149, 155 (1991).

The scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show good-cause

justification for the delay. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 935 (1987). A petitioner may challenge a request for a permit extension by seeking to prove, on balance, that delay was caused by circumstances that do not constitute good cause. *Washington Public Power Supply System* (WPPSS Nuclear Project, Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1229 (1982).

The need to evaluate and correct safety deficiencies can be good cause for delay in construction completion even when those deficiencies resulted from deliberate corporate wrongdoing. If there was a corporate policy of violating NRC requirements and that policy was discarded and repudiated by the permit holder, any delays from the need to take corrective action would be delays for good cause. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397, 402-03 (1986).

b. The Contention

Petitioners submitted the following contention:

The delay of construction of Unit 2 was caused by Applicant's intentional conduct, which had no valid purpose and was the result of corporate policies which have not been discarded or repudiated by Applicant.

As bases for the contention, Petitioners contend that a significant safety hazard exists where an applicant has employed and continues to employ corporate policies aimed at constructing a nuclear power plant in violation of NRC requirements and, as a result of these corporate policies, significant and substantial construction delays occurred and continue to occur. They further contend that the applicant has not repudiated or disregarded the corporate policies responsible for this delay. As a result, they allege that Texas Utilities is unable to demonstrate good cause for the delay and the amendment must be denied.

In support of the contention, Petitioners allege that the facts contained in CPA-1, the 1988 proceeding in which Texas Utilities sought to extend the construction completion date for Unit 1 to August 1, 1988, demonstrate that a factual dispute exists as to whether Texas Utilities had a corporate policy to violate NRC requirements that had no valid purpose and resulted in a delay in the construction of Unit 2. They further allege that CPA-1 demonstrates a factual dispute as to whether the corporate policy had not been discarded or repudiated.

Petitioners contend that Texas Utilities misled the licensing board in CPA-1 about critical facts in an effort to conceal its ongoing corporate policy of construction in violation of NRC requirements. These were said to include the

use of restrictive settlement agreements, the payment of hush money, the use of incorrect construction standards and improper design certification methods.

Petitioners further contend that Texas Utilities continues to receive Notices of Violation and civil fines which demonstrate that it employs the same corporate policies that originally resulted in construction delays.

In response, Texas Utilities asserts that Petitioners have failed to allege even a single fact in support of their contention that Unit 2 was delayed due to improper and intentional conduct. It claims that Petitioners' supplement consists of nothing more than a discussion of disparate events occurring over the past 10 years that have nothing to do with Texas Utilities' construction permit extension request. Texas Utilities states that the matters raised by Petitioners were previously brought to the attention of the Commission and satisfactorily resolved prior to the issuance of the operating license for Unit 1. Also, the construction permit completion date for Unit 2 was already extended by the NRC in November 1988 to August 1, 1992, on good-cause justification for the delay that resulted from reinspection and corrective action programs at Unit 1, which were to be applied to Unit 2. It requests that Petitioners' petition to intervene should be denied because they failed to establish a basis for a contention as required by section 2.714.

Staff contends that the contention is not admissible because it does not address the issue in the proceeding, i.e., whether it was appropriate for Texas Utilities to have delayed significant construction activities at Unit 2 from 1988 to January 1991, when it resumed significant construction activities. It states that Petitioners fail to explain how the alleged corporate policies, which may or may not have caused the delay in the construction of Unit 1 in 1986, caused Texas Utilities to inappropriately defer the resumption of significant construction activities at Unit 2 for more than 2 years from 1988 until 1991. Staff asserts that the contention is not relevant to any matter in the proceeding.

Staff further contends that in support of their contention Petitioners chiefly rely on legal pleadings filed in either the operating license proceeding for Units 1 and 2 or CPA-1 without explaining how any of these pleadings, even if true, caused Texas Utilities to inappropriately delay significant construction activities at Unit 2. Staff claims that the events Petitioner alleges to have occurred since the CPA-1 proceeding was terminated are unsupported. It concludes that Petitioners have failed to demonstrate that a genuine dispute of material facts exists making Petitioners' contention inadmissible.

Petitioners rely on the record in CPA-1, a proceeding to hear Texas Utilities' request of January 29, 1986, to extend the construction completion date of CPPR-126 for Unit 1 to August 1, 1988. Intervenor in that proceeding submitted a contention upon which the subject contention was modeled. The proceeding was considered along with the operating license applications for Unit 1 and its companion Unit 2. Docket No. 50-445-OL and Docket No. 50-446-OL.

The applications for operating licenses for Units 1 and 2 were filed in 1978. By 1983, the only contention remaining for litigation in the operating license proceeding challenged the quality assurance and quality control associated with the construction of Units 1 and 2. During the course of the proceeding, the licensing board found that the applicants had not demonstrated the existence of a system that promptly corrects design deficiencies and had not explained several design questions raised by the intervenor. It suggested the need for an independent design review and required the applicants to file a plan that might help to resolve the Board's doubts. LBP-83-81, 18 NRC 1410 (1983). Applicants took various actions to address the concerns that had been raised. Subsequently, Applicants, Staff, and the intervenor entered into an agreement in June 1988 to settle and dismiss the operating license proceeding and the application proceeding to extend the construction completion date for Unit 1. The licensing board concluded that as a result of the settlement it knew of no matters in controversy. LBP-88-18A, 28 NRC 101 (1988). It then dismissed the proceeding on July 13, 1988. LBP-88-18B, 28 NRC 103 (1988).

Petitioners would incorporate by reference into this proceeding the record from the operating license applications and construction permit extension proceedings. The record runs into many thousands of pages. They also reference two pleadings containing more than 200 pages. Based on that record, Petitioners would have us find that Texas Utilities had not repudiated, prior to the time the proceedings were settled, its corporate policy of violating NRC regulations, which resulted in delays in the construction of CPSES.

This we cannot do. Commission practice is clear that a petitioner may not simply incorporate massive documents by reference as the basis for its contention. Petitioners are expected to clearly identify the matters on which they intend to rely with reference to a specific point. To do otherwise does not serve the purposes of a pleading. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240, 241 (1989). This requirement is incorporated in 10 C.F.R. § 2.714(b)(2)(ii) which Petitioners fail to meet with their request.

Petitioners also allege that the following raise an issue as to whether Texas Utilities maintains a corporate policy of violating NRC regulations that caused the delay in the construction of Unit 2.

(1) RESTRICTIVE SETTLEMENT AGREEMENTS

Petitioners assert that Texas Utilities has not repudiated its policy of entering into restrictive settlement agreements with former minority owners of CPSES in order to keep relevant information from the licensing board in CPA-1 and the NRC. Brazos Electric Power Cooperative, Inc. (Brazos), a minority owner in CPSES, had contended in an August 14, 1987 pleading in CPA-1 that Texas

Utilities was responsible for failing to disclose material information and making misrepresentations to Brazos that may have delayed construction of Unit 1. Brazos asserted that it was a continuing practice of the permit holder. Petitioners assert that subsequently Texas Utilities and minority owners Brazos, Texas Municipal Power Agency, and Tex-La Electric Cooperative of Texas entered into settlement agreements whereby Texas Utilities purchased the interest of the minority owners who in turn agreed to drop their litigation and not to assist or cooperate with third parties in all proceedings related to the licensing of Comanche Peak or permit their employees, attorneys, and consultants from doing so. The agreements were signed in July 1988, February 1988, and March 1989, respectively.

We cannot discern from Petitioners' presentation how the entry of Texas Utilities into nondisclosure agreements resulted in delay in the construction of CPSES. The allegation was made but it is unsupported.

Moreover, even if Petitioners had alleged facts indicating intentional violations of NRC requirements as the root cause of the deficiencies requiring correction, it would not be sufficient to defeat the extension if the policy was discarded and repudiated by the permit holder and the delays occurred because of the need to correct the safety problems. *Comanche Peak*, CLI-86-15, 24 NRC at 401-04. For a petitioner to plead an admissible contention in a construction permit extension proceeding it is necessary to directly challenge the permit holder's asserted reasons that show good-cause justification for the delay. *Comanche Peak*, ALAB-868, 25 NRC at 935.

Petitioners at no time directly challenge Texas Utilities' good-cause justification for the delay in constructing Unit 2, i.e., applying safety modifications to Unit 2 based upon the reinspection and corrective action program applied to Unit 1. They do not present any supporting material to show that on balance the restrictive agreements were the cause of the delay at Unit 2 and not the reasons given by Texas Utilities in the application. Not only is this inconsistent with the law on contention requirements in a construction permit extension proceeding, it is contrary to the requirements of 10 C.F.R. § 2.714(b)(2)(iii). It requires petitioners to include references to the specific portions of the application that they dispute and the supporting reason for each dispute.

Petitioners allege that restrictive settlement agreements entered into with alleged whistleblowers established a practice of concealing evidence directly bearing on the issues to be litigated in the operating license and CPA-1 proceedings.

They claim that the agreements demonstrate that Texas Utilities has not repudiated its corporate policy that resulted in construction delay. Agreements were entered into between Joseph J. Macktal, Jr., and the contractor of CPSES (Brown & Root, Inc.) in January 1987 and between Lorenzo Polizzi and the architectural engineer for CPSES (Gibbs and Hill, Inc.) in June 1988.

The individuals, in settling employment claims with the contractors, agreed not to voluntarily testify or otherwise participate in any proceeding or investigation involving CPSES. The Polizzi agreement permitted him to inform the NRC of safety concerns relating to CPSES. Texas Utilities argues that it was not a party to either agreement and that the individuals were informed in 1989 that the restrictive clauses would not be enforced.

The pleading is similarly deficient as that relating to the nondisclosure agreements entered into with minority owners. The claim that the settlement agreements resulted in construction delay is unsupported. Contrary to the requirements of section 2.714(b)(2)(iii), Petitioners ignored and failed to challenge the reasons given by Texas Utilities for the delay of construction at Unit 2, which is critical for a contention opposing a construction permit extension.

(2) PATTERN OF CONTINUING VIOLATIONS

Petitioners allege that the operating license and CPA-1 proceedings demonstrated a corporate policy of Texas Utilities that resulted in a breakdown in the quality assurance (QA) and quality control (QC) programs employed by CPSES, which delayed construction. They contend that Texas Utilities continues to receive numerous Notices of Violation and civil penalties which shows that it continues to employ the same corporate policies that originally resulted in the delay of construction. In support, Petitioners presented a printout of the Notices of Violation and penalties received since the settlement of the former proceedings.

Petitioners specifically called our attention to the six notices that are said to have occurred related to QA and QC breakdowns. They were identified as occurring on May 17, 1990; August 3, 1990; February 21, 1991; March 29, 1991; April 1, 1991, and March 31, 1992. Petitioners assert that the Notices of Violation demonstrate that Texas Utilities has not abandoned its past corporate policy which resulted in delay.

Texas Utilities states that it has taken corrective and preventive actions for each of the six violations, and the NRC has closed all but the most recent violation. It disclaims that the violations provide a basis for a contention that there is a current or ongoing corporate policy of violating NRC regulations.

We do not believe that which Petitioners have presented supports a claim of a pattern of violations that demonstrates a policy to violate NRC regulations. Inevitably, there will be some construction defects tied to quality assurance lapses in any project approaching in magnitude and complexity, the erection of a nuclear power plant. *Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983)*. No information was provided to show that anything more was involved here. Furthermore, Petitioners have not shown how the

violations were the cause of the delay at Unit 2 rather than as justified by Texas Utilities.

(3) ALLEGED MISLEADING OF LICENSING BOARD IN OPERATING LICENSE AND CPA-1 PROCEEDINGS TO CONCEAL CORPORATE POLICY OF VIOLATING NRC REGULATIONS

Petitioners allege that Texas Utilities misled the licensing board in July 1988 about the root causes of design defects incorporated in the design of CPSES, which required a complete redesign of the CPSES pipe support system, thereby delaying construction.

(i) *"Hush Money" Settlement Agreements.* Petitioners allege that Texas Utilities arranged to have whistleblowers paid money in exchange for agreeing not to bring safety concerns to the NRC and denied such activity at the prehearing conference on July 13, 1988, which resulted in the termination of the proceedings. Specific mention is made of the Polizzi agreement. Petitioners claim that the failure of Texas Utilities to repudiate the agreements demonstrates that the practice will continue.

Texas Utilities denies that the agreements restrict whistleblowers from informing the NRC of safety concerns and that the NRC has so found. It asserts that the agreements are more than 4 years old and do not relate to the permit holder's current corporate policy.

The Board notes that the Polizzi agreement of June 23, 1988, provides that the agreement shall not "be interpreted to prevent Polizzi from informing the Nuclear Regulatory Commission of any and all safety concerns he may have relating to the Comanche Peak Steam Electric Station."

Even if we are to assume that "hush money" was paid, it does not *ipso facto* show that delay at Unit 1 was caused by the entering into the agreements or that the agreements, on balance, caused the delay at Unit 2 rather than the reasons given by Texas Utilities. Petitioners have not provided a valid basis in support of the contention.

(ii) *Incorrect Stiffness Values Were Used to Certify the CPSES Pipe Support System.* Petitioners allege that beginning in 1983, S.M.A. Hasan, an engineer at CPSES, had informed Texas Utilities management that incorrect stiffness values had been used to certify the CPSES pipe support system. The project pipe support engineer was advised of this in August 1985. Petitioners state that the licensing board was not apprised of this situation as Texas Utilities was obligated to do. A minority owner advised the licensing board in January 1987 that Texas

Utilities, that month, acknowledged using incorrect values in Unit 1. Petitioners further allege that the project pipe support engineer who oversaw the design of all piping support work at CPSES is believed to be currently employed as Texas Utilities' Manager of Civil Engineering. Petitioners claim that this demonstrates that Texas Utilities has not repudiated its policy of construction in violation of NRC requirements including the concealment of significant safety deficiencies.

Texas Utilities asserts that, in the mid-1980s, Hasan made allegations to the NRC regarding the pipe support certifications. It states that it advised the NRC that in July 1987 the pipe supports were being correctly validated and the NRC concluded that Hasan's concern had been adequately resolved. Texas Utilities further asserts that the matters were made known to the licensing board prior to the dismissal of the proceeding on July 13, 1988. It claims that Petitioners' allegations related to pipe support certification are more than 4 years old and do not relate to Texas Utilities' current corporate policies or as to whether it had repudiated past policies.

Petitioners' claim that Texas Utilities maintains its policy of construction in violation of NRC requirements, including the concealment of significant safety deficiencies, is unsupported as prescribed in section 2.714(b)(2)(ii). Lacking is a showing that the alleged improper certifications and their concealments extended beyond 1988. The only connection made of the prior activities of Texas Utilities and its current practices is that it continues to employ the same manager as to whom the initial complaints were made. There is no showing that he presently allows improper certifications or conceals them. An additional defect in the pleading is that it does not directly challenge the asserted reasons of Texas Utilities in justification for the delay.

(iii) *Harassment and Intimidation of Whistleblowers.* Petitioners contend that Texas Utilities has harassed and intimidated whistleblowers at CPSES. They assert that numerous whistleblowers continue to file complaints against Texas Utilities and their contractors. Petitioners claim that Texas Utilities has not repudiated its corporate policy of constructing in violation of NRC regulations, which has resulted in the delay of construction of Unit 2.

Petitioners rely on an April 28, 1988 statement of the intervenor in the operating license and CPA-1 proceedings in which the intervenor questions whether Texas Utilities has adequately identified the root cause of the harassment and intimidation of QC inspectors, management's role in it, and the alleged withholding of information regarding the intimidation of a contractor that was to conduct an independent assessment program. They also allege that Texas Utilities has not properly reviewed the concerns of whistleblowers and that harassment and intimidation still exist at CPSES. Petitioners seek discovery in order to document evidence which they state supports these and other assertions.

In response, Texas Utilities contends that the allegations of harassment and intimidation are unsupported. It further alleges that Petitioners did not provide a basis for the allegations that the intimidation and harassment or employee concerns resulted in the subject delay in the completion of CPSES Unit 2. Texas Utilities advises that in the mid-1980s an NRC special investigation team found that there were some incidents of intimidation and harassment, but there was no "climate of intimidation" at CPSES. Texas Utilities denies any deliberate corporate policy of violating NRC requirements.

Petitioners' assertion that an atmosphere of harassment and intimidation exists at CPSES is not supported as is prescribed in section 2.714(b)(2)(ii). The information supplied by Petitioners goes back to 1988 and before. No specifics were provided on who the whistleblowers are that continue to file complaints and what are their complaints. No nexus was provided between the alleged misconduct in the mid-1980s and Texas Utilities' alleged justification for the delay in the construction of Unit 2. Without such a connection the information provided is insufficient to support a litigable contention in a construction permit extension proceeding.

Although Petitioners would like to further develop support for the contention through discovery, we cannot give them that right. Discovery is only available to a party following the admission of a contention. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); 10 C.F.R. § 2.740(b)(1).

The contention fails because it does not directly challenge Texas Utilities' good-cause justification for the delay in construction of Unit 2, the time being needed to reinspect and to take corrective action at Unit 1 and to allow it time to make modifications at Unit 2 based on the knowledge gained. Petitioners' allegations of corporate wrongdoing do not show that a genuine dispute exists with the Applicants on their justification for the delay.

The contention also fails to comply with 10 C.F.R. § 2.714(b)(2)(iii) which requires that each contention contain sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. The showing must include references to the specific portions of the application that the petitioner disputes.

The contention is therefore inadmissible. 10 C.F.R. § 2.714(d)(1). The failure to submit a single admissible contention results in Petitioners not being permitted to participate in the proceeding as a party. 10 C.F.R. § 2.714(b)(1). The Orrs' petition for leave to intervene and to hold a hearing shall be denied.

c. Additional Pleadings

On November 17, 1992, Petitioners filed a document entitled "Notification of Additional Evidence Supporting Petitions to Intervene Filed by B. Orr, D. Orr,

J. Macktal, and S. Hansan" (Notification). Petitioners submit for consideration by the Board evidence they allege was not available to them on October 5, 1992, the date set for filing contentions.

The evidence consists of excerpts of settlement agreements entered into between Texas Utilities and minority owners Texas Municipal Power Agency (TMPA) and Brazos. The agreements are dated February 12, 1988, and July 5, 1988, respectively. They cover the purchase by Texas Utilities of the minority interests. The former minority owners agreed that they and their attorneys, employees, and consultants would not assist or cooperate with third parties in proceedings relating to Comanche Peak.

Petitioners allege that they were first notified by letter of October 13, 1992, that the agreements were available for inspection in the NRC's Public Document Room, which made it too late for their inclusion in the contention filed October 5, 1992.

They claim that through these restrictive settlement agreements Texas Utilities was able to secrete from the then-convened licensing board, the NRC, and the public, information calling into question aspects of the design and construction of CPSES and the ability of Texas Utilities to construct and operate the plants. Petitioners further claim that the agreements demonstrate a past corporate policy that has not been repudiated, which caused the delay in the construction of Unit 2. They also allege that the agreements show the payment of money for silence and that they violate the Energy Reorganization Act and important public policies.

Texas Utilities asserts in a response dated November 25, 1992, that Petitioners' Notification is procedurally improper and substantively irrelevant. It claims that the two documents were provided to the NRC years ago and were available to Petitioners long before October 13, 1992. It stated that, at a minimum, Petitioners should have addressed the five factors that must be considered before a nontimely filing may be entertained, as provided for in 10 C.F.R. § 2.714(a)(1), and that their failure to do so should result in the rejection of the document.

Texas Utilities further argues that Petitioners make no effort to explain how the agreements have anything to do with the current extension request. It claims that the agreements predate the previous extension of the construction completion date and are irrelevant. The agreements are said to fail to satisfy the Commission's requirements for admission of a contention in a construction permit extension proceeding as contained in *Comanche Peak*, CLI-86-15, *supra*.

Staff in a December 3, 1992 response argues that Petitioners have failed to establish good cause for the late filing of the Notification and that the information and legal arguments contained in it should not be considered by the Board. Staff also argues that the Notification fails to demonstrate that the contention has any discernable relationship to the issue in the proceeding. It asserts that the settlement agreements were last entered into in July 1988 which is prior to the

relevant time frame in the proceeding which is November 18, 1992, when the previous construction permit construction completion date was extended. Staff claims that Texas Utilities' defense of the agreements in no way demonstrates that the permit holder had a corporate policy that was responsible for the delay in the construction of Unit 2.

We find that the two settlement agreements cannot be considered as newly obtained evidence because they were publicly available prior to the October 5, 1992 filing date. The agreements were submitted to the NRC, in 1988, in support of two applications to amend the construction permits for CPSES to reflect the changes in ownership. The issuance of the amendments was noticed in the *Federal Register* along with the information that the application documents were available in the NRC's Public Document Room. 53 Fed. Reg. 31,778 (Aug. 19, 1988); 53 Fed. Reg. 50,610 (Dec. 16, 1988).

Furthermore, Petitioners were generally aware of the contents of the agreements when they filed their contention on October 5, 1992, and could have made in that filing all of the points they offer in the Notification. In the October 5, 1992 filing, Petitioners submitted excerpts of a similar settlement agreement that Texas Utilities entered into with Tex-La Electric Cooperative of Texas and argued that the agreement and those with Brazos and TMPA supported their contention. Petitioners stated that they were unable to get copies of the Brazos and TMPA settlement agreements but argued on the basis of all three because they were all similar. The submission of excerpts of the two agreements in the Notification were but a formality in that their relevant contents had already been used in a basis in support of the contention.

Petitioners used the excerpts of the Brazos and TMPA settlement agreements as a vehicle to expand on the previous matters presented in support of the contention and to introduce new arguments such as the claim that the settlement agreements reflected the payment of money for silence and that they violate the Energy Reorganization Act and public policies.

Not only can the Brazos and TMPA settlement agreements not be considered new evidence because of their previous availability, but their contents had already been used to support the contention. What Petitioners have proffered in their Notification is a late-filed amendment to the bases of their contention. It was offered without good cause and without addressing the five factors required to be considered by the Board prior to determining whether the nontimely filing should be entertained. 10 C.F.R. § 2.714(a)(1). We therefore reject the Notification.

Petitioners B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan filed a motion entitled "Motion to Compel Disclosure of Information Secreted by Restrictive Agreements," dated November 15, 1992. Petitioners request the Board to declare null and void the provisions of the settlement agreements between Texas Utilities and the three minority owners, which prohibit the minority owners and those associated with them from disclosing any potential

safety-related information to Petitioners, the NRC, and the general public. They also request that the Board require that the parties to the settlement agreements, and those affected by the agreements, submit to discovery by Petitioners. The purpose of the discovery is to permit Petitioners to file additional contentions and additional information in support of the previously filed contention.

Texas Utilities in a response dated November 25, 1992, requests that the motion be denied. It asserts that the request to declare the agreements null and void is beyond the scope of the Board's jurisdiction and that the request for discovery to frame contentions is for relief that a petitioner seeking to intervene is not entitled.

Staff, in its response dated December 3, 1992, agrees with Texas Utilities in opposing the motion. It also contends that the agreements violate neither the Energy Reorganization Act nor the Commission's regulations. However, to the extent the agreements are within the proceeding and they preclude the affected corporate entities from bringing information to the NRC they are without force and effect insofar as they relate to communications with the NRC.

We deny the motion because Petitioners seek relief that is not available to a petitioner for leave to intervene. The motion in effect is one for discovery. The request to declare parts of the settlement agreements null and void is but an integral part and in furtherance of the discovery request. Discovery is only available to a party to the proceeding that has already filed an admissible contention. *Point Beach*, ALAB-696, 16 NRC at 1263; 10 C.F.R. § 2.740(b)(1). Petitioners have not achieved that status and cannot be granted that relief. We do not rule at this time on whether the relief could be granted as requested had Petitioners achieved party status.

B. The Dow Petition to Intervene

1. Requisite Interest for Standing

R. Micky Dow, his spouse Sandra Long Dow, and Disposable Workers of Comanche Peak Steam Electric Station (Workers), each petitions for leave to intervene in the proceeding, pursuant to section 2.714.

R. Micky Dow alleges that he owns property within a 50-mile radius of CPSES and could be harmed by an accident at the plant. He claims to have already been adversely affected because of telephone threats by an officer of Texas Utilities which caused him to flee from his home and Texas.

Sandra Long Dow claims that in the normal course of events she would reside with her husband within a 50-mile radius of CPSES but has been precluded from doing so because of threats to him and harassment to her from those under the control of Texas Utilities.

Workers is stated to be an organization composed chiefly of persons who own property or reside within a 50-mile radius of the facility. Affidavits attesting to this are claimed by Petitioners to be already on file with the NRC. It was not identified where. The board of directors of Workers is reported to be made up of former whistleblowers who were prevented from testifying before the Commission because of an allegedly illegal settlement agreement. Workers claims to have had standing in "past issues" and wants to reclaim it here. The "past issues" were not identified.

Petitioners claim that all of those interested in the proceeding do, or will live, work, recreate, travel, and raise families within a radius of 50 miles of CPSES. Much of the food and all of the water used in the area was said to be subject to radioactive or toxic material releases from the facilities. They assert that there is good reason to deny the request for an extension but do not further identify it.

Petitioners request the suspension of the subject proceeding based on vague arguments relating to other proceedings that they are engaged in before the NRC and the federal courts. They argue mootness and due process as bases for suspending this proceeding.

Texas Utilities argues that the joint petition should not be accepted for filing. It asserts that it is one or more than a dozen actions involving CPSES that the Dows have initiated. Texas Utilities claims that the Dows have engaged in a pattern of not complying with the Commission's requirements, of making frivolous and scurrilous claims, of omitting material facts, and of harassing it and the NRC. Texas Utilities had requested the Commission to grant a similar motion in CLI-92-12, 36 NRC 62 (1992), but in denying the Dows' petition for late intervention and to reopen the record, the Commission did not address the Texas Utilities' motion.

Texas Utilities asserts that the Dows have not established standing for themselves on the basis of the proximity of their residence or their property to CPSES. It claims that the probable reason that the Dows have not chosen to remain in Texas is that he is a convicted felon and that there are felony arrest and misdemeanor warrants outstanding against him in Texas. Texas Utilities' position is that Mr. Dow's inability to establish standing is due to his own misconduct. It further argues that the Dows have not asserted any other injury-in-fact that falls within the zone of interests protected by the AEA and that organizational standing was not established on behalf of Workers. It would deny the Dow petition for lack of standing of the Petitioners.

Staff is of the same position as Texas Utilities that the Dow petition does not establish standing as provided in section 2.714. It views Petitioners' request to suspend the proceeding on the basis of mootness and due process claims as irrelevant considering that they have not established standing.

The Dows individually cannot be presumed to be adversely affected by either plant operations or a credible accident at the plant where their base of normal, everyday activities is not within close proximity (50 miles) of the facility. *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974).

The Dows fault Texas Utilities for not being able to reside within 50 miles from the plant and Texas Utilities blames the Dows for the situation. Irrespective of who is responsible, the Dows do not meet the conditions for invoking the presumption.

To establish standing, they are therefore relegated to do so by alleging an injury-in-fact that is within the zone of interests protected by the AEA or NEPA. The injury should likely be remedied by a favorable decision granting the relief sought. *Dellums v. NRC*, *supra*.

The Dows individually have not met the foregoing requirements. They have not satisfactorily explained how they, who do not reside in Texas, would have their health and safety jeopardized or suffer environmental harm because of the construction of Unit 2. The property alleged to be owned near the plant was never identified.

The alleged threats and harassment that were said to result in the Dows fleeing Texas is not an injury protected under the AEA or NEPA. A favorable decision for the Dows in the subject proceeding would not remedy the alleged injury. The forum for resolving that dispute is not here. They do not have requisite interest for standing.

We find that the Workers has not been shown to have the necessary interest for organizational or representative standing.

For an organization to have standing, it must show injury-in-fact to its organizational interests or to the interest of members who have authorized it to act for them. If the organization is depending upon injury to the interests of its members to establish standing, the organization must provide with its petition identification of at least one member who will be injured, a description of the nature of that injury, and an authorization for the organization to represent that individual in the proceeding. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982).

Workers does not state its organizational purpose nor does it claim any injury to its organizational interest. Its assertions that it had standing in the past in some unidentified matter does nothing to enhance its claim to standing in this proceeding. It is incumbent on Workers to establish standing on this record and it cannot rely on something else of which we know nothing.

Similarly, it has not established representational standing. It relies on unsupplied affidavits that are said to attest to Workers' members owning property or residing within 50 miles of the plant. The contents of the affidavits and the proceeding in which they were filed are unknown.

There is nothing in this record, as is required for representational standing, that identifies at least one member who will be injured, a description of the nature of that injury to the member, and an authorization for the Workers to represent that individual in this proceeding. Sandra Long Dow does not fulfill the role of being the injured member for the reasons we stated previously as to why she has not established individual standing.

Not having established the interest for standing, the request by the Dow petitioners to suspend this proceeding on claims of mootness and due process cannot be considered by us.

We will not decide on Texas Utilities' request that we not accept the filing of the Dow petition. There is insufficient evidence in this record to make that ruling. It would serve no useful purpose to further pursue the matter and thereby delay the disposition of this proceeding which can be disposed of on the existing record.

The petition for leave to intervene and to hold a hearing shall be denied on the grounds that Petitioners failed to establish the requisite interest for standing under section 2.714.

2. Aspects

Texas Utilities and Staff claim that the Dow petition for leave to intervene fails to set forth the specific aspect or aspects of the subject matter of the proceeding as to which Petitioners seek to intervene, contrary to section 2.714(a)(2).

We agree that this constitutes another defect in the Dow petition which is inadequate for establishing standing under section 2.714.

3. The Request to File Contentions

In a Memorandum and Order of September 11, 1992, we set October 5, 1992, as the date to file amended petitions and supplemental petitions containing contentions for litigation. On October 5, the Dow petitioners filed a motion for an extension of 30 days to make the filing. The request was based on a claim that movants were precluded from making a timely filing through circumstances over which they had no control. We denied the request on the grounds that their reason lacked credibility, was unsupported by probative evidence, and failed to show good cause.

R. Micky Dow asserted that on September 3, 1992, he was apprehended, confined, and held incommunicado for 30 days and his case materials were confiscated in order to disrupt his participation in the proceeding and to keep from timely making the October 5 filing date. Underscoring the lack of credibility of the story was that he said he was imprisoned on September 3,

1992, to keep him from making the October filing date, although it was not until September 11, 1992, that the Board issued its memorandum and set the date for filing.

In response to our Memorandum and Order of October 19, 1992, denying the motion, R. Micky Dow filed a motion for rehearing dated November 10, 1992. He now argues that he had no knowledge of the scheduling order and therefore could not timely respond. He asserts that granting an extension would not prejudice any of the parties and if the Board found his motion to be lacking in truth it would have been more appropriate to issue an order to show cause.

Texas Utilities opposes the motion because it provides no new information that would alter the Board's prior ruling that good cause for granting an extension had not been demonstrated. It contends that the motion merely provides additional unsubstantiated details related to precisely the same events discussed in the initial motion.

Staff also opposes the motion. It argues that the motion fails to demonstrate that the October 19, 1992 order was erroneous or arbitrary. Staff considers the motion for rehearing as a motion for reconsideration and states that the motion does not meet the standards for reconsideration. The Commission has held that motions to reconsider should be associated with requests for reevaluation of an order in light of an elaboration upon or refinement of arguments previously advanced and they are not the occasion for an entirely new thesis. *Central Electric Power Cooperative, Inc.* (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787 (1981).

Staff alleges that the claim of a lack of knowledge of the filing date is new and improper to raise in the motion for rehearing. Additionally, it states that the movant reiterates the same argument without further elaboration, that he was separated from his evidentiary material and was unable to contact anyone, which is also improper pleading. It also alleges that movant fails to understand his burden of proof in a motion for an extension of time and that the motion for rehearing was untimely.

The Dow motion for rehearing, along with the attached unverified statement of Mr. Dow only confirms our October 19, 1992 finding that the original motion lacked credibility, was unsupported by probative evidence, and failed to provide good cause for the requested extension.

The heart of the original motion was the Dow claim that he had a rough draft of the pleading to be filed, that he was incarcerated on September 3 for more than 30 days, and had his papers stolen so that he would not be able to timely file. Having had the Board point out that it first ordered the pleading filed on September 11, 1992, he now states that he never knew of the September 11 order and therefore could not meet it. This change merely conflicts with the original version and does nothing to enhance credibility.

Dow in his original motion claimed that he was held incommunicado for more than 30 days and could not contact anyone regarding the possible extension of the filing date. In his current statement he advises of three telephone conversations with one attorney, a visit by another, and of telephone calls he made but not with the frequency he wanted. He now undermines his claim that he could not contact anyone regarding the filing.

In his original motion of October 5, 1992, Dow stated that "the public record and court transcription in existence now will completely substantiate" his version of what occurred. The motion for rehearing remains unsupported by any probative evidence. All that was submitted was an unverified statement that conflicts with the original story.

Under 10 C.F.R. §§ 2.711(a) and 2.732, the Dows had the burden of showing good cause for the requested extension. They did not meet this burden provided for in the NRC's Rules of Practice and their motion for an extension failed. We found no basis to employ a show-cause procedure before deciding the motion. It was not required or warranted by the circumstances.

The Dows contend that granting the extension will not prejudice anyone. To the contrary, to grant a motion that legally should be denied results in a denial of due process. Parties would be injured if this was permitted to occur, and the administrative process would also suffer.

We will not deny the November 10, 1992 motion for rehearing on the grounds of untimeliness because there is no prescribed time for filing such a motion. We shall deny the motion on the basis that it failed to show that there was error in our denial of the motion for an extension of time to file contentions.

Order

Based upon all of the foregoing, it is hereby Ordered:

1. The November 15, 1992 "Motion to Compel Disclosure of Information Secreted by Restrictive Agreements" filed by B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan is denied.

2. The November 17, 1992 "Notification of Additional Evidence Supporting Petition to Intervene Filed by B. Orr, D. Orr, J. Macktal, and S. Hasan" is rejected.

3. The July 27, 1992 "Petition to Intervene and Request for Hearing of B. Irene, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan," as supplemented on October 5, 1992, is denied.

4. The November 10, 1992 "Motion for Rehearing by R. Micky Dow, Petitioner" is denied.

5. The July 28, 1992 "Petition of Sandra Long Dow *dba* Disposable Workers of Comanche Peak Steam Electric Station, and R. Micky Dow for Intervention and Request for Hearings" is denied.

6. The proceeding is terminated.

This Order is subject to appeal to the Commission pursuant to the terms of 10 C.F.R. § 2.714a, and specifically 10 C.F.R. § 2.714a(b). Any such appeal must be filed within 10 days after service of this Order and must include a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in opposition to the appeal within 10 days after service of the appeal.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
CHIEF ADMINISTRATIVE LAW
JUDGE

Dr. James H. Carpenter
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Bethesda, Maryland
December 15, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

In the Matter of

Docket Nos. 50-424-OLA-3
50-425-OLA-3
(ASLBP No. 96-671-01-OLA-3)
(Type: License Amendment)
(Transfer to Southern Nuclear)

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2)

December 24, 1992

The Licensing Board determined that there was a factual dispute concerning the extent of Petitioner's contacts with the Vogtle Plant, and it scheduled an evidentiary hearing on this one issue as part of a scheduled prehearing conference.

**RULES OF PRACTICE: STANDING; HEARING ON DISPUTED
ISSUES**

An evidentiary hearing may be held to determine whether or not petitioner has met the criteria for standing.

MEMORANDUM AND ORDER
(Factual Dispute About Residence; Evidentiary Hearing)

The January 12, 1993 prehearing conference shall include a determination of the factual dispute concerning the residence of Mr. Mosbaugh. According to Mr. Mosbaugh:

Mr. Mosbaugh owns property and resides at 1701 Kings Coat, Grovetown, Georgia, 30813. Said property is within 50 miles of plant Vogtle. Mr. Mosbaugh resides at this residence approximately one week each month. Said residence is a single family, two story structure situated on 2 1/2 acres of property deeded in the name of petitioner. . . .

Moreover, Mr. Mosbaugh routinely conducts in-person meetings with investigators of the Nuclear Regulatory Commission's Office of Investigation (which has been an ongoing process since 1990) at his Grovetown residence and other locations in the Augusta, Georgia area. . . . Mr. Mosbaugh voted in Columbia County, Georgia, in 1992 elections; continuously banks in the Augusta area, and continuously maintains a private telephone at his Grovetown residence. . . .¹

By contrast, Georgia Power Company challenges these assertions, claiming that Mr. Mosbaugh no longer uses his "residence" as a mailing address and that he voted in the general election in 1992 in Ohio, where he allegedly declared that his only residence is Clermont County, Ohio.²

We find that this factual dispute is relevant to whether or not Mr. Mosbaugh has standing in this license amendment proceeding. See *Boston Edison Co. (Pilgrim Nuclear Power Station)*, LBP-85-24, 22 NRC 97, 98-99 (1985) (residence 43 miles from a nuclear power plant is not sufficient to establish standing to challenge an amendment modifying an existing facility's spent fuel pool), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985).

Consequently, we set this factual dispute for hearing at the scheduled prehearing conference. Intervenor appears to have the burden of proof of establishing the extent of his contacts with the Vogtle Plant by a preponderance of the evidence.

We encourage the parties to reach stipulations as to the underlying facts and to be creative in cooperating on ways to narrow the contested issues and reduce the time that would otherwise be needed for trial. We are prepared to help in this process.

The prehearing conference will commence with the evidentiary hearing concerning standing. The Board may reach a final determination of this case

¹ Amendments to Petition to Intervene and Request for Hearing (Dec. 9, 1992) at 2. We note that Mr. Marvin B. Hobby, whose name is mentioned on page 1 of the Petition, has been dismissed as a petitioner.

² Georgia Power Company's Answer (Dec. 22, 1992) at 5-9.

based on that hearing. In that event, the prehearing conference could be adjourned before other matters are considered.

As we stated in our previous order (unpublished dated December 14, 1992):

All written exhibits and graphics to be used at the conference should be *received* by the Board and parties by January 7, 1993.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

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